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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

YEARBOOK

Volume XLVIII: 2017

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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-eighth 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 fiftieth session, which was held in Vienna, from 3-21 July 2017, 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 fiftieth 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-ninth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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

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
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VIII	1977	E.78.V.7
IX	1978	E.80.V.8
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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
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XXII	1991	E.93.V.2
XXIII	1992	E.94.V.7
XXIV	1993	E.94.V.16
XXV	1994	E.95.V.20
XXVI	1995	E.96.V.8

Volume	*Years covered*	*United Nations publication Sales No. or document symbol*
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 FIFTIETH SESSION (2017)

A. Report of the United Nations Commission on International Trade Law, fiftieth session (Vienna, 3-21 July 2017) (A/72/17)

[Original: English]

Contents

I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the fiftieth session of the Commission, held in Vienna from 3 to 21 July 2017.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, the present report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

II. Organization of the session

A. Opening of the session

3. The fiftieth session of the Commission was opened by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations, Mr. Miguel de Serpa Soares, on 3 July 2017.

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 14 November 2012, 14 December 2012, 9 November 2015, 15 April 2016 and 17 June 2016 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] Argentina (2022), Armenia (2019), Australia (2022), Austria (2022), Belarus (2022), Brazil (2022), Bulgaria (2019), Burundi (2022), Cameroon (2019), Canada (2019), Chile (2022), China (2019), Colombia (2022), Côte d'Ivoire (2019), Czechia (2022), Denmark (2019), Ecuador (2019), El Salvador (2019), France (2019), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2022), Indonesia (2019), Iran (Islamic Republic of) (2022), Israel (2022), Italy (2022), Japan (2019), Kenya (2022), Kuwait (2019), Lebanon (2022), Lesotho (2022), Liberia (2019), Libya (2022), Malaysia (2019), Mauritania (2019), Mauritius (2022), Mexico (2019), Namibia (2019), Nigeria (2022), Pakistan (2022), Panama (2019), Philippines (2022), Poland (2022), Republic of Korea (2019), Romania (2022), Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2022), Sri Lanka (2022), Switzerland (2019), Thailand (2022), Turkey (2022), Uganda (2022), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2022), Venezuela (Bolivarian Republic of) (2022) and Zambia (2019).

5. With the exception of Côte d'Ivoire, Iran (Islamic Republic of), Kenya, Lebanon, Lesotho, Liberia, Malaysia, Mauritania, Nigeria, 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, 29 were elected by the Assembly on 14 November 2012, at its sixty-seventh session, one was elected by the Assembly on 14 December 2012, at its sixty-seventh session, 23 were elected by the Assembly on 9 November 2015, at its seventieth session, five were elected by the Assembly at its seventieth session, on 15 April 2016, and two were elected by the Assembly on 17 June 2016, at its seventieth session. 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.

6. The session was attended by observers from the following States: Albania, Algeria, Belgium, Bolivia (Plurinational State of), Bosnia and Herzegovina, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Estonia, Finland, Lao People's Democratic Republic, Malta, Myanmar, Netherlands, New Zealand, Norway, Portugal, Republic of Moldova, Serbia, Slovakia, South Africa, Sudan, Sweden, Syrian Arab Republic, United Republic of Tanzania 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 the Settlement of Investment Disputes (ICSID), UNCTAD, United Nations Industrial Development Organization and the World Bank;

(b) Intergovernmental organizations: Asian-African Legal Consultative Organization, European Bank for Reconstruction and Development (EBRD), International Cotton Advisory Committee, International Institute for the Unification of Private Law (Unidroit), Organization for Economic Cooperation and Development (OECD), Organization for the Harmonization of Business Law in Africa and Permanent Court of Arbitration (PCA);

(c) Invited non-governmental organizations: Advisory Council of the United Nations Convention for the International Sale of Goods, American Bar Association, American Society of International Law, Asia-Pacific Regional Arbitration Group, Association for the Promotion of Arbitration in Africa (APAA), Association of the Bar of the City of New York, Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Centro de Estudios de Derecho, Economía y Política (CEDEP), Chartered Institute of Arbitrators (CIARB), Comité Maritime International (CMI), Commercial Finance Association, European Law Students' Association, Factors Chain International and the EU Federation for the Factoring and Commercial Finance Industry (FCI and EUF), Grupo Latinoamericano de Abogados para el Derecho del Comercio International, Hong Kong Mediation Centre (HKMC), Independent Film and Television Alliance, Institute of Law and Technology at Masaryk University, Instituto Iberoamericano de Derecho Concursal (IIDC), International Association of Lawyers, International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International), International Bar Association (IBA), International Chamber of Commerce (ICC), International Institute for Sustainable Development, International Law Institute, International Mediation Institute, International Swaps and Derivatives Association (ISDA), Law Association for Asia and the Pacific, Moot Alumni Association, National Law Center for Inter-American Free Trade, Russian Arbitration Association (RAA), Singapore International Mediation Institute (SIMI), Stockholm Chamber of Commerce Arbitration Institute, Swiss Arbitration Association (ASA), Vienna International Arbitral Centre (VIAC) and World Association for Small and Medium Enterprises.

9. The Commission welcomed the participation of international non-governmental organizations with expertise in the main 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. János Martonyi (Hungary)
Vice-Chairs:	Mr. Jorge Roberto Maradiaga (Honduras)
	Ms. Natalie Y. Morris-Sharma (Singapore)
	Ms. Kathryn Sabo (Canada)
Rapporteur:	Mr. Salim Moollan (Mauritius)

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 1047th meeting, on 3 July, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Commemoration of the fiftieth anniversary of UNCITRAL.
5. Micro, small and medium-sized enterprises: progress report of Working Group I.
6. Insolvency law: progress report of Working Group V.
7. Technical assistance to law reform.
8. UNCITRAL regional presence.
9. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: CLOUT and digests.
10. Status and promotion of UNCITRAL legal texts and the New York Convention:
    (a) General;
    (b) Functioning of the transparency repository;
    (c) International commercial arbitration moot competitions;
    (d) Bibliography of recent writings related to the work of UNCITRAL.
11. 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.
12. Relevant General Assembly resolutions.
13. Role of UNCITRAL in promoting the rule of law at the national and international levels.
14. International dispute settlement: progress report of Working Group II.
15. Possible future work in the area of international dispute settlement:
    (a) Concurrent proceedings;
    (b) Code of ethics/conduct for arbitrators;
    (c) Possible reform of investor-State dispute settlement.
16. Finalization and adoption of a model law on electronic transferable records and explanatory notes.
17. Electronic commerce: progress report of Working Group IV.
18. Legal developments in the area of public procurement and infrastructure development.
19. Possible future work in the area of security interests and related topics.
20. Endorsement of texts of other organizations: the Uniform Rules for Forfaiting of the International Chamber of Commerce.
21. Work programme of the Commission.
22. Date and place of future meetings.

23. Other business:

(a) Internship programme;

(b) Evaluation of the role of the Secretariat in facilitating the work of the Commission.

24. Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions.

25. Adoption of the report of the Commission.

12. Several delegations expressed concern that agenda item 21 (Work programme of the Commission) had been scheduled for consideration at the end of the second week of the session, which would not allow sufficient time for its consideration before the adoption of the report on 14 July. Another concern, shared by some delegations, was that placing that agenda item after agenda item 16 (Finalization and adoption of a model law on electronic transferable records and explanatory notes) did not facilitate the presence in the room of State representatives in charge of the general work programme of UNCITRAL. The alternative view was that the agenda item was scheduled in a way that would allow the Commission to have the complete information about progress made by all UNCITRAL working groups and views of delegates regarding proposals for future work before the item on the work programme of the Commission was considered.

13. Acknowledging that rescheduling the consideration of agenda item 21 at the current session of UNCITRAL would interfere with the travel arrangements already made by delegates and observers, the Commission decided to retain the scheduling of agenda items for the current session as announced in the provisional agenda (A/CN.9/894). It requested the Secretariat to schedule the consideration of the work programme of UNCITRAL at future sessions in such a way that it would accommodate the presence of relevant representatives of States and allow sufficient time for the consideration of that item. The Secretariat was also requested to be in close consultation with the Bureau of UNCITRAL on scheduling agenda items for future sessions. (See also chapter XIX, section C, below.)

E. Adoption of the report

14. The Commission adopted the present report by consensus at its1060th meeting, on 14 July, at its 1067th meeting, on 20 July, and at its 1068th meeting, on 21 July 2017.

III. Consideration of issues in the area of electronic commerce

A. Finalization and adoption of a model law on electronic transferable records and explanatory notes

1. Introduction

15. The Commission recalled that, at its forty-first and forty-second sessions, in 2008 and 2009, respectively, it had received proposals from States for work on electronic transferable records.[2] The Commission also recalled that, after preparatory work,[3] the Commission, at its forty-fourth session, in 2011, had mandated its Working Group IV (Electronic Commerce) to undertake work in the field of

[2] *Official Records of the General Assembly*, *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 335; and ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338.

[3] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 245-247 and 250; and ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 232-235.

electronic transferable records.[4] The Commission further recalled that, from its forty-fifth to its forty-ninth session, from 2012 to 2016, it had considered reports of the Working Group,[5] reaffirming its mandate and endorsing its decision to prepare a model law with explanatory materials.[6]

16. At its current session, the Commission was informed that the Working Group had completed its work on the preparation of a draft model law on electronic transferable records with accompanying explanatory materials at its fifty-fourth session (held in Vienna from 31 October to 4 November 2016). At that session, the Working Group had requested the Secretariat to revise the draft model law and explanatory materials contained in document A/CN.9/WG.IV/WP.139 and its addenda to reflect the deliberations and decisions at that session and transmit the revised text to the Commission for consideration at its fiftieth session (A/CN.9/897, para. 20). The Commission was further informed that, in accordance with the usual practice of UNCITRAL, the text of the draft model law as recommended by the Working Group had been circulated by the Secretariat to all Governments and relevant international organizations for comment.

17. At the session, the Commission had before it: (a) the report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session (A/CN.9/897); (b) a draft model law on electronic transferable records with explanatory notes (A/CN.9/920); (c) compilation of comments by Governments and international organizations on the draft model law and explanatory notes (A/CN.9/921 and Adds.1-3); and (d) a note by the Secretariat on proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission (A/CN.9/922).

18. The Commission proceeded with the article-by-article consideration of the draft model law together with the accompanying draft explanatory notes and related amendments proposed by Governments, international organizations and the Secretariat.

2. Article-by-article consideration

Article 1. Scope of application

19. It was suggested that an explicit reference to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)[7] (the "Rotterdam Rules") should be inserted in the footnote to draft article 1. It was recalled that the Rotterdam Rules enabled the use of negotiable electronic transport records and it was added that no other electronic transferable records should be issued under those Rules.

20. Noting that footnote 1 contained an illustrative list of items that enacting States could decide to exclude from the scope of their law on electronic transferable records while enacting it on the basis of the UNCITRAL model, some delegations did not object to listing transport documents issued under the Rotterdam Rules in footnote 1 as additional sub-item (d).

21. In response, it was indicated that one of the goals of the draft model law was to support the implementation of the Rotterdam Rules, and that suggesting an exclusion of the Rotterdam Rules from the scope of application of the draft model law might hinder that goal. It was added that the Rotterdam Rules and the draft model law were generally compatible. It was further indicated that a conflict could arise only with

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[4] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[5] For the reports of the Working Group on the work of those sessions, see A/CN.9/737, A/CN.9/761, A/CN.9/768, A/CN.9/797, A/CN.9/804, A/CN.9/828, A/CN.9/834, A/CN.9/863, A/CN.9/869 and A/CN.9/897.

[6] *Official Records of the General Assembly*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 230; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 226.

[7] General Assembly resolution 63/122, annex.

respect to interaction between the Rotterdam Rules and draft article 15, and that such a conflict, if it arose, should be dealt with in that specific context. However, it was also noted that other aspects of those two legislative texts could diverge. For instance, it was said that the notion of integrity of an electronic transferable record in the draft model law and the notion of integrity of an electronic transport record in the Rotterdam Rules were different.

22. It was also suggested that sub-item (c) in footnote 1 should be redrafted to refer to "electronic transferable records without a corresponding paper-based document", which would eliminate the need to refer to electronic transferable records whose substantive law was medium-neutral, as suggested in paragraph 22 of document A/CN.9/922.

23. After discussion, the Commission agreed to leave the text of the footnote unchanged and to insert the following paragraph after paragraph 11 of document A/CN.9/920: "The list of possible exclusions provided in the footnote to paragraph 3 is purely illustrative. Other subject matter that could be excluded from the scope of application of the Model Law include transport documents and electronic transport records falling under the scope of application of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the 'Rotterdam Rules')".

Draft explanatory notes to article 1 (A/CN.9/920, paras. 1 to 15; A/CN.9/922, paras. 22-23)

24. In addition to the amendments agreed to be made to the draft explanatory notes in connection with footnote 1 to draft article 1 (see para. 23 above), the Commission agreed to redraft paragraph 9 of the draft explanatory notes contained in document A/CN.9/920 as follows: "Paragraph 3 clarifies that the Model Law does not apply to investment securities. The general determination as to which instruments are to be counted as securities is a matter of substantive law. The term 'investment instruments' is understood to include derivative instruments, money market instruments and any other financial product available for investment. The term 'securities' does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes".

25. While some support was expressed for the suggestions contained in paragraph 22 of document A/CN.9/922, the prevailing view was that they should not be implemented. It was indicated that adding a reference to medium-neutral substantive law in the draft explanatory notes might add an unnecessary level of complexity, as it was clear that the draft model law could operate only on a functional equivalence basis.

26. It was indicated that contractual parties would be free to use in their agreement any source deemed useful and that, therefore, the insertion in the draft explanatory notes of specific text to indicate that possibility, as suggested in paragraph 23 of document A/CN.9/922, was unnecessary.

Article 2. Definitions

27. No comment was made with respect to the draft article.

Draft explanatory notes to article 2 (A/CN.9/920, paras. 16-21; A/CN.9/922, paras. 24-25)

28. The Commission agreed to replace "the person in control" with "possessor" in the last sentence of paragraph 19 of document A/CN.9/920. The Commission also agreed that the substantive comments contained in paragraphs 24 and 25 of document A/CN.9/922 should be reproduced in a footnote to the term "insurance certificates" in paragraph 20 of document A/CN.9/920.

Article 3. Interpretation

29. No comment was made with respect to the draft article.

Draft explanatory notes to article 3 (A/CN.9/920, paras. 22-27)

30. No comment was made with respect to the accompanying draft explanatory notes.

Article 4. Party autonomy and privity of contract

31. It was suggested that the draft model law or explanatory notes should explicitly identify provisions from which derogations by parties were permissible. The Commission noted that similar suggestions had been discussed in the Working Group and that the conclusion of that discussion was reflected in paragraph 1 of the draft article, which left it to enacting States to identify provisions from which parties could derogate.

32. The Secretariat informed the Commission that some States, while considering the adoption of the draft model law, had indicated that they would not enact draft article 4. The suggestion was made to monitor legislative enactments, business implementation and judicial application of that article.

Draft explanatory notes to article 4 (A/CN.9/920, paras. 28-34; A/CN.9/922, para. 26)

33. No comment was made with respect to the accompanying draft explanatory notes.

Article 5. Information requirements

34. The consideration of a suggestion to reflect provisions of national law related to the sanctity of private life in the draft article was deferred to a later stage.

35. In the subsequent discussion, no support was expressed for inclusion of the proposed amendment to the draft article, because such an amendment would touch upon issues of substantive law and would go beyond the intended scope of the draft model law. The Commission decided to retain the draft article unchanged.

Draft explanatory notes to article 5 (A/CN.9/920, paras. 35-37)

36. No comment was made with respect to the accompanying draft explanatory notes.

Article 6. Additional information in electronic transferable records

37. It was suggested that the phrase “as permitted by law” be inserted after the word “information” in the draft article. In response, it was noted that article 1, paragraph 2, of the draft model law precluded the insertion in an electronic transferable record of information not permitted under substantive law. Concern was also expressed that the suggested wording could be interpreted as restricting the addition in electronic transferable records of useful information such as automatically generated technical information.

38. Some delegations were nevertheless of the view that the draft model law or explanatory notes should impose some restrictions on information that could be added in the electronic transferable records so as not to introduce substantive changes with respect to their paper-based equivalents. The Commission decided to retain the draft article unchanged and address the matter in the draft explanatory notes (see para. 39 below).

Draft explanatory notes to article 6 (A/CN.9/920, paras. 38-40)

39. The Commission agreed to explain in paragraph 39 of document A/CN.9/920 that article 1, paragraph 2, of the Model Law would preclude inclusion in an electronic transferable record of additional information not permitted under substantive law.

Article 7. Legal recognition of an electronic transferable record

40. No comment was made with respect to the draft article.

Draft explanatory notes to article 7 (A/CN.9/920, paras. 41-48; A/CN.9/922, para. 27)

41. The Commission agreed with the suggestion contained in paragraph 27 of document A/CN.9/922.

Article 8. Writing

42. No comment was made with respect to the draft article.

Draft explanatory notes to article 8 (A/CN.9/920, paras. 50-56; A/CN.9/922, paras. 42-47)

43. No comment was made with respect to the accompanying draft explanatory notes.

Article 9. Signature

44. No comment was made with respect to the draft article.

Draft explanatory notes to article 9 (A/CN.9/920, paras. 50-54 and 57-61; A/CN.9/922, paras. 28 and 42-47)

45. The Commission agreed to insert in paragraph 57 of document A/CN.9/920 the following clarification: "Reference to electronic signatures in article 9 of the Model Law is intended also as reference to electronic seals or other methods used to enable the signature of a person electronically."

Article 10. Requirements for the use of an electronic transferable record

46. The Commission agreed that the title of the draft article should read "Transferable documents or instruments". It was explained that the suggested title was in line with the naming convention of provisions relating to functional equivalence and was clearer to a reader. No support was expressed for adding the word "exclusive" before the word "control" in paragraph 1 (b) (ii) of the draft article. The Commission agreed to replace the phrase "the electronic transferable record" with the phrase "that electronic record" in paragraph 1 (b) (iii) of the draft article to align the draft of that provision with that of paragraph 1 (b) (ii) of the draft article.

47. Concern was expressed that the translation of the definite article "the" in some languages did not convey the intended meaning. Recognizing that the suggestion raised linguistic rather than substantive issues, the Commission referred the matter to delegates for linguistic consultations together with paragraphs 77 and 78 of the accompanying draft explanatory notes contained in document A/CN.9/920.

48. Further to the linguistic consultations held pursuant to the Commission's request, the Commission considered two options: (a) to include a qualifier "singular" before the words "electronic transferable record" in paragraph 1 (b) (i) of the draft article; or (b) to insert an appropriate qualifier before the phrase "electronic transferable record" in paragraph 1 (b) (i) in those language versions where the definite article could not be used to appropriately convey the notion of singularity of the electronic transferable record. For the latter case, the Commission considered adding explanations along the following lines in paragraphs 77 and 78 of the draft explanatory notes contained in document A/CN.9/920:

> 77. The purpose of the provision is to identify the electronic transferable record that is the equivalent of the transferable document or instrument.
>
> 78. The combination of the article "the" and singular noun in the Arabic, English, French and Spanish language versions of the Model Law suffices to point at the singularity approach. A qualifier is omitted to avoid interpretative challenges. A qualifier could be interpreted as referring to the notion of uniqueness which has been abandoned and could ultimately foster litigation. A qualifier is used in the Chinese and Russian language versions of the Model Law because the proper qualifier may be found in those languages to avoid interpretation problems. All six language versions intend to convey the same notion.

49. Some delegations were of the view that the most desirable solution would be to insert a qualifier in all language versions to avoid any impression that various language versions intended to convey different meaning. It was, however, also recognized by those delegations that the matter had already been extensively discussed in the Working Group and that reopening that discussion in the Commission would not be desirable.

50. Concern was expressed that the proposed wording did not explain in full the meaning of the notion of "singularity". It was suggested that working group reports and other *travaux préparatoires* could be used to gather additional information on that notion.

51. The Commission decided to implement option (b), with the addition of the word "functional" before the word "equivalent" in the proposed revised paragraph 77 (see para. 48 above). (For further consideration of the matter, see paras. 64 and 66 below.)

Draft explanatory notes to article 10 (A/CN.9/920, paras. 62-86; A/CN.9/922, paras. 29, 30 and 38-41)

52. The proposal was made to change the second sentence of paragraph 63 of document A/CN.9/920 as follows: "Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance and thus to avoid the existence of multiple claims for performance of the same obligation." The suggestion was accepted.

53. Support was expressed for the proposal to change the third sentence of paragraph 63 of document A/CN.9/920 as follows: "Providing a guarantee of uniqueness in an electronic environment functionally equivalent to an original or authentic document or instrument in the paper world has long been considered a peculiar challenge". The Commission accepted that proposal.

54. The Commission agreed to change the first sentence of paragraph 64 of document A/CN.9/920 as follows: "Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible and as the identification of the specific record that is supposed to constitute the equivalent to a corresponding transferable document or instrument is not obvious due to the lack of a tangible medium."

55. The Commission agreed to change the third sentence of paragraph 64 of document A/CN.9/920 as follows: "However, a paper document, as a physical object,

is by nature unique and, furthermore, centuries of use of paper in business transactions have provided sufficient information to commercial operators for an assessment of the risks associated with the use of that medium, while practices relating to the use of electronic transferable records are not yet equally well established."

56. The Commission agreed to change paragraph 65 of document A/CN.9/920 as follows: "Article 10 aims at preventing the possibility of the existence of multiple claims to perform the same obligation by combining two approaches, i.e. 'singularity' and 'control'."

57. A suggestion was made to delete the words "and 'control'" in paragraph 67 of document A/CN.9/920. There was disagreement with the suggested change and the Commission decided to retain the wording unchanged.

58. The Commission agreed to add the word "also" before the phrase "have an evidentiary value" in the last sentence of paragraph 68 of document A/CN.9/920.

59. After discussion, the Commission agreed to replace the first and the second sentences of paragraph 70 of document A/CN.9/920 as follows: "The definition of 'electronic transferable record' does not cover certain documents or instruments which are generally transferable but whose transferability may be limited due to other agreements, for example in the case of straight bills of lading."

60. The suggestion was made to redraft the second sentence in paragraph 76 of document A/CN.9/920 as follows: "That requirement implements the requirement of a singular claim." The alternative view was that the wording should be retained unchanged since the provisions in question aimed at achieving the singularity of the record, not a singularity of claim. The Commission decided to retain the text unchanged.

61. The Commission agreed to delete the words "as opposed to other electronic records that are not transferable" in the first sentence of paragraph 77 of document A/CN.9/920. Clarification was sought about the second sentence in paragraph 77.

62. The suggestion was made to state clearly, for example in an introductory part to the explanatory notes, that an electronic transferable record confers the same rights and imposes the same obligations as a corresponding transferable document or instrument.

63. The Commission heard the suggestion that paragraph 78 of document A/CN.9/920 should be deleted or amended to explain the difference between "singularity" and "uniqueness". The alternative suggestion was to delete the introductory words "unlike other legislation on electronic transferable records,".

64. The Commission deferred decisions on paragraphs 77 and 78 of document A/CN.9/920 to a later stage until the linguistic issues referred to in paragraph 47 above were resolved. (For further consideration of the matter, see para. 66 below.)

65. The suggestion was made to delete paragraph 80 of document A/CN.9/920 or add to it a reference to article 12. The Commission agreed to retain the paragraph with a reference to article 12 along the lines of the reference contained in the last part of paragraph 81 of document A/CN.9/920.

66. The Commission agreed to revise paragraphs 77 and 78 of the draft explanatory notes to reflect the understanding reached on provisions of draft article 10, paragraph (1) (b) (i) (see para. 51 above).

67. With respect to the relationship between paragraphs 81 and 119 of the draft explanatory notes as to whether the reliability standard should be characterized as subjective or objective, the suggestion was made to remove the words "or subjective" from paragraph 81. It was explained that the same general reliability standard applied to the various articles of the model law and was therefore objective, while the assessment of the reliability of each method was to be carried out in the light of the specific function pursued with that method and was therefore relative. The Secretariat was requested to reflect those points in explanatory notes.

68. The Commission agreed to remove the words "or subjective" from paragraph 81 of the draft explanatory notes.

69. The Commission agreed to revise paragraphs 82 and 83 of the draft explanatory notes as follows:

> 82. Unlike other UNCITRAL texts on electronic commerce, the Model Law does not use the term "original" in the provisions that contain the requirements for establishing functional equivalence to the paper-based notion of "original". In that respect, it should be noted that article 8 of the UNCITRAL Model Law on Electronic Commerce refers to a static notion of "original", while electronic transferable records are meant, by their very nature, to circulate. Therefore, the notion of "original" in the context of electronic transferable records is different from that adopted in other UNCITRAL texts. With regard to the dynamic notion of "original" in the context of electronic transferable records, article 10, paragraph 1 (b) (iii), of the Model Law refers to integrity of the electronic transferable record as one of the requirements that needs to be fulfilled in order to achieve functional equivalence with a transferable document or instrument.
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> 83. Hence, while the notion of "original" of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying both a specific electronic record as the electronic transferable record to entitle the person in control to claim performance and that is the object of control (see above, paras. 65-67).

70. Clarification was sought regarding the words "dynamic notion of 'original'". The attention of the Commission was drawn to the explanation already contained in paragraph 82 of the draft explanatory notes, which could be expanded as necessary. The additional explanation could convey in particular that article 8 of the UNCITRAL Model Law on Electronic Commerce,[8] establishing functional equivalence for the notion of "original", referred to concepts such as "first generated in its final form", and was therefore particularly suitable for documents such as contracts whose modification was possible but neither necessary nor frequent. The notion of "original" in the draft model law, on the other hand, took into account the fact that, after issuance, the electronic transferable record was necessarily subject to modifications and would not be in its "final form" until presentation. The Commission agreed to insert that clarification in paragraph 82 of the draft explanatory notes.

71. The Commission agreed to implement the suggestion contained in paragraph 30 of document A/CN.9/922.

Article 11. Control

72. It was suggested that the title of the draft article should be changed from "Control" to "Possession" to convey the intended purpose of that draft article and to ensure consistency with the naming style of other articles relating to functional equivalence contained in the draft model law. In reply, it was noted that the Working Group had decided to highlight the notion of "control" in the title of article 11 because of its novelty and relevance. Recalling that discussion of the Working Group, the Commission agreed to retain the title unchanged.

73. It was also suggested that the word "publicly" should be added before the word "identify" in paragraph 1 (b) to stress the need to identify the person in control vis-à-vis concerned parties. Concern was raised that the suggestion might have substantive law implications, in particular as regards the role of public registries. Concern was also expressed that the proposal had never been discussed by the Working Group. The point was made that the suggestion would need to be reconciled with the need to accommodate anonymity and the use of pseudonyms under the draft model law. Support was expressed for retaining the text unchanged with inclusion of additional

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

explanation in the explanatory notes, if necessary, of the issue intended to be addressed with the suggestion. The Commission agreed to retain the text unchanged.

74. It was also suggested that the word "exclusive" should be inserted before the word "control" in paragraph 2 of the draft article to ensure consistency between that paragraph and paragraph 1 (a) of the same article that contained that qualifier. The Commission agreed to retain the text unchanged and to add at the end of paragraph 100 of the draft explanatory notes the following sentences: "Transfer of control implies transfer of exclusive control since the notion of 'control', similarly to that of 'possession', implies exclusivity in its exercise. The considerations on the joint exercise of control apply also to transfer of control (see above, paras. 92 and 95)."

75. Another suggestion was to insert the words "or permits" before the words "the possession" in the chapeau of paragraph 1 of the draft article, to reflect that security rights could be made effective against third parties by various methods, such as by taking possession or control or registering notice of the security right. It was noted that the same wording "or permits" was used in paragraph 2 of the draft article. Recognizing the need to ensure consistency of the draft model law with UNCITRAL texts in the area of security interests, the Commission agreed to change the chapeau of paragraph 1 of draft article 11 as suggested. The Commission also agreed to add to the draft explanatory notes the following explanations that would accompany the revision made: "This Model Law is not intended to restrict the creation of security rights in transferable documents or instruments. Thus, the control envisaged under article 11 provides the functional equivalent in those cases where the security rights would be created and made effective against third parties by possession of a paper document or instrument. This Model Law is also not intended to limit the creation of security rights where those rights would be made effective against third parties by their registration in a public registry." The Secretariat was requested to ensure that the text was consistent with the UNCITRAL texts in the area of security interests as regards terminology.

*Draft explanatory notes to article 11 (*A/CN.9/920*, paras. 87-102)*

76. In addition to the changes in the draft explanatory notes agreed in conjunction with the proposed amendments to draft article 11 (see paras. 74 and 75 above), the Commission also agreed:

(a) To revise paragraph 94 of the draft explanatory notes as follows: "Paragraph 1 (b) requires the person in control of the electronic transferable record to be reliably identified as such. The person in control of an electronic transferable record is in the same legal position as the possessor of an equivalent transferable document or instrument.";

(b) To replace the second sentence of paragraph 96 of the draft explanatory notes with the following wording: "The use of the services of a third party to exercise exclusive control does not affect exclusivity of control. It neither implies nor excludes the possibility that such a third party service provider or any other intermediary is a person in control. The person in control is to be determined by the applicable substantive law.";

(c) To replace the third sentence of paragraph 102 with the following: "The Model Law does not contain specific provisions on surrender, since paragraph 2, which governs transfer of control as the functional equivalent of transfer of possession and thus of delivery, would apply also to those cases.".

Article 12. General reliability standard

77. Several delegations were of the view that some of the circumstances listed in the draft article should be mandatory. It was explained that, in particular, the assurance of data integrity, the ability to prevent unauthorized access to and use of the system and the security of hardware and software were elements of critical importance for the correct management of electronic transferable records, in particular across borders. It was added that, for the same reasons, derogations by

contracting parties from the standards to determine the reliability of those elements should not be allowed.

78. Another suggestion was to insert additional items under paragraph (a) of the draft article that would address reliability of the method in addition to the reliability of the computer system. Specific indicators suggested for inclusion in paragraph (a) included extensive use of the standard, maturity of the technology used and reasonable design of the technology. The suggestion was made that, if those provisions were not included in the draft article, they should at least be reflected in the explanatory notes.

79. Views were expressed that those same issues had already been extensively discussed in the Working Group and the result of those deliberations was reflected in the current draft of article 12. Reopening the discussion of those issues in the Commission would therefore be undesirable.

80. The Commission decided to retain the draft article unchanged and reflect relevant points in the explanatory notes. (For further consideration of the matter, see paras. 82 to 84 below.)

*Draft explanatory notes to article 12 (*A/CN.9/920*, paras. 103-120;* A/CN.9/922*, paras. 29, 31, 32 and 48)*

81. With respect to paragraph 32 of document A/CN.9/922, the Commission agreed to clarify in paragraph 116 of the draft explanatory notes that reference to industry standards should not be interpreted as favouring the industry standards of one sector over those of others, which could be detrimental to supply chain management.

82. The view was expressed that paragraphs 104, 119 and other parts of the draft explanatory notes should highlight such elements as data integrity, access protection and hardware and software security as mandatory or more important for the reliability of electronic transferable records, in particular in the cross-border context. A related view was that the explanatory notes could encourage the parties to comply with those elements.

83. The alternative view was that no particular element from the illustrative list contained in draft article 12, subparagraph (a), should be highlighted in the explanatory notes as mandatory or more important, as the relevance of each element was circumstantial. The Commission recalled its decisions as regards draft article 4, on party autonomy and privity of contract (see para. 31 above), which left it to enacting States to identify provisions from which derogations by parties would not be permissible. It was understood that those provisions of article 4 would also be applicable to the list in draft article 12, subparagraph (a).

84. Some support was expressed for deleting paragraph 119 of the draft explanatory notes. The alternative view was that the paragraph should be retained. The Commission decided to retain the text of paragraph 119 unchanged.

Article 13. Indication of time and place in electronic transferable records

85. The Commission agreed to revise the draft article as follows: “Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record.”

*Draft explanatory notes to article 13 (*A/CN.9/920*, paras. 121-126)*

86. No comment was made with respect to the accompanying draft explanatory notes.

Article 14. Determination of place of business

87. The suggestion was made to change the title of the draft article to “Place of business” to better reflect its content. The Commission agreed with that suggestion.

88. Doubts were expressed about the scope of the draft article, in particular in the absence of any reference to the place of business in other provisions of the draft model law. The view was expressed that the determination of the place of business would be relevant with respect to issuance of the electronic transferable record and performance of the obligation contained therein, and that in both of those cases applicable substantive law would determine the place of business. Support was expressed for deleting draft article 14 because it might interfere with substantive law. The alternative view was that the draft article was the result of careful consideration by the Working Group and should be retained unchanged.

89. The Commission agreed to retain the draft article unchanged on the understanding that it might be helpful to States whose substantive law was silent on the determination of the place of business relevant to electronic transferable records.

Draft explanatory notes to article 14 (A/CN.9/920, paras. 127-130)

90. No comment was expressed with respect to the accompanying draft explanatory notes.

Article 15. Issuance of multiple originals

91. The suggestion was made to delete the draft article. The point was made that the practice of requiring multiple originals had originated in the paper environment in the light of concerns about loss of the only existing original. Doubts were expressed about the intent and the meaning of issuance of multiple originals in the electronic environment where such risks did not arise. It was noted that the Working Group had considered the draft article on the understanding that a business need for the issuance of multiple originals might arise, whereas subsequent consultations on the draft model law had not indicated such a need.

92. Another view was that the draft article should be retained unchanged. It was recalled that the draft model law did not purport to establish substantive rules on the matter (e.g., to permit or prohibit issuance of multiple originals). It was added that, where the substantive law allowed issuance of multiple originals, the draft article could be useful in establishing functional equivalence rules.

93. Broad support was expressed for the view that the deletion or retention of the draft article did not change the fact that issuance of multiple originals was possible under draft article 10 of the model law. The question arose as to whether the draft model law and explanatory notes should nevertheless encourage or discourage such a practice. It was agreed that the draft model law and explanatory notes should remain neutral on the matter.

94. The Commission agreed to delete the draft article but to retain most of the comments on issuance of multiple originals in explanatory notes.

Draft explanatory notes to article 15 (A/CN.9/920, paras. 131-136; A/CN.9/922, paras. 33-35)

95. Following the deletion of draft article 15 (see para. 94 above), the Commission agreed to amend paragraphs 131 to 136 of the draft explanatory notes contained in document A/CN.9/920 to read as follows:

> 131. The possibility of issuing multiple originals of a transferable document or instrument exists in several fields of trade. The Model Law does not affect the continuation of that practice with respect to the use of electronic transferable records in accordance with article 10 of the Model Law when that practice is permitted under applicable law. Similarly, the Model Law does not prevent the possibility of issuing multiple originals on different media (e.g., one on paper and one in electronic form), where this is permitted under applicable law.
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> 132. As noted (see above, para. 82), the Model Law does not contain a functional equivalent of the paper-based notion of original. Instead, the functions fulfilled by the original of a transferable document or instrument with respect to requesting performance are satisfied in an electronic environment by

the notions of "singularity" and "control" (see above, paras. 65-67). Hence, the transposition of the practice of issuing multiple original transferable documents or instruments in an electronic environment requires the issuance of multiple electronic transferable records relating to the performance of the same obligation.

133. However, caution should be exercised when issuing multiple electronic transferable records. In fact, doing so might lead to multiple claims for the same performance based on the presentation of each original. Moreover, in an electronic environment, the same functions may be pursued as with the issuance of multiple original transferable documents or instruments by selectively attributing control over one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (for example, title to property of goods, or security interests). In practice, an electronic transferable records management system could, for instance, provide information on multiple claims having different objects relating to the same electronic transferable record.

134. If substantive law contains an obligation to indicate whether multiple originals have been issued, the electronic transferable record must comply with it in accordance with the information requirements contained in article 10, paragraph 1 (a), of the Model Law.

135. Similarly, the Model Law does not specify whether one or all originals must be presented to request the performance of the obligation contained in the electronic transferable record as this matter is determined by applicable law or, where possible, by contractual agreement.

Article 16. Endorsement

96. No comment was made with respect to the draft article.

Draft explanatory notes to article 16 (A/CN.9/920, paras. 137-141)

97. No comment was made with respect to the accompanying draft explanatory notes.

Article 17. Amendment

98. No comment was made with respect to the draft article.

Draft explanatory notes to article 17 (A/CN.9/920, paras. 142-147)

99. No comment was made with respect to the accompanying draft explanatory notes.

Article 18. Replacement of a transferable document or instrument with an electronic transferable record

100. No comment was made with respect to the draft article.

Draft explanatory notes to article 18 (A/CN.9/920, paras. 148-162)

101. The Commission agreed to insert after paragraph 157 of the draft explanatory notes the following sentences: "However, information contained in a transferable document or instrument may have legal value for purposes not related to the functions pursued with transferability. For instance, a bill of lading may provide evidence of a contract of carriage of goods. The legal status of that information is to be determined by substantive law. Moreover, article 18 does not apply in cases where a second original is deliberately issued on a medium different from that used for the first original."

Article 19. Replacement of an electronic transferable record with a transferable document or instrument

102. No comment was made with respect to the draft article.

Draft explanatory notes to article 19 (A/CN.9/920, paras. 163-170)

103. No comment was made with respect to the accompanying draft explanatory notes.

104. It was agreed to add before paragraph 167 of the draft explanatory notes the following guidance on storage and archiving: "The Model Law does not contain specific provisions on storage and archiving. All applicable retention requirements found in other law, including the law on privacy and data retention, should be complied with. The notions of storage and archiving may apply to the information contained in the electronic transferable record, but not to the electronic transferable record as such." (A/CN.9/834, paras. 74 and 75.)

Article 20. Non-discrimination of foreign electronic transferable records

105. The suggestion was made that the draft article should be supplemented with the following provision: "The principle of non-discrimination of electronic transferable records may not in itself constitute grounds for recognizing the legal effect, validity or enforceability of foreign electronic transferable records if such records do not meet the criteria determining the reliability of the method used, as set out in article 12." It was indicated that if that suggestion was not accepted by the Commission, the proposed text could be included in the explanatory notes as an alternative.

106. The Commission decided to retain the draft article unchanged. (For the consideration of the suggestion in the context of the draft explanatory notes to article 20, see para. 108 below.)

Draft explanatory notes to article 20 (A/CN.9/920, paras. 171-179)

107. The suggestion was made to add to the explanatory notes the following provision: "The underlying domestic criteria concerning acceptance or non-acceptance of electronic transferable records issued or used in a jurisdiction not allowing the issuance and use of such records should not only be made public (transparency) but also be non-discriminatory. Therefore, the relevant implementing measures in such cases should be objective in nature and also not, in themselves, based 'solely' on origin. This assumes that acceptance of such records from jurisdictions that do allow their issuance or use would normally not raise these issues." It was noted that the suggested addition had substantive law implications and would broaden the intended scope of draft article 20. For those reasons, the Commission decided not to include the suggested wording in the explanatory notes to article 20.

108. As regards the suggestion to reflect in explanatory notes to article 20 the proposed wording in paragraph 105 above, concern was expressed about including it in its entirety since that text might conflict with paragraph 2 of draft article 20 by dictating a universal answer on how to deal with issues arising from the cross-border use of electronic transferable records. It was explained that paragraph 2 of draft article 20 left those issues for resolution by States on a case-by-case basis. The Commission agreed to include in paragraph 176 of the draft explanatory notes the following wording: "The principle of non-discrimination of electronic transferable records may not in itself constitute a ground for recognizing the legal effect, validity or enforceability of foreign electronic transferable records."

Draft explanatory notes: Introduction (A/CN.9/922, paras. 4-21)

109. It was suggested that the second sentence of paragraph 8 of the draft introduction contained in document A/CN.9/922 could be revised as follows: "Article 14, paragraph 3, of the Hamburg Rules may be interpreted as implying the possible use of electronic bills of lading." The Commission agreed with the suggestion.

110. The Commission recalled its decision to refer, in paragraph 13 and elsewhere in the explanatory notes where reference was made to medium-neutral electronic transferable records, to electronic transferable records for which substantive law was medium-neutral. In line with that decision, the Commission agreed to revise the fourth sentence of paragraph 13 of the proposed introduction to the explanatory notes contained in document A/CN.9/922 as follows: "The Model Law does not apply to electronic transferable records existing only in electronic form, as those records do not need a functional equivalent to operate in the electronic environment. The Model Law does not affect the medium-neutral substantive law applicable to electronic transferable records".

111. Subject to the above changes, the Commission approved the insertion of the introduction contained in chapter II, section A ("Proposed introduction"), of document A/CN.9/922, in the explanatory notes.

Relationship of the draft model law with other UNCITRAL texts in the area of electronic commerce (A/CN.9/922, paras. 36-53)

112. No support was expressed for adding a passage on the issues raised in paragraphs 42-48 of document A/CN.9/922 to the explanatory notes. The view was expressed that consideration of those issues should be deferred to a working group or should be addressed by enacting States on a case-by-case basis. In the subsequent discussion, no support was expressed for taking up those issues at the working group level.

113. It was recalled that the draft model law had been drafted with a focus on electronic transferable records and that no interaction with other UNCITRAL texts in the area of electronic commerce had thoroughly been considered by the Working Group. It was explained that different legislative solutions could be justified in the light of the specific focus of each text. It was also noted that practices of States in enacting UNCITRAL model laws varied, and it could therefore be undesirable to provide a universally applicable solution.

114. The Commission left it to the Secretariat, as part of its technical assistance activities, to provide guidance to States on how the UNCITRAL model law on electronic transferable records could interact with other texts of UNCITRAL in the area of electronic commerce on a case-by-case basis.

3. Adoption of the UNCITRAL Model Law on Electronic Transferable Records with an Explanatory Note

115. The Commission, after consideration of the text of the draft model law, adopted the following decision at its 1057th meeting, on 13 July 2017:

The United Nations Commission on International Trade Law,

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

Mindful that, while the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005),[9] the UNCITRAL Model Law on Electronic Signatures (2001)[10] and the UNCITRAL Model Law on Electronic Commerce (1996)[11] are of significant assistance to States in enabling and facilitating electronic commerce in international trade, they do not deal or do not sufficiently deal with issues arising from the use of electronic transferable records in international trade,

[9] General Assembly resolution 60/21, annex.
[10] General Assembly resolution 56/80, annex.
[11] General Assembly resolution 51/162, annex.

Considering that uncertainties as to the legal value of electronic transferable records constitute an obstacle to international trade,

Convinced that legal certainty and commercial predictability in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic transferable records on a technologically neutral basis and according to the functional equivalence approach,

Recalling that, at its forty-fourth session, in 2011, it mandated Working Group IV (Electronic Commerce) to undertake work on electronic transferable records,[12]

Having considered at its fiftieth session, in 2017, a draft model law on electronic transferable records prepared by the Working Group,[13] together with comments on the draft received from Governments and international organizations invited to sessions of the Working Group,[14]

Noting that the draft model law prepared by the Working Group deals with the use of electronic transferable records equivalent to paper-based transferable documents or instruments and does not deal with the use of transferable records existing only in electronic form or transferable records, documents or instruments for which substantive law is medium-neutral,

Believing that an UNCITRAL model law on electronic transferable records will constitute a useful addition to existing UNCITRAL texts in the area of electronic commerce by significantly assisting States in enhancing their legislation governing the use of electronic transferable records, or in formulating such legislation where none currently exists,

1. *Adopts* the UNCITRAL Model Law on Electronic Transferable Records, annexed to the report of the fiftieth session of the Commission;

2. *Requests* the Secretariat to finalize an explanatory note that will accompany the UNCITRAL Model Law on Electronic Transferable Records by reflecting deliberations and decisions at the Commission's fiftieth session as regards the draft explanatory notes contained in documents A/CN.9/920 and A/CN.9/922;

3. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Electronic Transferable Records together with an explanatory note, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

4. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Electronic Transferable Records when revising or adopting legislation relevant to electronic transferable records, and invites States that have used the Model Law to advise the Commission accordingly.

B. Progress report of Working Group IV

116. The Commission recalled that, at its forty-ninth session, in 2016, it had mandated Working Group IV (Electronic Commerce) to take up work on the topics of identity management and trust services as well as of cloud computing upon completion of the work on the draft model law on electronic transferable records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics, including with respect to their feasibility, in parallel and in a flexible manner and to

[12] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.
[13] A/CN.9/920.
[14] A/CN.9/921 and addenda.

report back to the Commission so that it could make an informed decision at a future session, including on the priority to be given to each topic.[15]

117. At its current session, the Commission had before it reports of the Working Group on its fifty-fourth session (A/CN.9/897), held in Vienna from 31 October to 4 November 2016, and on its fifty-fifth session (A/CN.9/902), held in New York from 24 to 28 April 2017. The Commission was informed that, at the fifty-fifth session of the Working Group, there was general agreement on the view that the suggested work on identity management and trust services on the one hand, and on cloud computing on the other, were different in scope and content. At the same session of the Working Group, it had been suggested that work on the two topics could continue in parallel, taking into account that differences between the projects on those two topics could lead to their having different rates of development. However, at the session, the view had also been reiterated that parallel work on both topics could place excessive demands on the Working Group, in particular at a more advanced stage, to the detriment of the quality of the final products (A/CN.9/902, para. 94). The Commission was also informed that, at the session of the Working Group, various views had been expressed on recommendations for future work (A/CN.9/902, paras. 95 and 96).

118. At the current session, the Commission heard different preferences for continuing work on each topic.

119. As regards work in the area of cloud computing, the view was expressed that the preparation of a checklist of contractual issues relating to cloud computing, identified by the Working Group as its project in that area, could proceed and be finalized expeditiously on the basis of research already accomplished, given that the content and the structure of the envisaged checklist had already been defined by the Working Group. It was noted that that work would be of great relevance for commercial operators. The view was expressed that, after completion of that work, the Working Group might consider taking up further projects in that area under the mandate given to it by the Commission during the previous year. The desirability of elaborating substantive rules on cloud computing by UNCITRAL was noted.

120. The prevailing view, however, was that it would be premature to discuss further work in that area beyond the preparation of the checklist. Some delegations were of the view that no further work in that area by UNCITRAL would be necessary. It was further indicated that, in any work in that area, cooperation would need to be sought with other organizations active in the field, namely the Hague Conference on Private International Law, with respect to the private international law aspects of cloud computing.

121. While recognizing that cloud computing raised important legal issues, many delegations were of the view that priority should be given to the work of UNCITRAL on legal aspects of identity management and trust services. Several delegations stressed that identity management and trust services were foundational to all UNCITRAL texts on electronic commerce and, more generally, to the use of electronic communications. It was indicated that strong commercial interest existed with regard to those topics. Ensuring cross-border reliability and interoperability and recognition of identity management and trust services for trustworthiness of commercial transactions and cross-border trade were thus considered important and urgent. The view was expressed that work on both identity management and trust services should proceed together in the light of a close interaction between those two topics. Drawing on existing regional instruments in that area, such as the European Union regulation on electronic identification and trust services for electronic transactions in the internal market,[16] was considered important.

122. It was recognized that work in the area of identity management and trust services was newer and more ambitious, touched upon more sensitive issues, generated greater

[15] *Official Records of the General Assembly*, *Seventy-first Session*, *Supplement No. 17* (A/71/17), para. 235.

[16] Regulation No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

interest and required, at the current stage, more brainstorming and concretization than work in the area of cloud computing. Support was expressed for the drafting of a legislative text on identity management and trust services. The suggestion was also made to continue discussing scope, key definitions and key principles related to identity management and trust services, since those issues would be relevant to any instrument prepared in that area.

123. The alternative view was that it would be unfeasible and undesirable for the Working Group to start drafting any text on identity management and trust services before the scope and goals of the work in that area had been clarified. Attention was drawn in particular to the need to clarify the relevance of trust services for identity management. Preference was therefore expressed for continuing to brainstorm, in the Working Group, general issues related to identity management and trust services. It was suggested that, once the progress report of the Working Group to the Commission at its next session had been considered, the Commission would be in a better position to give a more concrete mandate to the Working Group as regards its work in that area.

124. Some delegations did not object to the work in the area of cloud computing proceeding in parallel with the work in the area of identity management and trust services, although doubt was expressed about the utility of the envisaged checklist. Other delegations favoured prioritizing work in the area of identity management and trust services if the issue of resource constraints in handling work in both areas in parallel would arise. Other delegations expressed the view that they would wish to prioritize work in the area of cloud computing if resource constraints were indeed an issue.

125. A suggestion was made to delegate the work in the area of cloud computing to the Secretariat or an expert group so as not to use the Working Group's resources for detailed deliberations on the checklist. The understanding was that, if such an approach were followed, the Working Group would periodically review the progress of the Secretariat with regard to the preparation of the checklist.

126. While some support was expressed for that suggestion, there was also strong support for having the Working Group proceed with the work in that area. The view was expressed that work on cloud computing would require extensive technical deliberations in the Working Group, in addition to research by the Secretariat, since cloud computing touched on complex issues of cross-border legal relations and various branches of law.

127. Recognizing that, until the next session of the Commission in 2018, both the Secretariat and the Working Group would be able to handle both projects in parallel, the Commission reaffirmed the mandate given to the Working Group at its forty-ninth session, in 2016 (see para. 116 above). It agreed to revisit that mandate at its next session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services. The Secretariat was requested to consider convening expert group meetings as it deemed necessary to expedite the work in both areas and ensure the productive use of conference resources by the Working Group. States and international organizations were invited to share with the Working Group and the Secretariat their expertise in the areas of work assigned to the Working Group.

128. The Commission was informed about ongoing work in the field of paperless trade, including the legal aspects of electronic single-window facilities. It was indicated that that work was aimed in particular at exploring the complementarity between the chapters of free trade agreements on electronic commerce and UNCITRAL texts on electronic commerce, with a view to supporting the implementation of those chapters through the adoption of UNCITRAL texts.

IV. Consideration of issues in the area of security interests

A. Finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions

129. The Commission recalled that, at its forty-ninth session, in 2016, it had adopted the UNCITRAL Model Law on Secured Transactions,[17] and had given Working Group VI (Security Interests) two sessions to complete its work on a draft guide to enactment of that Model Law.[18] The Commission noted with appreciation that, at its thirtieth and thirty-first sessions, the Working Group had done so. At its current session, the Commission had before it the reports of those sessions of the Working Group (A/CN.9/899 and A/CN.9/904) and the draft guide to enactment (A/CN.9/914 and Adds.1-6).

130. The Commission agreed that the Secretariat should be given a mandate to make the changes to the draft guide to enactment that were approved by the Commission at its current session and necessary consequential editorial changes, avoiding making changes where it was not clear whether they would be editorial or substantive. The Commission also agreed that the Secretariat should review the entire draft guide to enactment to ensure consistency in the terminology used.

131. After considering a recommendation made by the Working Group at its thirty-first session, the Commission decided that a corrigendum should be issued to the Model Law: (a) to refer in article 81, paragraph 5, to paragraphs 3 and 4, and not to paragraphs 1 and 2 (see A/CN.9/904, para. 35); and (b) to add in article 85, paragraph 1, a reference to article 98 (see A/CN.9/904, para. 41).

1. Preface and general part (A/CN.9/914, paras. 1-20)

132. With respect to paragraph 4, it was agreed that: (a) the purpose of the Model Law should be stated more clearly by reference to wording that was used in the decision of the Commission adopting the Model Law and the relevant General Assembly resolution;[19] and (b) it should clarify that the Model Law had been designed for implementation in States with different legal traditions.

133. In the discussion, a suggestion was made that an additional paragraph should be inserted after paragraph 7 to explain the need to adapt the Model Law in States that already had efficient and modern systems of secured transactions that partially departed from the Model Law. It was stated that, for example, a system based on an ex-ante control of the documents by highly specialized civil servants might lead to the reduction of litigation, avoid delays in States with slow and inefficient judicial systems and facilitate control of money-laundering and abusive contractual clauses between large lenders and small and medium-sized enterprises. That suggestion did not receive sufficient support. It was stated that the Model Law was already sufficiently flexible and that such a paragraph could be interpreted as an open invitation to States to consider adopting the Model Law partly rather than as a whole.

134. Subject to the above-mentioned changes, the Commission adopted the preface to and the general part of the draft guide to enactment (A/CN.9/914, paras. 1-20).

2. Chapter I. Scope of application and general provisions (A/CN.9/914, paras. 21-76)

135. With respect to paragraph 28, it was agreed that recommendation 6 in the *UNCITRAL Legislative Guide on Secured Transactions*[20] (the "Secured Transactions Guide") was different from article 1, paragraph 4, and thus the reference to that recommendation should be deleted or explained.

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[17] United Nations publication, Sales No. E.17.V.I.

[18] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 119 and 122.

[19] General Assembly resolution 71/136.

[20] United Nations publication, Sales No. E.09.V.12.

136. With respect to paragraph 29, it was agreed that the last sentence should be deleted, as the Model Law did not contain any consumer protection rules.

137. The Commission considered the question of whether paragraph 31 should be revised and complemented by a set of model rules on security rights in attachments to movable and immovable property.

138. After discussion, the Commission agreed that paragraph 31 should be revised (but not complemented by a set of model provisions) to: (a) draw the attention of legislators to issues relating to attachments in movable and immovable property, referring to the relevant recommendations of the Secured Transactions Guide (see recommendations 21, 41, 43, 87, 88, 164-166 and 184); (b) explain that the Model Law did not address issues relating to security rights in attachments mainly because the general rules applied to security rights in attachments to movable property, and attachments to immovable property involved issues that did not lend themselves to harmonization at the international level; (c) note that, for that reason, the Secured Transactions Guide essentially deferred to national immovable property law; (d) explain that an attachment to movable property meant a tangible asset that was physically attached to another tangible asset in a manner that did not cause it to lose its separate identity; (e) clarify that a security right might be created in a tangible asset that was an attachment to movable property at the time of creation of the security right or became an attachment subsequently (see recommendation 21); (f) mention that a security right in a tangible asset that was effective against third parties at the time when the asset became an attachment to movable property remained effective against third parties thereafter without any further action (see recommendation 42); (g) note that the rule of "first to register or otherwise make effective against third parties a security right" applied to the various priority competitions discussed in the Secured Transactions Guide, including to a priority competition between a security right in a tangible asset that had become an attachment to movable property and a security right in that movable property (see Secured Transactions Guide, chap. V, para. 115); and (h) recommend that States enact a rule providing that the enforcing secured creditor would be liable for any damage to a movable asset caused by the act of removal of an attachment to movable property other than any diminution in its value attributable solely to the absence of the attachment (see recommendation 166).

139. With respect to paragraph 40, it was agreed that the last sentence should be deleted, as the question whether a control agreement needed to be in a single document or not was a matter for contract law or the law of evidence.

140. With respect to paragraph 43, it was agreed that examples should be given of assets that, depending on their use, could be characterized as consumer goods, inventory or equipment.

141. With respect to paragraph 44, it was agreed that the second sentence should be placed elsewhere in the draft guide to enactment (possibly in document A/CN.9/914/Add.1, para. 3), as it did not necessarily relate to the definition of the term "grantor".

142. With respect to paragraph 53, it was agreed that the example at the end of the last sentence should be deleted, as in that example the issuer did not have possession of the document.

143. With respect to paragraph 71, it was agreed that the third and fourth sentences should be more closely aligned with the text approved by the Commission at its last session.[21]

144. With respect to paragraph 74, it was agreed that the words "is inspired by" and "based on" in the first sentence should be replaced with more generic wording along the following lines: "follows the approach taken in".

[21] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 98.

145. Subject to the above-mentioned changes, the Commission adopted chapter I (Scope of application and general provisions) (A/CN.9/914, paras. 21-76).

3. Chapter II. Creation of a security right (A/CN.9/914/Add.1, paras. 1-36)

146. It was agreed that paragraph 1 should be revised to encourage States to enact the Model Law as a whole, including the asset-specific rules (in particular those on core commercial assets such as receivables), omitting only rules relating to types of assets that were unlikely to be used as security for credit in those States.

147. With respect to paragraph 3, it was agreed that it should clarify that: (a) in a general lease, a lessee could only create a security right in its rights under the lease; and (b) in a financial lease, as a result of the priority rules, a lessee could create a security right in the leased asset as a whole and that security right could have priority over the financial lease right of the lessor with respect to which no security right was registered. It was also agreed that the discussion as to whether the creditor of a receivable had the right to create a security right in a receivable even if it had transferred the receivable was a different matter and should be discussed in a separate paragraph.

148. With respect to paragraph 8, it was agreed that the last two sentences should be deleted because the maximum amount for which the security right might be enforced was often set at an extremely high level and thus did not protect grantors from excessive economic commitments.

149. With respect to paragraph 9, it was agreed that it should also reflect the last sentence of recommendation 17 contained in the Secured Transactions Guide ("Any exceptions to these rules should be limited and described in the law in a clear and specific way.").

150. With respect to paragraph 10, it was agreed that it should include a reference to paragraph 30 of document of A/CN.9/914, which explained that article 1, paragraph 6, implemented recommendation 18 contained in the Secured Transactions Guide.

151. With respect to paragraph 14, it was agreed that it should explain: (a) that to avoid giving the secured creditor a windfall, the secured creditor's right to enforce its security right both in the original encumbered asset and in the proceeds was limited by the amount of the secured obligation outstanding at the time of enforcement (see the Secured Transactions Guide, chap. II, para. 85); and (b) the impact of the absence of a rule along the lines of article 10, paragraph 1, which was discussed in the last sentence.

152. With respect to paragraph 15, it was agreed that the reference to a negotiable warehouse receipt that covered new inventory as proceeds of original encumbered inventory should be deleted, as such a warehouse receipt would not constitute proceeds. It was also agreed that the last sentence should be revised to stipulate that if encumbered assets were described in the security agreement in a comprehensive way (for example, inventory and receivables), those assets would be original encumbered assets, but they could also be proceeds if necessary (as, for example, in the grantor's insolvency, where a security right would not extend to assets acquired after the commencement of insolvency with respect to the grantor, unless they were proceeds of encumbered assets that belonged to the grantor before the commencement of insolvency; see the Secured Transactions Guide, recommendation 235).

153. It was agreed that paragraphs 16 and 17 should also refer to money, as article 10, paragraph 2, applied not only to rights to payment of funds credited to a bank account, but also to money. It was also agreed that the last sentence of paragraph 17 should be revised to explain that, if the balance in a bank account fell below the amount deposited, subsequent increases were unlikely to be proceeds of the original encumbered assets.

154. It was agreed that the last two sentences of paragraph 20 should be revised to refer to the quantity of the mass, as article 11, paragraph 2, limited the right to a mass by reference to its quantity, and not to its value.

155. With respect to paragraph 21, it was agreed that it should be revised to explain that the limit of a security right in a product under article 11, paragraph 3, related to value rather than to quantity, because the components of a mass could be counted (such as the number of litres of combined oil in the example in paragraph 20), but such counting was impossible in a product.

156. It was agreed that paragraph 24 should be revised to explain that an agreement limiting the grantor's right to create a security right in a receivable did not prevent the security right from being effective.

157. It was agreed that paragraph 28 should be revised to explain the rationale for the limitation of the scope of the rule in article 13, paragraph 1, to the types of receivables listed in article 13, paragraph 3.

158. It was widely felt that paragraph 28 should explain that: (a) the interference with party autonomy under article 13, paragraph 1, was justified, in the case of trade receivables, by the need to promote access to credit with receivables as security, but not in the case of receivables arising from financial contracts (excluded from the Model Law under art. 1, para. 3 (d)) or loan receivables, in which there was a justifiable reason for the debtor of those types of receivables to be able to control who its counter-party would be; and (b) under article 1, paragraph 3 (d), the Model Law applied to a payment right arising upon the termination of all outstanding transactions and, under article 13, paragraph 3 (d), the rule in article 13, paragraph 1, applied to such payment rights in line with the approach taken in article 4, paragraph 2 (b), and article 9, paragraph 3 (d), of the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) [22] (the "Assignment Convention").

159. With respect to paragraph 29, it was agreed that the reference to article 14, in parentheses, was unnecessary and should be deleted.

160. With respect to paragraph 30, it was agreed that the reference to an accessory guaranty or suretyship should be qualified, as in some States such a guaranty or suretyship was a personal right that supported rather than secured payment.

161. It was agreed that paragraph 31 should be revised to explain briefly the reasons why article 14 did not include recommendation 25, subparagraphs (g) and (h), contained in the Secured Transactions Guide.

162. It was agreed that paragraph 35 should be revised to explain that, under article 16, a security right in a negotiable document extended to the assets covered by the document only if the issuer of the document was in possession of the assets when the security right was created.

163. Subject to the above-mentioned changes, the Commission adopted chapter II (Creation of a security right) (A/CN.9/914/Add.1, paras. 1-36).

4. Chapter III. Effectiveness of a security right against third parties
(A/CN.9/914/Add.1, paras. 37-53)

164. It was agreed that paragraph 42 should be revised to explain that the purpose of article 21 was to preserve the priority achieved by the first method of third-party effectiveness.

165. It was agreed that paragraph 46 should be revised to explain that the price should not be so high as to prevent a consumer from encumbering his or her assets to obtain credit, but not so low either as to dissuade a creditor from entering into the transaction in the first instance because the transaction costs of ensuring and monitoring the third-party effectiveness of its security right would exceed the benefits.

166. With respect to paragraphs 52 and 53, it was agreed that: (a) the heading should be revised to read along the following lines: "Additional considerations for States parties to certain conventions for negotiable instruments and certificated non-intermediated securities"; (b) paragraph 53 should be revised to read along the

[22] General Assembly resolution 56/81, annex.

following lines: "A State that had enacted the Geneva Uniform Law (or the Bills and Notes Convention) might wish to note that a secured creditor in possession of a negotiable instrument or certificated non-intermediated security might have, in addition to its rights under the Model Law, the rights afforded by the Geneva Uniform Law (or the Bills and Notes Convention) where the instrument or the security contained an endorsement contemplated by the Geneva Uniform Law (or the Bills and Notes Convention)".

167. Subject to the above-mentioned changes, the Commission adopted chapter III (Effectiveness of a security right against third parties) (A/CN.9/914/Add.1, paras. 37-53).

5. Chapter IV. Registry system (A/CN.9/914/Add.2, paras. 1-58 and A/CN.9/914/Add.3, paras. 1-82)

168. With respect to paragraph 2 of document A/CN.9/914/Add.2, it was agreed that the essence of the first sentence of footnote 8 to the Model Law should be reflected to more clearly explain that, if the Model Registry Provisions were enacted in a separate law or other instrument, their enactment and entry into force should be coordinated so that they would enter into force simultaneously with the enactment of the Model Law and at a time when the Registry would be operational.

169. It was agreed that paragraph 3 of document A/CN.9/914/Add.2 should be revised to make a stronger recommendation for a fully electronic registry system in which notices could be submitted, stored and searched electronically.

170. A suggestion to delete paragraph 17 of document A/CN.9/914/Add.2 in its entirety did not receive support.

171. With respect to paragraph 19 of document A/CN.9/914/Add.3 and in other parts of the draft guide to enactment where reference was made to an article of the Model Law being "based on" another text, it was agreed that those words should be reviewed for accuracy and perhaps replaced with more general wording.

172. With respect to paragraph 22 of document A/CN.9/914/Add.3, it was agreed that the statement in the last sentence would not be true in all cases, and thus should be qualified along the following lines: "This option is predicated on the rationale that such a claimant generally may not have been prejudiced by relying on the unauthorized registration."

173. It was agreed that paragraph 34 of document A/CN.9/914/Add.3 should be deleted in its entirety, as it explained an approach that was not taken in the Model Law.

174. With respect to paragraph 42 of document A/CN.9/914/Add.3, it was agreed that the third and fourth sentences should be deleted, and instead the paragraph should: (a) refer to the two situations in which the secured creditor could select a registration period that would be too long or too short as described in paragraph 215 of the *UNCITRAL Guide on the Implementation of a Security Rights Registry*; [23] and (b) explain that article 24, paragraph 6, would rarely have any effect.

175. Subject to the above-mentioned changes, the Commission adopted chapter IV of the draft guide to enactment (A/CN.9/914/Add.2, paras. 1-58 and A/CN.9/914/Add.3, paras. 1-82).

6. Chapter V. Priority of a security right (A/CN.9/914/Add.4, paras. 1-80)

176. It was agreed that paragraph 74 would be deleted as it provided an explanation of what the Model Law did not address, which was unnecessary. In lieu of paragraph 74, it was agreed that paragraph 73 should include a reference to article 1, paragraph 3 (b), of the Model Law and paragraph 204 of the *Supplement on Security Rights in Intellectual Property*,[24] to clarify that article 50 would not apply to security

[23] United Nations publication, Sales No. E.14.V.6.
[24] United Nations publication, Sales No. E.11.V.6.

rights in intellectual property insofar as it was inconsistent with the law of the enacting State relating to intellectual property.

177. With respect to paragraph 78, it was agreed that the reference to the applicable law in the second sentence should be replaced by a reference to "the law of the enacting State" rather than to the law applicable under article 100, as that sentence was not intended to deal with a conflict-of-laws issue.

178. Subject to the above-mentioned changes, the Commission adopted chapter V of the draft guide to enactment (A/CN.9/914/Add.4, paras. 1-80).

7. Chapter VI. Rights and obligations of the parties and third-party obligors (A/CN.9/914/Add.5, paras. 1-51)

179. It was agreed that paragraph 1 should be revised to clarify that: (a) chapter VI applied to the rights and obligations of the parties before or after default, while chapter VII applied only to post-default rights and obligations of the parties; and (b) while, under article 3, the provisions of section II of chapter VI were not mandatory, the grantor and the secured creditor could not modify the rights and obligations of the debtor of the receivable or other third-party obligor without its consent, except to the extent provided in the provisions of section II of chapter VI (e.g., art. 63).

180. It was agreed that paragraph 6 should be revised to clarify that: (a) any additional cost for returning the encumbered asset to the grantor or a person designated by the grantor would generally be borne by the grantor; (b) whether that cost was reasonable should be subject to the standard of article 4; and (c) while article 54 was a mandatory provision, the allocation of the cost for returning the asset to the grantor or a person designated by the grantor was subject to party autonomy.

181. With respect to paragraph 11, it was agreed that the grantor had a right to request and obtain information from the secured creditor irrespective of the method by which the security right was made effective against third parties, and thus the reference to the contrary in the second sentence should be deleted.

182. With respect to paragraph 15, it was agreed that the fourth and fifth sentences, referring to implicit and explicit agreements, should be deleted. It was widely felt that those sentences dealt with a matter of contract law and was not specific to article 57.

183. With respect to paragraph 28, it was agreed that: (a) the example referring to successive security rights was very complex and potentially misleading, and should thus be deleted; and (b) the example referring to successive outright assignments should be retained and further clarified.

184. With respect to paragraph 33, it was agreed that: (a) the example in the third sentence should be revised to refer to successive outright transfers of receivables; and (b) the last sentence should be revised to state that article 63, paragraphs 8 and 9, provided ways for the debtor of the receivable to ensure that it would not make payment to the wrong person in those circumstances.

185. With respect to paragraph 41, it was agreed that: (a) the reference to the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988)[25] in the first sentence should be deleted, as paragraph 41 dealt with article 65, paragraph 3, which was based on article 19 of the Assignment Convention; and (b) the last sentence should clarify why the debtor of the receivable should not be able to waive defences based on its incapacity or fraud committed by the secured creditor.

186. With respect to paragraph 49, it was agreed that: (a) the last sentence should be replaced with a reference to the discussion in the Secured Transactions Guide (chap. VII, para. 34); and (b) an additional reference should be made to paragraph 37, which dealt with the rights of set-off of the debtor of the receivable (art. 64, para. 1(b)).

[25] General Assembly resolution 43/165, annex.

187. Subject to the above-mentioned changes, the Commission adopted chapter VI of the draft guide to enactment (A/CN.9/914/Add.5, paras. 1-51).

8. Chapter VII. Enforcement of a security right (A/CN.9/914/Add.5, paras. 52-96)

188. With respect to paragraph 58, it was agreed that the phrase "judicial or similar proceedings may not be efficient" should be replaced with the phrase "judicial or similar proceedings may be efficient".

189. With respect to paragraph 59, it was agreed that the discussion of the extrajudicial exercise of post-default rights should be complemented by a reference to article 3, paragraph 3, which dealt with alternative dispute resolution.

190. With respect to paragraph 67, it was agreed that the first sentence should be revised along the following lines: "Under paragraph 2, the right to terminate enforcement is extinguished once the relevant enforcement process is completed or a third party has acquired rights in the asset."

191. With respect to paragraph 69, it was agreed that the last sentence should be revised along the following lines: "This is so because the enforcement process has advanced so far that there is no merit in the higher-ranking secured creditor taking over the process."

192. It was agreed that paragraph 73 should be revised to explain that, whether it was the grantor or a third person, the person in possession of the encumbered asset was unlikely to raise unfounded objections, as such an objection might expose that person to liability to pay the additional costs incurred by the secured creditor in having to seek judicial assistance. It was widely felt that the risk of a breach of contract would not prevent the debtor or grantor already in breach of contractual obligations from raising unfounded objections.

193. With respect to paragraph 75, it was agreed that: (a) the more important rationale to be set out first was that, if the higher-ranking secured creditor had obtained possession through enforcement, the lower-ranking secured creditor should not be able to obtain possession from the higher-ranking secured creditor and thus interfere with the exercise of the enforcement rights of the higher-ranking secured creditor; and (b) the fifth sentence should include a reference to paragraph 90 (the last sentence of which suggested how States could implement article 81, paragraph 1) and explain that the conclusion reached in that sentence would only be accurate in States that enacted article 81, paragraph 1, as suggested in paragraph 90.

194. It was agreed that paragraph 76 should be revised to: (a) discuss the relationship between the right of the secured creditor to obtain possession and the right of the secured creditor to dispose of an encumbered asset (in particular, that a secured creditor might dispose of an encumbered asset without taking possession); and (b) clarify that article 78 applied also to intangible assets, with respect to which the concept of "possession" had no application.

195. It was agreed that paragraph 79 should be revised to refer to: (a) the grantor and other addressees of the notice; and (b) the notice, rather than the proposal, of the secured creditor's intention to dispose of the encumbered asset extrajudicially.

196. With respect to paragraph 80, it was agreed that the last two sentences should be revised to refer to an organized market related to a type of asset within the scope of the Model Law (e.g., a commodity exchange, rather than to a stock exchange in which intermediated securities would typically be traded that were not within the scope of the Model Law).

197. With respect to paragraph 81, it was agreed that the last sentence should be expanded to include reference to article 81, paragraph 2.

198. It was agreed that paragraphs 87 and 88 should be revised to avoid suggesting that the grantor might not have an interest in objecting to the secured creditor's proposal to acquire the asset in total or partial satisfaction of the secured obligation. It was widely felt that, if the encumbered asset's value was higher than the amount of the secured obligation, the grantor might object in order to claim any surplus. It was

also generally felt that other addressees of the proposal, such as other secured creditors, might have an interest in objecting irrespective of whether the secured obligation was fully or partially discharged through the acquisition of the encumbered asset by the enforcing secured creditor.

199. Subject to the above-mentioned changes, the Commission adopted chapter VII of the draft guide to enactment (A/CN.9/914/Add.5, paras. 52-96).

9. Chapter VIII. Conflict of laws (A/CN.9/914/Add.6, paras. 1-58)

200. It was agreed that paragraph 4 should be revised to clarify that the parties were permitted to select the law applicable to their mutual obligations as article 84 permitted a choice of law, and not because article 84 was non-mandatory.

201. It was agreed that paragraph 10 should be revised to clarify that a motor vehicle would always be treated as a mobile asset, irrespective of whether it actually crossed national borders.

202. It was agreed that paragraph 24 should explain that, even though under article 91, the applicable law would change as a result of a change in the connecting factor, the third-party effectiveness of a security right could be preserved under article 23 if the law of an enacting State became applicable.

203. It was agreed that paragraph 41 should be revised to clarify that the location of the relevant branch could be easily located in most, but not all, cases. It was agreed that both paragraphs 41 and 42 should be revised to refer to the different expectations of the parties.

204. With respect to paragraphs 46 and 48, it was agreed that the last sentence should be deleted, as it was either not fully accurate or specific to article 50, which dealt with security rights in intellectual property.

205. Subject to the above-mentioned changes, the Commission adopted chapter VIII of the draft guide to enactment (A/CN.9/914/Add.6, paras. 1-58).

206. In the context of the discussions on article 85, the question was raised whether article 85 or article 86 would apply to electronic negotiable instruments and electronic negotiable documents and thus whether the applicable law would be the law of the location of the asset or of the grantor. It was widely felt that the answer would depend on whether electronic negotiable instruments and negotiable documents were treated as tangible or intangible assets.

207. In that connection, it was noted that negotiable instruments and negotiable documents were listed in the definition of the term “tangible asset” in article 2, subparagraph (ll), of the Model Law as examples of tangible assets, since the Model Law had been prepared against the background of negotiable instruments and negotiable documents in their paper form. It was also noted that that the term “possession” was defined in article 2, subparagraph (z), of the Model Law as meaning “the actual possession of a tangible asset”. Thus, for specific policy considerations of secured transactions law, the provisions of the Model Law that referred to “possession” of a negotiable instrument or negotiable document (for example, arts. 16, 26, 46 and 49) were meant to apply only to negotiable instruments and negotiable documents in their paper form. It was also noted that the Model Law did not include definitions of the terms “negotiable instrument” or “negotiable document”, thus leaving their meaning to the law of the enacting State relating to negotiable instruments and negotiable documents, to which the Model Law deferred also for the rights and obligations of a person obligated on a negotiable instrument or the issuer of or other person obligated on a negotiable document (see arts. 68 and 70).

208. After discussion, it was agreed that, for reasons of clarity: (a) paragraph 65 of document A/CN.9/914 should list negotiable instruments and negotiable documents in their paper form as examples of tangible assets; (b) paragraph 46 of document A/CN.9/914 should list electronic negotiable instruments and negotiable documents as examples of intangible assets; and (c) the draft guide to enactment

should clarify that negotiability was left to other laws of the enacting State relating to negotiable instruments and negotiable documents.

209. The Commission next considered the relationship between the UNCITRAL Model Law on Secured Transactions and the UNCITRAL Model Law on Electronic Transferable Records (see chapter III, section A, above, and annex I to the present report). It was widely felt that the Model Law on Electronic Transferable Records was not intended to revise the substantive provisions of other laws but rather to facilitate the use of transferable documents or instruments in electronic form by providing rules on achieving the functional equivalent of possession. In particular, it was generally felt that article 11 of the Model Law on Electronic Transferable Records was not intended to change the concept of "possession" under the Model Law on Secured Transactions, which was intended to apply to tangible assets such as negotiable instruments and negotiable documents in paper form. Another view was that the plain meaning of article 11 of the Model Law on Electronic Transferable Records made the concept of "control" the functional equivalent of "possession" for the purposes of the Model Law on Secured Transactions.

210. After discussion, it was agreed that paragraph 53 of document A/CN.9/914 should: (a) clarify that the concept of "possession" in the Model Law on Secured Transactions applied only to tangible assets, and thus the provisions of that Model Law that applied specifically to tangible assets did not apply to negotiable instruments and negotiable documents in electronic form, to which the general provisions on general intangible assets of the Model Law would apply as they were movable assets in the sense of article 2, subparagraph (u); and (b) suggest that States that wished to enact both model laws should consider the relationship between them.

10. Chapter IX. Transition (A/CN.9/914/Add.6, paras. 59-83)

211. With respect to paragraph 69, it was agreed that it should be: (a) revised to clarify that the reference to article 103, paragraph 2, in the first sentence was to article 103, paragraph 1; and (b) placed after, or incorporated in to, paragraph 67, which also dealt with article 103, paragraph 1.

212. It was agreed that paragraph 74 should be deleted in its entirety as it discussed matters dealt with in paragraphs 75 and 77.

213. With respect to paragraph 78, it was agreed that the last sentence should be deleted as it could be misleading.

214. It was agreed that paragraph 83 should be revised to emphasize that: (a) the registry had to be operational before the law entered into force; (b) in determining when the new law would enter into force, States should take into account the criteria set out in subparagraphs (a), (c) and (d) in the third sentence, as well as the novelty of the new law and the complexity of the relevant markets of the enacting State; and (c) the mechanisms to determine the time when the new law should enter into force should be moved from the last sentence of paragraph 83 to paragraph 82, without any reference to specific time periods.

215. Subject to the above-mentioned changes, the Commission adopted chapter IX of the draft guide to enactment (A/CN.9/914/Add.6, paras. 59-83).

11. Adoption of the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

216. At its 1067th meeting, on 20 July 2017, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

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

Recalling also General Assembly resolutions 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013, in which the General Assembly recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) [26] and giving favourable consideration to the *UNCITRAL Legislative Guide on Secured Transactions* (2007),[27] the *Supplement on Security Rights in Intellectual Property*[28] and the *UNCITRAL Guide on the Implementation of a Security Rights Registry*,[29] respectively,

Recalling further that, at its forty-ninth session, in 2016, the Commission adopted the UNCITRAL Model Law on Secured Transactions[30] and that the General Assembly, in its resolution 71/136 of 13 December 2016, recommended the Model Law for use by States,

Convinced that the overarching benefits of the Model Law include an increase in access to affordable credit, the facilitation of the development of international trade and greater legal certainty in the exercise of international commercial activities,

Noting that a number of issues were referred to a draft guide to enactment of the Model Law during the deliberations of the Model Law and that, at its forty-ninth session, in 2016, the Commission agreed to give Working Group VI (Security Interests) up to two sessions to complete its work on the draft guide to enactment and submit it to the Commission for final consideration and adoption at its fiftieth session, in 2017,[31]

Noting also that the Working Group devoted two sessions, in 2016 and 2107, to the preparation of the draft guide to enactment, [32] and that, at its thirty-first session, in 2017, the Working Group approved the substance of the draft guide to enactment and decided to submit it to the Commission for final consideration and approval at its fiftieth session,[33]

Noting further with satisfaction that the draft guide to enactment provides background and explanatory information that could assist States in revising or adopting legislation relevant to secured transactions on the basis of the Model Law, and thus a guide to enactment of the Model Law would be an extremely important text for the implementation and interpretation of the Model Law, [34]

Expressing its appreciation to international intergovernmental and non-governmental organizations active in the reform of secured transactions law for their participation in and support for the development of the Model Law and the draft guide to enactment,

Having considered the draft guide to enactment at its fiftieth session, in 2017,

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

1. *Adopts* the *Guide to Enactment of the UNCITRAL Model Law on Secured Transactions*, consisting of the text contained in document A/CN.9/914 and

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[26] General Assembly resolution 56/81, annex. Also available as United Nations publication, Sales No. E.04.V.14.

[27] United Nations publication, Sales No. E.09.V.12.

[28] United Nations publication, Sales No. E.11.V.6.

[29] United Nations publication, Sales No. E.14.V.6.

[30] United Nations publication, Sales No. E.17.V.1.

[31] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 122.

[32] For the reports of those sessions of the Working Group, see A/CN.9/899, and A/CN.9/904.

[33] A/CN.9/904, para. 135.

[34] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 121.

Add.1-6, with amendments adopted by the Commission at its fiftieth session, and authorizes the Secretariat to edit and finalize the text of the Guide to Enactment of the Model Law pursuant to the deliberations of the Commission at that session;

2. *Requests* the Secretary-General to publish the Guide to Enactment of the Model Law, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the Model Law, taking also into account the information in the Guide to Enactment, when revising or adopting legislation relevant to secured transactions, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that, where necessary, States continue giving favourable consideration to the *UNCITRAL Guide on the Implementation of a Security Rights Registry* when revising relevant legislation, administrative regulations or guidelines, and to the *UNCITRAL Legislative Guide on Secured Transactions* and the *Supplement on Security Rights in Intellectual Property* when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

5. *Further recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001), the principles of which are also reflected in the Model Law, and the optional annex of which refers to the registration of notices with regard to assignments.

217. The Commission was informed that the Model Law had been made available as a United Nations publication and that the Guide to Enactment would be made available as a separate United Nations publication, as there was no budget to publish both the Model Law and the Guide to Enactment again. It was further noted that the Model Law and the Guide to Enactment would be made available on the UNCITRAL website at different times.

B. Possible future work in the area of security interests

218. The Commission held a preliminary discussion regarding future work in the area of security interests. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 21 (Work programme of the Commission) (see chapter XVII below).

219. The Commission recalled that, at its forty-ninth session, in 2016, it had decided that the preparation of a contractual guide on secured transactions and a uniform law text on intellectual property licensing should be retained in its future work programme together with the following topics: (a) whether the Model Law and its Guide to Enactment might need to be expanded to address matters related to secured finance to micro, small and medium-sized enterprises; (b) whether any future work on a contractual guide on secured transactions should include a discussion of contractual issues of concern to such enterprises (e.g., transparency issues); (c) any question that might not have already been addressed in the area of warehouse receipt financing (e.g., the negotiability of warehouse receipts); and (d) whether disputes arising from security agreements could be resolved through alternative dispute resolution mechanisms. The Commission also recalled that it had decided that those issues should be considered at a future session on the basis of notes to be prepared by the Secretariat after a colloquium or expert group meeting.[35]

220. At the current session, the Commission had before it two notes by the Secretariat (A/CN.9/913 and A/CN.9/924) reflecting the deliberations and conclusions of the

[35] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 124 and 125.

Fourth International Colloquium on Secured Transactions, which had been held in Vienna from 15 to 17 March 2017. The Commission took note of the possible future legislative work topics presented in document A/CN.9/913, which included contractual, transactional and regulatory issues related to secured transactions, finance to micro-businesses, warehouse receipts, intellectual property licensing, alternative dispute resolution in secured transactions and real estate financing. In particular, the Commission noted the desirability and feasibility of work on each topic, as well as the issues possibly to be addressed and the form such work might take. In that connection, the Commission noted that, in view of its limited resources, work could not be undertaken on all possible topics and priorities would thus need to be set.

221. In addition, the Commission considered a proposal by Australia, Canada, Japan and the United Kingdom (A/CN.9/926) that the Commission should prepare a practice guide for potential users of the Model Law with respect to contractual, transactional and regulatory issues related to secured transactions, as well as financing of micro-businesses. It was noted that the proposal referred to a number of issues addressed in document A/CN.9/913.

222. There was general support in the Commission for the preparation of such a practice guide. It was stated that the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions, adopted by the Commission at the current session (see section A of the present chapter), was mainly addressed to legislators and not to users of laws implementing the Model Law. In addition, it was said that, to be able to use a law implementing the Model Law to their benefit, parties to transactions, judges, arbitrators, regulators, insolvency administrators and academics would need some guidance with respect to contractual issues, such as the types of secured transactions that were possible under that law, transactional issues such as the valuation of collateral, and regulatory issues such as the conditions under which movable assets were treated as eligible collateral for regulatory purposes.

223. Moreover, it was pointed out that, in many States that had adopted a modern secured transactions law along the lines of the Model Law, users were not able to use it to the full extent and thus obtain access to lower-cost credit. It was also mentioned that the financing of micro-businesses raised some special issues (for example, with respect to notifications under the Model Law and the enforcement of a security interest). The proposed practice guide could provide useful guidance on those issues. It was further stressed that the overall value of the Model Law and of other texts prepared by UNCITRAL in the field of security interests would increase if they were complemented by a practice guide; that, it was said, would be the best use of the resources already devoted by the Commission to the preparation of its texts on security interests.

224. At the same time, in view of the limited resources available to the Commission, some doubts were expressed as to whether work on security interests should continue. It was stated that it might be better to refer the preparation of the proposed practice guide to the Secretariat with the assistance of experts and that the Commission could consider the text thus prepared at a future session.

225. With respect to warehouse receipts, the suggestion was made that the Secretariat should prepare a study on the feasibility and desirability of preparing an international legal standard. With respect to intellectual property licensing, the suggestion was made that the Commission might prepare a text on contractual issues, given their importance and the fact that there were gaps in the law relating to them. With respect to the use of alternative mechanisms to resolve disputes arising in the context of secured transactions, it was suggested that model rules might be prepared to address arbitrability and third-party issues. Those suggestions did not receive sufficient support for immediate referral to a working group. The Commission was informed that a delegation intended to prepare and submit a study on warehouse receipts for future consideration by the Commission.

226. The Commission took note of possible future coordination and technical assistance work on security interests and related topics (see A/CN.9/924). Recalling

its discussion on coordination and cooperation activities in the area of security interests (see chapter XIV, section A, below), the Commission renewed the mandate given to the Secretariat to continue its coordination and cooperation 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 transactions in receivables and securities. That mandate also included coordination and cooperation with international banking regulatory authorities.

227. After discussion, the Commission decided that a practice guide on secured transactions should be prepared and referred that task to Working Group VI. It was also agreed that the issues addressed in document A/CN.9/926 and the relevant sections of document A/CN.9/913 should form the basis of that work. The Commission further agreed that broad discretion should be accorded to the Working Group in determining the scope, structure and content of the practice guide.

228. With respect to the time frame, it was generally felt that at the current stage it was premature to fix the number of meetings the Working Group might need to complete its work, but the Commission requested the Working Group to proceed as expeditiously as possible. It was agreed that the date and place of future meetings of Working Group VI would be discussed under agenda item 22 (Date and place of future meetings). (For further consideration of the matter, see chapter XX below.)

229. With respect to the other future work topics discussed in document A/CN.9/913, the Commission decided that, with the exception of real estate financing, those topics should be retained on the Commission's future work agenda for further discussion at a future session, without assigning any priority to them.

V. Consideration of issues in the area of micro, small and medium-sized enterprises: progress report of Working Group I

230. The Commission had before it the reports of Working Group I Micro, Small and Medium-sized Enterprises on the work of its twenty-seventh and twenty-eighth sessions (A/CN.9/895 and A/CN.9/900, respectively) outlining progress on the two topics on its current work agenda, each of which involved the preparation of a legislative guide "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" [36] in respect of:

(a) The creation of a simplified business entity;

(b) Key principles of business registration.

231. The Commission noted that Working Group I, at its twenty-seventh session, held in Vienna from 3 to 7 October 2016, had continued its deliberations regarding the creation of a simplified business entity by considering the draft legislative guide on an UNCITRAL limited liability organization (UNLLO) (as set out in A/CN.9/WG.I/WP.99 and Add.1). Progress at that session had included discussion of section A, on general provisions (draft recommendations 1 to 6), section B, on the formation of an UNLLO (draft recommendations 7 to 10), and section C, on the organization of an UNLLO (draft recommendations 11 to 13). The Working Group had also heard the presentation of a legislative approach known in France as "Entrepreneur with limited liability" (A/CN.9/WG.I/WP.94), which represented a possible alternative legislative model applicable to micro and small businesses.

232. The Commission further noted that the Working Group had considered both topics currently on its agenda during its extended twenty-eighth session, held in New York from 1 to 9 May 2017. Those deliberations had commenced with a review of the entire consolidated draft legislative guide on key principles of a business registry

[36] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 220, 225 and 340; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 219.

(A/CN.9/WG.I/WP.101), save for the introductory section and draft recommendation 9 (Core functions of business registries) and its attendant commentary, to which the Working Group had agreed to revert at a future session. The Commission noted that the Working Group had further agreed to again consider the draft legislative guide on key principles of a business registry, as revised, at its twenty-ninth session, to be held in Vienna in 2017, with a view to its possible adoption by the Commission at its fifty-first session, in 2018. With respect to its deliberations regarding the creation of a simplified business entity, the Working Group had continued the work begun at its twenty-seventh session and considered the following recommendations (and related commentary) of the draft legislative guide on an UNLLO: section D, on managers (draft recommendations 14 to 16), section E, on contributions (draft recommendations 17 and 18), and section F, on distributions (draft recommendations 19 to 21).

233. The Commission also noted two proposals that had been made by States at the twenty-eighth session of the Working Group, the first being a proposal on possible future work on contractual networks, which was before the Commission at its current session (A/CN.9/925; see chapter XVII below), and the second being a proposal that the Working Group should attach model provisions on the dissolution and liquidation of micro, small and medium-sized enterprises as an annex to the legislative guide on an UNLLO (A/CN.9/WG.I/WP.104, containing the model provisions in an annex). In respect of the latter proposal, it was noted that the Working Group had agreed that any further consideration of that proposal should first be subject to domestic consultations and considered at a future session of the Working Group in conjunction with its deliberations regarding recommendation 24 (and related commentary) of the draft legislative guide on an UNLLO, regarding issues related to dissolution and winding-up of an UNLLO.

234. Several delegations highlighted the importance of the efforts of Working Group I to prepare legal standards aimed at reducing the administrative and legal burdens faced by micro, small and medium-sized enterprises, in particular in the light of the key role that such enterprises played in economies around the world, including in those of developing States. Confidence was expressed that the efforts of the Working Group would have a positive impact on such enterprises, and that the role of such norms in establishing a simple and sound system to support such businesses could have key economic benefits. It was further observed that efforts to reduce the obstacles faced by micro, small and medium-sized enterprises were likely to have a positive effect for enterprises of all sizes.

235. After discussion, the Commission commended the Working Group for the progress it had made on the two topics as reported above. In particular, the Commission welcomed the potential completion of the draft legislative guide on key principles of a business registry for possible adoption at the fifty-first session of the Commission. It noted that, consistent with the principles contained in General Assembly resolutions on the work of UNCITRAL,[37] the legislative texts resulting from the current work of the Working Group on those two topics should be published, including electronically, and in the six official languages of the United Nations, and be disseminated to Governments and other interested bodies.

VI. Consideration of issues in the area of international dispute settlement

A. Progress report of Working Group II

236. 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

[37] For example, General Assembly resolution 70/115, paras. 16 and 21.

of work in that area. At that session, the Commission had also invited delegations to provide information to the Secretariat in respect of that subject matter.[38]

237. The Commission also recalled that, at its forty-eighth session, in 2015, it had before it a compilation of responses received by the Secretariat (A/CN.9/846 and addenda).[39] At the same session, it had 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 preparation of a convention, model provisions or guidance texts. The Commission had 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.[40] At its forty-ninth session, in 2016, the Commission had commended the Working Group for its work on the topic and confirmed that the Working Group should continue its work.[41]

238. At the current session, the Commission considered the reports of the Working Group on the work of its sixty-fifth session (A/CN.9/896), held in Vienna from 12 to 23 September 2016, and sixty-sixth session (A/CN.9/901), held in New York from 6 to 10 February 2017. The Commission took note of the compromise reached by the Working Group at its sixty-sixth session, which addressed five key issues as a package (A/CN.9/901, para. 52) and expressed support for the Working Group to continue pursuing its work based on that compromise.

239. After discussion, the Commission expressed its satisfaction with the progress made by the Working Group and the support provided by the Secretariat. Considering the progress made, the Commission requested the Working Group to complete the work expeditiously.

B. Possible future work in the area of international dispute settlement

240. The Commission held a preliminary discussion regarding future work in the area of international dispute settlement. The conclusions reached during that preliminary discussion were reaffirmed by the Commission upon its consideration of agenda item 21 (Work programme of the Commission) (see chapter XVII below).

241. The Commission recalled that, at its forty-ninth session, in 2016, it had considered three topics for possible future work: concurrent proceedings, the preparation of a code of ethics for arbitrators, and possible reform of the investor-State dispute settlement regime.[42] At that session, the Commission had decided to retain those topics on its agenda for further consideration. It had further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all those topics so that the Commission would be in a position to make an informed decision whether to undertake work in any of the topics.

242. At its current session, the Commission had before it notes by the Secretariat on possible future work on concurrent proceedings (A/CN.9/915) and ethics (A/CN.9/916) in international arbitration, as well as on possible reforms of investor-State dispute settlement (A/CN.9/917), including a compilation of comments by States and international organizations (A/CN.9/918 and addenda). The Commission agreed to proceed with the consideration of possible reforms, taking those notes into account. For deliberation purposes it was agreed that the topic of investor-State dispute settlement reform would be considered in a comprehensive manner to also include the topics of concurrent proceedings and ethics.

243. At the outset, it was suggested that UNCITRAL should undertake work on investor-State dispute settlement reform as a matter of priority, as there was a need to

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[38] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 129.
[39] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 135.
[40] Ibid., para. 142.
[41] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 165.
[42] Ibid., paras. 174-195.

identify issues in relation to the existing settlement mechanism, to discuss whether those issues needed to be addressed and, if so, to develop any relevant solutions. As a general point, it was stressed that the main objective of that work should be to restore confidence in the overall system. It was underlined that there was value in multilateral consideration of the issues so as to avoid further fragmentation of the investor-State dispute settlement regime.

244. However, some doubts were expressed on the desirability and feasibility of UNCITRAL undertaking work on possible investor-State dispute settlement reforms. It was highlighted that there was currently a diverse body of more than 3,000 international investment agreements with significantly different approaches to both substantive investment protection and investor-State dispute settlement mechanisms. It was underlined that the diversity in approaches to investor-State dispute settlement reflected thoughtful decisions by sovereign States on what approach best suited their particular legal, political, and economic circumstances. It was said that because of those well-founded differences, past attempts to forge a single, multilateral approach to investment treaties had failed (for example, the negotiation of the multilateral agreement on investment under the auspices of OECD). In response, it was suggested that, although international investment agreements were not identical to and, indeed, contained differences, they generally followed similar patterns with regard to their structure and were centred around a number of core principles. It was stated that reforms to investor-State dispute settlement might enhance consistency in treaty interpretation and application.

245. In expressing further doubts, it was suggested that the diversity of approaches on investor-State dispute settlement needed to be respected. It was pointed out that reform was neither something new nor something that could be pursued only multilaterally, as States had advanced investor-State dispute settlement reform in myriad ways for many years. Some States had elected to modify and supplement existing arbitral rules, some had chosen to limit or eliminate access to arbitration, while others had elected to do away with investment treaties altogether. In that context it was suggested that discussions in international forums about approaches to investor-State dispute settlement reform were useful where that work was targeted at empirical research, experience-sharing and capacity-building to help countries identify and implement approaches that best suited their individual circumstances.

246. It was stated that criticism about investor-State dispute settlement was mainly based on perceptions and that work by UNCITRAL should not be undertaken based on mere perceptions, but on facts. In response, it was pointed out that the numerous studies on investor-State dispute settlement were based on empirical data and surveys.

247. The prevailing view was that UNCITRAL should undertake work on investor-State dispute settlement reform. Views expressed ranged from those fully supportive of conducting future work on the topic, those generally in favour of having an open-ended discussion at UNCITRAL and those who did not object to proceeding with future work but were cautious about the approach to be undertaken. As to the possible method of undertaking work on investor-State dispute settlement reform, the following suggestions were outlined.

248. As a first step, it was stated that work should begin with identifying underlying issues and concerns in order to provide the rationale for any proposed reforms and to proceed with the development of possible solutions.

249. It was suggested that work should build on an in-depth analysis and assessment of existing international investment agreements and investor-State dispute settlement mechanisms; it should not simply identify the problems but also ascertain the positive aspects and benefits of the current regime. It was underlined that a wealth of studies already existed from academia, civil society and international organizations that would assist in the consideration of the matter. It was further suggested that the work should be fact-driven rather than perception-driven and should aim at outlining the advantages and drawbacks of the different solutions.

250. It was stressed that work should be conducted through a Government-led process where States would be able to openly discuss and consider a wide range of

issues. It was noted that investor-State dispute settlement reform was connected with a number of policy issues and that Governments should have a leading role in that process. In that context, it was also noted that there was a need to take into account that States had different experiences and expectations with regard to the investor-State dispute settlement regime. The need for Governments to be represented by officials with adequate expertise and experience in negotiating investment treaties or investment chapters in free trade agreements and with exposure to claims related to investor-State dispute settlement was highlighted.

251. While the need for the process to be government-led was highlighted in particular, the need to engage with diverse stakeholders was similarly stressed. The participation in the process of intergovernmental organs and organizations (such as UNCTAD, the World Trade Organization (WTO), OECD, ICSID and PCA) and non-governmental organizations that had accumulated a vast amount of experience in that area was underscored. The benefits of involving experts, investors, academia and practitioners were noted.

252. It was generally agreed that discussion on investor-State dispute settlement reforms should be undertaken without prejudging the outcome and should not exclude any specific options. There was a general preference that work should cover the widest range of issues and possible solutions. It was generally stated that any investor-State dispute settlement reform should be conducted in a gradual manner. In that context it was stated that work by UNCITRAL should not rush to hasty conclusions about the need for reform or solutions for addressing issues.

253. It was also stated that any future work on the topic should be without any prejudice to possible approaches States might wish to adopt in the future. States had different perspectives, and diversity in approaches should be fully respected. It was mentioned that participation of States in the process should not be construed as a commitment to the result of the work.

254. There was general support that the working group tasked with the topic of investor-State dispute settlement reform should determine the specific issues to be considered. While a few suggested that future work should focus only on the topics of concurrent proceedings and ethics, it was generally felt that work on concurrent proceedings and a code of ethics could form part of the discussions on investor-State dispute settlement reforms. In relation to concurrent proceedings, it was mentioned that work could be considered on guidance to arbitral tribunals and to the manner in which the matter had been addressed in international investment agreements. Regarding the topic of ethics, it was highlighted that aspects mentioned in paragraphs 38 and 39 of document A/CN.9/916 would deserve further consideration. It was further suggested that work on ethics could address the conduct of various participants in the arbitral process, not just arbitrators.

255. As a possible solution for investor-State dispute settlement reform, a significant number of references were made to the establishment of a permanent multilateral investment court. It was suggested that, while not being the only possible solution, the idea of a permanent multilateral investment court should be given due consideration. It was suggested that one feature of a permanent multilateral investment court might be a built-in appellate mechanism. In that context, the possibility of establishing regional courts was mentioned.

256. Other topics mentioned for possible discussion by a working group included the appointment or selection of judges or arbitrators, an appeal or review mechanism, the seat of arbitration, applicable law and fees, as well as overall cost of investor-State dispute settlement and the nature and enforcement of awards or judgments. The suggestion was made that it would be useful to consider the role of domestic courts, State-to-State dispute settlement mechanisms and any other means of investment dispute resolution.

257. It was mentioned that work on investor-State dispute settlement reform should not be limited to procedural issues relating to investor-State dispute settlement but should encompass a broader discussion on the substantive aspects of international investment agreements, including but not limited to States' right to regulate, fair and

equitable treatment, expropriation and due process requirements. Nonetheless, it was stated that work on substantive standards was deemed less feasible than work on the procedural aspects.

258. Considering the above, the prevailing view was that UNCITRAL provided an appropriate multilateral forum to discuss relevant issues in an inclusive and transparent manner, where the interests not only of States but also of other stakeholders could be considered. It was recalled that UNCITRAL had successfully undertaken a reform of investor-State dispute settlement with the preparation of standards on transparency.

259. It was recalled that legislative work by UNCITRAL and its working groups was generally based on consensus. It was further recalled that, in accordance with UNCITRAL practice, consensus did not require unanimity, but was instead based on a widely prevailing majority and the absence of a formal objection that would trigger a request for a vote. The adoption of an instrument or a text by consensus did not give it any binding nature. It was stated that efforts should be made to consider all possible options so as to rally the broadest consensus.

260. While a few suggested that Working Group II should be tasked with investor-State dispute settlement reform upon completion of its work on the enforcement of settlement agreements resulting from international commercial conciliation, it was generally felt that it would be preferable to assign that work to another working group so as not to burden Working Group II unduly while it continued to fulfil its mandate.

261. The Commission had a preliminary discussion on the possible dates that could be allocated to a working group tasked with investor-State dispute settlement reform. While some expressed a preference for commencing work in 2018 so as to allow for consultations with domestic stakeholders and appropriate consideration of travel-related resources, there was also support for work to be undertaken with priority in 2017. (See chapter XX below for the final decision on that matter.)

262. The suggestion was made that the Secretariat should look into the possibility of holding working group sessions at locations other than Vienna and New York as a means to increase participation by States and relevant stakeholders. The Secretariat was requested to report back to the Commission on the administrative and financial implications of that suggestion.

263. Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission decided on the mandate set out below.

264. The Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement. In line with the UNCITRAL process, Working Group III would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s).

265. At the end of the deliberations on the topic of future work in the area of international commercial arbitration, a proposal was made that UNCITRAL should consider preparing model legislative provisions on adjudication. The proposal was based on experience in the construction industry and legislative developments in a number of jurisdictions that provided for recourse to an “adjudicator” for urgent resolution of disputes through summary proceedings. It was said that the introduction of such an adjudicator procedure required a legislative basis, in particular with respect

to the enforcement of the interim decision issued by the adjudicator. Considering the lack of time, the Commission agreed that the proposal could be further presented and considered at its next session, in 2018.

VII. Consideration of issues in the area of insolvency law: progress report of Working Group V

266. The Commission had before it the reports of Working Group V on the work of its fiftieth and fifty-first sessions (A/CN.9/898 and A/CN.9/903, respectively), outlining progress on the following topics on its current work agenda:

(a) Facilitating the cross-border insolvency of multinational enterprise groups, pursuant to a mandate given by the Commission at its forty-third session;[43]

(b) Recognition and enforcement of insolvency-related judgments, pursuant to a mandate given by the Commission at its forty-seventh session;[44]

(c) Obligations of directors of enterprise group companies in the period approaching insolvency, pursuant to a mandate given by the Commission at its forty-third session;[45]

(d) The insolvency treatment of micro, small and medium-sized enterprises, pursuant to a mandate given by the Commission at its forty-seventh session, in 2014,[46] and clarified at its forty-ninth session, in 2016.[47]

267. With respect to the work on enterprise groups, the Commission noted with satisfaction that the Working Group had made significant progress in developing a draft text on that complex and technically challenging topic. The substance of chapters 2 (arts. 3-11, on cooperation and coordination), 3 (arts. 12-13, on conduct of planning proceedings in the enacting State) and 4 (arts. 14-20, dealing with recognition of foreign planning proceedings and relief) were already well developed. While the discussion in the Working Group had clarified the policy considerations to be addressed in chapter 5, which addressed the treatment of foreign claims and included optional articles (arts. 22, 22bis and 23), the drafting required some further consideration. The Commission also noted that, given the complexity of the subject matter, the text would need to be accompanied by a guide to enactment that not only explained the policy behind the provisions, but also included examples of how the provisions might work in practice. While it was possible that the draft provisions would be sufficiently developed for consideration and adoption by the Commission in 2018, it was unlikely that the guide to enactment could be completed for consideration at the same time.

268. With respect to the work on recognition and enforcement of insolvency-related judgments, the Commission noted with satisfaction the progress that had been made towards the development of a draft model law, as evidenced by the draft text attached as an annex to the report of the fifty-first session (A/CN.9/903). While a few issues remained to be resolved, including the final definition of the term "insolvency-related judgment", one of the grounds for refusal of recognition and the relationship between the draft model law and the UNCITRAL Model Law on Cross-Border Insolvency,[48] the Commission noted that the draft text, together with a guide to enactment (which was currently being prepared), might be finalized at the upcoming fifty-second session of the Working Group, in 2017, in time to be circulated to States for comment in anticipation of completion and adoption by the Commission in 2018. The Commission further noted the steps that had been taken to facilitate close coordination with the Hague Conference on Private International Law, including the Secretariat's attendance, in February 2017, at the Special Commission on the Recognition and

[43] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.
[44] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.
[45] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.
[46] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.
[47] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.
[48] General Assembly resolution 52/158, annex.

Enforcement of Foreign Judgments. That coordination had enabled progress on the judgments project of the Hague Conference to be taken into consideration in the draft model law being developed by the Working Group. Stressing the importance of ensuring coordination with the work of the Hague Conference, the Commission encouraged the Secretariat to continue its efforts in that regard.

269. On the third topic of the obligations of directors of enterprise group companies in the period approaching insolvency, the Commission recalled 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 that the two texts were consistent in their approaches. It was anticipated that if the work on enterprise groups were to be ready for consideration by the Commission in 2018, the text on directors' obligations could also be submitted for finalization.

270. The Commission welcomed the initial work that had been done on the topic of insolvency of micro, small and medium-sized enterprises. It noted in particular that the Working Group had organized, at its fifty-first session, a number of presentations on approaches to micro, small and medium-sized enterprise insolvency and, following those presentations, had held a preliminary discussion on how to approach the topic. The Commission further noted that the Working Group had agreed that the *UNCITRAL Legislative Guide on Insolvency Law* [49] provided an appropriate framework for structuring future work on the topic. That work could proceed by examining each of the topics addressed in the *Legislative Guide* and considering whether the treatment provided was appropriate and necessary for a micro, small and medium-sized enterprise insolvency regime, building upon the brief outline provided in A/CN.9/WG.V/WP.121. Where such treatment was not found to be appropriate, consideration should be given to how it might need to be adjusted to micro, small and medium-sized enterprise insolvency. In addition, consideration should be given to issues not covered by the *Legislative Guide* that should nevertheless be addressed in a micro, small and medium-sized enterprise insolvency regime. The Commission took note that the work might be taken up in 2018 once work on some of the other topics on the current agenda of Working Group V had been finalized.

271. After discussion, the Commission commended the Working Group for the progress that was being made with its current work agenda, in particular for rising to the technical challenge posed by the various topics under consideration and for finding appropriate solutions, as reported above. The Commission requested the Secretariat to reflect, in its publications programme, the decisions to mandate work on those topics and to take any other measures necessary to ensure future publication of final texts resulting from that work, including in electronic form and in the six official languages of the United Nations.

VIII. Legal developments in the area of public procurement and infrastructure development

272. The Commission had before it a note by the Secretariat on possible future work in procurement and infrastructure development (A/CN.9/912). The Commission recalled its earlier consideration that it would be premature to engage in any type of legislative work on public procurement and infrastructure development, but that in the light of the continued importance of those topics, the Secretariat should (a) continue to monitor developments on suspension and debarment in public procurement and report periodically thereon to the Commission;[50] and (b) consider updating, where necessary, all or parts of the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (2000),[51] involving experts.[52]

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

[50] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 361.

[51] United Nations publication, Sales No. E.01.V.4.

[52] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17),

273. The Commission noted the importance of suspension and debarment procedures to effective systems of public procurement and in particular the avoidance of corruption. It was observed, however, that other organizations, including the United Nations Office on Drugs and Crime (UNODC) and OECD, were engaged in developing guidance on the issues involved. In order to avoid duplication of work, and taking into account that legislative development in UNCITRAL in that area was not considered feasible at present,[53] it was decided that the topic would not be added to the Commission's agenda in the near future. The Secretariat was authorized to conduct a further review of the topic at an appropriate time thereafter and, if that review indicated that legislative work might be desirable and feasible, report to the Commission accordingly.

274. The importance of public-private partnerships to States, particularly developing countries, was also highlighted. The Commission reaffirmed that the mandate to work on that topic should be limited, should not involve a working group, and should involve a Secretariat-led project to update, as necessary, the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*, involving experts. It was also recalled that the Commission had requested the Secretariat to consolidate the provisions of that *Legislative Guide* with the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003),[54] and noted that the Secretariat-led project included work to consolidate the texts accordingly. The Commission confirmed that the Secretariat should continue to update and consolidate the *Legislative Guide* and other relevant UNCITRAL materials, and should report further to the Commission, with draft texts as appropriate, at its fifty-first session, in 2018.

275. It was agreed that the Secretariat should also continue to promote the UNCITRAL Model Law on Public Procurement (2011) [55] through activities such as those referred to in documents A/CN.9/905 and A/CN.9/908, which were before the Commission at its current session (see chapters X and XIV of the present report).

276. It was also emphasized that the above-mentioned activities should be undertaken taking into account the resources available to the Secretariat.

IX. Endorsement of texts of other organizations: the Uniform Rules for Forfaiting of the International Chamber of Commerce

277. ICC requested the Commission to consider possible endorsement of the ICC Uniform Rules for Forfaiting. The Commission recalled that it had endorsed a number of ICC texts, such as the Incoterms 2010, the Uniform Rules for Demand Guarantees: 2010 Revision, the Uniform Customs and Practices for Documentary Credits, the Incoterms 2000, the International Standby Practices, the Uniform Rules for Contract Bonds and the Uniform Customs and Practices for Documentary Credits.

278. It was noted that the objective of the Uniform Rules for Forfaiting was to facilitate, without recourse, financing of receivables arising from international trade transactions by providing a new set of rules applicable to forfaiting transactions. The Commission further noted that forfaiting transactions were covered by the Assignment Convention and the UNCITRAL Model Law on Secured Transactions, and that the Uniform Rules complemented and were consistent with the provisions of the Convention and the Model Law.

279. Taking note of the usefulness of the Uniform Rules in facilitating international trade, the Commission, at its 1059th meeting, on 14 July 2017, adopted the following decision:

The United Nations Commission on International Trade Law,

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paras. 359, 360 and 362.

[53] A/CN.9/912, para. 6.

[54] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 18-21 and annex I.

[55] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 192 and annex I.

Expressing its appreciation to the International Chamber of Commerce for transmitting to it the Chamber's Uniform Rules for Forfaiting, which were approved by the Chamber's Banking Commission in November 2012 and adopted by the Chamber's Executive Board in December 2012, with effect from 1 January 2013,

Congratulating the International Chamber of Commerce on having made a further contribution to the facilitation of international trade by providing a new set of rules applicable to forfaiting transactions,

Noting that the Uniform Rules for Forfaiting constitute a valuable contribution to the facilitation of international receivables financing and thus international trade,

Also noting that the Uniform Rules for Forfaiting complement a number of international trade law instruments, including the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001)[56] and the UNCITRAL Model Law on Secured Transactions,[57]

Commends the use of the Uniform Rules for Forfaiting, as appropriate, in forfaiting transactions.

X. Technical assistance to law reform

280. The Commission had before it a note by the Secretariat (A/CN.9/905) on technical cooperation and assistance activities undertaken since the last report to the Commission in 2016 (A/CN.9/872). The Commission stressed that technical cooperation and assistance continued to be an important part of the Secretariat's activities aimed at ensuring that the legislative texts developed and adopted by the Commission were enacted or adopted by States and applied and interpreted in a uniform manner so as to promote the basic goal of harmonization of international trade law. Such technical assistance and cooperation activities enabled the Secretariat to provide States with information, including technical information, about the enactment of UNCITRAL texts, as well as with drafting assistance, practical experience of enactment, and information and advice on the interpretation and implementation of texts. The Commission acknowledged that the development of legislative texts was only the first step in the process of trade law harmonization and that technical cooperation and assistance activities were vital to the further use, adoption and interpretation of those legislative texts. The Commission expressed its appreciation for the work undertaken by the Secretariat in that regard.

281. The Commission noted that the continuing ability to respond to requests from States and regional organizations for those activities was dependent upon the availability of funds to meet associated costs. With respect to the UNCITRAL Trust Fund for Symposia, the Commission acknowledged the contribution by the Republic of Korea in support of participation in the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business project (as noted in A/CN.9/905, paras. 18 and 67). 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 considered very carefully and the number of such activities was limited. Of late, they had mostly been carried out on a cost-share or no-cost basis. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions and 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. The Commission appealed to all

[56] General Assembly resolution 56/81, annex. Also available as United Nations publication, Sales No. E.04.V.14.

[57] United Nations publication, Sales No. E.17.V.1.

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.

282. 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 for technical cooperation and assistance activities.

283. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to UNCITRAL Trust Fund for travel assistance to developing countries. The Commission noted that resources had been provided to El Salvador, Honduras and Sri Lanka to attend the forty-ninth session of the Commission and to Armenia, Côte d'Ivoire and Sierra Leone to attend sessions of working groups II, IV and VI.

284. With regard to the dissemination of information on UNCITRAL work and texts, the Commission noted the important role played by the UNCITRAL website (www.uncitral.org) and the UNCITRAL Law Library. The Commission welcomed the Library's inclusion on the UNCITRAL website of a new feature highlighting the role of UNCITRAL in supporting the Sustainable Development Goals. The Commission recalled its request that the Secretariat continue to explore the development of new social media features on the UNCITRAL website as appropriate,[58] noting that the development of such features in accordance with the applicable guidelines had also been welcomed by the General Assembly.[59] In that regard, the Commission noted with approval the continued development of the "What's new at UNCITRAL?" Tumblr microblog[60] and the establishment of an UNCITRAL presence on LinkedIn.[61] Finally, recalling the General Assembly resolutions commending the website's six-language interface,[62] the Commission requested the Secretariat to continue to provide, on the website, UNCITRAL texts, publications, and related information in a timely manner and in the six official languages of the United Nations.

XI. UNCITRAL regional presence

A. Regional Centre for Asia and the Pacific

285. The Commission had before it a note by the Secretariat on the activities undertaken by its Regional Centre for Asia and the Pacific (A/CN.9/910) and a note by the Secretariat on technical cooperation and assistance (A/CN.9/905, part II) that incorporated the activities undertaken in the region covered by the Regional Centre, and heard an oral report by the Head of the Regional Centre.

286. The Commission acknowledged the noticeable progress, made as a result of the regional activities of the Secretariat through the Regional Centre, in terms of awareness, adoption and implementation of UNCITRAL texts in Asia and the Pacific.

287. Strong support was expressed for the various activities undertaken by the Secretariat and the Regional Centre, which were aimed at:

(a) Providing capacity-building and technical assistance services to States in Asia and the Pacific, including to international and regional organizations and development banks. The Commission emphasized that key goal and how such efforts were also positively impacting the regional contributions to the work of UNCITRAL;

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[58] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 247.

[59] General Assembly resolutions 69/115, para. 21; 70/115, para. 21; and 71/135, para. 23.

[60] Available from http://uncitral.tumblr.com.

[61] Available from www.linkedin.com/company/uncitral.

[62] General Assembly resolutions 61/32, para. 17; 62/64, para. 16; 63/120, para. 20; 69/115, para. 21; 70/115, para. 21; and 71/135, para. 23.

(b) Supporting public, private and civil society initiatives to enhance international trade and development by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL;

(c) Building and participating in regional international trade law partnerships and alliances, including with other appropriate United Nations funds, programmes and specialized agencies, and furthering the establishment of such partnerships. The Commission noted with appreciation the participation, as a non-resident agency, in the efforts of the United Nations to deliver as one in the Lao People's Democratic Republic-United Nations Partnership Framework 2017-2021, in the United Nations Development Assistance Framework (UNDAF) Papua New Guinea 2018-2022 and in the United Nations Pacific Strategy 2018-2022. The Commission also welcomed the agreement on collaboration with the Asian Development Bank aimed at reforming arbitration laws in the South Pacific, focusing on assistance towards accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958[63] (New York Convention);

(d) Strengthening information, knowledge and statistics through briefings, workshops, seminars, publications, social media and information and communications technologies, including in regional languages;

(e) Functioning as a channel of communication between States in the region and the Secretariat. The Commission reiterated the suggestion, made at its forty-seventh session,[64] that States designate focal points in charge of coordinating with the Regional Centre, on non-legislative regional activities of the Secretariat. The Commission further recommended the Secretariat to continue enhancing its communication with States in the region.

288. The Commission requested the Secretariat to actively engage in fundraising activities in order for the Regional Centre to carry out its activities and urged Member States in the region to provide voluntary contributions to the project.

289. The Commission was informed that the Secretariat had completed the necessary arrangements for the extension of the support given by the Government of the Republic of Korea for the operation of the Regional Centre, covering an additional five-year period, from 2017 to 2021, including the necessary amendments to the Memorandum of Understanding signed on 18 November 2011 between the United Nations and the Ministry of Justice and the Incheon Metropolitan City of the Republic of Korea. The Government of the Republic of Korea extended its offer for an annual financial contribution of $450,000 to the UNCITRAL Trust Fund for Symposia, in addition to the office premises, equipment and furniture which it had already provided. The Republic of Korea also extended its offer to provide the non-reimbursable loan of a legal expert to engage in technical cooperation and assistance activities for the coming years. The Commission expressed its gratitude to the Government of the Republic of Korea for the generous gesture to extend its contribution, making possible the continued operation of the Regional Centre.

290. The Commission noted with appreciation the extension by the Government of Hong Kong, China, of the arrangement to contribute a non-reimbursable loan of a legal expert to the Regional Centre to engage in technical cooperation and assistance activities for a second year. The Commission expressed its gratitude to the Government of China for its support to the operations of the Regional Centre.

B. Proposals for the establishment of other regional centres

291. The Commission heard a statement by Cameroon recalling the commitment of the country, through the Chair of the forty-ninth session of the Commission, to seeking to develop the interest of African States in UNCITRAL and to enhancing their

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

[64] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 212.

participation in its activities. In that context, the Commission welcomed the announcement by Cameroon that it was in the process of accession to and ratification of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[65] (United Nations Sales Convention), the Rotterdam Rules, the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005),[66] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)[67] (Mauritius Convention on Transparency). The Commission also noted with appreciation that the fiftieth anniversary of UNCITRAL had been celebrated in a well-attended event in Cameroon, entitled "UNCITRAL at 50 and arbitration in Africa".

292. The Commission was advised that Cameroon proposed to host an UNCITRAL regional centre for Africa, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs of the Secretariat. The objectives of the regional centre would be to contribute to the interest of relevant stakeholders in the region in the work of the Commission and to promote the adoption, use and understanding of UNCITRAL texts in Africa.

293. The Commission expressed its gratitude to the Government of Cameroon for its proposal. The Commission noted that the specific offer received from the Government of Cameroon was for a pilot project under which its ministries of justice, trade, finance and foreign affairs had pledged to contribute to the establishment and operation of an UNCITRAL regional centre for Africa that would rely entirely on extrabudgetary resources and would be inspired by the model followed for the establishment of the UNCITRAL Regional Centre for Asia and the Pacific. The Commission approved the establishment of the UNCITRAL Regional Centre for Africa in Cameroon, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs. The Secretariat was requested to take the necessary steps for the establishment of the UNCITRAL Regional Centre for Africa and to keep the Commission informed of developments, including its funding and budget situations.

294. The Commission's attention was also drawn to its statements at previous sessions about the importance of a regional presence for raising awareness of the work of UNCITRAL and, particularly, for promoting the adoption and uniform interpretation of UNCITRAL texts. In view of the successful activities of the Regional Centre for Asia and the Pacific, further efforts should be made to establish an UNCITRAL presence in other regions.

295. The Bahrain Chamber for Dispute Resolution advised that the Government of Bahrain was actively pursuing the establishment, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs, of an UNCITRAL regional centre for the Middle East and North Africa in that State to increase familiarity with UNCITRAL texts and their level of adoption and use in the region. The objectives of the proposed regional centre would be to provide technical assistance to States on the adoption, use and understanding of UNCITRAL texts, to coordinate with international and regional organizations on trade law reform projects in the region, to coordinate communication between States in the region and UNCITRAL and its secretariat, and to build and participate in appropriate regional partnerships and alliances, including with other United Nations bodies.

296. The Commission expressed its gratitude to the Government of Bahrain for its proposal. The Commission noted that the specific offer received from the Government of Bahrain was for a pilot project under which the Bahrain Chamber for Dispute Resolution, in cooperation with other government authorities, had pledged to contribute to the establishment and operation of an UNCITRAL regional centre for the Middle East and North Africa that would rely entirely on extrabudgetary resources and would be inspired by the model followed for the establishment of the UNCITRAL

[65] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[66] General Assembly resolution 60/21, annex.
[67] General Assembly resolution 69/116, annex.

Regional Centre for Asia and the Pacific. The Commission approved the establishment of the UNCITRAL Regional Centre for Middle East and North Africa in Bahrain, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs. The Secretariat was requested to take the necessary steps for the establishment of the UNCITRAL Regional Centre for the Middle East and North Africa and to keep the Commission informed of developments, including its funding and budget situations.

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

297. The Commission considered document A/CN.9/906, on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts, which provided current information on the system for collecting and disseminating information on court decisions and arbitral awards relating to UNCITRAL texts (CLOUT) and the digests of case law.

298. As in previous sessions, the Commission commended the Secretariat for its work on CLOUT and noted with appreciation the increasing number of UNCITRAL legislative texts that were available in the system. As at the date of document A/CN.9/906, 179 issues of compiled case-law abstracts had been prepared, dealing with 1,661 cases. At the date of the oral report to the Commission, that number had arisen to 180 issues for a total of 1,771 cases. The cases related to the following texts:

- New York Convention
- Convention on the Limitation Period in the International Sale of Goods (New York, 1974) [68] and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)[69]
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)[70]
- United Nations Sales Convention
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[71]
- Electronic Communications Convention
- UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006[72]
- UNCITRAL Model Law on International Credit Transfers (1992)[73]
- UNCITRAL Model Law on Electronic Commerce (1996)[74]
- UNCITRAL Model Law on Cross-Border Insolvency (1997)[75]
- UNCITRAL Model Law on Electronic Signatures (2001)[76]

299. The Commission took note that there were no meaningful changes in respect of figures provided at its forty-ninth session, in 2016, as to the jurisdictions contributing abstracts to CLOUT. The Commission also took note that the majority of the abstracts published referred to countries in the Group of Western European and other States. With regard to the legislative texts available in the system, the United Nations Sales

[68] United Nations, *Treaty Series*, vol. 1511, No. 26119.
[69] Ibid., vol. 1511, No. 26121.
[70] Ibid., vol. 1695, No. 29215.
[71] Ibid., vol. 2169, No. 38030, p. 163.
[72] United Nations publication, Sales No. E.08.V.4.
[73] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.
[74] General Assembly resolution 51/162, annex.
[75] General Assembly resolution 52/158, annex.
[76] General Assembly resolution 56/80, annex.

Convention and the UNCITRAL Model Law on International Commercial Arbitration were still the most reported, although there had been a modest but continuous increase of cases concerning the UNCITRAL Model Law on Cross-Border Insolvency and the New York Convention.

300. The Commission was informed that the Secretariat had coordinated a new round of appointments of national correspondents for the period 2017-2022. The Commission further noted that in the period reviewed in document A/CN.9/906, national correspondents had provided approximately 53 per cent of the abstracts published in CLOUT. Although the contribution from the national correspondents was large, it was observed that the materials had mainly been prepared by a small number of correspondents, while the majority had been unable to contribute for the entire duration of their mandate.

301. The Commission expressed its appreciation for the publication of the updated digest of case law relating to the United Nations Sales Convention on the UNCITRAL website in English and Arabic. The Commission acknowledged that translation of the digest into the other official languages of the United Nations was ongoing.

302. The Commission noted with satisfaction the performance of the website www.newyorkconvention1958.org, the continuous efforts to improve its content and accessibility on all electronic supports, and the successful coordination between that website and CLOUT.

303. The Commission was informed that, in order for CLOUT to remain consistent with its original purpose, reach higher volumes of users and provide those users with extensive information on the interpretation of UNCITRAL texts, a further strengthening or reorganization of the system should be explored. In that regard, it was noted that CLOUT was established at a time in which the desired information on the interpretation of UNCITRAL texts was available to a limited extent. At the same time, a wealth of well-established commercial and non-commercial legal resources had been developed, both online and on paper, on domestic and international case law, including case law that applied UNCITRAL texts, which had greatly facilitated access to legal information worldwide. It would thus be timely for the Commission to consider the most appropriate way forward for the system. In that respect, while reaffirming the Secretariat's mandate to coordinate CLOUT and the preparation of digests, the Commission noted that the Secretariat, after consulting with CLOUT national correspondents, might provide more detailed information on possible ways to approach that matter for the Commission's consideration at its future sessions.

304. The Commission also heard an oral report of the meeting of national correspondents. The Commission was informed that the Secretariat had given a presentation of document A/CN.9/906, which had provided the opportunity to brief the newly appointed national correspondents on the structure and functioning of the CLOUT system and on their responsibilities as national correspondents. Moreover, information had been provided on how the UNCITRAL secretariat promoted the uniform application of UNCITRAL texts, including by collaborating with Unidroit and the Hague Conference on Private International Law. Ways to further improve the performance of the CLOUT system in order to reach an increasingly higher volume of users had also been discussed at the meeting. It was noted that those exchanges of views would further continue in order to involve those correspondents who could not attend the meeting, and would inform the Secretariat's notes on the subject for consideration at future Commission sessions.

XIII. Status and promotion of UNCITRAL legal texts

A. General discussion

305. 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.9/909). The Commission noted with appreciation the

information on treaty actions and legislative enactments received since its forty-ninth session.

306. 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) Mauritius Convention on Transparency — signature by Cameroon (3 States parties);

(b) United Nations Sales Convention — accession by Fiji (86 States parties);

(c) Electronic Communications Convention — accession by Fiji (8 States parties).

307. The Commission expressed appreciation to the General Assembly for the support it provided to UNCITRAL in its activities and in particular in its distinct role in furthering the dissemination of international commercial law. In particular, the Commission referred to the long-established practice of the General Assembly, upon acting on UNCITRAL texts, to recommend to States to give favourable consideration to UNCITRAL texts and to request the Secretary-General to publish UNCITRAL texts, including electronically, in the six official languages of the United Nations, and take other measures to disseminate UNCITRAL texts as broadly as possible to Governments and all other relevant stakeholders.

B. Functioning of the transparency repository

308. The Commission recalled that, under article 8 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[77] (Transparency Rules), the repository of published information under the Transparency Rules (transparency repository) was to be established.

309. The Commission further recalled that, at its forty-sixth session, in 2013, it had expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of the transparency repository.[78] 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 a transparency repository as a public administration directly responsible for the servicing and proper operation of its own legal standards.[79]

310. The Commission also recalled that, at its forty-seventh session, in 2014, the Secretariat had reported on steps taken in respect of the transparency repository function to be performed.[80]

311. The Commission further recalled that, at its forty-eighth session, in 2015, it had 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.[81] It also recalled that the General Assembly, in its resolution 70/115, had requested 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.

312. The Commission noted that the General Assembly, in its resolution 71/135, on the report of the Commission on the work of its forty-ninth session, had requested the Secretary-General to continue with the pilot project until the end of 2017, to be funded entirely by voluntary contributions.

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[77] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.

[78] Ibid., para. 80.

[79] Ibid., para. 79.

[80] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 108.

[81] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 161.

313. The Commission noted with appreciation that the Secretariat had received a grant from the Fund for International Development (OFID) of the Organization of the Petroleum Exporting Countries in the amount of $125,000 and funding by the European Commission in the amount of 100,000 euros, which would allow the secretariat of the Commission to operate the pilot project until the end of 2017.

314. The Commission recalled that a legal officer had been hired in April 2016 to operate the transparency repository. The Commission noted that the Secretariat had received an increased number of inquiries on the Transparency Rules and performed a steadily increasing number of capacity-building activities on the UNCITRAL standards on transparency in treaty-based investor-State arbitration (the UNCITRAL transparency standards). The Commission was further informed that a number of educational activities had taken place and that the UNCITRAL transparency standards were included in several academic programmes, including moots such as the Willem C. Vis International Commercial Arbitration Moot, the Frankfurt Investment Arbitration Moot Court, the Foreign Direct Investment International Arbitration Moot and the IBA-VIAC Mediation and Negotiation Competition. As a result, more than 3,800 students became familiar with the UNCITRAL transparency standards.

315. The Commission was informed about the launch of a new 18-month project under the overall project "Open regional fund — legal reform", conducted by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), upon appointment by the Federal Ministry for Economic Cooperation and Development of Germany (BMZ). Among the main aims of the project was the promotion of the UNCITRAL transparency standards in South-Eastern Europe.

316. The Commission noted that, overall, and partly as a result of the promotional activities, the trend in investor-State dispute settlement was moving towards transparency. The Commission also noted that, after ratification by Mauritius, Canada and Switzerland (listed in chronological order of ratification), the Mauritius Convention on Transparency would enter into force on 18 October 2017. None of the ratifying States had made reservations and, as a result, the Transparency Rules were now part of the investor-State dispute settlement regime created by investment treaties concluded by those three States. Thus, the Transparency Rules would apply on a unilateral basis, under all treaties concluded by those States, if the claimant agreed to their application (i.e., 35 treaties for Canada, 28 treaties for Mauritius and 114 treaties for Switzerland). The Commission also noted that 16 other States had signed the Mauritius Convention on Transparency.

317. The Commission was informed that the UNCTAD International Investment Agreement Navigator database contained 60 treaties that had been concluded after 1 April 2014. Of those treaties, 46 offered investors the possibility of initiating arbitration according to the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)[82] and thereby incorporating the Transparency Rules. In addition, about 50 per cent of those treaties established elements of transparency for arbitral proceedings not conducted under the UNCITRAL Arbitration Rules. Only 14 treaties excluded the application of the Transparency Rules, half of which foresaw some elements of transparency, either the publication of documents, access to hearings or the possibility of third parties submitting submissions, inspired by the Transparency Rules.

318. With respect to the budget situation of the transparency repository, the Commission was informed about the financial commitment of the European Commission to continue supporting the operation of the transparency repository until 2020, through the provision of an additional 300,000 euros. The grant agreement had been signed on 13 December 2016. The Commission expressed its appreciation to the European Commission for its renewed commitment to providing funding that would allow the Secretariat to continue operating the transparency repository.

319. The Commission was informed that the Secretariat was currently in contact with OFID regarding the obtaining of renewed funding. More generally, the Commission

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

reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the funding of the transparency repository, preferably in the form of multi-year contributions, so as to facilitate its continued operation.

320. The Commission was informed that, with the recent provision of funds from the European Commission, and taking into account the pending decision by OFID to continue funding, as well as possible new commitments, the secretariat would be able to continue operating the transparency repository until the end of 2020.

321. 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 continue to operate the transparency repository. Accordingly, the Commission recommended to the General Assembly that it request the secretariat of the Commission to continue operating the repository of published information in accordance with article 8 of the Transparency Rules, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions. The Commission also requested that the Commission and the General Assembly be informed of developments regarding the funding and budgetary situation of the transparency repository, based on its pilot operation.

C. International commercial arbitration moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

322. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twenty-fourth Moot, the oral arguments phase of which had taken place in Vienna from 7 to 13 April 2017. It was also noted that the best team in oral arguments had been the University of Ottawa (Canada). As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams in the Twenty-fourth Moot were based on the United Nations Sales Convention.

323. The representative of the Vis Moot recalled the historical background of the Vis Moot and mentioned that it was one of the remarkable educational events in the area of international trade law. The significant contribution of Michael L. Sher to the Vis Moot was reiterated, and it was recalled that the idea of the Moot had emanated from the UNCITRAL twenty-fifth anniversary Congress. An update on the competition was provided: 338 teams from 76 countries had participated in the 2017 Vis Moot, comprising some 2,000 students, 1,000 arbitrators and 700 coaches. Reiterating the role of the Vis Moot in fostering international trade law and promoting standards in international arbitration, it was stressed that the Vis Moot had also contributed to increasing cultural diversity and improving the gender balance in international arbitration.

324. It was mentioned that an improved gender balance had been demonstrated by the increased participation of female students in recent Vis moots. It was further mentioned that the following year would mark the twenty-fifth anniversary of the Vis Moot and that the UNCITRAL Arbitration Rules would be used. The oral arguments phase of the Twenty-fifth Vis Moot would be held in Vienna from 23 to 29 March 2018. Lastly, the representative expressed appreciation to the Commission for its continued support of the Vis Moot.

325. It was also noted that the Vis East Moot Foundation had organized the Fourteenth Willem C. Vis (East) International Commercial Arbitration Moot, which had been co-sponsored by the Commission, the East Asia Branch of CIARB and many law firms based in Hong Kong, China. The final phase had taken place in Hong Kong from 26 March to 2 April 2017. A total of 125 teams from 31 jurisdictions had participated and the best team in oral arguments had been the West Bengal National University of Juridical Sciences (India). The Fifteenth Vis (East) Moot would be held in Hong Kong from 11 to 18 March 2018.

2. Madrid Commercial Arbitration Moot 2017

326. It was noted that Carlos III University of Madrid had organized the Ninth International Commercial Arbitration Competition in Madrid from 3 to 7 April 2017, which had been co-sponsored by the Commission. Legal issues addressed by the teams had related to an international sale of goods to which the United Nations Sales Convention, the New York Convention and the rules of arbitration of the Madrid Court of Arbitration were applicable. A total of 23 teams from 11 jurisdictions had participated in the Madrid Moot 2017, which had been held in Spanish. The best team in oral arguments was Pontificia Universidad Católica del Perú (Peru). The Tenth Madrid Moot would be held from 16 to 20 April 2018.

3. Mediation and negotiation competition

327. It was noted that the third mediation and negotiation competition organized jointly by IBA and VIAC, with the support of the Commission, would take place in Vienna from 10 to 14 July 2017. Legal issues to be addressed by the teams had been those addressed at the Twenty-fourth Willem C. Vis International Commercial Arbitration Moot (see para. 322 above). A total of 33 teams from 15 jurisdictions had registered to participate.

D. Bibliography of recent writings related to the work of UNCITRAL

328. The Commission recalled that the UNCITRAL Law Library specialized in international commercial law. Its collection featured important titles and online resources in that field in the six official languages of the United Nations. In 2016, library staff had responded to approximately 490 reference requests from more than 45 countries and had hosted researchers from more than 22 countries.

329. Considering the broader impact of UNCITRAL texts, the Commission took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/907) and the influence of UNCITRAL legislative guides, practice guides and contractual texts as described in academic and professional literature. 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 that regard, the Commission recalled and repeated its request that non-governmental organizations invited to the Commission's annual session donate copies of their journals, reports and other publications to the UNCITRAL Law Library for review.[83] The Commission expressed appreciation to all non-governmental organizations that had donated materials. The Commission noted, in particular, the addition to the UNCITRAL Law Library collection of current and forthcoming issues of the journals *Revue camerounaise de l'arbitrage* (APAA) and *Islamic Capitals and Cities* (Organization of Islamic Capitals and Cities), as well as a great number of books, yearbooks and other publications from the Arab Society of Certified Accountants, CEDEP, the Centre for Transnational Law at the University of Cologne (Germany), the International Rail Transport Committee, the China International Economic and Trade Arbitration Commission, the International Institute for Conflict Prevention and Resolution, the Club of Arbitrators of the Milan Chamber of Arbitration, the Council of the Notariats of the European Union, the European Consumer Centres Network, the European Commerce Registers' Forum, the European Law Institute (ELI), EUF, FCI, the International Federation of Consulting Engineers, the Fondation pour le droit continental, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine, the International Law Association, INSOL Europe, INSOL International, ISDA, the International Women's Insolvency and Restructuring Confederation, the Stockholm Chamber of Commerce and the Kuala Lumpur Regional Centre for Arbitration. The Commission also took note of a large monographic donation by the publisher C.H. Beck.

[83] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 264.

XIV. Coordination and cooperation

A. General

330. The Commission had before it a note by the Secretariat (A/CN.9/908) 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.9/875). The Commission expressed appreciation for the Secretariat engaging with a high number of organizations and entities, both within and outside the United Nations system. Among others, the Secretariat had participated in the activities of the following organizations: the Hague Conference on Private International Law, Unidroit, the European Commission, the United Nations Inter-Agency Cluster on Trade and Productive Capacity, the Office of the United Nations High Commissioner for Human Rights, UNODC, OECD, the Economic Commission for Europe, UNCTAD, the World Bank, the International Law Institute and WTO.

331. The Commission took particular note with satisfaction of the coordination activities involving the Hague Conference on Private International Law and Unidroit. It was mentioned that the Secretariat could pursue further cooperation with the Hague Conference with regard to its judgments project (see para. 268 above) so that developments, including the up-to-date draft text, could be shared with the relevant working groups of the Commission. It was said that having such information would greatly assist the work of the working groups in considering how the projects interacted and in ensuring that there was no overlap or duplication of work.

332. The Commission also noted that the coordination work of the Secretariat concerned topics currently being considered by the working groups, as well as topics related to texts already adopted by the Commission, and that the Secretariat had 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.

333. The Commission heard an oral report on the preparation of a guidance document in the area of international commercial contract law (with a focus on sales). It was recalled that, over the previous few decades, UNCITRAL, the Hague Conference on Private International Law and Unidroit, as well as a number of other entities, including at the regional level, had drawn up various legislative and non-legislative instruments in the area of international commercial contract law. It was added that, given the number of instruments in place, it would be beneficial to provide guidance in order to identify the relevance and impact of each instrument and their relationship with other legal instruments. In that light, at its forty-ninth session, the Commission had approved the "Joint proposal on cooperation in the area of international commercial contract law (with a focus on sales)" and had asked the Secretariat to implement the Commission's decision in coordination with the Hague Conference on Private International Law and with Unidroit and to report periodically on the progress of that work.[84]

334. It was indicated that work had started by identifying experts who, in a personal capacity, could assist in preparing a draft text, tentatively in the form of a legal guide, to be circulated for validation to stakeholders and, eventually, to be presented to the Commission. It was explained that the goal of the suggested legal guide was to assist in identifying, understanding and applying uniform instruments. It was added that the legal guide would be aimed at explaining the relationship between different instruments and the fundamental features of each of them, rather than focusing on their details. It was reiterated that the legal guide would have no normative character and would not contain an interpretation of relevant rules, but rather would provide basic information on existing instruments and include illustrations for the benefit of different legal actors, such as judges, arbitrators, legislators and legal counsels. It was

[84] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 281.

also indicated that special attention was being paid to minimizing the budgetary impact of the suggested work.

335. The Commission took note of the progress made on the preparation of a guidance document on international commercial contract law (with a focus on sales) and encouraged the Secretariat to continue its collaboration with the Hague Conference on Private International Law and Unidroit on the project.

336. The Commission also heard an oral report on coordination activities relating to security interests. It was recalled that, at its forty-ninth session, in 2016, it had renewed the mandate of the Secretariat to continue its coordination efforts in the area of security interests and given a mandate to the Secretariat to update the joint publication *UNCITRAL, Hague Conference and Unidroit Texts on Security Interests*[85] and to reflect that decision in its publications programme.[86] The Commission requested the Secretariat to continue those efforts and to update the joint publication in order to include further recently adopted texts on security interests. The Commission asked the Secretariat to reflect that request in its publications programme and to take any other measures to ensure future publication of any final text resulting from that work, including electronically and in the six official languages of the United Nations.

337. The Commission noted with appreciation the efforts of the Secretariat in coordinating and cooperating with a number of other organizations active in the area of security interests. It was noted that the Secretariat had provided comments on the World Bank principles for effective insolvency and creditor/debtor regimes contained in the Insolvency and Creditor Rights Standard and was expecting to receive the comments of the World Bank on a revised draft of the Standard that contained the key recommendations of the Secured Transactions Guide. In addition, it was noted that the Secretariat had met with representatives of the European Commission and had discussed further coordination efforts, including a joint expert group meeting, with a view to ensuring a coordinated approach to the law applicable to the third-party effects of transactions in receivables and securities. It was further noted that the Secretariat had attended the first meeting of governmental experts on a draft protocol to the Convention on International Interests in Mobile Equipment (Cape Town Convention) on matters specific to agricultural, construction and mining equipment, with a view to ensuring the avoidance of duplication of efforts that could lead to overlap and conflict with the Commission's work on security interests. The Commission also noted with appreciation the Secretariat's coordination efforts with the World Bank Group, the Organization of American States and APEC in providing technical assistance and assistance with respect to local capacity-building in the area of security interests.

338. The Commission observed that coordination work often involved travel to meetings of the different organizations concerned and the use 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. Reports of other international organizations

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

1. International Institute for the Unification of Private Law

340. The Secretary-General of Unidroit reported on the main activities of Unidroit since the forty-ninth session of UNCITRAL, in 2016. In particular, the Commission was informed about the activities set out below.

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[85] United Nations (New York, 2012).

[86] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 127 and 128.

(a) Cape Town Convention

341. The Cape Town Convention continued to attract new accessions, with 73 States parties. Similarly, the Aircraft Protocol now had 67 States parties, while the recent ratification of the Protocol to the Cape Town Convention on Matters Specific to Railway Rolling Stock (Rail Protocol) by Gabon, and its signature by France, Sweden and the United Kingdom had put it firmly on the path towards further ratification and entry into force.

342. The Ratification Task Force for the Rail Protocol (in which Unidroit participated in as co-chair of the Rail Preparatory Committee), had met several times in the previous 12 months to monitor progress and identify strategic partners.

343. The committee of governmental experts entrusted with the preparation of a draft protocol to the Cape Town Convention on matters specific to agricultural, construction and mining equipment had held its first meeting from 20 to 24 March 2017. The meeting had been attended by 126 representatives from 48 Governments (30 Unidroit member States and 18 non-member States), six regional and intergovernmental organizations, including an observer from UNCITRAL, and four international non-governmental organizations.

344. The committee had made good progress in reviewing the preliminary draft text provided by the study group. The most debated issues had been: (a) the scope of the protocol in relation to agricultural, construction and mining equipment; (b) how the protocol should address interests arising out of the association of such equipment with immovable property; and (c) the amendment procedure for the protocol, with particular regard to the Harmonized System codes of the World Customs Organization, contained in the annexes to the preliminary draft protocol.

345. Most of the text proposed by the study group had been adopted by the committee. The committee hoped that it would be able to finalize the draft protocol at its second meeting, scheduled to take place in Rome from 2 to 4 October 2017.

(b) Transnational civil procedure — formulation of regional rules

346. Against the background of the American Law Institute /Unidroit Principles of Transnational Civil Procedure, which had been adopted in 2004, Unidroit continued to work with ELI to adapt those Principles to the specificities of European regional legal cultures, with a view to drafting Europe-specific regional rules.

347. The steering committee and co-reporters of working groups had met in Vienna in November 2016 and in Rome in April 2017. The project had also been presented at the ELI Annual Assembly held in Ferrara, Italy, from 7 to 9 September 2016. Unidroit and ELI had confirmed their estimate of substantial completion of the project by 2018.

(c) Legislative guide on principles and rules capable of enhancing trading in securities in emerging markets

348. The Committee on Emerging Markets Issues, Follow-up and Implementation, established to assist with the promotion and implementation of the 2009 Geneva Convention on Substantive Rules for Intermediated Securities, had held its third meeting in Rome on 12 and 13 December 2016, at which it had reviewed in detail the comments received on the draft legislative guide circulated earlier in 2016. Following the meeting, a videoconference had been held on 16 January 2017 to review the revised draft legislative guide, which had later been circulated again for comment.

349. The Committee had held its fourth meeting in Beijing on 29 and 30 March 2017, at the invitation of the China Securities Regulatory Commission. It had been jointly hosted by the China Securities Depository and Clearing Corporation Ltd.

350. On the first day, an open colloquium had been held on the theme “Enhancing and ensuring legal certainty in both current and future holding systems”. On the second day, building upon the discussions during the colloquium, the members and observers of the Committee, as well as other States and organizations, had reviewed in detail the draft legislative guide on intermediated securities. The draft legislative

guide, as revised, had been adopted by the Unidroit Governing Council at its ninety-sixth session, held in Rome from 10 to 12 May 2017. The guide was being edited and would be published later in 2017.

(d) Cooperation on international sales law

351. The secretariats of Unidroit, UNCITRAL and the Hague Conference on Private International Law had continued their exploratory work on the preparation of a guidance document on existing texts in the area of international sales law (see also paras. 333 and 334 above).

(e) Cultural property

352. Unidroit had a long-standing history of cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) in the area of cultural property. The 1995 Convention on Stolen or Illegally Exported Cultural Objects had 40 States parties, following the recent accessions of Bosnia and Herzegovina, the Lao People's Democratic Republic and Tunisia. Cooperation had intensified with UNESCO and the other organizations participating in the task force on the implementation of Security Council resolution 2199.

(f) Private law and agriculture

353. Unidroit was pursuing its cooperation with the Rome-based organizations of the United Nations system for food and agriculture. After the adoption of the Unidroit/ Food and Agriculture Organization of the United Nations (FAO)/ International Fund for Agricultural Development *Legal Guide on Contract Farming*, the three organizations had devised a series of promotional and follow-up activities. In that context, the Unidroit and FAO secretariats were currently preparing a legislative study on contract farming with a view to assisting in the development of a favourable legal framework in that area of importance for food security. Another follow-up activity was the preparation of a legal guide on agricultural land investment contracts, the scope and structure of which had been discussed at the first meeting of the working group, from 3 to 5 May 2017. The first draft chapters would be considered at the next meeting, in late 2017.

2. Organization for Economic Cooperation and Development

354. The OECD representative outlined some of the recent work of the Organization relevant to that of UNCITRAL, particularly relating to arbitration and investment dispute settlement. Issues pertaining to differences between commercial arbitration and investment arbitration, with regard to the role of appointing authorities, and to multiple investment treaty claims against a Government by shareholders of the same company for the same injury, were presented as examples of issues discussed at OECD, which provided important background for investment policymakers considering questions relating to dispute settlement. In addition, the experience of OECD in updating the thousands of existing double tax treaties was mentioned. The conclusion by 68 jurisdictions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting in June 2017, which allowed Governments to update the many existing bilateral tax treaties in a single process, was highlighted, along with its possible relevance for reform of the many investment treaties. In conclusion, the current work of OECD at its investment round tables, in which a wide range of OECD, Group of 20 and other Governments participated, was presented. It was noted that, as an intergovernmental forum that had met every six months since 2011 to discuss investment treaties, the round table had fostered an informative dialogue between Governments, enriched with input from stakeholders and experts. Lastly, it was mentioned that the current agenda of the round table addressed: (a) the balance between investor protection and Governments' right to regulate; (b) the societal benefits and costs of investment treaties; and (c) arbitrators, adjudicators and appointing authorities. The OECD representative reaffirmed the continued interest of OECD in cooperating with UNCITRAL.

3. United Nations Conference on Trade and Development

355. The representative of UNCTAD presented the *World Investment Report 2017: Investment and the Digital Economy*, launched on 7 June 2017. Some of the main foreign direct investment trends at the global and regional levels were presented, as well as the latest trends in international investment policymaking. With respect to the latter it was noted that, in 2016, the number of international investment agreements had continued to grow, as had the number of known treaty-based investor-State dispute settlement cases.

356. It was noted that, since 2010, UNCTAD had focused its work on the reform of international investment agreements to make them more conducive to sustainable development and that many of the new international investment agreements included reform elements that preserved the right to regulate, while maintaining investor protection, and improved investor-State dispute settlement, while fostering responsible investment. It was stated that the *World Investment Report 2017*, in which the need to modernize existing old-generation international investment agreements had been emphasized, contained an analysis of 10 policy options that States could adapt and adopt in line with their specific reform objectives. Among those reform options, engaging multilaterally was particularly underscored. It was stated that multilateral engagement established a common understanding and that it would be the most efficient way to address the inconsistencies, overlaps and development challenges of today's international investment agreement regime. However, it was also stated that such an approach would also be the most challenging avenue for international investment agreement reform.

357. The Mauritius Convention on Transparency, which fostered greater application of the Transparency Rules to international investment agreements concluded prior to 1 April 2014, was mentioned as an example of a possible multilateral approach. It was stated that future international investment agreement reform actions could draw upon the process of multilateral negotiations that had led to the Transparency Rules and the Mauritius Convention on Transparency, and the Convention's opt-in mechanism.

358. At the end of the presentation, some high-level UNCTAD events were highlighted, including the annual international investment agreements conference (to be held in Geneva from 9 to 11 October 2017), at which discussions would be held on how to modernize existing old-generation international investment agreements, and the regional conference on international investment policies (to be held in Baku on 24 and 25 October 2017), at which discussions would be held on the latest developments and key challenges in international investment policies for economies in transition and assistance would be provided to policymakers in devising and reforming international investment policies.

4. Permanent Court of Arbitration

359. The representative of the Court made a statement providing a summary of its work during the period 2016-2017, including an update of the Court's provision of registry support in a number of different international arbitration and conciliation proceedings and its experience with the operation of the UNCITRAL Arbitration Rules, including its role as the appointing authority. Noting the Court's experience in investment arbitration and with tribunals with a permanent or long-term character, and recognizing the numerous reforms being proposed in the area of investment dispute settlement, the Court's role in assisting its member States in designing and implementing efficient and fair dispute resolution proceedings was underscored. It was further stated that, while the Court took no view on the desirability of particular reforms, it stood ready to support any new approaches to the present system of investment arbitration at the technical level.

C. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups

360. The Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on the UNCITRAL rules of procedure and methods of work.[87] In paragraph 9 of that summary,[88] 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 to restructure the information about such organizations,[89] 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 that the adjustments made had been to the satisfaction of the Commission.[90]

361. The Commission also recalled that, at its forty-eighth session, in 2015, it had requested the Secretariat, when presenting its oral report 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.[91] The Commission further recalled that, at its forty-ninth session, in 2016, it had welcomed the detailed and informative report presented by the Secretariat pursuant to that request.[92]

362. The Commission noted that, since its forty-ninth session, the Energy Community had been added to the list of international intergovernmental organizations invited to sessions of UNCITRAL and that the following organizations had been added in the list of international non-governmental organizations invited to sessions of UNCITRAL: Arbitrators' and Mediators' Institute of New Zealand Inc. BAC/BIAC, HKMC, IIDC, RAA, and SIMI. The Commission noted the reasons for the Secretariat's decision to invite those additional international non-governmental organizations to sessions of UNCITRAL and its working groups. It also heard information about non-governmental organizations whose requests to be invited to sessions of UNCITRAL and its working groups had been rejected and reasons for the rejection.

363. The Commission also noted that, pursuant to General Assembly resolutions 68/106 and 69/115 (para. 8 in both resolutions), 70/115 (para. 7) and 71/135 (para. 9), all States and invited organizations were reminded, when they were invited to UNCITRAL sessions, about the rules of procedure and methods of work of UNCITRAL. Such a reminder was effectuated by inclusion in invitations issued to them of a reference to a dedicated page of the UNCITRAL website where the main official documents of UNCITRAL pertaining to its rules of procedure and work methods could be easily accessed.

364. The Commission welcomed the report of the Secretariat on international governmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups, but requested the Secretariat to provide the relevant information in writing for future sessions.

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[87] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 305.
[88] Ibid., annex III.
[89] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 292.
[90] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 178.
[91] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 280.
[92] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 290.

XV. Commemoration of the fiftieth anniversary of UNCITRAL

A. Statements congratulating UNCITRAL

365. States from all regions joined in applauding the outstanding contribution of UNCITRAL to a better international legal order. Throughout the session, the Commission heard further messages of congratulation from States and long-standing delegates to UNCITRAL, emphasizing its achievements and contributions to the development of the international law of trade.

366. At the 1068th meeting of the Commission, the Secretariat informed the Commission that a message had been received from the Prime Minister of the Russian Federation on the occasion of the fiftieth session of UNCITRAL. The Secretary of UNCITRAL read out the message to the Commission.

367. It was observed that, in the period to 1966, the focus of the international legal community — including the International Law Commission — had been on public international law. Consequently, there had been no United Nations-led systematic approach to developing substantive legal rules of a private international law character to govern international trade. The proposal of Hungary to the General Assembly at its nineteenth session to establish UNCITRAL had subsequently been welcomed by the General Assembly as an opportunity for considering the challenges in international trade law and trading relations that had arisen as a result of the significant technological and social changes over the previous century.

368. The Commission's attention was drawn to the major achievements of UNCITRAL in issuing conventions, model laws, legislative guides and other texts over its 50 years of existence. States acknowledged the success, in a variety of areas of international trade law, of UNCITRAL texts including the New York Convention, the United Nations Sales Convention, the UNCITRAL Arbitration Rules and the texts on insolvency, secured transactions and electronic commerce. It was recalled that UNCITRAL had issued recommendations to Governments and international organizations concerning the legal value of computer records [93] back in 1985, demonstrating innovative legal thinking at a time when e-commerce was an entirely new, and little understood, topic. That intellectual leadership underpinned the wide acceptance of later UNCITRAL texts on e-commerce and others.

369. It was noted that the benefits of the highly regarded UNCITRAL texts also accrued in their effective implementation and use in practice, and States enumerated the many UNCITRAL texts that they had enacted domestically.

370. The development potential of UNCITRAL texts was noted to be reflected in many of the Sustainable Development Goals. Predictable, stable and balanced legal frameworks, such as those promoted by UNCITRAL, enabled and increased trust between trading partners, which in turn allowed the potential benefits of international trade to be realized. In other words, people prospered because those benefits allowed trading partners to minimize their legal risks and to resolve disputes in a fair, efficient and speedy manner.

371. In addition, it was underscored that the benefits of such an international legal order extended beyond those well-understood economic benefits to improved peace and security — themselves key elements of the United Nations agenda. Peace and security required a solid legal grounding and a common understanding of the principles of law in a variety of fields, so that States were enabled to support a business environment and cooperation and thus to foster development.

372. It was also observed that an increasingly economically interdependent world required not just a harmonized but also a modernized legal framework for the facilitation of international trade and investment. Here, too, the sustainability of developments from social, environmental and economic perspectives were crucial for meeting today's challenges, and the demonstrated willingness of UNCITRAL to

[93] Available from www.uncitral.org/pdf/english/texts/electcom/computerrecords-e.pdf.

balance human and economic needs was welcomed in that regard. It was added that UNCITRAL had proved itself adept at meeting past and present challenges, also in cooperation with other international and regional organizations active in international trade law reform.

373. In that connection, it was observed that the fiftieth anniversary offered an opportunity to look to the future. Many delegates and observers appreciated that ideas for possible future work were considered during the Commission session.

374. The contributions of all participants in the UNCITRAL law-making process were recognized. The achievements of the eight secretaries of UNCITRAL to date were acknowledged. It was noted that the efforts of the Secretariat in supporting the Commission and its working groups, the devotion of considerable resources by States and the expertise of international observer organizations had all played a considerable part in ensuring the success of UNCITRAL. That success, it was emphasized, was founded on the practical value of UNCITRAL texts, the development process of which had ensured the provision of commercially realistic texts that could and would function well in domestic use. It was also emphasized that the limited resources of UNCITRAL also indicated a need for cooperation with other rule-formulating agencies and development institutions.

375. In addition, it was recalled that UNCITRAL had been established to provide countries at all levels of development with a voice in the development of its legal texts. States, including developing countries, were pleased to observe that they had been able to provide officers of the Commission and its working groups, and had benefited not only from being able to contribute to legislative development, but also from enacting and using the resulting texts. Further benefits had been provided to an entire generation of lawyers in terms of training, experience and practical implementation of rules in the field of international trade law. UNCITRAL was urged to continue its efforts to facilitate the participation of all member States in its meetings, so as to ensure the continued worldwide acceptance of its texts.

B. Mini-conference organized by Hungary

376. The Commission heard that, on 3 July 2017, Hungary had held a mini-conference at the Vienna International Centre to celebrate the fiftieth annual session of UNCITRAL. The Commission recalled that the Government of Hungary made the proposal to the nineteenth session of the General Assembly that had resulted in the establishment of UNCITRAL by means of resolution 2205 (XXI). Hungary had proposed the inclusion of an item on the agenda of that session entitled “Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade”.

377. At the mini-conference, the relationship between UNCITRAL and Hungary, pitfalls and challenges in the international unification of private law and the United Nations Sales Convention as a source of inspiration for the new Hungarian contractual liability were discussed.

378. The Commission expressed its appreciation for the mini-conference.

C. UNCITRAL Congress 2017

379. The Commission recalled its instruction to the Secretariat to organize a Congress to commemorate its fiftieth anniversary,[94] and heard that the Congress had taken place from 4 to 6 July 2017. The Commission was informed that the programme and other materials for the Congress were available on the UNCITRAL website.

380. At the Congress, which had been entitled “Modernizing International Trade Law to Support Innovation and Sustainable Development”, the question of how trade law

[94] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 366.

reform based on the modern, fair and harmonized rules of UNCITRAL could contribute to the 2030 Agenda for Sustainable Development had been examined. In that regard, the Commission's attention was drawn to the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,[95] in which States had endorsed the efforts and initiatives of UNCITRAL, 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 by 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 that field.

381. The Commission heard that the Congress had provided an opportunity for the first in-depth look into the past and future of UNCITRAL since 2007. It was reported that the event had succeeded in bringing together delegates and experts who had worked with UNCITRAL for decades and new and young participants with an interest in the work of UNCITRAL.

382. It was noted that one of the aims of the Congress had been to raise awareness of issues that the Commission might wish to take into account in considering its work programme at a future time, including topics for possible future research, how UNCITRAL developed and updated legislative texts and how to encourage the effective use and implementation of such texts. Some participants submitted policy and proposed research papers and had been able, through brief presentations, to encourage other participants to read those papers and consider the issues raised. The quality of the interventions from speakers, moderators and other participants had been recognized as excellent.

383. The Congress had also elicited innovative ideas for modernizing international trade law in a sustainable manner. It was observed that the articulation of ideas for the future was precisely what such a Congress should achieve — in other words, the Congress had been much more than a celebratory event.

384. The Legal Counsel had opened the Congress by emphasizing the importance of international cooperation and trade to the United Nations agenda, particularly the 2030 Agenda for Sustainable Development. In addition to congratulating UNCITRAL on its achievements, he had acknowledged the transparent, inclusive and multilingual manner in which its texts were developed, and had welcomed the opportunity it provided for developing countries to have a voice in that process. The comment echoed the overarching goal of the 2030 Agenda to "leave no one behind".

385. The Minister of Justice of Austria, the country that had hosted UNCITRAL for nearly 40 years, had congratulated UNCITRAL on its fiftieth anniversary and recalled the proposal of Hungary that had led to the establishment of the Commission, in 1966. He recognized that UNCITRAL had met the need for progressive development of private international law in international trade, had allowed the enormous technological and social changes over recent decades to be accommodated in the resulting legal frameworks and had taken the lead through dialogue to bring many divergent views together. He had welcomed the emphasis on modernization of those frameworks and on sustainability, which remained a necessity in the current times of enormous environmental, economic and social challenges.

386. During the first session of the Congress, distinguished speakers from a variety of regions and organizations[96] had presented international regional and national perspectives on the achievements of UNCITRAL and its potential contributions to sustainable development (including economic growth, development and institution-building). The speakers had voiced ongoing commitment to UNCITRAL, described as one of the most influential organs in legal harmonization, and had encouraged nations to join together to support its work, described as a "masterpiece of global hope and security". Points raised included the importance of reducing barriers to access to international commercial markets and of enhancing trade and economic

[95] General Assembly resolution 69/313, annex.

[96] Details on the speakers and sessions may be found in the Congress programme, available on the UNCITRAL website.

growth, and so improving peoples' well-being in all countries, and in developing countries in particular. In addition, the Commission's major and positive effect on the rule of law and in improving international trade and cooperation, the importance of recognizing the anti-globalization movement and the pernicious effect of corruption on international trade had been emphasized.

387. The benefits of cooperation and coordination and the positive contributions of UNCITRAL to a collaborative approach had also been highlighted. Examples included the Commission's work on anti-corruption with UNODC (custodian of the United Nations Convention against Corruption) and the support given to other international bodies such as the World Bank in its reform activities in insolvency and secured transactions and to EBRD in its legal transition work, in which UNCITRAL texts had served as models for national legislative reform.

388. Key emerging themes had included the "convening power of UNCITRAL", a phrase repeated throughout the Congress. The phrase reflected that UNCITRAL provided a learning space in which people could gain an understanding of the questions to be addressed and of the experience of others, so as to develop the law of international trade in a way that would be fit for purpose.

389. In a keynote speech opening the afternoon sessions on 4 July, the benefits to one system from the use of UNCITRAL texts had been outlined, demonstrating the importance of creativity in law-making, the benefits and challenges of increased human interaction in cross-border commerce and the importance of the rule of law in supporting that commerce. International cooperation and coordination, once again, had been identified as key drivers of success.

390. During the first panel of the Congress, the qualitative and quantitative benefits in the use of model laws, including empirical research demonstrating a large and positive impact of UNCITRAL texts on dispute settlement, the challenges raised in the interpretation of model law-based provisions and success factors for model laws, and the need for, and impact and functions of, model laws at the regional level, had been considered.

391. A second panel had addressed the process of UNCITRAL law-making in corporate insolvency, transport of goods by sea and secured transactions, and the benefits of the participation of both delegates from States and experts in legislative development. The challenges of achieving broad and consistent representations in UNCITRAL work had also been noted.

392. A subsequent panel had considered the relationship between multilateral and regional organizations, and whether their work reinforced each other's or created tension. The similarities between law reform at the multilateral and regional levels had been noted, and it had been observed that transferability of solutions between systems should be assumed — and, indeed, that attempts to impose one region's or system's solution might be counterproductive. The benefits of an empirically based approach had been highlighted, and the power of UNCITRAL to convene participants had again been recognized as key. Ongoing challenges relating to disengagement in some regions and retaining consistent expert presence in some working groups had been noted, and UNCITRAL had been urged to engage in interactive regional engagement in response.

393. Opportunities and challenges in the use of UNCITRAL models had also been discussed. While the success of UNCITRAL in bridging impasses and finding middle ground had been noted, so had the challenges that nonetheless remained. Examples included unexpected interpretations of texts and the use of options and guidance rather than legislative text and variations in enactment, which had all led to divergence in practice. On the other hand, the role of UNCITRAL in promoting consistency in terminology as an aid to understanding had been a positive step, although linguistic issues would remain considerable. The growing interaction between investment law and foreign direct investment also brought into play the need to balance the interests of the private and public sectors and the importance of stable legal frameworks.

394. The first day had concluded with a moderated exchange of views by former secretaries and Chairs of UNCITRAL and the Commission's current Secretary. They had discussed the comparative advantage of UNCITRAL in law reform in terms of its multilingualism and inclusiveness and had agreed that, despite the Commission's limited resources, pursuing cooperative approaches would remain critical. It had been added that the influence of UNCITRAL could not always be measured and that success criteria went far beyond the domestic enactment of UNCITRAL texts. Indeed, it had been considered that even failures could be instructive and lead to new and creative solutions. It had been further agreed that there was no perfect system of working groups and that the Commission's willingness to adapt its structure to meet the challenges it faced was another factor underpinning its achievements.

395. The second day had started with a session on the topic "Developments in the law of international trade and commerce: integrated systems to support cross-border trade". Stressing the importance of existing UNCITRAL texts on electronic commerce, several suggestions had been made to build upon that solid platform.

396. The day's first panel had been devoted to legal issues arising from digital contracts and digital property. Reference had been made to smart goods, whose software component, including periodic access to updates, was essential for proper use. Another example cited was that of electronic enforcement, which could significantly impact upon remedies for non-performance. It had been noted that the legal aspects of those emerging issues was yet to be fully explored. Another set of questions related to the relationship between the notion of ownership, itself subject to different definitions, and control over data, including for privacy and data protection purposes.

397. During the second panel, various aspects of the use of distributed ledgers based on blockchain technology (DLT), including cryptocurrencies and smart contracts, had been discussed. It had been indicated that several of those aspects could be addressed in existing legislative texts inspired by the principle of technological neutrality, and a "fitness check" of UNCITRAL texts might indicate that they were better able to accommodate modern tools than was in fact appreciated. However, matters related to the delocalized nature of certain distributed ledgers could pose additional challenges to legal notions based on geographical location. It had been added that ongoing efforts aimed at dealing with legal and regulatory issues pertaining to distributed ledgers would benefit from closer coordination and that UNCITRAL could be in a position to do so effectively. It had been concluded that UNCITRAL should monitor developments in the field.

398. The third panel had dealt with transport, trade facilitation and payments. With respect to payments, it had been indicated that business practices had changed significantly since the adoption of the UNCITRAL Model Law on International Credit Transfers (1992)[97] and that the preparation of a new legislative text could bring significant benefits, for instance with respect to supporting regulatory mechanisms, promoting financial inclusion and stability and implementing monetary policies more effectively. Examples of issues to be considered included: liability allocation, including for fraud and error; authentication of parties and security of transfers; finality of settlements; and recognition of multilateral clearing.

399. With respect to trade facilitation, reference had been made to the importance of UNCITRAL texts, namely the Electronic Communications Convention and the Model Law on Electronic Transferable Records, in implementing provisions on electronic commerce and paperless trade facilitation contained in free trade agreements. In particular, it had been indicated that the possibility of dematerializing bills of lading and similar commercial documents could greatly support interoperability for business-to-business and business-to-Government electronic exchanges at the national and international levels.

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

400. It had also been suggested that UNCITRAL could consider preparing a uniform legal regime for logistics contracts, which were distinct from traditional carriage of goods or warehousing contracts, and some aspects of which were already successfully dealt with in the Rotterdam Rules. It had further been noted that, while most existing legislative provisions on electronic commerce were transactions-oriented, the platform model was currently prevalent in the digital economy. Accordingly, it had been suggested that UNCITRAL should consider preparing dedicated legislative provisions for electronic platforms, dealing with issues such as the relationship between platform operators and users, including allocation of liability, and decentralized reputational systems.

401. Applying modern technologies to the question of the credit economy, it had been considered at the Congress how DLT might affect many aspects of secured transactions, including the substantive rules, the infrastructure and the practices. One issue that had been raised was whether the rules of the UNCITRAL Model Law on Secured Transactions that applied to equity securities should also apply to cryptocurrencies and tokens that were similar to equity securities. DLT might minimize a number of risks, such as that of unauthorized registrations, for which the Model Law provided comprehensive and complex rules. DLT also had the potential to facilitate the indexing of registrations against unique identifiers of grantors that might be allocated by and maintained in DLT systems, reducing the risk that registrations would be found seriously misleading. From the practical standpoint, DLT applications had the potential to facilitate the monitoring of encumbered assets, preventing their misuse and connecting those assets with other applications that facilitated their disposal (e.g., supply chain systems). Enforcement of security rights could also be streamlined while preserving the balance between the rights of secured creditors, grantor and third parties affected by enforcement. Finally, DLT introduced a number of new questions in relation to the intersection of secured transactions and prudential regulation, including whether cryptocurrencies and equity-like tokens would qualify as eligible collateral allowing banks to reduce capital charges.

402. Enhancing coordination between secured transactions law and prudential regulation had been noted as an essential element for fostering access to credit in a safe and sound financial environment. In particular, the panel had highlighted that a lack of coordination between those two branches of the law undermined the effectiveness of secured transactions law reforms in broadening financial inclusion and might raise financial stability concerns. In fact, while the UNCITRAL Model Law on Secured Transactions facilitated the use of any movable assets as collateral, capital requirements were sceptical of the ability of non-financial assets to effectively reduce risk. Hence, asset-based lending tended to develop outside regulated banking activities. It had been suggested UNCITRAL should promote a dialogue and inter-institutional cooperation with the Basel Committee on Banking Supervision and other relevant organizations, so as to develop guidance on compatible use of their tools. The overarching aim should be to facilitate the extension of secured credit, including through domestic banking systems, in order to reduce the cost of borrowing and promote financial stability.

403. The subsequent sessions on insolvency law had commenced with a short panel discussion on the work undertaken by UNCITRAL on insolvency law to date, including the lessons learned not only from the range of harmonization techniques used in the texts completed by Working Group V (e.g., model law, legislative guide and practice guide), but also from the degree of complexity of the topics pursued and their relevance to the different participants in the process.

404. A second panel had introduced proposals on the following: a model law approach to resolving sovereign insolvency; the need to incorporate, in insolvency regimes for micro, small and medium-sized enterprises, provisions on both corporate and personal insolvency; a global recognition regime for the resolution of financial institutions; and addressing various issues arising from the intersection of insolvency proceedings and arbitration.

405. A third panel had extended the discussion to include the following: the development of a framework for asset tracing and recovery; the unification of private

international law rules to resolve conflict and achieve consistency in cross-border insolvency judgments; the possibility of developing a convention on various aspects of cross-border insolvency; an approach to resolving sovereign insolvency involving the use of arbitration and conciliation; an approach to resolving transnational corporate collapse through recognition of the right of corporations (at their inception) to select and register the insolvency law that would apply to resolve future financial difficulty; and formulation of choice-of-law rules to facilitate certainty and avoid conflict in cross-border bank insolvencies. The participants had concluded that there remained much work to be done in the field, and had once again highlighted the importance of cooperation in achieving successful outcomes.

406. The third day of the Congress had started with consideration of the topic of dispute settlement. The first panel had been a round-table discussion on possible reforms of the investor-State dispute settlement regime, and had prompted three topics for discussion: issues related to the current investor-State dispute settlement regime; adjustments and improvements to that regime; and, finally, the possible creation of a multilateral investment court. The panel had debated various recently developed solutions to the issues identified. The adoption of the Transparency Rules by an increasing number of stakeholders, as well as the forthcoming entry into force of the Mauritius Convention on Transparency, had also been mentioned as positive developments.

407. The second panel had focused mainly on commercial arbitration, and had considered three main issues: whether there was a need for further regulation or whether the time had come for deregulation; issues faced when regulating in a multilateral context, such as the inherent tensions in any harmonization project, and how UNCITRAL had sought to strike a balance through its working methods and the different types of instruments it has developed; and the spillover from investor-State arbitration into commercial arbitration. Topics of interest for possible work mentioned during the panel discussion had included the question of combining arbitration and conciliation, parallel proceedings and adjudication.

408. The third panel, on new frontiers in dispute settlement, had covered developments in the field of online dispute resolution and solutions of a technological nature to enhance access to justice. A proposal on developing bilateral treaties on commercial arbitration had also been introduced.

409. During the afternoon of the third day, the use, implementation and effective understanding of UNCITRAL texts in practice had been addressed. The first panel had considered the tools that UNCITRAL and cooperating entities had issued to support the better understanding of its texts on dispute settlement: guides on the New York Convention, the *2012 Digest of Case Law on the Model Law on Arbitration* and the ASA toolbox for promoting the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings.[98]

410. Participants at the Congress had then considered the issue of implementing the United Nations Sales Convention and had discussed aspects of promoting the adoption, use and uniform interpretation of that Convention. At a general level, it had been indicated that a dynamic interpretation of the Convention was necessary to ensure its continuing relevance for evolving business practices. It had been noted that a number of existing legal mechanisms promoted that dynamic interpretation, but that more specific guidance, possibly in the form of a model law, could also be beneficial. A case study had examined issues related to the possible adoption of the Convention at the national level, and had concluded that the provisions of the Convention were generally compatible with all legal traditions and economic systems, and should therefore be adopted universally.

411. Another case study had highlighted the influence of certain fundamental notions of the Convention on the development of contract law at the national level, suggesting that smaller jurisdictions might be more open to the influence of uniform and international law texts. Other suggestions had been to fill gaps in legal education at

[98] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 159-160.

the undergraduate level and to develop rules and practices specific to cross-border sales and not strictly connected with national law. Yet another participant had stressed the importance of extending the number of languages in which guidance on the United Nations Sales Convention was available, to the benefit of legal actors, commercial operators and, in particular, small and medium-sized enterprises that were unaware of contractual agreements in foreign languages and under foreign law.

412. At the penultimate session, the challenges of keeping UNCITRAL texts up to date had been considered, using public procurement and public-private partnerships as an example. The challenges of working in a dynamic area of law (common to most UNCITRAL topics), the amount of time necessary to develop an UNCITRAL legislative text and the importance of evaluating the effectiveness of those texts in practice had all been highlighted. Participants had highlighted areas of possible improvement in the UNCITRAL Model Law on Public Procurement to reflect new developments, and had discussed whether or not they indicated that the Model Law itself should be amended. The risks of reopening issues that had proved challenging in achieving consensus, of some States seeking to impose their solutions (echoing comments made earlier in the Congress) and the benefits of complementing texts through providing supplemental materials, up-to-date guidance and interpretation had all been noted. Examples of the use of the Model Law in practice had been recognized as underscoring the need to take into account experience in regional reform and when enacting the text domestically when seeking to harmonize systems worldwide. No easy answers had been found to the questions of how to preserve the UNCITRAL knowledge base when working groups completed their work, although the potential to harness modern technology to preserve discussion and continuity had been raised.

413. During the final session, participants had considered the coordination and cooperation function of UNCITRAL, and how knowledge-gathering and knowledge dissemination could be enhanced through more in-depth and systematized cooperation, despite the different structures, membership and working modalities of the rule-formulating agencies. It had been noted that they all faced a common challenge: persuading the intended beneficiaries of their work of its value, since none had enforcement power.

414. The importance of legal infrastructure on trade and investment at the regional level by reference to the Asia-Pacific region had been highlighted, and the Congress had heard about the variety of international models used and their benefits for the region and events improving the understanding of those models. The potential of the Global Legal Information Network a multilingual and worldwide resource tool for the assimilation of laws — had also been discussed, and participants had been urged to support and raise awareness of the Network.

415. The panel had discussed various mechanisms to disseminate and preserve the value of the work of UNICTRAL, and concluded that one of them, discussed for some time in UNCITRAL circles, would be for UNCITRAL to survey and report annually on international, regional and some domestic reforms in international trade law in an annual publication.

416. In closing the Congress, the Secretary of UNCITRAL had thanked all the participants for their commitment and enthusiasm and had encouraged further study of the new concepts in international commerce that had been discussed during the Congress, the discussions of how existing solutions and instruments might already meet many new challenges, and the conclusion that wider promotion and adoption would further contribute to the successes of UNCITRAL. He had been pleased to hear the widespread view that the Commission had a major and exciting role to play in the years to come.

417. The Commission had also heard that other events were organized in connection with the Congress. The first was a side event on contractual networks, organized by Italy to provide an overview of its proposal for consideration by Commission at its current session (A/CN.9/925; see chapter XVII below) regarding possible future work by UNCITRAL on contractual networks. At that event, the main features of a contractual network, which could be considered as bridging the gap between contract

law and company law, had been briefly outlined, and representatives of the private sector in Italy had provided examples of contractual networks intended to facilitate the internationalization of local businesses, mainly micro, small and medium-sized enterprises. In that regard, the success story of a contractual network aiming to facilitate access by Italian businesses to the Indian market and establish partnerships with local businesses had been presented in detail.

418. The topics of other side events had been "Integrating sustainability considerations into international commercial law reform" (such as inclusive competitiveness and access to global supply chains, the business and human rights legal framework in the UNCITRAL context and environmental issues, climate change and UNCITRAL texts) and "The potential contribution of the digital economy to the sustainability agenda" (including free flow of information and implications for UNCITRAL works on e-commerce, uniform law on electronic contracts as a step forward in the elimination of barriers in electronic commerce and improving cooperation in cross-border insolvency issues by means of blockchain technology).

419. The Commission welcomed the report of the Congress and congratulated UNCITRAL on the event. The structure and breadth of the sessions, it was noted, had enabled an enriching discussion that would benefit the participants, and future deliberations in UNCITRAL.

420. The Commission requested the Secretariat to prepare and publish the proceedings of the Congress and selected materials presented for consideration at the Congress.

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

A. Introduction

421. 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,[99] in response to the General Assembly's invitation to the Commission to comment, in its report to the Assembly, on the Commission's current role in promoting the rule of law.[100] 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 had 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.[101] That view had been endorsed by the General Assembly.[102]

422. At its fiftieth session, the Commission took note of General Assembly resolution 71/148, on the rule of law at the national and international levels, in paragraph 22 of which the General Assembly invited the Commission to continue to comment, in its

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[99] 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, para. 113.

[100] 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; 68/116, para. 14; 69/123, para. 17; and 70/118, para. 20.

[101] *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), para. 419; ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 334; ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 320; ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 195; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 267; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 215; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 294 and 318; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17),para. 303.

[102] General Assembly resolutions 63/120, para. 11; 64/111, para. 14; 65/21, para. 12; 66/94, para. 15; 67/89, para. 16; 68/106, para. 12; 69/115, para. 12; 70/115, para. 11; and 71/135, para. 13.

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 on ways and means to further disseminate international law to strengthen the rule of law from the perspective of the areas of work of UNCITRAL, in line with paragraph 26 of that resolution. In formulating its comments to the General Assembly on the topic, the Commission was assisted by the views of experts summarized in section B below.

423. The Commission requested the Secretariat to consider informing the Commission in writing about relevant developments related to topics on which the Commission would be expected to provide comments to the General Assembly under the agenda item at future sessions.

424. The Commission heard a statement about role of UNCITRAL in promoting the rule of law. Reference was made in particular to its work towards enhancing the effectiveness of settlement of international and regional commercial disputes, compiling best practices and ensuring acceptance and uniform interpretation of international commercial law. The importance of the transparency, objectivity and inclusiveness of the Commission was considered to be a major contributor to its continued success in strengthening the rule of law at the national and international levels.

B. Summary of experts' views

425. Experts shared experiences regarding the dissemination of international commercial law in the national, bilateral, regional and international contexts, highlighting the role of State and non-State institutions in that respect. The role of national legislators in using international commercial law while implementing national commercial law reform and the role of judges in applying and interpreting international commercial law in a uniform way were highlighted in particular.

426. Specific reference was made to the importance of outreach in dissemination activities to micro, small and medium-sized enterprises, as they often lacked access to professional legal advice and faced difficulties in ensuring the contractual balance and the need to cut transaction costs to stay competitive. Means of dissemination of international contract law to that particular audience could include model contracts for small firms or standard clauses based on internationally accepted standards and their translation into local languages by chambers of commerce or other professional associations.

427. The speakers were unanimous in underscoring the role of education for all relevant actors, in particular youth and legal practitioners, on international commercial law. Organization of courses, training sessions and other similar events, such as Vis Moot competitions, and reviews of international commercial law developments in publications, were considered traditional but still very effective and indispensable ways of disseminating international commercial law. The relevance of CLOUT and digests to judicial training was emphasized.

428. Specific examples were provided on the use of UNCITRAL texts in technical assistance, legal diagnostics, ranking, benchmarking, assessment methodologies and similar tools implemented by multilateral institutions in partnerships with UNCITRAL. UNCITRAL partners in those activities valued UNCITRAL texts, model laws in particular, for provisions readily transposable to national legislation and for verifiable targets for policy implementation.

429. The Commission was also informed about recent examples of UNCITRAL texts being used to devise information technology solutions for implementing commercial law reform, in particular electronic public procurement portals. The dialogue established between the legal and information technology communities through the EBRD UNCITRAL Public Procurement Initiative[103] helped to explain to developers of those solutions policy considerations embedded in the 2011 UNCITRAL Model Law on Public Procurement. As a result, transparency standards of the Model Law

[103] www.ppi-ebrd-uncitral.com.

were expected to underlie the Open Contracting Data Standard[104] used globally for electronic public procurement. The value of the Model Law was also highlighted in the context of accession by States to the WTO Agreement on Government Procurement and implementation of regional instruments in the area of public procurement.

430. The Commission was also informed about current trends in legal research technology and challenges faced by international intergovernmental organizations in adopting them. Examples of information technology-based solutions employed by Governments and private entities for expediting legal research, including cross-border research, facilitating contract drafting and achieving consistent results in jurisprudence were provided.

431. The lack of financial and human resources, in particular dedicated information technology resources, and long-term budget sustainability were cited as the main challenges faced by international intergovernmental organizations in becoming innovative developers of legal research technology. The need to adhere to the principle of multilingualism made the implementation of innovative solutions in the United Nations system particularly difficult.

432. The digital divide was cited as another major challenge faced by a United Nations body that might be mandated to reach all jurisdictions or specifically target countries with no or limited Internet access or where most users used mobile devices. Without pre-existing commercial models that addressed the particular needs of that group of end users, development of a suitable solution by a United Nations body would require greater information technology expertise and costs.

433. The UNCITRAL partnership on the New York Convention Guide[105] was cited as an example of successful partnering of a United Nations body with external partners where the external partners provided resources and skills for information technology innovation while the UNCITRAL secretariat offered substantive expertise, reputation and the infrastructure to provide translations into six languages. There were, however, also examples of projects that had intended to be international in outreach but had subsequently failed, producing a significant negative impact on end users and jeopardising their trust in future similar projects. Any partnership or project with external partners would thus need to address reputational risks, issues of long-term sustainability or at least preservation and a mechanism for perpetual access and ownership by a United Nations body.

434. The Commission expressed appreciation to experts for their valuable input to the discussion of that agenda item and requested the Secretariat to reflect the main points made by experts in the report of the Commission.

C. UNCITRAL comments to the General Assembly

435. The Commission recalled that collection and dissemination of information concerning international trade law was listed among the functions of UNCITRAL in General Assembly resolution 2205 (XXI) and, at its first session, had been envisaged as a permanent aspect of the work of the Commission, in particular to avoid wasteful duplication of effort and of result and to ensure effective coordination among all concerned.[106]

436. The Commission recognized that dissemination of international trade law, in addition to being a stand-alone function of UNCITRAL, was also inherently present in its other functions, such as the function of coordinating the work of organizations active in the field of international trade law and encouraging cooperation among them and the function of promoting wider use of UNCITRAL texts and their uniform

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[104] http://standard.open-contracting.org.

[105] http://newyorkconvention1958.org.

[106] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), paras. 29 and 30.

[106] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), paras. 29 and 30.

interpretation and application. The Commission also considered that it made an important contribution to the dissemination of texts of other organizations that were of relevance to its work, in particular by endorsing them for use or adoption.

437. The Commission decided therefore to bring to the General Assembly's attention the deliberations and decisions at the current session under other agenda items of relevance to the topic (see chapters IX-XV and XVIII of the present report).

438. The Commission recognized the role of States, the General Assembly, international organizations invited to sessions of UNCITRAL, other UNCITRAL partners, UNCITRAL methods of work, documentation and publications in the dissemination of international commercial law. The Commission also recognized the role of regular reviews of the work of UNCITRAL in the *Repertory of Practice of United Nations Organs*, the *United Nations Juridical Yearbook* and other United Nations and non-United Nations publications, and the importance of enhancing cooperation with academia, which the Commission had highlighted at its forty-fifth session, in 2012.[107]

439. The Commission expressed appreciation to the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law for reflecting international trade law within the framework of activities conducted under the Programme pursuant to the request made by UNCITRAL in its early years.

440. While recalling achievements in the dissemination of international commercial law, the Commission recognized the need for constant adaptation of its dissemination practices to new issues and requested the Secretariat to consider the improvements in its dissemination practices suggested at the Congress and by the experts (see section B above). A specific call was made for removing obstacles to innovative dissemination practices faced by the United Nations. The proliferation of online tools designed to assist with international commercial law reform but not representing internationally agreed commercial law standards was cited as a new challenge to the implementation of the UNCITRAL mandate.

441. The Commission reiterated the need for better integration of its work in the broader agenda of the United Nations. The Commission was of the view that achieving that result would in itself contribute to further dissemination of international commercial law to strengthen the rule of law. To that end, the Commission recommended that the Secretariat should take additional steps towards dissemination across the United Nations system, in particular to legal advisers, of the Guidance Note on Strengthening United Nations Support to States, Upon Their Request, to Implement Sound Commercial Law Reforms, endorsed by the Commission at its 2016 session.[108]

XVII. Work programme of the Commission

442. The Commission recalled its agreement to reserve time for discussion of its overall work programme as a separate topic at each session, in order to facilitate the effective planning of its activities.[109]

443. The Commission took note of the documents prepared to assist its discussions on the topic (A/CN.9/911, the documents referred to therein and two proposals submitted separately, namely, A/CN.9/923 and A/CN.9/925).

A. Current legislative programme

444. The Commission took note of the progress of its working groups as reported earlier in the session (see chapters III to VII of the present report), and confirmed the

[107] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 179-181.
[108] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 262 and annex II.
[109] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 310.

programme of current legislative activities as set out in table 1 of document A/CN.9/911.

B. Future legislative programme

445. Recalling the importance of a strategic approach to the allocation of resources to, inter alia, legislative development, and its role in setting the work programme of UNCITRAL, especially as regards the mandates of working groups, [110] the Commission recalled that it had considered proposals for possible future legislative development earlier in the session. It proceeded to review its provisional decisions on those proposals, as follows. [111]

446. As regards e-commerce, the Commission confirmed that Working Group IV should continue with its ongoing projects on the contractual aspects of cloud computing and on legal issues related to identity management and trust services (see also para. 127 above).

447. The Commission confirmed that Working Group III should undertake work on the possible reform of investor-State dispute settlement, including questions of concurrent proceedings in the field of investment arbitration and code of ethics in international arbitration. In so doing, the Working Group should identify and consider concerns regarding investor-State dispute settlement and whether reform was desirable; if so, it should develop solutions to be recommended to the Commission (see also para. 264 above).

448. As regards procurement and infrastructure development, the Commission confirmed that the Secretariat (with the assistance of experts) should continue to update and consolidate the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* and associated texts, and should report further to the Commission, with draft texts as appropriate, at its fifty-first session, in 2018. The Commission also decided not to include the question of suspension and debarment in its agenda for the time being. (See also paras. 273 and 274 above.)

449. As regards secured transactions, the Commission confirmed that a practice guide on the topic should be prepared to address contractual, transactional and regulatory issues arising in the context of secured transactions, as well as finance to micro-businesses, and referred that task to Working Group VI (see also para. 227 above).

450. The Commission also heard two further proposals for legislative development.

451. Firstly, the Government of Italy presented a proposal on possible future work on contractual networks (A/CN.9/925).

452. It was explained that the proposal sought to support the current work of Working Group I on business registration and the creation of a simplified business entity. The proposal envisaged research into ways to allow business activity prior to the creation of a legal personality and into the determination of corporate structure, allowing businesses to access credit and government facilities. The objective would be to allow such businesses to form networks and contract with larger companies in supply chains as a network. The proponents stated that the intention was to conduct further research to identify solutions, with initial results to be presented to the Commission at its fifty-first session, in 2018.

453. Support was expressed for the proposal as set out in document A/CN.9/925, recognizing the importance of the topic to micro, small and medium-sized enterprises in particular, and it was suggested that Working Group I could undertake the research set out in the proposal.

454. An alternative view was that, while the proposal was supported in principle, it was not currently appropriate to refer the work concerned to Working Group I. In

[110] Ibid., paras. 294 and 295.

[111] See also table 2, entitled "Summary of mandated and possible future legislative activity", in document A/CN.9/911.

support of that view, it was stated that further study and a consideration of the many questions that the proposal raised should first be undertaken, and that the solutions should not necessarily be confined to micro, small and medium-sized enterprises (and consequently, if referred to a working group, need not be undertaken necessarily by Working Group I).

455. The Commission expressed its thanks to the Government of Italy for the proposal. It also welcomed the willingness of the proponents to conduct additional research to develop the proposal further, so that it could come before the Commission in 2018 for decisions on whether the work should go forward and, if so, in what capacity.

456. CMI presented a proposal on possible future work on cross-border issues related to the judicial sale of ships (A/CN.9/923).

457. The proponents explained the nature of judicial sales addressed in the proposal, and issues that were preventing the transfer of vessels with clean title. Recalling that over 95 per cent of world trade took place using transport by sea and that, in current times of financial difficulty, there were increasing failures by ship owners, unable to obtain additional financing, to pay debts as they fell due. In addition, the scale and worldwide nature of the concerns were highlighted.

458. It was explained that a variety of debts would arise as a result of the operation of a ship, and that non-payment thereof would give rise to maritime claims that enabled creditors to arrest a vessel for non-payment, with an eventual order for judicial sale of the vessel. The outcome of such a sale should be to transfer clean title to the purchaser of the vessel, but in some jurisdictions, courts did not recognize and enforce that outcome when the order for the judicial sale emanated from another jurisdiction. The consequences of that failure included difficulties for the purchaser in re-registering such vessels and trading freely with them, as well as the exposure of such purchasers to claims against prior owners for undisclosed liabilities. The risks of a failure to obtain clean title depressed the price fetched by vessels through judicial sale by as much as half their value and led to a cascading set of problems in a number of sectors, including reluctance by financial institutions to lend, lower repayments to creditors and an inability for ship owners to obtain funding. Those problems resulted in serious loss in economic value and a reduction in the state and maintenance of the world fleet.

459. The proponents also explained that a short, self-contained instrument along the lines of the New York Convention could provide a solution to those issues. In essence, it would ensure that prior claimants would look to ship sale proceeds and previous ship owners to settle their claims, and clean title to vessels would be transferred and recognized across borders.

460. It was observed, in considering the proposal, that the concerns were highly relevant to UNCITRAL and to world trade. The pernicious consequences of the current situation included the hindering of the flow of cargo, the destruction of value and assets and unnecessary legal action, which compromised the industry and world trade because vessels unable to trade clogged ports. For all those reasons, and those set out in document A/CN.9/923, UNCITRAL was requested to take up the proposal.

461. A view was expressed that the proposal might be better addressed in an organization specializing in maritime matters, such as the International Maritime Organization (IMO). The view was further expressed that the problem, while a legitimate concern, might not have broad enough support from enough States in UNCITRAL and that it should not be taken up by a working group at the present time in the light of the full complement of issues currently assigned to those groups.

462. It was recalled that CMI had also presented its proposal to IMO and the Hague Conference on Private International Law, but that neither organization had placed it on its work programme. However, CMI had been invited to present additional information in respect of the matter for possible future discussion in those organizations in due course.

463. There was support for the view that UNCITRAL was well placed to resolve the private international law issues raised by the proposal in a technical and non-politicized environment and it was observed that, in discussions at the Hague Conference on Private International Law, a number of delegations had expressed the view that the proposal would be best taken up by UNCITRAL. It was also considered doubtful that the proposal fell within the mandate of IMO, given its focus on public international law and on more technical issues relating to safety and the protection of the environment.

464. A number of delegations supported the proposal and expressed their interest in taking it up, subject to the availability of working group resources and any necessary consultation with other organizations. While swift resolution of the questions raised by the proposal was encouraged, the Commission agreed that additional information in respect of the breadth of the problem would be useful and that the proposal could be reconsidered by the Commission at a future session. It was therefore suggested that CMI might seek to develop and advance the proposal by holding a colloquium so as to provide additional information to the Commission and allow it to take an informed decision in due course.

465. The Commission thanked CMI for its proposal and noted the importance of the issues raised. It decided not to refer the proposal to a working group at the present time but agreed that UNCITRAL, through its secretariat, and States would support and participate in a colloquium to be initiated by CMI to discuss and advance the proposal. The Commission agreed to revisit the matter at a future session.

C. Current and possible future activities to support the adoption and use of UNCITRAL texts (support activities)

466. The Commission recalled 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 the Commission, through member States and through partnering arrangements with relevant international organizations. It also recalled the importance of promoting increased awareness of UNCITRAL texts among those organizations and within the United Nations system.[112]

467. The Commission took note of the reports on support activities before it at its current session (listed in document A/CN.9/911), notably technical cooperation and assistance activities undertaken by the Secretariat, including through the UNCITRAL website; the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts; and coordination activities (A/CN.9/905, A/CN.9/906 and A/CN.9/908).

468. In concluding the agenda item, it was emphasized that all the above-mentioned activities should be undertaken taking into account the extent of the resources available to the Secretariat.

XVIII. Relevant General Assembly resolutions

469. The Commission took note of General Assembly resolutions 71/135, on the report of UNCITRAL on the work of its forty-ninth session, 71/136, on the UNCITRAL Model Law on Secured Transactions, 71/137, on the 2016 UNCITRAL Notes on Organizing Arbitral Proceedings, and 71/138, on the Technical Notes on Online Dispute Resolution, adopted upon the recommendation of the Sixth Committee.

[112] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 263-265.

XIX. Other business

A. Internship programme

470. The Commission recalled the considerations taken by its secretariat in selecting candidates for internships and noted with satisfaction the continuing positive implications of changes introduced in 2013 and 2014 in the United Nations internship programme (selection procedures and eligibility requirements) on the pool of eligible and qualified candidates for internships from underrepresented countries, regions and language groups.[113]

471. The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-ninth session, in July 2016, 19 new interns had undertaken an internship with the UNCITRAL secretariat in Vienna. Most of them had come from developing countries and countries in transition, with two coming from the least developed countries.

472. The Commission was informed, however, that the large majority of applications were received from the Group of Western European and other States. In particular, the Secretariat faced difficulties in attracting candidates from Africa and Latin America and candidates with fluent Arabic language skills.

473. States and observer organizations were requested to bring the possibility of applying for internships at the UNCITRAL secretariat to the attention of interested persons who met those specific requirements. Taking into account that internships at the United Nations were unpaid, States and observer organizations were invited to consider granting scholarships to potential interns.

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

474. The Commission recalled that, at its fortieth session, in 2007,[114] it had been informed of the programme budget for the biennium 2008-2009, which had listed "facilitating the work of UNCITRAL" among the expected accomplishments of the Secretariat. The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).[115] At that session, the Commission had agreed to provide feedback to the Secretariat.

475. The Commission was informed that the request for evaluation of the role of the Secretariat in servicing UNCITRAL since the start of its forty-ninth session (27 June 2016) had elicited 14 responses, and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat, as indicated in those responses, remained generally high (seven States had given 5 out of 5, four States had given 4 out of 5, two States had given 3 out of 5, and one State had given 1 out of 5).

476. 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 feedback, for budgetary and other purposes, about the UNCITRAL secretariat's performance from more States for a more objective evaluation of the role of the Secretariat.

477. The Commission expressed its appreciation to the Secretariat for its work in servicing UNCITRAL.

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[113] See also ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 328-330; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 343 and 344; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 277 and 278; ibid., *Seventieth Session, Supplement No. 17* (A70/17, paras. 371 and 372); and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 378 and 379.

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

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

C. Methods of work

478. Delegates recalled their statements regarding scheduling of agenda items, in particular agenda item 21, made upon the adoption of the agenda of the session (see para. 12 above). In addition, it was suggested that clustering related issues and consolidating items on possible future work on which the decision of the entire Commission, rather than experts in a particular field, was required, would help in better organizing UNCITRAL sessions.

479. The Secretariat was requested to seek the views of States on the draft provisional agenda as early as possible before the next UNCITRAL session. It was understood that, in finalizing the provisional agenda, the Secretariat would seek to take those comments into account.

480. Delegates also recalled statements made under other agenda items requesting the Secretariat not to repeat in their oral reports to the Commission the content included in the Secretariat's written reports to the Commission and to replace, as and where appropriate, in particular, regarding agenda items 11 (c) and 12, oral reports by the Secretariat with written reports to be issued before the session (see also paras. 364 and 423 above). A view was expressed that written reports would facilitate consultations on important issues within and among States before the session. However, it was generally felt that it should be left to the Secretariat to achieve the right balance between written and oral methods of communication of necessary information to the Commission.

481. The view was also expressed that States should have confidence in the Secretariat's ability to organize UNCITRAL sessions in the best way, taking into account various considerations. The extensive experience of the Secretariat in the organization of UNCITRAL meetings and its ability to reconcile various competing considerations was emphasized.

D. Retirement of the Secretary of UNCITRAL and other long-serving members of the UNCITRAL secretariat

482. The Commission noted that its Secretary, Renaud Sorieul, having reached the age of retirement, was scheduled to leave the United Nations Secretariat on 31 October 2017. Mr. Sorieul had served as a member of the Secretariat since 1989 and as Secretary of the Commission and Director of the International Trade Law Division of the Office of Legal Affairs since 2008. The Commission saluted Mr. Sorieul's major contribution to achieving the goals of UNCITRAL, which, as had been stated by the General Assembly, was the core legal body within the United Nations system in the field of international trade law. It was acknowledged that Mr. Sorieul had strongly supported the work of the Commission and had built enduring foundations for its ongoing projects and future endeavours. The time during which Mr. Sorieul had served as Secretary of the Commission had been a most productive one and, under his leadership, the secretariat of the Commission had made essential contributions to that work, despite the limited resources available to it. The Commission expressed its appreciation to Mr. Sorieul for his 28 years of exemplary United Nations service, for his outstanding contribution to the process of modernization, unification and harmonization of international trade law, and for his efforts towards expanding the presence of UNCITRAL around the world.

483. The Commission also took note of the retirement of two long-standing members of its secretariat, Mr. Timothy Lemay, Principal Legal Officer, and Mr. Spyridon Bazinas, Senior Legal Officer. The Commission expressed its appreciation to those two staff members for their essential support to the activities of UNCITRAL and its secretariat.

XX. Date and place of future meetings

484. At its thirty-sixth session, in 2003, the Commission had agreed that: (a) working groups should normally meet for a one-week session twice a year; (b) extra time, if required, could be allocated from the unused entitlement of another working group provided that such arrangement would not result in the increase of the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in the increase of the 12-week allotment, it should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.[116] At the current session, the Commission noted that all working groups would meet for two one-week sessions before its fifty-first session, in 2018, except for Working Group IV (Electronic Commerce), which would meet only for one one-week session that would take place in New York in the first half of 2018.

485. The Commission took note of General Assembly resolutions on the pattern of conferences promulgating policies as regards six significant holidays (Orthodox Good Friday, Yom Kippur, the Day of Vesak, Diwali, Gurpurab and Orthodox Christmas), on which the United Nations Headquarters and the Vienna International Centre remained open but United Nations bodies were invited to avoid holding meetings. The Commission noted that the policies had become effective at United Nations Headquarters on 1 January 2017 and would become effective at the Vienna International Centre on 1 January 2018. Accordingly, dates proposed by the Secretariat for sessions of UNCITRAL working groups in the second half of 2017 in Vienna were not affected by those policies. The Commission agreed to take into account those policies as far as possible when considering the dates of its future meetings.

A. Fifty-first session of the Commission

486. The Commission approved the holding of its fifty-first session in New York from 25 June to 13 July 2018 (it was noted that the United Nations Headquarters would be closed on 4 July 2018). 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 fiftieth and fifty-first sessions of the Commission

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

(a) Working Group I (Micro, Small and Medium-sized Enterprises) would hold its twenty-ninth session in Vienna, from 16 to 20 October 2017, and the thirtieth session in New York, from12 to 16 March 2018;

(b) Working Group II (Dispute Settlement) would hold its sixty-seventh session in Vienna, from 2 to 6 October 2017, and its sixty-eighth session in New York, from 5 to 9 February 2018;

(c) Working Group III (Investor-State Dispute Settlement Reform) would hold its thirty-fourth session in Vienna, from 27 November to 1 December 2017, and its thirty-fifth session in New York, from 23 to 27 April 2018;

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

(d) Working Group IV (Electronic Commerce) would hold its fifty-sixth session in New York, from 16 to 20 April 2018;

(e) Working Group V (Insolvency Law) would hold its fifty-second session in Vienna, from 18 to 22 December 2017, and its fifty-third session in New York, from 7 to 11 May 2018;

(f) Working Group VI (Security Interests) would hold its thirty-second session in Vienna, from 11 to 15 December 2017, and its thirty-third session in New York, from 30 April to 4 May 2018.

488. The Commission noted that two remaining days of reserved conference services for UNCITRAL in Vienna in 2017 would be used for an expert meeting on public-private partnerships (see chapter VIII above).

489. The Secretariat was requested to inform States about changes in the dates of sessions announced in the provisional agenda sufficiently in advance to allow consultation with States' representatives in affected working groups.

2. Sessions of working groups in 2018 after the fifty-first session of the Commission

490. The Commission noted that the following tentative arrangements had been made for working group meetings in 2018 after its fifty-first session, subject to the approval by the Commission at that session, and that those dates included Gurpurab (23 November 2018). The Commission requested the Secretariat to explore whether an alternative week in the second half of 2018 could be found for a session of Working Group IV (Electronic Commerce) in Vienna that would not include a significant holiday, and decided to consider the matter further at its next session:

(a) Working Group I (Micro, Small and Medium-sized Enterprises) would hold its thirty-first session in Vienna from 24 to 28 September 2018;

(b) Working Group II (Dispute Settlement) would hold its sixty-ninth session in Vienna from 10 to 14 September 2018;

(c) Working Group III (Investor-State Dispute Settlement Reform) would hold its thirty-sixth session in Vienna, from 8 to 12 October 2018;

(d) Working Group IV (Electronic Commerce) would hold its fifty-seventh session in Vienna from 19 to 23 November 2018;

(e) Working Group V (Insolvency Law) would hold its fifty-fourth session in Vienna from 10 to 14 December 2018;

(f) Working Group VI (Security Interests) would hold its thirty-fourth session in Vienna from 26 to 30 November 2018.

Annex I

UNCITRAL Model Law on Electronic Transferable Records

CHAPTER I. GENERAL PROVISIONS

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 transferable document or instrument including any rule of law applicable to consumer protection.

3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to […].[1]

Article 2. Definitions

For the purposes of this Law:

"*Electronic record*" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;

"*Electronic transferable record*" is an electronic record that complies with the requirements of article 10;

"*Transferable document or instrument*" means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

Article 3. Interpretation

1. This Law is derived from a model law 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.

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.

Article 4. Party autonomy and privity of contract

1. The parties may derogate from or vary by agreement the following provisions of this Law: […].[2]

2. Such an agreement does not affect the rights of any person that is not a party to that agreement.

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[1] The enacting jurisdiction may consider including a reference to: (a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of 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); and (c) electronic transferable records existing only in electronic form.

[2] The enacting jurisdiction may consider which provisions of the Model Law, if any, the parties may derogate from or vary by agreement.

Article 5. 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.

Article 6. 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 transferable document or instrument.

Article 7. Legal recognition of an electronic transferable record

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

2. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

3. The consent of a person to use an electronic transferable record may be inferred from the person's conduct.

CHAPTER II. PROVISIONS ON FUNCTIONAL EQUIVALENCE

Article 8. Writing

Where the law requires that information should be in 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.

Article 9. Signature

Where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record.

Article 10. Transferable documents or instruments

1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and

(b) A reliable method is used:

(i) To identify that electronic record as the electronic transferable record;

(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) To retain the integrity of that electronic record.

2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises 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.

Article 11. Control

1. Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

(b) To identify that person as the person in control.

2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.

CHAPTER III. USE OF ELECTRONIC TRANSFERABLE RECORDS

Article 12. General reliability standard

For the purposes of articles 9, 10, 11, 13, 16, 17 and 18, the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

(i) Any operational rules relevant to the assessment of reliability;

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The security of hardware and software;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(vii) Any applicable industry standard; or

(b) Proven in fact to have fulfilled the function by itself or together with further evidence.

Article 13. 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 transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record.

Article 14. Place of business

1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country.

Article 15. Endorsement

Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the

electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.

Article 16. Amendment

Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such.

Article 17. Replacement of a transferable document or instrument with an electronic transferable record

1. An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

Article 18. Replacement of an electronic transferable record with a transferable document or instrument

1. A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the transferable document or instrument.

3. Upon issuance of the transferable document or instrument in accordance with paragraphs 1 and 2, the electronic transferable record shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

CHAPTER IV. CROSS-BORDER RECOGNITION OF ELECTRONIC TRANSFERABLE RECORDS

Article 19. 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 abroad.

2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument.

Annex II

List of documents before the Commission at its fiftieth session

Symbol	*Title or description*
A/CN.9/894	Provisional agenda, annotations thereto and scheduling of meetings of the fiftieth session
A/CN.9/895	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its twenty-seventh session
A/CN.9/896	Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session
A/CN.9/897	Report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session
A/CN.9/898	Report of Working Group V (Insolvency Law) on the work of its fiftieth session
A/CN.9/899	Report of Working Group VI (Security Interests) on the work of its thirtieth session
A/CN.9/900	Report of Working Group I (Micro, Small and Medium-sized Enterprises) on the work of its twenty-eighth session
A/CN.9/901	Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session
A/CN.9/902	Report of Working Group IV (Electronic Commerce) on the work of its fifty-fifth session
A/CN.9/903	Report of Working Group V (Insolvency Law) on the work of its fifty-first session
A/CN.9/904	Report of Working Group VI (Security Interests) on the work of its thirty-first session
A/CN.9/905	Technical cooperation and assistance
A/CN.9/906	Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts
A/CN.9/907	Bibliography of recent writings related to the work of UNCITRAL
A/CN.9/908	Coordination activities
A/CN.9/909	Status of conventions and model laws
A/CN.9/910	UNCITRAL regional presence: activities of the UNCITRAL Regional Centre for Asia and the Pacific
A/CN.9/911	Work programme of the Commission
A/CN.9/912	Possible future work in procurement and infrastructure development
A/CN.9/913	Possible future legislative work on security interests and related topics
A/CN.9/914 and Adds.1-6	Draft guide to enactment of the UNCITRAL Model Law on Secured Transactions
A/CN.9/915	Possible future work in the field of dispute settlement: concurrent proceedings in international arbitration

Symbol	*Title or description*
A/CN.9/916	Possible future work in the field of dispute settlement: ethics in international arbitration
A/CN.9/917	Possible future work in the field of dispute settlement: reforms of investor-State dispute settlement
A/CN.9/918 and Adds.1-9	Settlement of commercial disputes: investor-State dispute settlement framework — compilation of comments
A/CN.9/919	Endorsement of texts of other organizations: International Chamber of Commerce Uniform Rules for Forfaiting
A/CN.9/920	Draft model law on electronic transferable records with explanatory notes
A/CN.9/921 and Adds.1-3	Draft model law on electronic transferable records: compilation of comments by Governments and international organizations
A/CN.9/922	Draft model law on electronic transferable records with explanatory notes: proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission
A/CN.9/923	Proposal of the Comité Maritime International for possible future work on cross-border issues related to the judicial sale of ships
A/CN.9/924	Possible future coordination and technical assistance work on security interests and related topics
A/CN.9/925	Possible future work by UNCITRAL on contractual networks: proposal of the Government of Italy
A/CN.9/926	Possible future work on security interests: proposal for a practice guide to the UNCITRAL Model Law on Secured Transactions — proposal of the Governments of Australia, Canada, Japan and the United Kingdom of Great Britain and Northern Ireland

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

(TD/B/64/12)

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

At its 1162nd plenary meeting, the Board took note of the annual report of the United Nations Commission on International Trade Law at its fiftieth session (A/72/17), held in Vienna from 3 to 21 July 2017.

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 fiftieth session (A/72/458)

[Original: English]

Rapporteur: Mr. Peter **Nagy** (Slovakia)

I. Introduction

1. At its 2nd plenary meeting, on 15 September 2017, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its seventy-second session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its fiftieth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 10th, 17th and 21st meetings, on 9, 20 and 25 October 2017. The views of the representatives who spoke during the Committee's consideration of the item are reflected in the relevant summary records.[1]

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 fiftieth session (A/72/17).

4. At the 10th meeting, on 9 October, the Chair of the United Nations Commission on International Trade Law at its fiftieth session introduced the report of the Commission on the work of its fiftieth session.

II. Consideration of proposals

A. Draft resolution A/C.6/72/L.10

5. At the 17th meeting, on 20 October, the representative of Austria, on behalf of Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, Cyprus, Denmark, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, Liechtenstein, Lithuania, Luxembourg, Madagascar, Mauritius, Namibia, the Netherlands, the Philippines, Portugal, Romania, the Russian Federation, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America, subsequently joined by Czechia, El Salvador, Mexico and the Republic of Moldova, introduced a draft resolution entitled "Report of the United Nations Commission on International Trade Law on the work of its fiftieth session" (A/C.6/72/L.10).

6. At the 21st meeting, on 25 October, Armenia, Belarus, Ireland, Kiribati, Latvia and Poland joined in sponsoring the draft resolution.

7. At the same meeting, the Committee adopted draft resolution A/C.6/72/L.10 without a vote (see para. 10, draft resolution I).

B. Draft resolution A/C.6/72/L.11

8. At the 17th meeting, on 20 October, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled "Model Law on Electronic Transferable Records of the United Nations Commission on International Trade Law" (A/C.6/72/L.11).

[1] A/C.6/72/SR.10, A/C.6/72/SR.17 and A/C.6/72/SR.21.

9. At its 21st meeting, on 25 October, the Committee adopted draft resolution A/C.6/72/L.11 without a vote (see para. 10, draft resolution II).

III. Recommendation of the Sixth Committee

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

Draft resolution I
Report of the United Nations Commission on International Trade Law on the work of its fiftieth 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,[2]

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

Reaffirming the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal 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. *Commends* the Commission for the finalization and adoption of the Model Law on Electronic Transferable Records;[3]

3. *Also commends* the Commission for the finalization and adoption of the Guide to Enactment of the Model Law on Secured Transactions, which provides useful background and explanatory information for States in revising or adopting legislation on the basis of the Model Law, which is aimed at establishing an efficient secured transactions regime that would increase access to affordable secured credit and promote sustainable development through the facilitation of international trade and commercial activities, and requests the Secretary-General to publish the Guide to

[2] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17).
[3] Ibid., chap. III, sect. A.

Enactment of the Model Law, including electronically, in the six official languages of the United Nations and to disseminate it broadly to Governments and other interested bodies;[4]

4. *Congratulates* the Commission on its fiftieth anniversary, and notes with satisfaction that the Congress to commemorate the anniversary, held in Vienna from 4 to 6 July 2017 during the fiftieth session of the Commission, entitled "Modernizing International Trade Law to Support Innovation and Sustainable Development", acknowledged the centrality of international cooperation and coordination to the achievements of the Commission, elicited innovative ideas for modernizing international trade law in a sustainable manner that could not only raise awareness of the work of the Commission and its potential to support cross-border commerce but also contribute to the 2030 Agenda for Sustainable Development,[5] and emphasized the leading role played by the Commission in providing an inclusive, transparent and multilateral forum in which to address the legal challenges facing international trade, and requests the Secretary-General to ensure the publication of the proceedings of the Congress to the extent permitted by available resources;

5. *Notes with satisfaction* the contributions from the Fund for International Development of the Organization of the Petroleum Exporting Countries and from the European Commission, which allow the operation of the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[6] and that the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, which constitutes 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);[7]

6. *Requests* the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation;

7. *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 micro, small and medium-sized enterprises, dispute settlement, electronic commerce, insolvency law and security interests,[8] and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes in those areas;

8. *Takes note* of the decision by the Commission to entrust Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement, whereby it would: first, identify and consider concerns regarding investor-State dispute settlement; second, consider whether reform was desirable in the light of any identified concerns; and, third, if the Working Group were to conclude that reform was desirable, develop relevant solutions to be recommended to the Commission with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s);[9]

9. *Also takes note* of the decision by the Commission to reaffirm the mandate given to Working Group IV at its forty-ninth session to take up work on the topics of identity management and trust services, as well as cloud computing, and to revisit that mandate at its following session, in particular if the need arose to prioritize between

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[4] Ibid., chap. IV, sect. A.
[5] Ibid., chap. XV, sect. C.
[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[7] Resolution 69/116, annex.
[8] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), chaps. III–VII.
[9] Ibid., para. 264.

the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services;[10]

10. *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 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;

11. *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;[11]

(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, and welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients;

12. *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,[12] requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of

[10] Ibid., para. 127.
[11] Resolution 70/1.
[12] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17).

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 recalls in this regard its previous resolutions related to this matter, and notes in that regard the discussions of the Commission during its fiftieth session on its methods of work, including the request by Member States that the Secretariat seek and take into account the views of States on the draft provisional agenda as early as possible before the next session of the Commission,[13] as well as achieve the right balance between written and oral methods of communication of necessary information to the Commission;[14]

13. *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 providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, expresses its appreciation to the Republic of Korea and China, whose contributions enabled continuing operation of the Regional Centre, notes that the continuation of the regional presence relies entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, welcomes 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;

14. *Welcomes* the offer of the Government of Bahrain, approved by the Commission, to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs of the Secretariat, a regional centre for the Middle East and North Africa in Bahrain as an important step for the Commission in reaching out to increase familiarity with texts of the Commission and to provide technical assistance to developing countries in the region, it being understood that the establishment of a regional presence would have to rely entirely on extrabudgetary resources, including but not limited to voluntary contributions from States,[15] and expresses its appreciation to the Government of Bahrain for its generous contribution to the project, and requests the Commission, in its annual report, to keep the General Assembly informed of developments regarding the project, in particular its funding and budgetary situation;

15. *Welcomes* the offer of the Government of Cameroon, approved by the Commission, to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs, a Regional Centre for Africa in Cameroon as an important step for the Commission in reaching out to increase familiarity with Commission texts and to provide technical assistance to developing countries in the region, it being understood that the establishment of a regional presence would have to rely entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, expresses its appreciation to the Government of Cameroon for its generous contribution to the project, and requests the Commission, in its annual report, to keep the General Assembly informed of developments regarding the project, in particular its funding and budgetary situation;

16. *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;

17. *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

[13] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 479.
[14] Ibid., para. 480.
[15] Ibid., paras. 295 and 296.

Main Committee during the seventy-second 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;

18. *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;

19. *Notes* the statement and the views of experts on the role of the Commission in promoting the rule of law presented during the fiftieth session of the Commission on ways and means of further disseminating international law to strengthen the rule of law from the perspective of the areas of work of the Commission and the comments transmitted by the Commission pursuant to paragraph 22 of General Assembly resolution 71/148 of 13 December 2016, highlighting its role in promoting the rule of law, in particular through wide dissemination of international commercial law, including across the United Nations system;[16]

20. *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;

21. *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;

22. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[17] 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;[18]

23. *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 decision of the Commission to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing the

[16] Ibid., chap. XVI.
[17] Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.
[18] 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.

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;[19]

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

25. *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;

26. *Notes* the decision of the Commission to commend the use of the Uniform Rules for Forfaiting of the International Chamber of Commerce, as appropriate, in forfaiting transactions, to facilitate international receivables financing and thus international trade more generally;

27. *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;

28. *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;

29. *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,[20] 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;[21]

30. *Expresses its appreciation* to Mr. Renaud Sorieul, Secretary of the Commission since 2008, who will retire on 31 October 2017, for his outstanding and devoted contribution to the process of the unification and harmonization of international trade law in general and to the Commission in particular.

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

[20] 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.

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

Draft resolution II
Model Law on Electronic Transferable Records of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with 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,

Recalling also its resolution 60/21 of 23 November 2005, by which it adopted the United Nations Convention on the Use of Electronic Communications in International Contracts and called upon all Governments to consider becoming party to the Convention, and its resolutions 51/162 of 16 December 1996 and 56/80 of 12 December 2001, in which it recommended that all States give favourable consideration to the Model Law on Electronic Commerce and the Model Law on Electronic Signatures of the Commission, respectively,

Noting that, while the Convention, the Model Law on Electronic Commerce and the Model Law on Electronic Signatures are of significant assistance to States in enabling and facilitating electronic commerce in international trade, they do not fully address issues arising from the use of electronic transferable records in international trade,

Considering that uncertainties as to the legal value of electronic transferable records constitute an obstacle to international trade,

Convinced that legal certainty and commercial predictability in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic transferable records on a technologically neutral basis and according to the functional equivalence approach,

Recalling that, at its forty-fourth session, in 2011, the Commission mandated its Working Group IV (Electronic Commerce) to undertake work on electronic transferable records,[22]

Noting that the Working Group devoted 10 sessions, from 2011 to 2016, to that work, and that the Commission considered at its fiftieth session, in 2017, a draft model law on electronic transferable records prepared by the Working Group, together with comments on the draft received from Governments and international organizations invited to sessions of the Working Group,[23]

Believing that a model law on electronic transferable records will constitute a useful addition to existing Commission texts in the area of electronic commerce by significantly assisting States in enhancing their legislation on electronic commerce, in particular as it relates to the use of electronic transferable records, or in formulating such legislation where none exists,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Transferable Records;[24]

2. *Requests* the Secretary-General to publish the Model Law together with an explanatory note, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

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[22] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.
[23] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), chap. III.
[24] Ibid., annex I.

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to electronic commerce, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that States continue to consider becoming parties to the United Nations Convention on the Use of Electronic Communications in International Contracts[25] and to give favourable consideration to the use of the Model Law on Electronic Commerce[26] and the Model Law on Electronic Signatures[27] when revising or adopting legislation on electronic commerce;

5. *Appeals* to the relevant bodies of the United Nations system and other relevant international and regional organizations to coordinate their legal activities in the area of electronic commerce, including paperless trade facilitation, with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of legislation on electronic commerce.

[25] Resolution 60/21, annex.
[26] Resolution 51/162, annex.
[27] Resolution 56/80, annex.

D. General Assembly resolutions 72/113, 72/114, and 72/119

72/113. Report of the United Nations Commission on International Trade Law on the work of its fiftieth 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,[28]

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;[146]

2. *Commends* the Commission for the finalization and adoption of the Model Law on Electronic Transferable Records;[29]

3. *Also commends* the Commission for the finalization and adoption of the Guide to Enactment of the Model Law on Secured Transactions, which provides useful background and explanatory information for States in revising or adopting legislation on the basis of the Model Law, which is aimed at establishing an efficient secured transactions regime that would increase access to affordable secured credit and promote sustainable development through the facilitation of international trade and commercial activities, and requests the Secretary-General to publish the Guide to Enactment of the Model Law, including electronically, in the six official languages of the United Nations and to disseminate it broadly to Governments and other interested bodies;[30]

4. *Congratulates* the Commission on its fiftieth anniversary, and notes with satisfaction that the Congress to commemorate the anniversary, held in Vienna from 4 to 6 July 2017 during the fiftieth session of the Commission, entitled “Modernizing International Trade Law to Support Innovation and Sustainable Development”, acknowledged the centrality of international cooperation and coordination to the

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[28] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17).
[29] Ibid., chap. III, sect. A.
[30] Ibid., chap. IV, sect. A.

achievements of the Commission, elicited innovative ideas for modernizing international trade law in a sustainable manner that could not only raise awareness of the work of the Commission and its potential to support cross-border commerce but also contribute to the 2030 Agenda for Sustainable Development,[31] and emphasized the leading role played by the Commission in providing an inclusive, transparent and multilateral forum in which to address the legal challenges facing international trade, and requests the Secretary-General to ensure the publication of the proceedings of the Congress to the extent permitted by available resources;

5. *Notes with satisfaction* the contributions from the Fund for International Development of the Organization of the Petroleum Exporting Countries and from the European Commission, which allow the operation of the repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration[32] and that the Commission reiterated its strong and unanimous opinion that the secretariat of the Commission should continue to operate the transparency repository, which constitutes 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);[33]

6. *Requests* the Secretary-General to continue to operate, through the secretariat of the Commission, the repository of published information in accordance with article 8 of the Rules on Transparency, as a pilot project until the end of 2020, to be funded entirely by voluntary contributions, and to keep the General Assembly informed of developments regarding the funding and budgetary situation of the transparency repository based on its pilot operation;

7. *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 micro, small and medium-sized enterprises, dispute settlement, electronic commerce, insolvency law and security interests,[34] and encourages the Commission to continue to move forward efficiently to achieve tangible work outcomes in those areas;

8. *Takes note* of the decision by the Commission to entrust Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement, whereby it would: first, identify and consider concerns regarding investor-State dispute settlement; second, consider whether reform was desirable in the light of any identified concerns; and, third, if the Working Group were to conclude that reform was desirable, develop relevant solutions to be recommended to the Commission with a view to allowing each State the choice of whether and to what extent it wished to adopt the relevant solution(s);[35]

9. *Also takes note* of the decision by the Commission to reaffirm the mandate given to Working Group IV at its forty-ninth session to take up work on the topics of identity management and trust services, as well as cloud computing, and to revisit that mandate at its following session, in particular if the need arose to prioritize between the topics or to give a more specific mandate to the Working Group as regards its work in the area of identity management and trust services;[36]

10. *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 activities with those of the Commission, to avoid duplication of efforts and to promote

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[31] Ibid., chap. XV, sect. C.
[32] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I.
[33] Resolution 69/116, annex.
[34] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), chaps. III–VII.
[35] Ibid., para. 264.
[36] Ibid., para. 127.

efficiency, consistency and coherence in the modernization and harmonization of international trade law;

11. *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;[37]

(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, and welcomes the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients;

12. *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,[38] 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 recalls in this regard its previous resolutions related to this matter, and notes in that regard the discussions of the Commission during its fiftieth session on its methods of work, including the request by Member States that the Secretariat seek and take into account the views of States on the draft provisional agenda as early as possible before the next session of the Commission,[39] as well as achieve the right balance between written and oral methods of communication of necessary information to the Commission;[40]

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[37] Resolution 70/1.

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

[39] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), para. 479.

[40] Ibid., para. 480.

13. *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 providing capacity-building and technical assistance services to States in the Asia-Pacific region, including to international and regional organizations, expresses its appreciation to the Republic of Korea and China, whose contributions enabled continuing operation of the Regional Centre, notes that the continuation of the regional presence relies entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, welcomes 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;

14. *Welcomes* the offer of the Government of Bahrain, approved by the Commission, to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs of the Secretariat, a regional centre for the Middle East and North Africa in Bahrain as an important step for the Commission in reaching out to increase familiarity with texts of the Commission and to provide technical assistance to developing countries in the region, it being understood that the establishment of a regional presence would have to rely entirely on extrabudgetary resources, including but not limited to voluntary contributions from States,[41] and expresses its appreciation to the Government of Bahrain for its generous contribution to the project, and requests the Commission, in its annual report, to keep the General Assembly informed of developments regarding the project, in particular its funding and budgetary situation;

15. *Welcomes* the offer of the Government of Cameroon, approved by the Commission, to establish, subject to the relevant rules and regulations of the United Nations and the internal approval process of the Office of Legal Affairs, a Regional Centre for Africa in Cameroon as an important step for the Commission in reaching out to increase familiarity with Commission texts and to provide technical assistance to developing countries in the region, it being understood that the establishment of a regional presence would have to rely entirely on extrabudgetary resources, including but not limited to voluntary contributions from States, expresses its appreciation to the Government of Cameroon for its generous contribution to the project, and requests the Commission, in its annual report, to keep the General Assembly informed of developments regarding the project, in particular its funding and budgetary situation;

16. *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;

17. *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 seventy-second 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;

18. *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

[41] Ibid., paras. 295 and 296.

Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

19. *Notes* the statement and the views of experts on the role of the Commission in promoting the rule of law presented during the fiftieth session of the Commission on ways and means of further disseminating international law to strengthen the rule of law from the perspective of the areas of work of the Commission and the comments transmitted by the Commission pursuant to paragraph 22 of General Assembly resolution 71/148 of 13 December 2016, highlighting its role in promoting the rule of law, in particular through wide dissemination of international commercial law, including across the United Nations system;[42]

20. *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;

21. *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;

22. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,[43] 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;[44]

23. *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 decision of the Commission 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;[45]

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

25. *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,

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[42] Ibid., chap. XVI.

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

[44] 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.

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

ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

26. *Notes* the decision of the Commission to commend the use of the Uniform Rules for Forfaiting of the International Chamber of Commerce, as appropriate, in forfaiting transactions, to facilitate international receivables financing and thus international trade more generally;

27. *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;

28. *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;

29. *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,[46] 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;[47]

30. *Expresses its appreciation* to Mr. Renaud Sorieul, Secretary of the Commission since 2008, who will retire on 31 October 2017, for his outstanding and devoted contribution to the process of the unification and harmonization of international trade law in general and to the Commission in particular.

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[46] 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.

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

72/114. Model Law on Electronic Transferable Records of the United Nations Commission on International Trade Law

The General Assembly,

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with 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,

Recalling also its resolution 60/21 of 23 November 2005, by which it adopted the United Nations Convention on the Use of Electronic Communications in International Contracts and called upon all Governments to consider becoming party to the Convention, and its resolutions 51/162 of 16 December 1996 and 56/80 of 12 December 2001, in which it recommended that all States give favourable consideration to the Model Law on Electronic Commerce and the Model Law on Electronic Signatures of the Commission, respectively,

Noting that, while the Convention, the Model Law on Electronic Commerce and the Model Law on Electronic Signatures are of significant assistance to States in enabling and facilitating electronic commerce in international trade, they do not fully address issues arising from the use of electronic transferable records in international trade,

Considering that uncertainties as to the legal value of electronic transferable records constitute an obstacle to international trade,

Convinced that legal certainty and commercial predictability in electronic commerce will be enhanced by the harmonization of certain rules on the legal recognition of electronic transferable records on a technologically neutral basis and according to the functional equivalence approach,

Recalling that, at its forty-fourth session, in 2011, the Commission mandated its Working Group IV (Electronic Commerce) to undertake work on electronic transferable records,[48]

Noting that the Working Group devoted 10 sessions, from 2011 to 2016, to that work, and that the Commission considered at its fiftieth session, in 2017, a draft model law on electronic transferable records prepared by the Working Group, together with comments on the draft received from Governments and international organizations invited to sessions of the Working Group,[49]

Believing that a model law on electronic transferable records will constitute a useful addition to existing Commission texts in the area of electronic commerce by significantly assisting States in enhancing their legislation on electronic commerce, in particular as it relates to the use of electronic transferable records, or in formulating such legislation where none exists,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Transferable Records;[50]

2. *Requests* the Secretary-General to publish the Model Law together with an explanatory note, including electronically, in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

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

[49] Ibid., *Seventy-second Session, Supplement No. 17* (A/72/17), chap. III.

[50] Ibid., annex I.

3. *Recommends* that all States give favourable consideration to the Model Law when revising or adopting legislation relevant to electronic commerce, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that States continue to consider becoming parties to the United Nations Convention on the Use of Electronic Communications in International Contracts[51] and to give favourable consideration to the use of the Model Law on Electronic Commerce[52] and the Model Law on Electronic Signatures[53] when revising or adopting legislation on electronic commerce;

5. *Appeals* to the relevant bodies of the United Nations system and other relevant international and regional organizations to coordinate their legal activities in the area of electronic commerce, including paperless trade facilitation, with those of the Commission, to avoid duplication of efforts and to promote efficiency, consistency and coherence in the modernization and harmonization of legislation on electronic commerce.

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[51] Resolution 60/21, annex.
[52] Resolution 51/162, annex.
[53] Resolution 56/80, annex.

72/119. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 71/148 of 13 December 2016,

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,[54]

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,[55] takes note of the report of the Secretary-General submitted pursuant to paragraph 41 of the declaration,[56] 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

[54] Resolution 60/1.
[55] Resolution 67/1.
[56] A/68/213/Add.1.

pledges to continue to exchange information, knowledge and best practices in this regard;

3. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;[57]

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. *Further reaffirms* its commitment to working tirelessly for the full implementation of the 2030 Agenda for Sustainable Development,[58] and recalls that the goals and targets are integrated and indivisible and balance the three dimensions of sustainable development;

8. *Recalls* the constructive debate held on the subtopic "Ways and means to further disseminate international law to strengthen the rule of law" in the Sixth Committee during the seventy-second session of the General Assembly;

9. *Recognizes* the role of multilateral treaty processes in advancing the rule of law, and in this regard reaffirms its support for the annual treaty event organized by the Secretary-General, welcomes the organization of workshops on treaty practice by the Treaty Section of the Office of Legal Affairs of the Secretariat, 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;

10. *Reaffirms* the importance of the registration and publication of treaties under Article 102 of the Charter, takes note of the report of the Secretary-General entitled "Review of the regulations to give effect to Article 102 of the Charter of the United Nations",[59] submitted pursuant to its resolution 71/148, and stresses that the regulations should be useful and relevant to Member States;

11. *Recalls* the obligation of Member States, under Article 102 of the Charter, to register with the Secretariat every treaty and every international agreement they enter into, and expresses appreciation for the efforts by the Secretariat and by Member States to support activities aimed at ensuring the implementation of this obligation, including capacity-building, publications or technical assistance;

12. *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 communications technologies;

13. *Recognizes* the importance of the legal publications prepared by the Treaty Section, and stresses the need to update the *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* in the light of these new developments and practices;

14. *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;

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[57] A/72/268.
[58] Resolution 70/1.
[59] A/72/86.

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

16. *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;

17. *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;

18. *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;

19. *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;

20. *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;

21. *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;

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

23. *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 and expertise in strengthening the rule of law through access to justice, including with regard to the provision of birth registration for all, appropriate registration and documentation of refugees, migrants, asylum seekers and stateless persons, and legal aid, where appropriate, in both criminal and civil proceedings, and in this regard recognizes the role of knowledge and technology, including in judicial systems, and stresses the need to intensify the assistance extended to Governments upon their request;

24. *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;

25. *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;

26. *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;

27. *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;

28. *Decides* to include in the provisional agenda of its seventy-third session the item entitled "The rule of law at the national and international levels";

29. *Invites* Member States and the Secretary-General to suggest possible subtopics for future Sixth Committee debates, for inclusion in the forthcoming annual report, with a view to assisting the Sixth Committee in choosing future subtopics.

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Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

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

A. Report of the Working Group on MSMEs on the work of its twenty-seventh session (Vienna, 3-7 October 2016)

(A/CN.9/895)

[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 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. 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] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

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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.97, paras. 5-20.

[3] A/CN.9/800, paras. 22-31, 39-46 and 51-64.

[4] Ibid., paras. 32-38.

[5] Ibid., paras. 47-50.

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

4. At its twenty-third session (Vienna, 17 to 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, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding the simplification of incorporation, the Working Group considered 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.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided 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. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, 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.

6. At its forty-eighth session, in 2015, 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 reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[1] In its discussion in respect of the future legislative activity, the Commission also 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.[2]

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the later, following presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, Add.1 and Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of Working Papers A/CN.9/WG.I/WP.93, Add.1 and Add.2 at its next session.[3] In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).[4] The

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; and *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[2] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 340.

[3] See Report of Working Group I (MSMEs) on the work of its twenty-fifth session, A/CN.9/860, para. 73.

[4] Ibid., paras. 76 to 96.

Working Group agreed to continue discussion of the draft text in Working Paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

8. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I continued its consideration of the legal issues surrounding the simplification of incorporation and on key principles in business registration. In respect of the former, the Working Group resumed its deliberations on the basis of working paper A/CN.9/WG.I/WP.89. Following its discussion of the issues in Chapters III and V,[5] the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see A/CN.9/WG.I/WP.99 and Add.1).[6] In respect of key principles in business registration, the Working Group considered recommendations 1 to 10 of the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) for a legislative guide, and requested the Secretariat to combine those two sets of documents into a single draft legislative guide for discussion at a future session.[7] In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs.[8] The Working Group also decided at its twenty-sixth session[9] that it would devote the deliberations at its twenty-seventh session to a draft legislative guide on a simplified business entity, and at its twenty-eighth session (New York, 1 to 9 May 2017) to a consideration of a draft legislative guide reflecting key principles and good practices in business registration.

9. At its forty-ninth session (New York, 27 June to 15 July 2016), the Commission commended the Working Group for its progress in the preparation of legal standards in respect of the legal issues surrounding the simplification of incorporation and to key principles in business registration, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle. The Commission also noted the decision of the Working Group to prepare a legislative guide on each of those topics and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate its work.[10]

II. Organization of the session

10. Working Group I, which was composed of all States Members of the Commission, held its twenty-seventh session in Vienna from 3 to 7 October 2016. The session was attended by representatives of the following States Members of the Working Group: Argentina, Brazil, Canada, China, Colombia, Czechia, El Salvador, France, Germany, India, Indonesia, Italy, Japan, Kuwait, Mexico, Pakistan, Panama, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

11. The session was attended by observers from the following States: Croatia, Cyprus, Dominican Republic, Luxembourg, Netherlands, Niger, Republic of Moldova, Saudi Arabia, Slovakia, Tunisia and United Arab Emirates.

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

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[5] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 22 to 47.

[6] Ibid., paras. 48 to 50.

[7] Ibid., paras. 51 to 85 and 90.

[8] Ibid., paras. 86 to 87.

[9] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, para. 90.

[10] *Official Records of the General Assembly, Seventy-first session, Supplement No. 17* (A/71/17), under preparation.

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

(a) *Organizations of the United Nations system*: World Bank (WB);

(b) *Invited intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO), Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA); Fondation pour le droit continental (FDC); the National Law Center for Inter-American Free Trade (NLCIFT); New York State Bar Association (NYSBA); and the Law Association for Asia and the Pacific (LAWASIA).

14. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Mr. Arjuna Obeyesekere (Sri Lanka)

15. In addition to 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.97);

(b) Note by the Secretariat on a Draft legislative guide on an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and Add.1); and

(c) Observations by the Government of the French Republic (A/CN.9/WG.I/WP.94).

16. 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.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

17. The Working Group considered the observations in document A/CN.9/WG.I/WP.94 and engaged in discussion in respect of the preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, in particular on a draft legislative guide on an UNCITRAL limited liability organization on the basis of Secretariat documents A/CN.9/WG.I/WP.99 and Add.1. 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: draft legislative guide on an UNCITRAL limited liability organization

Preliminary matters

Introduction of the legislative guide on an UNCITRAL limited liability organization

18. The Working Group recalled that the draft legislative guide on an UNCITRAL limited liability organization ("UNLLO") contained in A/CN.9/WG.I/WP.99 and Add.1 had been prepared with a view to including all of the concepts that the Working Group had considered to date, as well as those it had agreed upon, in respect of the

preparation of a legal text on a simplified business entity. In summarizing the introduction to the draft legislative guide in paragraphs 1 to 24 of A/CN.9/WG.I/WP.99, a number of observations were made in regard to the preparation of the text, including the following:

(a) The draft text took a "think small first" approach, focusing on the perceived needs of various types of MSMEs wishing to participate in the legally regulated economy and accommodating their growth over time;

(b) The purpose of the text was to attempt to satisfy those perceived MSME needs;

(c) Discussions in the Working Group to date had considered a number of different simplified business forms reflected in legislation from many different States, which had proven a rich source of information for distilling best practices for a cross-border approach;

(d) Freedom of contract was an important aspect of the draft legislative guide, as were mandatory provisions and default rules intended to fill any gaps in the agreement of parties forming the enterprise; and

(e) The draft legislative guide followed the Working Group's discussions to date in taking an informed but innovative approach to creating a free-standing legal regime that could meet the needs of MSMEs and that was derived from the collective domestic experience of States but attempted to avoid unnecessary formalistic and rigid corporate law rules that were not suited to MSMEs.

19. It was further noted that the draft legislative guide adopted neutral terminology in an attempt to establish clear concepts unencumbered by existing corporate law regimes. These terms included "UNLLO" (which the Working Group was encouraged to use at least as an interim term until it could decide on a preferred name); "members" instead of "shareholders"; "ownership" or "interest" instead of "shares"; "formation information" to denote the data required for formation of the UNLLO; and "members' agreement" to indicate the rules agreed among members for the operation of the UNLLO. It was observed that definitions of these and other concepts would be required in the introductory section of the draft text, but that those definitions would be prepared in future, as the text took shape.

Preliminary issues

20. Various delegations in the Working Group raised the following preliminary matters:

(a) Some delegations were of the view that it would be necessary to prepare a model law with standard forms in addition to a legislative guide in order to provide effective assistance to developing countries in reforming their laws;

(b) It was observed that de-linking the draft legislative guide from corporate law would not be possible since gaps in the UNLLO approach would need to be filled by corporate law. It was pointed out that other reforms that have taken place with regard to simplified incorporation have done so. It was further observed that the terminology would need to be adjusted to make this possible;

(c) Support was expressed for the commentary in A/CN.9/WG.I/WP.99 to more fully discuss the list of considerations for simplified incorporation in footnote 19 of A/CN.9/WG.I/WP.99 and paragraph 66 of A/CN.9/825, repeated in paragraph 2 of A/CN.9/WG.I/WP.89 and echoed in section D.3 of A/CN.9/WG.I/WP.98, which set forth the views of the UNCTAD secretariat;

(d) Reservations were expressed in respect of using the term "UNLLO";

(e) It was suggested that alternative dispute resolution should be included in the draft legislative guide (in response, reference was made to the mention of dispute resolution in paragraph 52 of A/CN.9/WG.I/WP.99/Add.1); and

(f) Some concern was expressed that the UNLLO had not yet been implemented in any economy (in response, it was observed by some delegations that neither the Dutch East India Company nor the German GmbH — Gesellschaft mit beschraenkter Haftung — had been tested in any economy prior to becoming huge successes of company law globally).

A. General Provisions

Recommendation 1 and paragraphs 25 to 30 of A/CN.9/WG.I/WP.99

21. A delegation expressed the concern that the phrases "members' agreement" and "formation information" might be confusing, since the phrase "members' agreement" could not distinguish the agreements intended here from other agreements among some but not all of the members, and suggested that the Working Group revert to its previous use of "operating document" and "formation document". That suggestion was not taken up and it was noted that "formation information" should be defined in the text, as should "members' agreement", particularly in the case of a single member UNLLO.

22. It was suggested that draft paragraph 25 would need to be revised to the extent that it suggested that the draft legislative guide need not be specifically linked to existing legislation in the enacting State. It was pointed out that the recent legislative reforms on simplified incorporation for MSMEs have been done in the context of revising the corporate code. For example, in some States, legislation on simplified incorporation for MSMEs has incorporated by reference general corporate law on mergers, consolidations, spin-offs and sales of substantially all the assets. In response it was clarified that the UNLLO draft legislative guide simply intended to establish an innovative and freestanding legislative approach for dealing with MSME concerns, but that the UNLLO legal form would need to be consistent with a State's domestic law and general principles of law would continue to apply to fill any gaps. In addition, it was noted that in order for it to represent an innovative international standard, it was logical that the UNLLO regime would have to avoid being directly linked to existing domestic company law. Moreover, it was observed that the list of suggested gaps was certainly relevant for more sophisticated enterprises and might be kept in mind for UNLLOs that were scaling up their operations and converting to other forms, but that it was less likely to be relevant in respect of MSMEs. A suggestion was made that more sophisticated rules of that nature might be mentioned in the commentary, but that such rules should not be the focus of the draft legislative guide. The Working Group agreed to revert to this discussion at a later stage.

23. There was support for the suggestion that mention of "expansive freedom of contract" in paragraph 30 of A/CN.9/WG.I/WP.99 could also be accompanied by mention of the protection of third parties dealing with the UNLLO, perhaps by way of inclusion in a definition of "members' agreement" (which could set out the relationship among members and vis-à-vis third parties) or in connection with draft recommendation 11. In addition, some terminological questions were raised in respect of the different language versions of the draft legislative guide, and delegations were invited to contact the Secretariat with specific instances so that they could be followed up with the translation teams.

24. A concern was raised that the phrase "if any" in draft recommendation 1 was unnecessary, since the members of an UNLLO would always have a members' agreement, whether that agreement was in writing or otherwise. It was observed that the phrase could refer to the possibility that there might be gaps in aspects of the member agreement governance of the UNLLO, but there was support for the view that the phrase "if any" was confusing, if not redundant, and it was agreed that that phrase could be deleted.

25. A suggestion was made to reverse the order of the references to the members' agreement and the governing law in draft recommendation 1 in order to emphasize that the members' agreement was of greater importance as between the two. Other delegations were of the view that the two sources were of equal importance and that

reversing their order would not in any event render one more important than the other. The suggestion to reverse the order was not taken up, nor was a suggestion to include "formation information" in draft recommendation 1.

26. Concern was expressed that draft recommendation 1 was in itself redundant, since it should be clear that the law enacted on the basis of the draft legislative guide governed the UNLLO, and that stating it might seem circuitous. It was further suggested that reference need not be made in the draft recommendation to the members' agreement at all, since its importance as an element of the regime governing the UNLLO was obvious through its inclusion in draft recommendation 11. However, in view of the importance of the members' agreement to the governance of the UNLLO, some delegations preferred to retain mention of it in draft recommendation 1.

27. In an effort to clarify draft recommendation 1, text was suggested along the lines of: "Except when statutory default rules are mandatory, the members' agreement governs the rights, duties and relations among the members, and controls over any contrary provisions of the statute. To the extent the members' agreement does not otherwise provide, the provisions of the statute control." A suggestion was also made to separate draft recommendation 1 into two separate concepts dealing with: (1) how other laws applied to the UNLLO and (2) the application of the members' agreement to the relationship among members and to third parties. Alternatively, it was suggested that draft recommendation 1 could consist of text along the lines of: "The law should provide that it governs the UNLLO."

28. After discussion, the Working Group agreed that it should defer its decision on draft recommendation 1 and its commentary until after it had considered recommendation 11 and its accompanying commentary.

Recommendation 2 and paragraphs 31 to 34 of A/CN.9/WG.I/WP.99

29. A drafting suggestion was made that the commentary in draft paragraph 34 could enumerate the industrial sectors in which an UNLLO could participate and leave to a footnote the list of regulated sectors in which an UNLLO could be prohibited from engaging.

30. There was some support in the Working Group for the view that draft recommendation 2 was too broad in permitting an UNLLO to be organized for "any lawful activity." There was also support for the alternate view that the phrase was appropriate in that the activities of the UNLLO should not be unnecessarily constrained, leaving it to an enacting State to decide upon any necessary exclusions. There was, however, general agreement in the Working Group that the main focus of the UNLLO's activities was intended to be commercial in nature. It was noted that UNCITRAL texts broadly defined "commercial" activities, and it was suggested that that definition might be considered for inclusion in the text. It was also observed that the terms "commercial" or "business" might exclude certain activities in some jurisdictions. After discussion, the Working Group agreed to insert the phrase "business or commercial" between the words "any lawful" and "activity" in draft recommendation 2, and to clarify in the draft commentary that States should interpret those terms broadly, and could in fact permit broader application of the UNLLO regime.

Recommendation 3 and paragraphs 35 to 38 of A/CN.9/WG.I/WP.99

31. It was suggested that the second sentence in draft paragraph 37 should be moved elsewhere since it could be said to detract from draft recommendation 3, by referring to legislative models adopted in some States that permitted the separation of business assets of an entity from the personal assets of its members without resort to the concept of legal personality. However, other delegations were of the view that it was important to maintain reference in the draft text of such other business models. After discussion, the Working Group requested the Secretariat to resolve the matter by attempting to locate an appropriate section in the draft text where mention of those business models could be included.

32. There was agreement in the Working Group that draft paragraph 37 should be corrected by deleting the phrase "and limited liability", which appeared after the phrase "without resort to legal personality" in the current text.

33. The Working Group also agreed to add the phrase "distinct from its members" after the phrase "legal personality" at the end of draft recommendation 3.

Recommendation 4 and paragraphs 39 to 43 of A/CN.9/WG.I/WP.99

34. The Working Group agreed to delete the following phrases from the draft commentary:

(a) In paragraph 41, third sentence, the phrase "or liability to other members of the UNLLO" since it concerned liability matters of a different nature from the member's liability solely by reason of being a member of the UNLLO; and

(b) In paragraph 42, first sentence, the phrase "in the ordinary course of business", since it was not a phrase commonly used in lifting limited liability protection of an UNLLO ("piercing the corporate veil"), which more often referred to fraud or abuse of the legal business form.

35. A question was raised concerning footnote 42 in A/CN.9/WG.I/WP.99 and the suggestion that if the law were completely de-linked from corporate law, it would still be possible for courts to pierce the corporate veil under State law. After discussion, it was generally agreed that, as set out in footnote 42, "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 the establishment of standards on it to enacting States." It was also observed by some delegations that in countries with a civil law tradition, as was equally the case in States with a common law tradition, the suppletive law would provide for piercing the corporate veil, even if it was not specifically included in a law enacted on the basis of the UNLLO legislative guide.

36. The Working Group expressed its preference for the drafting of recommendation 4 as reflected in footnote 37. However, some concern was expressed that draft recommendation 4.2 might require clarification, in that it referred to liability beyond the member's personal liability for the obligations of the UNLLO solely by virtue of being a member. For the same reason, a proposal to add cross-references to other instances of member liability in the draft legislative guide — for example, in recommendation 21 — was not taken up. Further, although it was observed that in some States, members could agree that they would bear unlimited liability to third parties for obligations incurred by the business, the Working Group was of the view that such an approach was too complex for the UNLLO context, particularly since it raised issues of notice to third parties. While draft recommendation 4.2 was thought to have some value in making it clear that members had the freedom to decide among themselves on how to apportion liability, the Working Group was of the view that that point might best be highlighted elsewhere in the text and in reference to the members' agreement.

37. After discussion, the Working Group agreed to retain the text of recommendation 4.1 as it appeared in footnote 37, but to delete draft recommendation 4.2.

Recommendation 5 and paragraphs 44 to 47 of A/CN.9/WG.I/WP.99

38. The Working Group recalled that it had at previous sessions considered the issue of whether or not an UNLLO should be required to have minimum capital at the time of its formation (see, for example, paras. 29 and 51 to 59 of A/CN.9/800; paras. 56 and 75 to 76 of A/CN.9/825; paras. 26 to 29 of A/CN.9/WG.I/WP.85; and paras. 10 to 12 of A/CN.9/WG.I/WP.86/Add.1). It was noted that draft recommendation 5 advised that the law should not contain a minimum capital requirement for the formation of an UNLLO. Further, it was observed that paragraph 45 of the commentary noted a number of mandatory mechanisms in the draft legislative guide

for the protection of third parties dealing with the UNLLO, as well as suggesting in paragraph 47 certain other mechanisms that might be implemented by States whose policy considerations required the imposition of a minimum capital requirement.

39. A proposal was made that the text should also permit States to require a nominal amount of minimal capital at the time of formation of the UNLLO, or to impose progressive capital requirements over time. The reason for that suggestion was said to be that minimum capital requirements functioned not only to protect third parties, but that they also assisted in terms of the soundness, effectiveness and productivity of the enterprise and provided information in respect of financial and governance rights.

40. In response, reference was made to previous discussions in the Working Group opposing the imposition of minimum capital requirements on MSMEs (see the references in para. 38 above), as well as to the fact that draft recommendation 5 did not preclude the UNLLO from raising capital later in its life cycle, after its formation.

41. In reference to consideration in the Working Group of paragraph 47, it was observed that some regional and State legal systems contained a conversion mechanism requiring very small enterprises to be converted to more complex legal business forms once they reached a certain size. It was also noted that some States provided assistance for micro-enterprises only until they reached a certain size. There was some support in the Working Group for the content of draft paragraph 47, which some delegations were also in favour of expanding, for example by emphasizing in the commentary the importance to the UNLLO of building up its capital over time. There was also support for retaining the first sentence of paragraph 47 in its current location and for relocating the second and third sentences of that paragraph, possibly in relation to draft recommendations 23 and 24 in respect of the later stages of the UNLLO's life cycle. It was also observed that the Working Group may wish to consider draft recommendation 5 in relation to its future consideration of draft recommendation 17 in respect of members' contributions, although it was observed that the context of the two was different in that recommendation 5 concerned capital required at the formation of the UNLLO, while recommendation 17 was in respect of the operation of the UNLLO after its creation.

42. After discussion, the Working Group agreed that the general view and the current prevailing practice was that minimum capital requirements should not be imposed since such requirements could create barriers for MSMEs wishing to enter the legally regulated economy. As such, it was agreed that draft recommendation 5 should be retained in the text as prepared. In addition, the Secretariat was requested to reflect the considerations raised in the Working Group during the current and previous sessions in regard to policy choices for and against capital requirements in the commentary of the draft legislative guide for review at a future session.

Recommendation 6 and paragraphs 48 to 52 of A/CN.9/WG.I/WP.99

43. The Working Group was in agreement with the general principle of draft recommendation 6 that the name of the simplified business entity should include a phrase or abbreviation that put third parties on notice of its nature. While there was agreement to use UNLLO on an interim basis as suggested earlier in the session, some concern was raised in respect of its appropriateness due to its reference to "UNCITRAL" ("UN") and its use of the word "organization". The Working Group agreed that, particularly in light of the considerations outlined above in paragraphs 18, 19 and 22, the draft legislative guide in A/CN.9/WG.I/WP.99 and Add.1 were an appropriate starting point for the Working Group in the fulfilment of its mandate.

44. A proposal was made to combine draft recommendation 6 with draft recommendation 9(a)(i). The Working Group did not take up that proposal, as the prevailing view was that the two recommendations concerned different matters (recommendation 6 concerned disclosure of the UNLLO's limited liability status to third parties, while recommendation 9 concerned what information must be filed for

the UNLLO's creation), and that the concepts should be kept separate for the sake of simplicity and clarity.

45. In relation to paragraph 49 of the commentary, it was observed that while there was agreement that strict sanctions for UNLLOs failing to use their distinctive name or abbreviation in correspondence with third parties might not be recommended, the Working Group might wish to consider at a later stage whether it should include a recommendation in respect of the consequences for an UNLLO that did not observe its legal requirements.

46. It was suggested that paragraphs 50 to 52 of the commentary were more in keeping with the Working Group's preparation of a draft legislative guide on business registration. In reference to draft paragraph 52, a view was expressed that access to modern technology could be a complicating factor for businesses with a similar name, even when they operated in different industries or geographic regions; however, it was also observed that similar names were likely to arise given the sheer number of small businesses and that prohibiting their use might not be practical. The Working Group agreed to delete paragraphs 50 to 52 and to replace them with an appropriate reference to the draft legislative guide on business registration. The Working Group agreed to retain the text of draft recommendation 6 as drafted.

B. Formation of the UNLLO

Recommendation 7 and paragraphs 53 to 55 of A/CN.9/WG.I/WP.99

47. In keeping with the previous decision of the Working Group (see footnote 51 of A/CN.9/WG.I/WP.99), there was broad support for the suggestion that draft recommendation 7 should be adjusted to state expressly that any "legal or natural" person could be a member of the UNLLO. Concern was expressed that if a legal person, and especially another UNLLO, were permitted to be the sole member of an UNLLO such an arrangement might increase the risk of money-laundering, fraud and other illicit behaviour on the part of the UNLLO. It was observed that business law was not thought to be an appropriate tool for such regulation and that it should be left to enacting States to adopt the necessary measures to prevent such illicit activity, but that the commentary might include additional reference to the work of the Financial Action Task Force (FATF) on disclosure of beneficial ownership (see also footnote 67). After discussion, the Working Group agreed that the draft legislative guide should facilitate broad use of the UNLLO, and should thus permit the UNLLO to have legal persons among its members. The Working Group requested the Secretariat to consider how best to reflect that decision, whether through including in draft recommendation 7 the phrase "legal or natural" between "any" and "person" or whether to include it in a definitional section, as well as to ensure that the understanding of "a legal person" was broad enough to include legal entities capable of making an investment. A delegation observed that the approach in recommendation 7 was too restrictive, because it precluded additional alternatives to become a member in this type of entity such as through trusts and other patrimonial structures existing in both civil law and common law jurisdictions.

48. It was suggested that an addition be made to paragraph 54 of A/CN.9/WG.I/WP.99 including the possibility of States having a limit on the number of UNLLOs of which a legal or natural person could be a member. There was support in the Working Group that the phrase "an UNLLO may have a maximum number of members, or that" in paragraph 54 of A/CN.9/WG.I/WP.99 should be deleted. Further, it was observed that the final sentence of paragraph 53 should be maintained, and possibly moved to the beginning of paragraph 54, to signal that stipulating a maximum number of UNLLO members was not recommended. A proposal was also made that the draft commentary to draft recommendation 7 could clarify that the UNLLO was not permitted to be listed in the stock market. It was, however, noted that paragraphs 26 and 27 of A/CN.9/WG.I/WP.99 already addressed the issue of the nature and main features of the UNLLO, but that if necessary, additional detail could be added to those paragraphs for consideration by the Working Group at a later stage.

49. A suggestion was made to divide draft recommendation 7 into two recommendations along the following lines: (a) The law should provide that the UNLLO must have at least one member from the time of its formation until its dissolution; and (b) Any legal or natural person may be a member of the UNLLO. A view was expressed that adjusting the recommendation as suggested could result in a situation in which a sole member who passed away would leave the UNLLO without a member, however, it was agreed that the inheritance laws of the State or the dissolution and winding-up provisions of the legislative guide would govern such an eventuality. Although the Working Group agreed to leave the issue of whether or not to divide draft recommendation 7 for future consideration, there was agreement that the commentary to draft recommendation 7 should emphasize the requirement that an UNLLO should have at least one member at all times (see para. 55 of A/CN.9/WG.I/WP.99).

Recommendation 8 and paragraphs 56 to 59 of A/CN.9/WG.I/WP.99

50. The Working Group recalled that at a previous session there had been broad agreement that the preferred time of formation was at the moment of issuance of the certificate of registration of the simplified business entity (see para. 58, A/CN.9/WG.I/WP.99 and para. 65 of A/CN.9/831). It was observed that that approach would likely be included in the draft legislative guide on business registration and should be linked to the current text, and further that draft recommendation 8 and its commentary left scope for the enacting State to specify the precise moment at which an UNLLO came into existence as a legal entity. After discussion and consideration of whether it should be possible for the UNLLO to come into legal existence at a time before or after the moment of its registration, the Working Group agreed to revise the text of draft recommendation 8 along the following lines: "The law should specify the moment at which the UNLLO acquires its legal personality." The Working Group agreed that the commentary should recommend that the time of constitution of legal personality should be either at the time of registration or after registration.

51. It was observed that the Working Group might wish to consider including commentary in the legislative guide in respect of contracts that were entered into prior to the legal formation of the UNLLO. It was suggested that such commentary could be inserted at an appropriate location in the current draft so as to highlight that members may wish to consider how such matters are to be dealt with in their members' agreement.

Recommendation 9 and paragraphs 60 to 67 of A/CN.9/WG.I/WP.99

52. The Working Group agreed to revert in the draft legislative guide to the use of the phrase "formation document" (as found in the draft model law in A/CN.9/WG.I/WP.89 and the annex to A/CN.9/WG.I/WP.83) in lieu of the phrase "formation information," on the understanding that the word "document" was intended to refer to electronic, paper-based and mixed media information that must be submitted to the designated State authority in order to create an UNLLO. The Working Group also widely supported a suggestion that at this stage of its discussion on draft recommendation 9 it should only consider the information required for the valid formation of an UNLLO, and that it would discuss at a later stage which information on the formation and organization of the UNLLO should be required to be publicly disclosed.

53. It was observed that the current text of draft recommendation 9 was intended to contain the minimum information required for the valid formation of the UNLLO. Views were expressed that additional information should be added to that minimum requirement. However, the Working Group was reminded that in the spirit of the "think small first" approach taken by the draft legislative guide, the purpose of the recommendation was to list only the minimum information necessary for the establishment and operation of the UNLLO and that any additional requirements could create an unnecessary burden for MSMEs and could jeopardize their resort to the UNLLO legal form. Although some views were expressed that it was not necessary to include the names of the managers of the UNLLO, the Working Group

was in general agreement that the information listed in subparagraph (a) of draft recommendation 9 met the threshold for the minimum information necessary to create the UNLLO, although some clarification of the terminology in subparagraph (a)(iii) might be necessary.

54. It was suggested that in keeping with the approach outlined in the paragraph above, information in subparagraph (b) of draft recommendation 9 on the name and address of each member of the UNLLO should not be required for the valid formation of the UNLLO. It was observed that such a requirement might place an unnecessary burden on entrepreneurs in terms of the need to update the information whenever membership in the UNLLO changed. It was further suggested that errors in the spelling of names and addresses of the members could raise questions relating to the legal validity of the UNLLO. It was observed that the issue of the correction of errors was one of the matters considered in the legislative guide on business registration also under preparation by the Working Group. It was also observed that this matter might need to be addressed in the commentary to the UNLLO. Moreover, it was noted that compliance by an enacting State with FATF recommendation 24 (see footnote 67 of A/CN.9/WG.I/WP.99 as well as para. 47 above) required only information on the name(s) of the UNLLO manager(s), and not of the members of the UNLLO. Further, it was suggested that for transparency and other purposes, information on the names and addresses of its members could be maintained by the UNLLO, and that such information could made available upon the request of the State or of interested parties. Although some delegations remained of the view that the name(s) of at least the founding member(s) should be included in draft recommendation 9, after discussion, the Working Group agreed that the names and addresses of the UNLLO members need not be included in the information required for the formation of the UNLLO and that paragraph (b) of draft recommendation 9 should be deleted.

55. After discussion and although different views were expressed on this issue, the Working Group agreed that the following information was not necessary for the valid formation of an UNLLO, and thus should not be included in draft recommendation 9: (i) the limited liability status of the UNLLO, which was noted to be explicit in the UNLLO's name; (ii) the moment at which the UNLLO possessed legal personality, which would form part of its business registry file; (iii) the business activities of the UNLLO; (iv) the capital of the UNLLO, if any; (v) any limitation on the extent to which UNLLO managers could legally bind the UNLLO; (vi) any limitation on the number of members of the UNLLO; and (vii) any restrictions on the transfer of ownership interests in the UNLLO.

Recommendation 10 and paragraph 68 of A/CN.9/WG.I/WP.99

56. It was observed that draft recommendation 10 might be unnecessary and could cause confusion by seeming to suggest that a manager could unilaterally change the content of the formation document of the UNLLO. Such information could possibly include key features of the UNLLO including its name or type of management, and there was a general view that such decisions should be left to UNLLO members. The Working Group further noted that if the goal of the draft recommendation was to keep the information in the business registry current, that issue might be sufficiently dealt with in the draft legislative guide on business registration, which considered various mechanisms for that purpose (see also para. 61 of A/CN.9/WG.I/WP.99).

57. After discussion, the Working Group agreed to delete draft recommendation 10 from the text, requesting the Secretariat to consider whether elements of the commentary in draft paragraph 68 should be retained elsewhere in the text, possibly in respect of draft recommendation 9.

C. Organization of the UNLLO

Recommendation 11 and paragraphs 1 to 4 of A/CN.9/WG.I/WP.99/Add.1

58. The Working Group agreed to defer consideration of draft recommendation 11 until a later stage of its deliberations in light of its reference to a list of the mandatory

recommendations drawn from throughout the text, including some that had not yet been considered by the Working Group.

Recommendation 12 and paragraphs 5 to 8 of A/CN.9/WG.I/WP.99/Add.1

59. The view was expressed that recommendation 12 as currently drafted might be cumbersome for UNLLOs wishing to scale up in size. The reasoning for that view was said to be that the increased number of members would not easily permit each of them to share equally in management, as established by the default rule, and that it might not be practical for members to nominate a manager, despite the default rule in draft recommendation 16 that they could do so by way of a simple majority decision. It was proposed that draft recommendation 12 should instead be adjusted such that the default rule would be that only a single member UNLLO would be member-managed, while the default position for all multi-member UNLLOs would be that they would be manager-managed. Academic research was also cited in support of that position, and there was some support for the proposal in the Working Group.

60. In response to that proposal, it was noted that draft recommendation 12 was designed with the "think small first" principle in mind and that, in that context, the appropriate default rule was thought to be the simple approach that all members of the UNLLO should share equally in its management. The appropriateness of that approach was thought to be particularly so in the case of micro and small enterprises, since those UNLLOs that were larger in size would have greater understanding of management concepts and more resources so as to better be able to contract out of the simple member-manager default rule and adopt a management regime considered more appropriate for their context. In addition, it was noted that unless the proposal intended to limit the number of managers to one, the issue of multiple decision-makers could equally arise if the proposal were adopted by the Working Group. It was further observed that members of the UNLLO were free, in any event, to agree by unanimous decision to adopt a manager-managed system in lieu of the member-managed default approach, and in doing so each member would thus have to agree consciously to give up any management role, but that if the default rule were changed to require the appointment of a manager for multiple member UNLLOs, a member could effectively be deprived against that member's will of an opportunity to manage the business.

61. Reference was made to paragraph 84 of the report of the twenty-fifth session of the Working Group (A/CN.9/860) which listed a number of features that the Working Group agreed should be contained in the text being prepared on a simplified business entity. It was noted that although that list had been prepared in reference to the draft model law contained in A/CN.9/WG.I/WP.89 that had then been under consideration by the Working Group and was thus quite detailed, each of the features listed in paragraph 84 was in fact consistent with the draft legislative guide on an UNLLO currently under consideration.

62. The prevailing view in the Working Group was that recommendation 12 should be retained in the text as currently drafted, and the proposal to change it was not taken up. Later in the session, the Working Group revisited that decision (see para. 69 below).

Recommendation 13 and paragraphs 9 to 11 of A/CN.9/WG.I/WP.99/Add.1

63. There was broad agreement in the Working Group that the unanimous consent rule in draft recommendation 13(c) might not be workable in practice, particularly if the UNLLO could have an unlimited number of members. It was agreed that the rule for decisions on matters outside of the ordinary course of business should instead be that of a "qualified majority" such as, for example, a two-thirds majority. It was also agreed that the phrase "simple majority" as used in the text should be modified by referring either to "majority" or "absolute majority" and that consideration might be given to whether such terms should be defined in the text. In determining which matters would be considered "outside of the ordinary course of business and activities of the UNLLO", the Working Group agreed that those instances, which would require

a qualified majority, could be illustrated by reference to the non-exhaustive list found in paragraph 10 of the commentary, which should later be specified clearly.

64. The view was expressed that draft recommendation 13 might be clearer if the concepts of management and control (i.e. members' authority to make decisions) that it contained were separated out into two distinct recommendations irrespective of whether the UNLLO was member-managed or manager-managed. For example, it was said to be unclear whether paragraph (c) of draft recommendation 13 would also apply to manager-managed UNLLOs, since it concerned matters outside of the ordinary course of the activities and affairs of the UNLLO. It was also suggested that additional clarification might be achieved by considering separately the application of the draft recommendation in the member-manager context, particularly in reference to paragraphs (b) and (c) of recommendation 13, and in the manager-managed context. There was support in the Working Group for those views.

65. In order to further clarify the text, a proposal was made to differentiate the concepts represented in draft recommendation 13 into two distinct recommendations, with one dealing with daily management issues and the other dealing with control of the UNLLO by its members. The proposal was: to move draft recommendation 12 and issues relating to the daily management of the UNLLO to Chapter D ("Managers"); to change the name of Chapter C to "Organization and Control of the UNLLO"; and to change the word "manage" in paragraph (a) of recommendation 13 to "control". It was explained that an "equal right to control" would mean that the default approach would be that each member would have a vote, which could be cast in making majority decisions in the cases outlined in paragraph (b), which concerned day-to-day operational aspects of the business, and by way of qualified majority in the cases outlined in paragraph (c), which concerned decisions of fundamental importance to the UNLLO itself. There was some support in the Working Group for that proposal.

66. In considering the proposal outlined in the paragraph above, a number of additional issues were raised in the Working Group, including:

(a) That discussion of control might be more appropriate in connection with recommendations 17 and 18 on contributions by members of the UNLLO;

(b) That discussion, in particular, of voting rights might also be had in connection with contributions, and that such rights might be linked to the proportion of a member's contribution;

(c) That it could be difficult to value a member's contribution to the UNLLO, which could consist of goodwill or other intangibles, suggesting that equal allocation of voting rights might be a better default rule;

(d) That members would be likely to agree on their voting rights based on their contributions, such that resort to a default rule for equal voting was unlikely in practice;

(e) That the UNLLO could be required to make decisions on a variety of matters at the time of its formation; however, it was observed that that approach could in itself create barriers to entry; and

(f) That the draft legislative guide generally contained default rules based on equality, for example, in respect of control, contributions, and distributions, but that they were in the text as a consequence of having been agreed as appropriate at previous sessions of the Working Group and that, in any event, broad freedom of contract for members to decide their own rules was the underlying principle of the text.

67. After discussion in the Working Group, it was proposed that paragraph (a) of draft recommendation 13 should be replaced with the text along the following lines: "(a) The members of the UNLLO have rights of control in proportion to their contributions, if the value of the contribution is stated in the formation document or members' agreement. If the value of the contribution is not stated in the formation document or members' agreement, members have equal rights of control." Although it was observed that the phrase "unless otherwise agreed" might not be needed in the

chapeau of draft recommendation 13, it was noted that it might still be needed in respect of paragraphs (b) and (c) and that efforts to rationalize the drafting could be made in a future iteration of the text. In response to a question whether the adoption of the proposal would necessitate a change to the agreed text of draft recommendation 5 that the law should not contain a minimum capital requirement, it was observed that members were entitled to provide information in the formation document in addition to the recommendation 9 minimum requirements (see, also, the commentary in paragraph 67 of A/CN.9/WG.I/WP.99). An additional proposal was made that the phrase "voting rights" could be substituted for the phrase "rights of control" in the proposal, and with that adjustment, the Working Group agreed to adopt the proposed text for draft recommendation 13(a).

68. It was noted that in order to create an UNLLO, draft recommendation 9(a)(iii) already required its founders to indicate whether the UNLLO was to be member-managed or manager-managed. There was general agreement in the Working Group that this requirement effectively obviated the need for a default rule on the matter, since the choice would already be made upon the establishment of the UNLLO.

69. In light of the Working Group's consideration of draft recommendation 13 and of its agreement that draft recommendation 9 required an indication of whether the UNLLO was member-managed or manager-managed at the time of its formation, a proposal was made to revise the decision of the Working Group in respect of the text of draft recommendation 12 (see para. 62 above) by replacing it with text along the following lines: "The UNLLO may be member-managed or manager-managed. A single member UNLLO will be member-managed unless otherwise agreed." It was queried whether the second sentence of the proposal was necessary, since all UNLLOs, including single member UNLLOs, would have to choose at the time of formation whether they were member-managed or manager-managed. An additional question was raised whether an UNLLO would be validly formed if a member was declared manager in the formation document or submitted the formation document without expressly being appointed manager in the members' agreement. After discussion, the Working Group agreed to replace the text of draft recommendation 12 with the proposed text. A few delegations supported the view that commentary should be added indicating that it was also recommended that enacting States should provide that UNLLOs with only a few members would also be subject to the default rule of member-management.

D. Presentation of A/CN.9/WG.I/WP.94

70. The Working Group heard a short introduction of working paper A/CN.9/WG.I/WP.94 which presented a legislative approach that allows individual entrepreneurs to benefit from limited liability without requiring them to create a legal person that is separate from the natural person. It was said that under such a scheme, defined as Entrepreneur with Limited Liability (EIRL), the individual entrepreneur could allocate assets to its professional activity that were segregated from its personal assets. Pursuant to this form of asset partitioning, business creditors could only pledge the assets allocated to the commercial activity of the entrepreneur and not its personal assets or those of the entrepreneur's family. It was also said that the principle of asset segregation, along the lines presented in A/CN.9/WG.I/WP.94, was not new and that several States had prepared legislation based on that principle in the past fifty years. It was further noted that similar principles to those underlying the scheme of the Entrepreneur with Limited Liability had inspired the legislative scheme of the "entreprenant" adopted by the seventeen OHADA Member States.

V. Other matters

71. The Working Group recalled that its twenty-eighth session was scheduled to be held in New York from 1 to 9 May 2017. The Working Group further noted the decision of the Commission at its forty-ninth session (para. 394, A/71/17) that the

fifty-first session of Working Group V (Insolvency Law) would be held from 10 to 19 May 2017. The Working Group was advised that Working Group V intended to consider issues related to MSMEs (pursuant to the decision of the Commission confirmed in 2016, see para. 246, A/71/17) on the first day of its session, i.e. 10 May 2017, and that delegates to Working Group I were invited to attend and participate in that discussion.

72. The Working Group confirmed that it would consider the draft legislative guide on key principles of business registration currently under preparation during the first week of its twenty-eighth session, i.e. from 1 to 5 May 2017. Further, the Working Group decided that from 8 to 9 May 2017, it would continue its discussion of a draft legislative guide on an UNLLO (A/CN.9/WG.I/WP.99 and Add.1), as well as consider possible future work.

B. Contribution by the United Nations Conference on Trade and Development (UNCTAD): lessons learned on business registration (A/CN.9/WG.I/WP.98)

[Original: English]

The secretariat of the United Nations Conference on Trade and Development (UNCTAD) has submitted to the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the information in the annex attached in order to provide assistance to the Working Group in its deliberations. The information attached is reproduced in the form in which it was received by the UNCITRAL Secretariat.

Background

This paper is an initial contribution from the United Nations Conference on Trade and Development (**UNCTAD**). It reflects insights and best practices learned over the past decade by the Business Facilitation Program (www.businessfacilitation.org) in UNCTAD's Division on Investment and Enterprise, and by the Global Enterprise Registration team. The paper provides:

(a) An overview of importance of formalization;

(b) A definition of business registration and the challenges it poses;

(c) Lessons learned regarding business registration;

(d) Lessons learned regarding the business registry; and

(e) Examples of effective business registration websites already implemented.

Over the past 10 years UNCTAD's business facilitation program has helped 27 countries put 1,786 administrative procedures online, and in the process reduced the number of steps required to register a business by 80 per cent on average.[1] UNCTAD's business facilitation program provides technical assistance to help countries develop computer systems (information portals and online single windows) that contribute to greater transparency and efficiency in public services and improved governance.

The Global Enterprise Registration portal (**GER.co**), launched at the United Nations World Investment Forum in October 2014, is the world's first website with links to all business registration websites worldwide and a rating of each website's user-friendliness. The GER.co website shows that as of March 11, 2016, 62 economies have not put their business registration processes online. Twenty-eight economies have developed single windows to allow easy online registration; of those, four provide all mandatory registrations and certificates online. The remaining 107 economies with online business registration processes offer information portals describing those processes.[2] Governments can reference GER.co to learn best practices from their peers.

A. Importance of Formalization

Recognizing the importance of formalizing businesses, the **United Nations' Sustainable Development Goal 8, Target 8.3** "encourages the formalization and growth of micro, small, and medium-sized enterprises[3] **ILO labor standard (R204)** further recommends that International Labor Organization (ILO) members facilitate workers' transition from the informal to the formal economy.[4]

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[1] http://issuu.com/cfi.co/docs/cfi.co_summer_2015/21?e=6174959/14467542. p.21.

[2] www.ger.co.

[3] www.un.org/sustainabledevelopment/economic-growth/2030 Agenda on Sustainable Development, adopted by UNGA on Sept 15, 2015.

[4] www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204.

A 2010 report by UNCTAD shows that formalizing even just a small portion of the informal sector could significantly increase government fiscal revenues and support the infrastructure development vital for domestic growth and for attracting foreign investment.[5]

Informality is a global challenge. According to the Organization for Economic Cooperation and Development (OECD), 1.8 billion people work in the informal economy out of a global working population of 3 billion.[6] That is 60 per cent of the global workforce, with the proportion projected to increase to around 66 per cent by 2020.[7] In developing countries the problem of informality is particularly acute. The World Bank's International Finance Corporation (IFC) and the Global Partnership for Financial Inclusion estimate that over 90 percent of MSMEs in developing countries operate in the informal sector.[8]

Informality also has a gender dimension. According to the IFC, "worldwide, women are three times more likely than men to be working in the informal economy. This has huge implications. Formalization of a business is the first step toward accessing financial and other types of support that can help a small business grow to scale."[9]

Greater formalization is essential to inclusive economic growth, since formalization provides workers with the dignity of lawfulness and greater access to social and financial services and protections. Greater formalization will reduce corruption and opportunities for extortion. It will also increase government's tax revenues and ability to provide public services and infrastructure, which will contribute to economic growth.

B. Definitions

Business registration is, in practice, a series of processes involving multiple public agencies. To be able to work legally, an enterprise has to register with various registries.

In most countries these registries are:

- Business registry (declaration of legal existence)
- National tax administration (registration as a tax payer)
- Social Security (registration as an employer)

In addition to these basic registrations, depending on the country, additional registrations may be required:

- Subnational tax administration (state or municipal level)
- Ministry of Labor (if the company employs personnel)
- Pension funds
- Chamber of Commerce
- Statistical office

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[5] UNCTAD (2010, February 15). Public investment in administrative efficiency for business facilitation- sharing best practices, 5.

[6] OECD (2009, March). Is Informal Normal? Messages, figures and data.

[7] Ibid.

[8] Note by the Secretariat, Reducing the Legal Obstacles Faced by Micro, Small and Medium-Sized Enterprises (MSMEs), ¶ 20, UN Doc. A/CN.9/WG.I/WP.92 (Aug. 12, 2015) (citing studies by the International Finance Corporation and the Global Partnership for Financial Inclusion finding that "[t]he total number of MSMEs worldwide is estimated to be between 420 to 510 million businesses, of which 360 to 440 million (around 86 per cent) are in emerging markets. Of these, 36 to 44 million SMEs globally (comprising about 9 percent of the total MSME population) are registered, i.e. they are operating within the legally regulated economy."

[9] www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/gender+secretariat/entrepreneurship/investment+climate/win-business-registration.

• Other offices

Depending on the business activity and location, specific licences may be required: hygiene and security, conformity to urban planning, banking and insurance licences, food processing, sale of liquors, etc.

The complexity of registration derives, for businesses, from the multiple registries and interactions or steps involved in the process, and from the quantity of information they are required to provide.

C. Lessons learned regarding business registration across all public agencies

1. **User-centric approach**. Governments' goals at all times should be simple, efficient, low cost registration, and simple, cost-effective procedures, as seen from the user's point of view.

2. **Procedures**. Governments should keep to a minimum:

(a) The number of different registries to which businesses should register. Governments should review carefully the services provided by existing registries, their relevance, and the cost/benefit relationship;

(b) The quantity and complexity of information requested from businesses by the various registries. The information requested should be strictly restricted to the data effectively necessary for the concerned registries to exercise properly the control, or grant the support, entrusted to them;

(c) The number of interactions and the time necessary for registration with the various registries.

3. **Single Windows**. Governments should make it possible for businesses to register simultaneously with all the mandatory registries, by providing data through a single form, providing only one set of documents and only one payment, through physical or electronic single windows.

4. **Information**. Governments should make publicly available, at a minimum:

(a) A list of all registries for which registration is mandatory, and for each registry indicate who must register and the purpose of that registration;

(b) For each registry, a list of the steps needed to achieve the registration, indicating for each step, the necessary contacts, the data, documents and payment required, the results to be expected, ways of complaints and recourse and the legal basis;

(c) Information about obligations taken on through business registration, clear instructions for compliance, and a description of penalties for non-compliance, if any;

(d) Information about the benefits of business registration, which typically include the ability to open a business bank account, protections through application of labor and safety standards, and improving infrastructure and services through tax payments;

(e) Whenever possible, this information should be made available online.

5. **Unique Business Identification Number**. Governments should grant to businesses a unique identification number that should be recognized and accepted by all public entities, at the national and subnational levels. The first registry with which a business registers should grant the unique identification number, and it should be easy for a business to retrieve that number if lost or forgotten. It would simplify registration and cross border trade and investment if all governments were to agree on a common alphanumeric system for registering businesses that would facilitate identification of a company's ultimate beneficiary ownership by country.

6. **Outreach, obligations and benefits**. Governments should proactively educate youth and entrepreneurs about the complete business registration process, including obligations taken on through registration, and the benefits of registration:

(a) Governments should promote business registration through public outreach campaigns to reduce informality arising from lack of access or understanding of the registration process and of the benefits of being registered;

(b) Governments should ensure that information regarding ongoing compliance with the law, such as issuance of licences and permits and notification of a business' closure, and fulfilment of obligations taken on by registration, such as tax payment, is similarly clear and easily available, and that penalties for non-compliance, if any, are known;

(c) Governments should consider adding incentives to the registration process, e.g. through access to ancillary services for registered businesses, such as establishment of a bank account, credit, training and access to health insurance.

D. Lessons learned regarding the business registry specifically

1. Registration at the business registry should be mandatory only for companies.

2. Individuals (i.e. sole traders/sole proprietorships) and partnerships should be offered the possibility to register if they want to benefit from services offered by the business registry, such as protecting a business or trade name, separating personal assets from assets devoted to the business or limiting their liability. (Removing the obligation for individuals to register at the business registry would not compromise the objective to formalize their activities, as they would still be required to register as tax payers and comply with all other registration procedures.)

3. Incorporation of non-publicly traded companies should be simplified through regimes such as the "SAS" (e.g. no minimum capital, no need for notarized by-laws, possibility of having only one shareholder, standardized incorporation documents, broad purpose clause permitting MSMEs to engage in all lawful activities, flexible organizational structure, maximum freedom of contract, full-fledged limited liability).

E. Examples of effective business registration websites already implemented in developing countries

The Global Registration Portal (GER.co) rates all the world's official business registration websites using a 10 dot scale to show their user-friendliness. The rating criteria reflect lessons learned by UNCTAD and the Kauffman Foundation's Global Entrepreneurship Network, which is the largest non-governmental organization in the world promoting the interests of entrepreneurs. GER.co is divided between online single windows and information portals. GER.co calls "online single windows" websites which either allow entrepreneurs to apply simultaneously for all mandatory registrations, with various public agencies, or will allow entrepreneurs to do so in the near future, even if that goal has not been achieved yet. Websites allowing registration with only one administration are not listed.

GER.co defines "Information portals" as websites showing information on the business registration process. These websites detail all of the mandatory registration processes with various public agencies or aim to do so in the future. Information portals describing processes for only one administration are not listed.

With the "Assessment of websites" tool on GER.co, governments can evaluate their own sites according to the GER rating criteria, which describe a website's functionality and features. Through self-assessment, governments can see their sites from the vantage point of users and see how to make their sites more user-friendly. Governments can look at websites with higher ratings on GER.co to learn from their peers.

A perfect rating for an online single window (10 green dots) means a government has implemented a web platform that allows the user to: (1) apply for all mandatory registrations through a single online form; (2) pay all fees through an electronic website included in the platform; (3) receive online all the certificates documenting that the business was successfully registered; and (4) contact a competent institution with any problems that may occur during the registration process.

A perfect rating for an information portal (10 green dots) means a government has clearly listed: (1) what to do: the mandatory steps to register a business, with the end goals of each mandatory registration clearly described and their legal justifications clearly indicated; (2) how to do it: clearly explained how to process the mandatory registrations by providing the contact information for each office involved in the registration process along with required documentation, downloadable forms, and the cost and average time to complete each registration, and (3) that the site has a user-friendly orientation: the process is presented step-by-step, from the user's point of view, and the site provides contact information to register a complaint.

C. Note by the Secretariat on a draft legislative guide on an UNCITRAL Limited Liability Organization (A/CN.9/WG.I/WP.99 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session in 2013, the United Nations Commission on International Trade Law (UNCITRAL) requested that work be commenced aimed at reducing the legal obstacles and barriers encountered by micro, small and medium-sized enterprises (MSMEs) throughout their life cycle, with a particular focus on their context in developing economies.[1] The life cycle of a business could be said to consist of several stages, which may be summarized as starting a business, operating a business, restructuring a business and dissolving a business. The mandate granted to Working Group I by the Commission was that work should focus on the first stage in that life cycle, i.e. starting a business.[2]

2. To that end, Working Group I commenced its deliberations at its twenty-second session in February 2014. At its most recent session (twenty-sixth session, New York, 4 to 8 April 2016), Working Group I continued its consideration of two main topics, one of which is discussion of a simplified business entity as a business suited to the needs of MSMEs.[3] These deliberations had been taking place on the basis of the framework of issues drawn from the key features of simplified business regimes (outlined in A/CN.9/WG.I/WP.86), and as illustrated in the draft model law on a simplified business entity (A/CN.9/WG.I/WP.89), as well as other possible models (for example, that contained in the annex to A/CN.9/WG.I/WP.83).

3. Following its discussion of the framework of issues that might be considered in a simplified business regime, the Working Group decided that the legislative text it was preparing on a simplified business entity should be in the form of a legislative guide. To that end, the Working Group requested the Secretariat to prepare for discussion at a future session a draft legislative guide (consisting of recommendations and commentary) that reflected its policy discussions to date.[4] This draft legislative guide has been prepared by the Secretariat in response to that request.

4. The vast majority of businesses in both the developing and the developed world are MSMEs. As recognized by the Commission through its decision to grant Working Group I its current mandate, in the light of the forces of globalization and economic

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; reiterated at subsequent sessions of the Commission: ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 321 and *Seventieth Session, Supplement No. 17* (A/70/17), paras. 220, 225, 340 and 321.

[2] The Commission stated that "such work should start with a focus on the legal questions surrounding the simplification of incorporation" and has confirmed Working Group I's approach that such work should proceed on two relevant issues: legal questions surrounding the creation of a simplified business entity and key principles in business registration. Supra, note 1, and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), under preparation.

[3] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 22 to 47.

[4] Ibid., paras. 48 to 50.

integration it is important to strengthen the economic role and position of MSMEs. The Working Group has thus sought to establish the best practices of States and policymakers to create a legal business form tailored to facilitate the operation of MSMEs, thereby also stimulating entrepreneurship and innovation.

5. In its discussions to date, the Working Group has considered a number of different simplified business forms on which legislation has been enacted in various jurisdictions representing different legal traditions around the world. A selection of such business forms included in the comparative analysis that the Working Group first considered in this regard (A/CN.9/WG.I/WP.82) was drawn from 11 different States from different regions of the world and included 16 different legal regimes in total.[5] The Working Group has also received documentation and information in respect of several other simplified business forms that have been adopted in certain States to provide the benefits of, inter alia, asset partitioning to business entities, in a less complex form that may not necessitate the granting of legal personality.[6]

6. Other information in respect of different approaches to creating simplified business forms has been provided by delegations to Working Group I. These reforms have included specific legislative efforts to provide for single member businesses or business entities,[7] as well as broader reforms to assist MSMEs that have been implemented in various States, including in developing economies.[8]

7. Discussion in the Working Group on this topic has also provided a rich source of information relevant to the present topic. Many delegations have intervened to share the benefit of their lengthy experience in creating an appropriate national legislative framework to deal appropriately with key issues in respect of the various corporate business forms in their State.

8. Many of these business forms, simplified and otherwise, have enjoyed economic success in their respective jurisdictions. Moreover, the Working Group's combined experience regarding the various domestic approaches to creating and reforming legal business forms — both MSME-specific and otherwise — has highlighted that States' good practices share a number of key principles. These principles appear to transcend national borders and could be said to be international in their application.

9. This draft legislative guide has attempted to distil these good practices and key principles into a series of draft recommendations on how a State should institute and regulate a legal form for MSMEs that can best promote their success and sustainability. The draft commentary that precedes each recommendation relies on discussions that have taken place in the Working Group and on documentation it has considered at its sessions to explain in greater detail the rationale leading to those recommendations. The Working Group may wish to note that the Secretariat has made every effort to ensure that each issue that has been considered in discussions in the Working Group to date, as well as any agreement that has been reached on such issues,

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[5] Those States were Colombia, France, Germany, India, Japan, New Zealand, Singapore, South Africa, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. See footnote 4, A/CN.9/WG.I/WP.82.

[6] See the alternative legislative models for micro and small businesses described by Italy and France in A/CN.9/WG.I/WP.87 and A/CN.9/WG.I/WP.94.

[7] Information shared with the Working Group has included, for example, that in respect of the "auto-entrepreneur", in force both in France (see paras. 22 to 23, A/CN.9/WG.I/WP.87) and the Member States of the Organisation for the Harmonization of Business Law in Africa (known by its French acronym, OHADA) (Acte Uniforme Révisé Portant Sur Le Droit Commercial Général, adopted 15 December 2010, see www.ohada.com/actes-uniformes/940/999/titre-2-statut-de-l-entreprenant.html). Other efforts to create particular regimes for single member businesses have included those of the European Union (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)), as well as a draft model law on a single member business entity prepared by the Secretariat (A/CN.9/WG.I/WP.86/Add.1).

[8] Information in this respect has been shared in the Working Group in respect of such reform efforts in a number of States, including Chile, China, Colombia, El Salvador, Mexico, the Philippines, Rwanda, Thailand, and others.

has been reflected in this draft legislative guide.[9] To assist readers in that regard, the present text is heavily footnoted.

10. As emphasized in materials previously considered by the Working Group,[10] and in keeping with its desire to create a legal text that can accommodate the evolution of the MSME from a very small single entrepreneur model to a more complex multi-member entity,[11] a "think small first" approach has also been taken in this draft legislative guide. To that end, this draft text has been prepared with a focus on the actual needs of MSMEs and consideration of how those entrepreneurs who operated them could most benefit from legislation based on these recommendations and be encouraged to conform to the rules they contain. Such entrepreneurs could range from individual street vendors working in busy marketplaces, to small family business owners wishing to scale up and formalize their operations, to small firms seeking to grow and position themselves in more innovative sectors, such as the information technology field.

11. In order to "think small first" and assess how best to design these draft legislative recommendations to meet the needs of entrepreneurs operating MSMEs, the Working Group may wish to consider what those needs might be. These could include a number of items, but it is suggested that, at a minimum, such needs might be the following.

12. First, most entrepreneurs could be expected to want *freedom, autonomy and flexibility* in how they operate their business, without the need to resort to rigid and formalistic rules and procedures or have detailed requirements dictated to them regarding how they must carry out their activities. They are likely to want to decide for themselves on many aspects of the business' current operations, as well as on how it might evolve and develop over time.

13. Second, MSME entrepreneurs are likely to want *speed and simplicity* to characterize not only the legal establishment of their business, but also its administration and operation. The rules governing the business should be in simple and accessible terms, and the use of modern technology and other simple techniques, such as the use of mobile applications to complete payments or prepare balance sheets, should be encouraged to assist such entrepreneurs.

14. Third, MSMEs need an *identity and visibility* in order to successfully compete in the market and to attract clients. These features facilitate their recognition in the market and permit third parties to more easily locate the business and its products. In addition to the obvious protections and advantages associated with taking on a legally recognized identity and operating within a framework of statutory laws,[12] the business can also use its identity to develop the reputation and "brand" of the business, which can add value to it.

15. Fourth, such entrepreneurs need *certainty in and protection of their property rights*. As such, MSME operators may be expected to want to be permitted to control the ownership rights in their business and to be able to take advantage of asset partitioning, so as to protect their personal assets from the claims that their creditors may have against the business. It is equally important for the personal creditors of those who own and/or manage these businesses not to be able to seize the assets of such businesses in order to satisfy such personal debts.

16. Finally, MSME operators generally want *to control and to manage their business*, rather than leaving those details to a professional manager.

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[9] Of course, the Secretariat would be grateful if any oversight in that regard is highlighted so that those issues can be included in a future iteration of this draft text.

[10] See paras. 1 and 5, A/CN.9/WG.I/WP.86/Add.1; para. 3 (iii), A/CN.9/WG.I/WP.90; and paras. 2 and 39, A/CN.9/WG.I/WP.89.

[11] As agreed by the Working Group at its previous sessions (see paras. 24, 32 and 42 to 43 of A/CN.9/800, paras. 67 and 74 of A/CN.9/825, and para. 19 of A/CN.9/831).

[12] Such protections and advantages have been enumerated in para. 35 of A/CN.9/WG.I/WP.92, and include, inter alia, asset partitioning, protection against potential administrative abuse and other abuse of rights, easier access to credit, labour law protection for employees, and similar features.

17. Through "thinking small first" and considering the above-described real world business needs, this draft legislative guide aims at assisting States in the creation of legal rules tailored to satisfy those needs and expectations. For example, the need of MSME entrepreneurs for freedom, autonomy and flexibility is woven throughout this draft legislative guide in its recognition of the importance of freedom of contract and the text's avoidance of formalistic and rigid corporate law rules. However, this draft guide also acknowledges through its many default rules that such entrepreneurs may also require protection against circumstances or events that they may not foresee. Second, speed and simplicity characterize not only the recommendations for rules on the establishment of the business entity, but this guide as a whole uses accessible terminology, clearly acknowledges technology and welcomes its use. In addition, to provide MSMEs with identity and visibility, the draft recommendations provide the business entity with legal personality and provide a simple vehicle for the entrepreneur to create a legally recognized business. Further, limited liability protection for the business entity and rules on the transfer of rights of its members are some of the mechanisms that provide certainty and protection for the property rights of MSME operators. Finally, control by the MSME entrepreneur over the operation and management of their business is assured through an emphasis on member-management as the default governance approach and on the more horizontal hierarchical governance structure that characterizes this draft legislative guide.

18. The Working Group has also considered different approaches that could be taken to achieving its goal of creating a specific and simplified legal form to facilitate the operation of MSMEs. There was broad agreement in the Working Group that its goal should not be to reform and simplify outdated company law regimes, but rather to develop a separate and innovative approach based on the collective domestic experience of delegations, and to specifically tailor it to MSMEs.[13]

19. In view of that agreement and in recognition that more formalistic and rigid corporate-style rules may not be appropriate for such businesses, this draft legislative guide has taken the view that the optimal solution for the creation of an appropriate simplified legal regime for MSMEs is to draw ideas from the good practices in corporate law reform identified by the Working Group to date, while creating an innovative legal regime for MSMEs capable of standing on its own. The scheme envisioned in this draft legislative guide is thus neither dependent upon nor specifically linked to existing company law in any State.

20. One clear advantage of that approach is that it enables States to more easily adopt a regime that implements the legislative recommendations. Perhaps more important, however, is that this approach permits States to craft appropriate legislative measures using a clean slate approach, allowing them to step away from existing business forms and to respond to the real needs of the types of businesses that such a scheme seeks to serve. The approach favoured in this draft legislative guide is intended to acknowledge and focus on the real nature of many businesses in developing economies. Some of these businesses, of course, share common traits with businesses in more developed economies. The recommendations in this draft legislative guide create a legal business form that moves away from more traditional, hierarchical and formal governance towards less rigid and formalistic structures based on the actual needs and expectations of entrepreneurs. This approach may also present the best possible opportunity for the Working Group to achieve a unified text capable of being used in a cross-border context, and not dependent on the legal regime of any particular State, but rather representing a product of good practices drawn from legal regimes around the world.

21. Further, such an approach may also have important cross-border effects. As was indicated in the materials before UNCITRAL during its deliberations in 2013 leading to the establishment of the present MSME work, in addition to reducing barriers to MSMEs registering and operating their businesses within statutory frameworks and

[13] As agreed by the Working Group at its twenty-fourth session (New York, April 2015) (para. 54, A/CN.9/831). See, also different approaches to legal reform as outlined in paras. 5 to 7, A/CN.9/WG.I/WP.82.

helping them to maximize their economic potential, work on the simplification of business incorporation and registration could have additional international effects. In particular, an internationally recognized simplified business form could facilitate cross-border trade for MSMEs, since it would provide a recognizable basis for such business forms and avoid problems that might arise due to a lack of international recognition of the business form of the enterprise.[14]

22. In pursuit of this informed and innovative approach to MSME law reform, this draft legislative guide has adopted revised terminology that is intended to be as neutral as possible. In order to assist the Working Group in considering the real issues facing MSMEs and to learn from existing company law solutions but not to rely on their more rigid rules, "corporate" and "company" terminology is not used. Nor is the previous term "simplified business entity" used.[15] Instead, this guide describes a new entity: the "UNCITRAL Limited Liability Organization" (the "UNLLO"). Like all aspects of this draft text, use of this term is of course subject to the approval of the Working Group, but it is suggested that the term be adopted on an interim basis as a reminder of the innovative and independent goal to which the Working Group aspires.

23. Similarly, this draft text has dispensed with other corporate-related terminology in favour of more neutral terms. As previously agreed by the Working Group, the term "members" (and not "shareholders")[16] is used to describe the owners of the UNLLO, and a member's interest in the UNLLO is referred to as "ownership" or "interest" (and not "shares").[17] In addition, non-corporate terminology has also been chosen by describing as "formation information" the set of data that must be submitted upon the formation of an UNLLO and will largely be made public. The rules agreed by the members for the operation of the UNLLO, which will not generally be publicly disclosed, are referred to as the "members' agreement".[18]

24. The UNLLO approach in this draft legislative guide has been taken in an effort to fulfil each of the desired goals and considerations outlined above.[19] In addition, this text is intended to include all of the business law concepts considered by the Working Group to date, using them to create an innovative but informed legal business form based upon the actual needs of MSMEs in emerging markets.

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[14] Note by the UNCITRAL Secretariat, A/CN.9/780, para. 10.

[15] The Working Group may wish to recall its previous discussions on what might be the best and most neutral term for the business entity being created. Although there was support for the use of the term "simplified business entity", a view was expressed that the phrase "simplified company" should be used, and the Working Group agreed to use the former term in the draft model law but to place it in square brackets (see para. 68, A/CN.9/825; and paras. and 38, A/CN.9/831.

[16] The Working Group agreed at its twenty-sixth session (New York, April 2016) that the term "share" should be replaced with an alternative and more neutral term (see para. 25, A/CN.9/866).

[17] The Working Group agreed at its twenty-fourth session (New York, April 2015) to use the term "member" rather than "shareholder", since it was thought to be more system-neutral and inclusive (see para. 48, A/CN.9/831).

[18] Although the terms "formation document" and "operating document" were chosen as neutral terms in previous iterations of the materials before the Working Group, concern was expressed since the legal regime in some States did not recognize two separate documents that corresponded to the functions as indicated. The Working Group agreed that the important feature to be preserved in a future iteration was not necessarily regarding the terminology, but rather in respect of the contents or information contained therein and which aspects of that information would be made public (see para. 39 and 68, A/CN.9/831).

[19] This draft legislative guide also takes into account those considerations said by some delegations to be key (see para. 66, A/CN.9/825 and para. 2, A/CN.9/WG.I/WP.89) including:
(i) permitting the simplified business entity to have one or more members; (ii) providing for full-fledged limited liability; (iii) establishing simple registration (see the draft legislative guide on business registration currently under preparation by the Working Group) and formation requirements; (iv) enabling maximum freedom of contract for members while establishing clear default rules to fill any gaps in rule-making; (v) providing for a flexible organizational structure; (vi) making minimum capital optional; (vii) not requiring a statement of the entity's purpose; (viii) permitting the optional use of intermediaries; (ix) providing for fiscal transparency and simplified accounting; and (x) building on the presumption that a ready-made business form statute should focus on the needs of the smallest entities first (the "think small first" principle).

II. Draft legislative guide on an UNCITRAL Limited Liability Organization (UNLLO)

A. General Provisions

25. As noted above, the approach taken in this draft legislative guide on an UNLLO is to create a legal business form that does not depend for its establishment, definition or operation on the existing law in an enacting State. Instead, the UNLLO is intended to be a distinct product of independent legislation whose preparation is guided by the recommendations in this draft legislative guide, and which is not specifically linked to any existing legislation in the enacting State.[20]

26. Although the legal forms for privately held businesses may vary from State to State, one of their main hallmarks could be said to be to function as independently as possible from the strict rules that govern public companies. For example, privately held businesses tend to have specific relief from the rules governing public companies including: simpler formation rules; nominal or no minimum capital requirement; greater freedom of contract; and fewer disclosure requirements.[21]

27. The main focus of legislative reforms to assist the creation of privately held business entities to date has been on the creation of 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.[22] By way of this legislative guide, the UNLLO can now be added to this list. This flexibility in business form has been achieved in part by allowing the members of the business to agree through contractual mechanisms on the internal governance of the enterprise, to contract around the more superfluous and cumbersome protective requirements traditionally associated with public companies, and to tailor rights and duties that are more consistent with the needs of privately 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, as well as default provisions to fill any gaps in their agreement.[23]

28. The Working Group has agreed in principle that freedom of contract should be a guiding principle in establishing the internal organization of the UNLLO.[24] In recognition of the importance of freedom of contract for such privately held businesses, the operation of the UNLLO is governed to as great an extent as possible by the contractual agreement reached by its members, except in cases where the legislation establishing the UNLLO is mandatory and cannot be contracted out of by agreement. Of course, in the case where an UNLLO has only one member, this agreement will be a reflection of the will of the single member of the UNLLO. The contractual agreement between the members of the UNLLO is referred to in this text as the "members' agreement".

29. In addition to offering broad flexibility and freedom of contract in establishing the internal governance of the enterprise, the provisions establishing the UNLLO as

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[20] It will be recalled that this draft legislative guide takes an informed but innovative approach, first assessing the real needs of MSMEs in their economic context and then applying principles learned from existing domestic legal business forms to create an innovative and independent approach to satisfy those particular needs. This approach includes a movement away from more traditional, hierarchical and formal corporate governance structures to a more flexible and responsive regime so as to meet the needs and expectations of MSMEs, particularly in developing economies.

[21] International Encyclopedia of Comparative Law, Volume XIII, Business and Private Organizations (1998), Detlev Vagts ed., Chapter 2, Limited Liability Companies and Private Companies, pp. 2 and 13.

[22] See Working Paper A/CN.9/WG.I/WP.82, paras. 8-11.

[23] See Working Papers A/CN.9/WG.I/WP.82, paras. 10-11 and A/CN.9/WG.I/WP.86, para. 22.

[24] In that regard, the Working Group also observed that MSMEs could find it difficult to establish such rules, and that standard forms could be useful to assist such businesses (see para. 63, A/CN.9/800 and para. 23 of A/CN.9/WG.I/WP.86). Once the Working Group has advanced its work on this draft legislative guide, it may wish to consider whether it would be useful to prepare such standard form members' agreements to assist MSMEs in this regard.

recommended in this draft legislative guide provide default provisions to fill any gaps that might exist in the rules established by the members of the UNLLO. These default rules can be particularly important for smaller or less-experienced business persons who may not foresee every eventuality required for the successful operation of the UNLLO.

30. The fact that the UNLLO is established through an independent and delinked legislative approach along with expansive freedom of contract among its members to organize the UNLLO's operations is reflected in draft recommendation 1. In addition, the fact that the operation of the UNLLO will in large part be governed by the principle of the freedom of contract of its members is reflected below (in A/CN.9/WG.I/WP.99/Add.1) in draft recommendation 11.

Recommendation 1: The law should provide that an UNCITRAL Limited Liability Organization ("UNLLO") is governed by this law and by the members' agreement, if any.

31. Draft recommendation 2 permits an UNLLO to be organized for any lawful activity. Although the UNLLO must naturally be a privately held enterprise, this legislative guide takes a very broad approach to the permitted activity of an UNLLO in order to provide maximum flexibility to the MSMEs that are anticipated will use the business form. No mention is made in this draft legislative guide in respect of general objectives clauses, since the modern trend in that respect 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 UNLLO to decide whether or not they wish to include a more restrictive purpose clause in the members' agreement.[25]

32. The Working Group may wish to note that while it previously suggested that a simplified business entity could be limited to commercial or business purposes,[26] such a narrowing of the broad scope of the UNLLO may not be warranted in a text like the present legislative guide. Although this text recommends that a very permissive approach should be taken to drafting legislation to create the UNLLO legal form, a State referring to the legislative guide in the preparation of its legislation could nonetheless decide to narrow the permitted scope of an UNLLO according to its particular policy requirements.

33. As the recommendation is currently drafted, it would permit UNLLOs to engage in a very broad range of lawful activities, which could include non-profit activities as well as activities that may not necessarily be considered business activities under the law of the State, such as the simple ownership of property.

34. States wishing to more specifically enumerate the industrial sectors or activities in which an UNLLO may participate could prohibit an UNLLO from engaging in certain regulated industries, such as in the banking, microcredit or insurance industry.[27] Similarly, for additional clarity, participation in specific activities could also be specifically permitted, and might include activities in the agricultural, artisanal and cultural sectors,[28] or participation by cooperatives and funds.[29]

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[25] The Working Group agreed at its twenty-third session (November 2014) during a discussion of whether purpose clauses were necessary that a very broad approach should be taken in this regard in order to provide maximum flexibility for MSMEs wishing to use the legal form being established (see para. 70, A/CN.9/825, para. 27 of A/CN.9/WG.I/WP.86, and para. 9 of A/CN.9/WG.I/WP.89).

[26] The Working Group suggested at a previous session that the simplified business entity be limited to a commercial privately held entity (see para. 69, A/CN.9/825), and later modified its view to suggest that the legal form should be limited to lawful "business", rather than "commercial" activity (see paras. 33, 36 and 37, A/CN.9/831).

[27] The Working Group agreed that it might be useful to establish what the scope of application of the legal text would be, for example, that it might exclude enterprises in certain highly regulated sectors (see para. 24, A/CN.9/800, para. 68, A/CN.9/825 and para. 8, A/CN.9/WG.I/WP.89).

[28] The Working Group agreed on such an inclusion at its twenty-fourth session (April 2015) (see para. 36 of A/CN.9/831).

[29] The Working Group agreed on the possibility of such an inclusion at its twenty-second (February 2014) and twenty-third (November 2014) sessions (see para. 25 of A/CN.9/800 and para. 69 of A/CN.9/825).

Recommendation 2: The law should provide that an UNLLO may be organized for any lawful activity.

35. This draft legislative guide on an UNLLO embraces the granting of legal personality in order to give clear expression to the nature of the UNLLO as a legal entity separate from its members.[30] Legal personality in this context confers upon the UNLLO the legal rights and duties necessary for it to function within a legal system, including the ability to acquire rights and assume obligations in its own name.[31]

36. Legal personality provides a means through which the UNLLO's assets can be separated from the personal assets of its members, a process which has been referred to as affirmative asset partitioning.[32] This, in turn, facilitates defensive asset partitioning by an UNLLO that has been granted limited liability and which can then protect the personal assets of the UNLLO members from exposure in the event that the UNLLO does not do well or becomes involved in legal disputes. At the same time, the distinct legal personality of the UNLLO also permits it to be shielded from potential claims by the personal creditors of its members.

37. Legal personality and limited liability protection (see draft recommendation 4) provide a convenient legal mechanism for the UNLLO to separate its assets from the personal assets of its members. However, it should be noted that, in some States, there are legislative models that permit the separation of business assets of an entity from the personal assets of its members without resort to legal personality and limited liability, thus providing the benefits of asset partitioning for MSMEs and their members by way of a legal structure that stops short of full limited liability and legal personality.[33]

38. It should be noted that this draft legislative guide does not consider domestic taxation policy in respect of the legal form of an UNLLO. In the interests of preparing a system-neutral legal form, such policy matters were thought best left to States drafting legislation on the basis of this guide, with the understanding that States consider their policy options in terms of how best to reduce legal obstacles for UNLLOs, and MSMEs, more generally.[34]

Recommendation 3: The law should provide that the UNLLO has a legal personality.

39. Limited liability is a legal concept that permits entrepreneurs to take business risks without fear that their personal assets will be jeopardized in case of failure. This is important both for the protection of the members of the organization and for the promotion of innovation and business creation. However, many MSMEs do not currently enjoy the benefits of limited liability protection. As such, and in order to offer that important and attractive feature to such economic actors, the legislative

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[30] At its twenty-second session (February 2014), the Working Group expressed general support for the view that limited liability and legal personality offered MSMEs important advantages in doing business and that it was important to provide access to these advantages to such enterprises (see para. 28, A/CN.9/800 and para. 69, A/CN.9/800). Legal personality was also considered by the Working Group at its twenty-third (November 2014) and twenty-fourth (April 2015) sessions (see para. 10 of A/CN.9/WG.I/WP.89, para. 72 of A/CN.9/825 and paras. 42-49 of A/CN.9/831), including key aspects that should be included in the concept of legal personality.

[31] The concept of legal personality of the entity has also been variously described as including the power to do all things necessary or convenient to carry on its activities, the ability to acquire and hold tangible or intangible assets, the ability to act through agents, and the capacity to sue and be sued in its own name.

[32] See, for example, Henry Hansmann and Reinier Kraakman, "The Essential Role of Organizational Law", 110 Yale L.J. 387 (2000) (www.yalelawjournal.org/article/the-essential-role-of-organizational-law).

[33] See, for example, the mechanisms described in paras. 47 to 49 of A/CN.9/WG.I/WP.92, as reported to the Working Group in A/CN.9/WG.I/WP.87, and referred to in para. 29 of A/CN.9/800, paras. 56 to 61 of A/CN.9/825 and para. 20 of A/CN.9/831. An additional such legislative mechanism is described in A/CN.9/WG.I/WP.94.

[34] The Working Group was encouraged at its twenty-fourth session (New York, April 2015) to avoid an overemphasis on tax-related issues and focus on developing a system-neutral legal instrument, and it was suggested that although tax issues need not be directly addressed in the draft text, they should be noted in the commentary (see paras. 18 and 50, A/CN.9/831).

regime establishing the UNLLO offers limited liability protection to UNLLO members.[35]

40. The presence of such a liability shield generally prevents the members of an UNLLO from incurring direct or indirect personal liability as a result of the activities of the UNLLO. In effect, the financial liability of a member of the UNLLO is limited to a fixed sum, usually the value of the member's contribution to the UNLLO. Limited liability plays an important role to assist MSMEs in that it provides the members of an UNLLO with a convenient means for defensive asset partitioning, separating a member's personal assets from those owned by the UNLLO, thus protecting a member's personal assets from exposure in the event that the business does not thrive or becomes involved in legal disputes. In addition, as noted above, limited liability of members and distinct legal personality of the organization often go hand in hand (see draft recommendation 3). Granting both attributes to the UNLLO will assist in promoting the stability of the organization and access by it to lower cost credit.

41. Of course, the UNLLO itself has unlimited liability to its creditors and all of the assets of the UNLLO are available to satisfy those claims. In addition, it is important to note that the limitation on the liability of the member for the obligations of the UNLLO refers to liability that results solely from that person's status as a member of the UNLLO. Members of the UNLLO may still have personal liability (including tort liability), or liability to other members of the UNLLO, or for example, a member may be liable for a personal guarantee that has been undertaken in respect of the obligations of the UNLLO.

42. Draft recommendation 4 establishes the default rule that members of the UNLLO will enjoy limited liability for the obligations of the UNLLO in the ordinary course of business. It would also be possible under the draft recommendation for members to agree in the members' agreement that one or more of them would forego the limited liability protection offered by the default rule, or that a member's limited liability for the losses of the UNLLO would be greater than the value of that member's contribution.

43. Of course, it will remain open for courts to lift the limited liability protection of an UNLLO ("piercing the corporate veil") and impose personal liability on members and managers in cases of fraud or other wrongful acts done in the name of the UNLLO.[36] Such an abuse of the UNLLO legal form could arise, for example, where a member makes use of UNLLO assets as though they were that member's personal assets.

Recommendation 4: The law should provide that, unless otherwise agreed,[37] a member is not liable for any obligation of the UNLLO solely by reason of being a member of that UNLLO.

44. Some States maintain the view that a minimum capital requirement is a reasonable quid pro quo for members of a privately held business to receive the benefit of limited liability protection. However, even such States have in many instances dramatically reduced minimum capital requirements for privately held businesses to nominal or initially low but progressively increasing sums. There was agreement in the Working Group that the modern trend in simplified business forms

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[35] As agreed by the Working Group at its previous sessions (paras. 25, 28 to 30, A/CN.9/800; paras. 51, 69 and 71, A/CN.9/825; paras. 51 to 60, A/CN.9/831).

[36] See, also, para. 45(e) in relation to draft recommendation 5, as well as draft recommendations 14, 20 and 21.

[37] If the Working Group is of the view that the draft recommendation would be clearer if these two concepts were separated from each other (see also the discussion of the Working Group reflected in para. 52 of A/CN.9/831), the draft recommendation could appear in two parts as follows:

"Recommendation 4.1: The law should provide that a member is not personally liable for the obligations of the UNLLO solely by reason of being a member of the UNLLO."

"Recommendation 4.2: The law should provide that members may agree that one or more members will be personally liable for the obligations of the UNLLO in the circumstances specified in the members' agreement."

is that a minimum capital requirement is not typically required, or if it is required, it is only for a nominal amount, thus reducing the initial financial burden on smaller entrepreneurs wishing to create legally recognized businesses.[38] Since the minimum capital required to create such a business is often one of the most expensive considerations for new businesses, its elimination or reduction may be expected to be one factor that can positively affect the rate of establishment of legally recognized business entities.[39]

45. Moreover, the Working Group agreed that the issue of minimum capital requirements should be dealt with in the context of general mechanisms for the protection of creditors and other third parties dealing with the UNLLO.[40] The more important of such mechanisms are included in this draft legislative guide as mandatory rules, while others may be found elsewhere in a State's legislative framework. These mechanisms include:[41]

(a) Making members of the UNLLO liable for improper distributions and obliging them to repay the UNLLO for any such distributions (see draft recommendations 20 and 21, which are mandatory rules);

(b) Prescribing standards of conduct including good faith and fiduciary responsibilities (see draft recommendation 14, which is a mandatory rule);

(c) Requiring transparency and accessibility in the keeping and sharing of UNLLO records and information (see recommendations 26 and 27, which are mandatory rules);

(d) Requiring that the entity's business name contain an indicator of its limited liability status (for example, "UNLLO") and that its name be set out in contracts, invoices and other dealings with third parties (see draft recommendation 6, which is a mandatory rule);

(e) Permitting exceptions to the limited liability protection of members of the UNLLO in certain circumstances (a rule on "piercing the corporate veil" is a judicial remedy in respect of corporations that is available in some States but that should not necessarily be imported in respect of the UNLLO, where it might better be characterized in terms of mandatory rules prohibiting a member's abuse of the UNLLO legal form; such mandatory rules are found in draft recommendations 14, 20 and 21);[42]

(f) Establishing requirements in respect of the transparency, quality and public availability of registered information on the UNLLO and its managers (this could be expected to be a function of the business registry law of a State and recommendations in this respect are included in the draft legislative guide on business registration, also under preparation by this Working Group);

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[38] See paras. 51 to 54 of A/CN.9/800 and paras. 56 and 75 to 76 of A/CN.9/825. 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 become legally recognized, 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] See para. 30, A/CN.9/WG.I/WP.86.

[40] See paras. 55 to 59 of A/CN.9/800 and paras. 77 to 78 of A/CN.9/825.

[41] See the general discussion of these issues by the Working Group in paragraph 32 of A/CN.9/WG.I/WP.86 and paragraphs 77 to 78 of A/CN.9/825.

[42] The Working Group may also wish to recall that it has previously considered the issue of "piercing the corporate veil", reaching general agreement 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 the establishment of standards on it to enacting States." (paras. 56 and 58, A/CN.9/831). In any event, courts may still "pierce the corporate veil" under State law if the UNLLO legal form is abused by its members, and such a tool need not be specifically inserted into the text of the draft legislative guide.

(g) Establishing a supervisory role for commercial registries or specialized agencies (this could also be expected to be a function of the business registry law of the State);

(h) Establishing credit bureaux (this would be a policy decision of the State); and

(i) Requiring corporate governance oversight (this would be a policy decision of the State).

46. In keeping with the nature of the UNLLO as a mechanism to assist MSMEs, as well as the modern trend away from minimum capital requirements and the inclusion of other mechanisms to protect third parties dealing with the UNLLO, this draft legislative guide does not contain a minimum capital requirement for the establishment of an UNLLO. As noted above, the main mechanisms included in the draft legislative guide to provide protection to third parties dealing with the UNLLO is found by way of the mandatory rules in draft recommendations 6, 14, 20, 21, 26 and 27, as outlined in subparagraphs 45 (a) to (e) above.[43]

47. Should a State's policy considerations necessitate the imposition of a minimum capital requirement, even of a nominal or progressively increasing amount, it is not recommended that that requirement be placed on the UNLLO. Instead, such a State may consider other mechanisms, such as the establishment of a maximum size (for example, based upon the number of employees) or level of profitability of the UNLLO, which would then be required to convert to another legal form (of which the State might require minimum capital) upon exceeding that maximum. It should be cautioned, however, that such an approach could unnecessarily restrict the growth of UNLLOs.

Recommendation 5: The law should not contain a minimum capital requirement for the formation of an UNLLO.

48. In order to signal to third parties dealing with the UNLLO that its members, by definition, enjoy limited liability protection (as well as the other features associated with being an UNLLO), the law should require that the name of the UNLLO must include a phrase or abbreviation (such as "UNLLO") that would enable it to be distinguished from other types of business entity.[44] The use of the same or a similar phrase or abbreviation in different States would assist UNLLOs engaging in cross-border trade in that the defining characteristics of the entity would be immediately known upon recognition of the phrase or abbreviation, even in the cross-border context. Since the UNLLO legal form is intended as an innovative legal form specifically tailored to MSMEs and existing independently from a State's existing laws on business associations,[45] the choice of an appropriate identifying phrase or abbreviation need not be dependent on the local legal context. As such, it may be possible and appropriate for the Working Group to agree on a suggested unified term to be used for the identification of the UNLLO.

49. While some States may wish to require the UNLLO to use its distinctive phrase or abbreviation in all correspondence with third parties in order to signal to those parties the UNLLO's limited liability, specifying in the UNLLO legislation that a failure to do so would result in a sanction such as denial of the benefit of limited liability protection might be too harsh a penalty to impose on MSMEs. Instead, States may wish to encourage the UNLLO to use its distinctive phrase or abbreviation in all correspondence in order to enhance legal certainty, but not make it mandatory so as to avoid creating an additional burden on the UNLLO by potentially increasing its administrative costs of compliance and verification.[46] Practically speaking, since the

[43] See also para. 16 of A/CN.9/WG.I/WP.89.

[44] The Working Group agreed on this approach at its previous sessions (see para. 69, A/CN.9/825 and paras. 61 to 63, A/CN.9/831).

[45] As generally agreed upon by the Working Group at its twenty-fourth session (New York, April 2015) (see para. 54, A/CN.9/831).

[46] As agreed by the Working Group at its twenty-fourth session (New York, April 2015) (see para. 62, A/CN.9/831).

distinctive phrase or abbreviation forms part of the name of the UNLLO, it would likely be included in all correspondence involving the UNLLO, in any event.

50. In terms of the name chosen for the UNLLO, some States provide for or require prior registration (and approval) of company names to enable the appropriate commercial registry or other body administering business associations under its law to prevent the proposed name of the UNLLO from conflicting or being confused with the name of another entity or existing trade names.[47]

51. While States may continue to follow the approach of requiring advance reservation of the name of the UNLLO, it should be noted that many of the UNLLOs that will be established will be MSMEs, and care should be taken that such name reservation requirements do not inadvertently create additional hurdles for such enterprises. Further, name reservation may be dealt with by the State's business registration regulations rather than in the UNLLO law itself.

52. States usually also require that the name of a business be sufficiently distinguishable from other business entities. States may wish to include a provision permitting authorities to authorize the use of an UNLLO name that is similar to or even indistinguishable from that of another business entity; this approach may best be understood in the context of MSMEs, 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.[48] States should, of course, make their own policy choices in respect of how best to determine whether the name of an UNLLO is sufficiently distinguishable for that State's particular context and taking into account the resources required and available to ensure that there is compliance with the State's name requirements.[49]

Recommendation 6: The law should provide that the name of the UNLLO must include a phrase or abbreviation that identifies it as an UNLLO.

B. Formation of the UNLLO

53. In order to accommodate the creation of an UNLLO by a sole member, including by an individual entrepreneur engaged in relatively simple business activities, and to permit the UNLLO legal form to evolve from a very small single member model to a more complex multi-member entity,[50] this draft legislative guide takes a flexible approach and recommends that the law should permit an UNLLO to be established and operated with a single member or with multiple members. Moreover, in keeping with the view expressed by the Working Group, a member of an UNLLO may be any legal or natural person.[51] As an additional feature to enhance the flexibility of the UNLLO, draft recommendation 7 does not specify a maximum number of members for the UNLLO.[52]

54. It should be noted that should a State have strong policy considerations that require it to specify that an UNLLO may have a maximum number of members, or that a legal person may not be a member of an UNLLO, these restrictions should be made clear in the legislation.

55. In addition, the requirement that an UNLLO must have at least one member throughout its life cycle is in line with this draft legislative guide's objective of simplicity, as well as with making the UNLLO transparent and accountable. Indeed, requiring that an UNLLO have at least one member at all times may help prevent the

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[47] See para. 13 of A/CN.9/WG.I/WP.86/Add.1 and para. 17 of A/CN.9/WG.I/WP.89.

[48] See para. 19 of A/CN.9/WG.I/WP.89.

[49] As agreed by the Working Group at its twenty-fourth session (New York, April 2015) (see para. 63, A/CN.9/831).

[50] As agreed by the Working Group at its previous sessions (see paras. 24, 32 and 42 to 43 of A/CN.9/800, paras. 67 and 74 of A/CN.9/825, and para. 19 of A/CN.9/831).

[51] As agreed by the Working Group at its twenty-fourth session (New York, April 2015) (see para. 64, A/CN.9/831).

[52] See also para. 20 of A/CN.9/WG.I/WP.89.

creation of organizations without active business operations or assets ("shell" organizations) and make transparency and accountability requirements more easily enforceable (see draft recommendation 9).

Recommendation 7: The law should provide that the UNLLO must have at least one member from the time of its formation until its dissolution, and that any person may be a member of the UNLLO.

56. In order to provide legal certainty as to when the UNLLO comes into existence, this draft legislative guide recommends that the law should specify the time of formation of the UNLLO.[53]

57. The draft legislative guide on business registration (also under preparation by the Working Group) considers inter alia the optimal approach for the registration of all businesses, including for an UNLLO.[54] Consequently, this draft legislative guide takes the view that, outside of the specific information required for the valid registration of an UNLLO (see draft recommendation 9), matters relating to the operation of the business registry should be dealt with by legislation prepared on the basis of the dedicated legislative guide on business registration.

58. Regardless of whether an UNLLO is registered using an electronic, paper-based or mixed business registration system, upon fulfilling the necessary requirements, the UNLLO will receive a notice of registration from the designated State authority. The State may choose at which specific time the UNLLO is formed, but in keeping with the view expressed by the Working Group,[55] the State may wish to specify that the time of formation of the UNLLO is at the moment of issuance of the notice of the UNLLO's registration. In order to accommodate the simple nature of the UNLLO, and in keeping with the recommendations of the draft legislative guide on business registration, issuance of the notice of registration should be as fast and as streamlined as possible.

59. In States that do not adhere to the declaratory system of business registration, formation of the UNLLO is coupled with a review of the formal correctness of the formation information as overseen by judicial authorities, an administrative agency or an intermediary,[56] and a notice of registration of the UNLLO could be expected to be issued following that review.[57] While these issues are discussed in greater detail in the draft legislative guide on business registration, they would not affect the recommendation in this draft legislative guide that the law should specify the time of formation of the UNLLO. In effect, regardless of whether or not a State uses a declaratory system of business registration, the most appropriate time of formation is likely to be at the moment of issuance of the UNLLO's notice of registration.

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[53] The Working Group may wish to note that this draft legislative guide also, of course, deals with the dissolution and winding-up of an UNLLO in draft recommendation 24.

[54] As a consequence, discussion and recommendations on certain business registration issues referred to by the Working Group (for example, using electronic means for registration and providing a single interface for business registration and intergovernmental and cross-border collaboration and information-sharing, see paras. 26 to 27, A/CN.9/800; in respect of keeping delays in the issuance of the notice of registration to a minimum and avoiding arbitrary rejection of an application for formation of a business entity, see para. 65 of A/CN.9/831) are contained in the draft legislative guide on business registration and are not repeated in this draft legislative guide.

[55] As agreed by the Working Group at its twenty-fourth session (New York, April 2015) (see para. 65, A/CN.9/831).

[56] See para. 20 of A/CN.9/WG.I/WP.89.

[57] For further discussion of this issue by the Working Group at its twenty-fourth session (New York, April 2015), see para. 67, A/CN.9/831, which also notes that a business would not be permitted to begin operations until it had obtained the necessary licences, but that such considerations were not related to the legal formation of the business entity.

Recommendation 8: The law should specify the time of formation of the UNLLO.

60. In this draft legislative guide, the "formation information"[58] refers to the whole of the electronic, paper-based or mixed media information that must be submitted to the designated State authority in order to create the UNLLO.

61. States typically require different types and amounts of information to be submitted for the valid formation of a legal business entity usually dependent on the type of business entity being created. In a reflection of the intended simplicity of the UNLLO, this draft legislative guide reduces the required information for its formation to the minimum information necessary for the establishment and operation of the UNLLO, as well as the protection of third parties dealing with it. In addition, draft recommendation 9 respects the principle that it should be as simple as possible for an MSME or individual entrepreneur to provide the information required so as to avoid creating unnecessary burdens and to encourage compliance with the law.[59] Keeping the information required for formation of business entities (including the UNLLO) as current as possible[60] is a matter that is dealt with in some detail in the draft legislative guide on business registration.

62. Paragraph (a) of draft recommendation 9 sets out the information[61] that must be submitted for the formation of the UNLLO and that will be made public by the designated State authority, usually through publication on the State's business register.[62] That information must include the name of the UNLLO as well as its business address. In some cases, where the business does not have a standard form address, a precise description of the geographic location of the business should be inserted instead of the business address. In any event, the business address or geographic location of the UNLLO would be used for service or mailing purposes. The formation information should also include a statement of whether the UNLLO is managed by its member or members ("member-managed"), which may be expected to be the case in most instances, or whether it is to be managed by a designated manager or managers ("manager-managed").[63]

63. The final piece of mandatory information that must be provided for formation of the UNLLO and which will be publicly available is the name of each manager. It is important to disclose this information in order to provide protection for third parties since the manager is the person with legal authority to bind the UNLLO in its dealings with such parties (see also draft recommendation 15, which establishes that each publicly disclosed manager has individual authority to bind the UNLLO).[64] If the business is member-managed, the name of each member must be included; if the business is manager-managed, the name of each designated manager must be included. It should be noted that the term "manager" as used in this draft legislative guide includes both a member-manager and a manager-manager. Further, information on the residential address of each manager is not required; the rationale for this is that public availability of the residential address of a manager may present a risk to

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[58] The term "formation information" has replaced the previous term "formation document" (see para. 39 and 68, A/CN.9/831) used in the draft texts that the Working Group has considered to date (A/CN.9/WG.I/WP.86/Add.1 and A/CN.9/WG.I/WP.89).

[59] The Working Group reached agreement on this point at its twenty-fourth session (New York, April 2015) (see para. 69, A/CN.9/831).

[60] See the discussion of the Working Group on this issue at para. 73 of A/CN.9/831.

[61] At its twenty-fourth session (New York, April 2015), the Working Group did not come to an agreement on what information should be mandatory and what should be publicly disclosed, but it considered a number of the items of information now found in draft recommendation 9 (see paras. 23 to 27 and 68 to 75, A/CN.9/831).

[62] These and other issues relating to the business register are dealt with in the draft legislative guide on business registration, also under preparation by the Working Group.

[63] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 84(b), A/CN.9/860).

[64] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 83, A/CN.9/860).

personal safety and is not essential to fulfil the objective of protection of third parties.[65]

64. It is thought that the mandatory information set out in paragraph (a) of draft recommendation 9 strikes an appropriate regulatory balance. Because the formation information required pursuant to paragraph (a) is made public, it should provide sufficient legal and commercial certainty for the State and for the protection of third parties dealing with the UNLLO. In addition, because the required information is kept to the minimum necessary, providing it should not be overly burdensome on the MSME or individual entrepreneur that is seeking to form an UNLLO.

65. Paragraph (b) of the draft recommendation sets out the information that must be submitted for the formation of the UNLLO but which will not be made public by the designated State authority, that is, the name and address of each member of the UNLLO. It should be noted that if the UNLLO is member-managed, the list of names of its members will also be the list of its managers, and, as such, that list of members' names only (not including their addresses) will be made public pursuant to paragraph (a). Requiring the UNLLO to submit the names and addresses of its members, but not necessarily to disclose them publicly, fulfils an important role in providing transparency to State authorities in terms of the beneficial ownership of the UNLLO.

66. This approach to the information that an UNLLO must provide to State authorities would be expected to meet the requirements of the international standards on beneficial ownership, and in fact, likely exceeds them in requiring that a list of the names and addresses of members of the UNLLO be submitted to State authorities (but not necessarily be made public, unless the UNLLO is member-managed, in which case only the names of the members would be publicly disclosed). The information requirements in this draft legislative guide[66] should thus assuage any concerns that the UNLLO legal form could be misused for illicit purposes, including money-laundering and terrorist financing.[67]

67. It should also be noted that draft recommendation 9 establishes the minimum mandatory information that must be submitted to State authorities in order to form an UNLLO. Of course, it is open to the UNLLO to include in its formation information any additional information it deems appropriate for inclusion and public disclosure.[68]

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[65] See para. 24 of A/CN.9/WG.I/WP.89.

[66] See, also, draft recommendations 26 and 27 on record-keeping, inspection and disclosure of UNLLO information to its members.

[67] Financial Action Task Force (FATF) Recommendation 24 in respect of transparency and beneficial ownership of legal persons encourages States to conduct comprehensive risk assessments of legal persons and to ensure that all companies are registered in a publicly available company registry. The basic information required is: (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 (f) a list of directors. In addition, companies are required to keep a record of their shareholders or members. (See 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). In addition, it should be recalled that business entities, in order to conduct activities, usually must 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. For consideration of these issues by the Working Group, see paras. 27 and 41 of A/CN.9/800 and paras. 47 to 55 of A/CN.9/825, as well as information contained in paras. 26 to 32 of A/CN.9/WG.I/WP.82 and paras. 21 and 26 of A/CN.9/WG.I/WP.89.

[68] This approach is in keeping with the view of the Working Group expressed at its twenty-fourth session (New York, April 2015) (see para. 74, A/CN.9/831). See, also, the discussion below in respect of the additional information that an UNLLO might wish to disclose in order to access credit or attract investors, but should not be required to disclose (see, infra, footnote 38, A/CN.9/WG.I/WP.99/Add.1).

Recommendation 9: The law should provide that only the following information is required for valid formation of the UNLLO:

(a) Information that will be made public:

(i) The name of the UNLLO;

(ii) The business address or precise geographical location of the UNLLO;

(iii) A statement of whether the UNLLO is member-managed or manager-managed; and

(iv) The name of each manager;[69] **and**

(b) Information that will not be made public: the name and address of each member.

68. In order to ensure that the formation information of the UNLLO is kept as current as possible,[70] the law should permit each manager to make any necessary amendment to it. While, of course, the business registry law in the State will contain provisions on any requirements for the amendment of the formation information, managers will have an incentive to keep at least the public information of the UNLLO current so as to avoid potentially misleading third parties dealing with the UNLLO. Further, in the case of member-managed UNLLOs, draft recommendation 10 means, of course, that each member has the authority to amend the formation information.

Recommendation 10: The law should provide that the formation information may be amended by any manager, unless otherwise agreed by the members.

[69] Of course, the term "manager" in this draft legislative guide refers to both a member-manager and a manager-manager.

[70] See, also, supra, para. 61, which notes that the draft legislative guide on business registration (under preparation) deals in some detail with the techniques that may be used to keep the business registry as current as possible, without unduly burdening MSMEs or single entrepreneurs.

(A/CN.9/WG.I/WP.99/Add.1) (Original: English)

Note by the Secretariat on a draft legislative guide on an UNCITRAL Limited Liability Organization

ADDENDUM

Contents

II. Draft legislative guide on an UNCITRAL Limited Liability Organisation (UNLLO) (*continued*)

C. Organization of the UNLLO

1. As noted above (in A/CN.9/WG.I/WP.99) in respect of draft recommendation 1,[1] the Working Group has agreed in principle that freedom of contract should be the guiding principle in establishing the internal organization of the UNLLO.[2] As a consequence of that principle, the operation of the UNLLO is governed by the agreement of its members, except for those cases in which the law is mandatory and cannot be modified by member agreement. The agreement between the members of the UNLLO is referred to in this text as the "members' agreement."[3] Where an UNLLO has only one member, the member's agreement will reflect the will of the single member, and may also be oral, in writing or by conduct. When the members' agreement is silent on a non-mandatory issue, resort is had to the default rules in this draft legislative guide in order to fill any rule-making gap.

2. The members' agreement refers to the written or oral agreement among the members of the UNLLO, or an agreement that is established through a course of conduct, that governs the affairs of the UNLLO and the relationships of its members

[1] See, supra, paras. 27-28, A/CN.9/WG.I/WP.99.

[2] Again, as noted above (see, supra, note 24, A/CN.9/WG.I/WP.99), the Working Group also observed that standard forms could be useful to assist MSMEs that might find it difficult to establish rules by agreement (see para. 63, A/CN.9/800 and para. 23 of A/CN.9/WG.I/WP.86). Once the Working Group has advanced its work on this draft legislative guide, it may wish to consider whether it would be useful to prepare standard form members' agreements to assist MSMEs in this regard.

[3] The term "members' agreement" has replaced the previous term "operating document" (see paras. 39 and 68, A/CN.9/831) used in the draft texts that the Working Group has considered to date (A/CN.9/WG.I/WP.86/Add.1 and A/CN.9/WG.I/WP.89).

with each other. The broad flexibility permitted for the form of the members' agreement recognises that in the case of many MSMEs, there may be no formal written agreement at all, and that, in such cases, members should be able to rely on oral agreements and agreement by conduct.[4] It should be cautioned, however, that it may be in the best interests of members to have a written agreement, since oral members' agreements or agreements by conduct are more difficult to prove should there be a dispute.

3. This draft legislative guide does not require that an UNLLO members' agreement be made public, but instead requires sufficient information about the UNLLO to be disclosed in the formation information in order to provide adequate protection to third parties. In addition, this approach protects the privacy of members (unless they are also managers, in which case only their names will be made public) and adds to the ease of the UNLLO's operations by avoiding the need to file amendments with the business registration authorities each time a change is made to the members' agreement.[5]

4. The list of mandatory recommendations that cannot be contracted out of by members in their agreement is included in this draft recommendation. The rules that are mandatory are those that establish the necessary legal framework of the UNLLO and provide legal certainty, or that are necessary to protect the rights of the UNLLO and of third parties dealing with the UNLLO.

Recommendation 11: The law should provide that the members of the UNLLO may adopt a members' agreement in any form, including an agreement that is written, oral or established by way of conduct. The members may agree in their members' agreement on any matter relating to the UNLLO, except in respect of the mandatory rules set out in recommendations 1, 2, 3, 6, 7, 8, 9, 14, 15, 20, 21, 24(c), 26 and 27.

5. The organization of the UNLLO is based on simple default rules that offer a clear solution for the problems that may occur in multi-member privately held companies in which the composition of the entity's membership is likely to be an important characteristic. This is due to the fact that an UNLLO will likely have a relatively small number of members who will have substantial participation in the management and operation of the UNLLO.

6. A professional manager approach (which is common, of course, in public companies) may be poorly tailored to fit the governance needs of many privately held firms, particularly when they are micro and small enterprises, and, as noted above, where members most often take on management roles as well. Draft recommendation 12 thus makes a member-managed UNLLO (i.e. decentralized management) the default approach. Since draft recommendation 13(a) sets out the default rule that the members of an UNLLO have equal rights to manage it, the default rule in draft recommendation 12 that the UNLLO is member-managed means that it is managed by all members.

7. Draft recommendation 12 also permits the members to agree that the UNLLO will be manager-managed (i.e. centralised management), in which case one or more managers will be elected by the members in accordance with the members' agreement (see draft recommendation 16), and those managers will take on the management of the regular operations of the UNLLO.

8. Where there is only one member of an UNLLO, that member will be the manager, unless the member appoints a manager.

Recommendation 12: The law should provide that the UNLLO is member-managed by all members, unless otherwise agreed.

9. When the UNLLO is member-managed, its member-managers will have joint and equal management and control rights, unless they agree otherwise in the

[4] The Working Group has made reference to the likelihood of such oral agreements in the past (see para. 52, A/CN.9/831).

[5] See also para. 12, A/CN.9/WG.I/WP.89.

members' agreement. This is also reflected in draft recommendation 15 below, which grants each publicly disclosed manager the authority to bind the UNLLO in its dealings with third parties.[6]

10. Further, unless there is agreement to the contrary, matters that arise in the ordinary course of business of the UNLLO will be decided by a simple majority of its members, and decisions that are outside of the ordinary course of business of the UNLLO would require the unanimous approval of its members. Decisions outside of the ordinary course of business would include decisions such as those relating to dissolution and winding-up of the UNLLO, to its conversion to another business form, or to changing its organization from a member-managed to a manager-managed model, or vice versa.[7] This default approach to member-management of the UNLLO is reflected in draft recommendation 13.

11. This draft legislative guide takes the view that it is unnecessary for the UNLLO legislation to specify every aspect of the UNLLO's operations, and instead leaves it to members to decide in their members' agreement on the details concerning the management of the UNLLO. In order to manage the UNLLO fairly, effectively and transparently, members may wish to agree in the members' agreement on rules in respect of the following issues:[8]

(a) That as is reasonable in the circumstances, timely records should be kept of the members' decisions, both inside and outside of the ordinary course of business of the UNLLO, as well as the form in which those records should be maintained;[9]

(b) Any requirement in respect of members' meetings, including their frequency and location, as well as any limitation thereon;

(c) Any requirement in terms of who can call a members' meeting;

(d) The conduct of members' meetings, including whether they may be held by technological means or by written consent;

(e) Any notice period required prior to the holding of a members' meeting;

(f) In what form any required notice of the members' meeting should be provided (for example, in writing or in any other form), and what information (if any) should be attached to the notice (for example, the UNLLO's financial information);

(g) Whether waiver of any required notice is permitted and what form that waiver may take; and

(h) Any decisions that would require a majority that differs from the default rule of simple majority for decisions in the ordinary course of business or unanimity for decisions outside of the ordinary course of business of the UNLLO.

Recommendation 13: The law should provide that, unless otherwise agreed:

(a) The members of the UNLLO have equal rights to manage the UNLLO;

(b) Any difference arising between members as to matters in the ordinary course of the activities and affairs of the UNLLO shall be decided by simple majority; and

(c) Any difference arising between members as to matters outside of the ordinary course of the activities and affairs of the UNLLO shall require unanimous consent.

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[6] Permitting members to vary their equal management rights will not adversely affect third parties, since the UNLLO will be bound by any decision by a publicly disclosed manager (see draft recommendations 9 and 15).

[7] See, also, para. 21 of A/CN.9/WG.I/WP.82.

[8] As agreed by the Working Group at its twenty-sixth session (New York, April 2016) (paras. 39 to 47, A/CN.9/866).

[9] As agreed by the Working Group at its twenty-sixth session (New York, April 2016) (para. 44, A/CN.9/866). For additional detail or the form in which such records should be maintained, see paras. 56-57 and draft recommendation 26 below.

D. Managers

12. Fiduciary duties tend to be broad standards of performance that reduce the risk of a member or a manager acting opportunistically, and encourage that person to act instead in favour of promoting the welfare of the UNLLO, and, indirectly, its members. Such duties may be separated into: (1) a duty of care; (2) a duty of loyalty, including a duty to refrain from self-dealing transactions, personal use of business assets, usurpation of enterprise opportunities, and competition with the UNLLO; (3) a duty to disclose information; and (4) a duty of good faith and fair dealing. The inclusion of such duties tend to be a standard feature of business associations law; for example, fiduciary duties are found in each of the simplified corporate forms examined by the Working Group when it first took up its mandate.[10]

13. Fiduciary duties offer protection against a manager's pursuit of personal interest and any excessively negligent behaviour on their part. However, fiduciary duties cannot be used to discipline managers in the performance of their official duties and thus subject their business judgement to criticism after the fact. Members could also agree to include in their members' agreement a provision that they owe fiduciary duties to each other.

14. Since this draft legislative guide is built on the premise that freedom of contract should to a large extent govern the internal governance structure of the UNLLO, the freedom of contract principle also applies to fiduciary duties, but only to an extent: the rule establishing a manager's duties in draft recommendation 14 is mandatory and members cannot contract out of it. Members are free, however, to establish in their members' agreement that a fiduciary duty is owed to each other or that a manager must adhere to a standard that is higher than that established in draft recommendation 14.

15. Similarly, members may specify in their agreement that certain activities are permitted for managers and do not constitute a breach of the duties established in draft recommendation 14. Such agreement, however, would not include eliminating or limiting the liability of a manager: (i) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or (ii) for any transaction from which the manager derived an improper personal benefit.[11] Permitting freedom of contract of the members to this extent could be expected to be useful in the context of UNLLOs, since this approach would allow members to derogate from a rigid corporate legal framework which may not be necessary in the UNLLO context, while still requiring appropriate protection for the UNLLO, its members and third parties dealing with it.

16. While this draft legislative guide provides contractual flexibility with respect to clarifying aspects of the fiduciary duties owed, it nonetheless contains broad standards of the performance expected from a manager. The following fundamental aspects of the fiduciary duties owed by a manager are thought to be included in this legislative guide through draft recommendations 14 and 27: (1) a duty to act in good faith and reasonably in the best interests of the UNLLO; (2) a duty to preclude from self-dealing transactions, personal use of assets of the UNLLO, usurpation of opportunities of the UNLLO, and competition with the simplified business entity; and (3) a duty to disclose information to all members of the UNLLO.[12]

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[10] See paras. 24 and 25 and the corresponding tables in A/CN.9/WG.I/WP.82, considered at the twenty-second session of the Working Group (February 2014).

[11] Similar approaches may be found in various legislative enactments in respect of fiduciary duties. For example, the United States Revised Uniform Limited Liability Act of 2006 clarifies the ability of members to define and limit the duties of loyalty and care that members owe to each other and to the business entity. See, also, the Delaware General Corporation Law, Section 102(b)(7), which allows the members to limit the duty of care by agreeing to eliminate or limit the personal liability of a manager to the business entity or its members in such cases.

[12] These aspects were previously identified as important duties owed by the manager in paragraph 40, A/CN.9/WG.I/WP.89.

Recommendation 14: The law should provide that a manager[13] of the UNLLO must act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner that the manager reasonably believes to be in the best interests of the UNLLO.

17. Each manager of the UNLLO, whether member-managed or manager-managed, has the authority to legally bind the UNLLO. It is for that reason that the name of each manager must be included in the publicly disclosed information required for the formation of the UNLLO under draft recommendation 9. The disclosure of such information provides important protection to third parties dealing with the UNLLO. In most cases, the UNLLO will be member-managed, and each member will be authorised to legally bind the UNLLO.[14]

18. Restrictions may be agreed upon in the members' agreement in respect of the extent to which each manager can bind the UNLLO (for example, only up to a certain monetary threshold), or to vary the default rule that each manager can legally bind the UNLLO. Such modifications of the default rules will be effective as between the members of the UNLLO. However, such restrictions or variations will not be effective as against third parties dealing with the UNLLO unless those third parties have notice of that restriction or variation of the manager's authority. If third parties dealing with the UNLLO do not have notice of any limitation that a members' agreement has placed on the authority of a publicly disclosed manager, the UNLLO will nonetheless be bound by a decision in the ordinary course of that manager regardless of whether that decision exceeds the manager's authority as limited by the members' agreement.

Recommendation 15: The law should provide that each publicly disclosed manager[15] individually has the authority to bind the UNLLO.

19. The members may establish rules in their members' agreement for the appointment and removal of a manager.[16] In the absence of such agreement, draft recommendation 16 provides a default rule that such decisions should be made by a simple majority of the members.

20. In the case of a manager-managed UNLLO, should a manager become unavailable (through death or otherwise), the members would be required to appoint another manager under the terms of the members' agreement. Appointing another manager would be important to ensure that amendments to the UNLLO's formation information, including the name of each manager (draft recommendation 9(a)(iv)) can validly be made pursuant to draft recommendation 10.

Recommendation 16: The law should provide that, unless otherwise agreed by the members, a manager or managers may be elected and removed by a simple majority decision of the members.

E. Contributions

21. Since the UNLLO is not required to have a capital structure, it is not necessary that members make contributions to it in order for it to exist. The UNLLO need not necessarily have assets at its formation, since assets would be generated through its operations. As such, the default rule in this draft legislative guide is that members are not required to make contributions to the UNLLO.

22. Of course, members may contract out of the default rule established in draft recommendation 17, and in their members' agreement they may choose to establish

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[13] Again, it should be recalled that the term "manager" refers to both a member-manager and a manager-manager.

[14] Clearly, it is not necessary for the members to name a board of management, but they may do so according to the members' agreement as agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 84(a), A/CN.9/860).

[15] Once more, it should be noted that the term "manager" refers to both a member-manager and a manager-manager.

[16] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 84(d), A/CN.9/860).

what each member will provide to the UNLLO by way of contribution (see draft recommendation 18 below).[17]

Recommendation 17: The law should provide that, unless otherwise agreed, a member of the UNLLO is not required to make a contribution to it in order to be a member.

23. Draft recommendation 18 of the legislative guide further elaborates on draft recommendation 17 by requiring the law to permit members maximum flexibility to decide upon the amount and type of their agreed contributions to the UNLLO.[18] It is recommended that members maintain a central record of the amount and type of contribution of each member to ensure that the rights of the members are respected (see also draft recommendations 26 and 27 below).

24. In specifying in their members' agreement the types of contribution that members of the UNLLO may make, members may wish to consider the following possibilities: tangible or intangible property or other benefits to the UNLLO, including money, services performed, promissory notes, other binding agreements to contribute money or property and contracts for services to be performed. Although it is generally encouraged that members should be permitted great flexibility in determining for themselves what type of contributions to the UNLLO would be appropriate, in some cases, local law may restrict the types of contribution that may be made. For example, in some States, it is not permitted to use the provision of services as a contribution to the establishment of a business entity. In such cases, those restrictions may be specified in the law prepared on the basis of this draft legislative guide.[19]

25. Where members agree to make contributions to the UNLLO, but do not specify the amount of the contributions, draft recommendation 18 provides that, in keeping with the general approach to ownership[20] and management of the UNLLO, contributions should be made by each member in an equal amount.[21]

26. Moreover, determination of the value of each contribution should be left to the members of the UNLLO, as they are in the best position to determine the value of their contributions.[22] Should members wish to include duties to each other in terms of the accurate value of their contribution, this may be accomplished in the members' agreement; any other mechanism, such as requiring an audit or other external valuation method, is likely to be too burdensome for MSMEs.[23]

27. It should also be noted that more complex ownership[24] structures could be established by the members in their agreement, including by way of agreement on

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[17] As considered generally and agreed by the Working Group at its twenty-fourth session (New York, April 2015) (see para. 29, A/CN.9/831).

[18] As agreed by the Working Group at its previous sessions (para. 29 of A/CN.9/831 and para. 34, A/CN.9/866).

[19] As agreed by the Working Group at its twenty-sixth session (New York, April 2016) (paras. 34 to 35, A/CN.9/866).

[20] The Working Group agreed at its twenty-sixth session (New York, April 2016) that in order to achieve a common understanding, the next draft of the text should explain what was meant by the term "share", and should present possible alternatives for more neutral terms (para. 25, A/CN.9/866). Since this draft legislative guide attempts to create a system for a legal business form that is not dependent on the corporate model, it refers to "interest" and "ownership" to indicate that portion of the UNLLO that is owned by a particular member.

[21] As agreed by the Working Group at its twenty-sixth session (New York, April 2016) (para. 34, A/CN.9/866).

[22] As agreed by the Working Group at its twenty-sixth session (New York, April 2016) (para. 34, A/CN.9/866).

[23] As agreed by the Working Group at its twenty-sixth session (New York, April 2016) (para. 37, A/CN.9/866).

[24] The Working Group agreed at its twenty-sixth session (New York, April 2016) that in order to achieve a common understanding, the next draft of the text should explain what was meant by the term "share", and should present possible alternatives for more neutral terms (para. 25, A/CN.9/866). Since this draft legislative guide attempts to create a system for a legal business form that is not dependent on the corporate model, it refers to "interest" and "ownership" to indicate that portion of the UNLLO that is owned by a particular member.

different classes and types of membership,[25] as well as on special rights that might attach to such different classes of membership.

Recommendation 18: The law should provide that members are permitted to agree upon contributions made to the UNLLO, including the amount and type of such contributions, but that in the absence of such agreement, contributions that are made to the UNLLO should be made in equal amounts by the members.

F. Distributions

28. In keeping with the general default approach of the UNLLO, this draft legislative guide provides that unless the members of an UNLLO have otherwise agreed in their members' agreement, members will share equally in the ownership of the UNLLO and in any distributions made by it.[26]

29. The members of the UNLLO may also agree on the type of distribution (for example, including cash or property of the UNLLO) as well when such distributions may be made. It is important to note, however, that some States may not permit non-monetary distributions and that, in such cases, States should specify those restrictions in the UNLLO law enacted on the basis of this draft legislative guide.

Recommendation 19: The law should provide that, unless otherwise agreed, any distribution by the UNLLO shall be made equally among its members.

30. Although the amount, type and timing of distributions may be subject to the members' agreement, this draft legislative guide includes mandatory provisions governing distributions aimed at protecting third parties dealing with the UNLLO. In order to protect such parties, the members of the UNLLO cannot contract out of the rule prohibiting distributions from being made by the UNLLO when such a distribution would violate either an insolvency test, as reflected in draft recommendation 20(a), or a balance sheet test, as reflected in draft recommendation 20(b). Under the insolvency test, the UNLLO must still be able to pay its debts upon giving effect to the distribution, while the balance sheet test ensures that distributions can only made if the UNLLO's remaining assets exceed its total liabilities. At previous sessions of the Working Group, a concern was expressed as to whether the insolvency and balance sheet tests were appropriate for MSMEs or if they might be too complex, but no decision was reached in that regard.[27] The Working Group may wish to note that, on their face, these tests may appear to be more complex than they are, since most MSMEs are able to track their financial status quite accurately, and may even rely on the many simple mobile applications that exist for such purposes.

31. This mandatory rule, in conjunction with the clawback provision in draft recommendation 21, is intended to protect third parties and creditors who are dealing with the UNLLO from any dissipation of the UNLLO's assets through improper distributions to its members.

32. This draft legislative guide does not contain a specific provision holding managers liable for making improper distributions.[28] In most cases, the UNLLO will

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[25] The Working Group agreed at its twenty-sixth session (New York, April 2016) that this draft legislative guide should start with the simplest model and should establish the default rule to be one of equal voting rights and equal distributions, unless otherwise agreed in the members' agreement. The Working Group also agreed that this legislative guide should permit the establishment of more complex ownership structures, including special rights, which could be mentioned in the commentary (paras. 27 and 29, A/CN.9/866).

[26] The Working Group agreed at its twenty-sixth session (New York, April 2016) that this draft legislative guide should start with the simplest model and should establish the default rule to be one of equal voting rights and equal distributions, unless otherwise agreed in the members' agreement (para. 27, A/CN.9/866). See, also, the discussion of including a default rule for distributions at para. 32 of A/CN.9/831.

[27] See para. 31, A/CN.9/831 and para. 30, A/CN.9/866.

[28] See the discussion of the Working Group at its previous sessions (para. 32 of A/CN.9/831 and para. 33, A/CN.9/866).

be member-managed, and it is submitted that holding each member liable in draft recommendation 21 to return the entire amount of the improper distribution should act as an adequate disincentive for the member-managed situation. Where the UNLLO is manager-managed, the duties set out draft recommendation 14 along with draft recommendations 20 and 21 should provide an adequate basis on which to find managers liable should they make improper distributions.

Recommendation 20: The law should prohibit distributions from being made to any member if upon giving effect to such distribution:

(a) The UNLLO would not be able to pay its debts as they become due in the usual course of business; or

(b) The UNLLO's total assets would be less than the sum of its total liabilities.

33. In keeping with the rule on improper distributions established in draft recommendation 20, draft recommendation 21 provides an operative provision that permits the entire amount of any such distribution to be clawed back from each member who received that distribution, or any portion of it. Such a rule is intended both to protect third parties dealing with the UNLLO and to provide an incentive to members to ensure that any distributions made to them would not leave the UNLLO insolvent or with greater liabilities than assets.

34. It should be noted that payments of reasonable compensation for services rendered[29] and for bona fide debt owed by the UNLLO to a member should not be considered as distributions, and would thus not be subject to the clawback provision in draft recommendation 21.

35. In addition, as noted in para. 32 above, managers that make distributions in violation of one of the tests in draft recommendation 20 could also be held liable for that decision pursuant to the managers' duties set out in draft recommendation 14.

Recommendation 21: The law should provide that each member who received a distribution, or any portion of a distribution, made in violation of recommendation 20 is liable to reimburse the UNLLO for the entire amount of that distribution.

G. Transfer of rights

36. Because of the nature of the UNLLO as a micro or small business that is privately held, its members are likely to value the composition of its membership and to resist transfers of ownership without the approval of other members. In addition, there is unlikely to be a ready market for the sale and transfer of an ownership interest in an UNLLO.

37. The ownership stake of an UNLLO member entitles it to exercise two sets of rights: financial rights to share in the profits and losses of the UNLLO and to receive distributions, and governance rights to participate in the management and control of the UNLLO, including fiduciary rights and information rights. Moreover, the default rule for most aspects of the UNLLO as established in this draft legislative guide is that members share in rights on an equal basis.

38. Consistent with this general approach, and in light of the likely context of the UNLLO, the default rule should be that members of the UNLLO are permitted to transfer their financial rights, unless they have agreed otherwise in their members' agreement. Also bearing in mind the general nature of UNLLOs, the default rule in respect of the transfer of governance rights in the UNLLO should be that such rights are not transferable by members unless they have agreed otherwise in their members' agreement. This latter rule in respect of governance rights reflects the idea that, given the particular characteristics of the UNLLO, non-transferring members must consent

[29] See para. 30, A/CN.9/866.

to changes in the management and control of the UNLLO. These rules are reflected in draft recommendation 22.

39. In the situation of the death of a single member of the UNLLO, complications could arise in that the member's financial rights might be transferable, but not the member's governance rights. The members' agreement should contain appropriate provisions to provide any necessary clarity in that circumstance.

Recommendation 22: The law should provide that members may transfer their financial rights in the UNLLO, but that they may not transfer their non-financial rights in the UNLLO. Members of the UNLLO may vary this rule by agreement.

H. Restructuring or conversion

40. As noted above (in para. 53, A/CN.9/WG.I/WP.99) in respect of draft recommendation 7, this draft legislative guide is intended to permit the UNLLO to evolve from a very small single member enterprise to a more complex multi-member business entity,[30] and possibly to convert into another legal business form altogether. That approach is reflected in draft recommendation 23, which permits the members of the UNLLO to agree to restructure the UNLLO or to convert it into a different legal form.

41. As noted above in para. 10 in connection with draft recommendation 13, a decision on the restructuring or conversion of the UNLLO would be a decision outside of the ordinary course of business, and would thus require unanimous consent, unless otherwise agreed by the members.[31]

42. The State in which the UNLLO would restructure or convert to another legal form may wish to ensure that adequate safeguards are in place to protect third parties dealing with the UNLLO from any adverse effects on their rights that could arise from such a restructuring or conversion. Such safeguards may already exist in legislation providing for conversion into other legal business forms,[32] and could consist, for example, of notice periods, publication requirements or rules on the transfer of third party rights to the new business form.

Recommendation 23: The law should provide that the members of an UNLLO may restructure it or convert it into another business form by agreement.

I. Dissolution and winding-up

43. Draft recommendation 24, paragraph (a), establishes that the members of the UNLLO may decide in their members' agreement that the UNLLO will be dissolved and wound up on the occurrence of an event specified in that agreement. Should the members of the UNLLO not have established terms under which the UNLLO would be dissolved and wound up, they may decide by unanimous consent to dissolve and wind up the entity as indicated in paragraph (b) of draft recommendation 24. This level of required consent is commensurate with that required in respect of a decision by members on restructuring the UNLLO or converting it into another legal form, as well as reflecting the default rule for decisions made by members on matters outside of the ordinary course of business.[33]

44. Draft recommendation 24, paragraph (c), is a mandatory rule that members are not entitled to vary by agreement. A judicial or administrative decision made pursuant

[30] See paras. 24 and 32 of A/CN.9/800, paras. 67 and 74 of A/CN.9/825, and para. 19 of A/CN.9/831.

[31] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015), the level of agreement among members for restructure and conversion of the UNLLO should be commensurate with that required for dissolution and winding-up of the UNLLO (para. 90, A/CN.9/860).

[32] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 91, A/CN.9/860).

[33] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 87, A/CN.9/860).

to the law of the State that the UNLLO is dissolved must be respected by the members of the UNLLO, and could include, for example, a decision by a bankruptcy court.[34]

45. Again, the State in which the UNLLO would be dissolved or wound up may wish to ensure that adequate safeguards are in place to protect third parties dealing with the UNLLO from any adverse effects that could arise from its dissolution or winding-up. Such safeguards may already exist in other legislation providing for dissolution or winding-up of legal business forms.[35]

Recommendation 24: The law should provide that the UNLLO shall be dissolved and wound up in the following circumstances:

(a) On the occurrence of any event that is specified in the members' agreement as causing the dissolution of the UNLLO;

(b) On the unanimous consent of the members; or

(c) Upon the rendering of a judicial or administrative decision that the UNLLO is dissolved.

J. Dissociation or withdrawal

46. Members of an UNLLO will often have equal financial and managerial control rights; indeed, that is the default rule that runs throughout this legislative guide. It is further reflected in the fact that the default rule is that decisions made outside of the ordinary course of the activities and affairs of the UNLLO require the unanimous consent of the members (draft recommendation 13(c)). As noted above, such extraordinary matters would include issues relating to the very existence of the UNLLO, such as its restructuring, conversion to a different legal business form, dissolution and winding-up. Similarly, the default rule for resolving differences among members on matters in the ordinary course of business of the UNLLO is that such matters may be decided by a simple majority of members (draft recommendation 13(b)), thus providing a convenient way to resolve more routine differences of view amongst the UNLLO members. These two default rules provide a reasonable, coherent and stable decision-making system for members to resolve basic disputes and to continue to conduct the affairs of the UNLLO, as well as effectively providing a veto for any member that does not agree with important decisions that could affect the very existence of the UNLLO.

47. However, once dissatisfaction or distrust disrupts their relationship, members of the UNLLO may not find these default decision-making mechanisms to be adequate and they may be unable to negotiate their way out of the dispute. Members may not have foreseen the possibility of such an intractable dispute, and may not have provided a mechanism for its resolution in their members' agreement. As such, the UNLLO legislation should include a default rule for dealing with such disputes.

48. One approach could be to permit one or more dissatisfied members to compel the dissolution of the UNLLO and the liquidation of its assets. This approach, however, could create uncertainty and instability for the members and the UNLLO. Most importantly, perhaps, it would not permit the UNLLO to continue its existence and would thus result in a net loss in economic value.

49. A second approach to dealing with such intractable member disputes would be to facilitate the continued existence of the UNLLO, instead permitting members to withdraw or to be expelled from the UNLLO and to receive the fair value of their ownership interest. However, the disadvantage of permitting members to expel another member is that such an arrangement could be subject to abuse and result in minority oppression. In the scenario in which a conflict among members could result in a majority of members expelling a minority, the minority would be left to keep its

[34] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 85, A/CN.9/860).

[35] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 86, A/CN.9/860). See, also, para. 42 above.

ownership or to sell it back to the majority members for whatever price the majority was willing to offer.

50. Draft recommendation 25 suggests that the preferred approach in creating a default rule to resolve intractable disputes is to permit members to withdraw from the UNLLO and to be paid the fair value of their interest over a reasonable time. In this outcome, unless the members vote unanimously otherwise, the UNLLO continues to exist, thus preserving both economic stability and value. Moreover, permitting the payment of the fair value of the withdrawing member's ownership interest over time avoids a situation where the withdrawing member could hold the UNLLO and its remaining members to ransom by demanding immediate payment of the entire amount. Complying with an immediate demand of that sort might not be possible for the UNLLO or its remaining members, and could effectively force the dissolution of the UNLLO by rendering it insolvent.

51. The default rule suggested in draft recommendation 25 may still present challenges in terms of assessing the fair value of the withdrawing member's interest. The starting point for that valuation should obviously be that the dissociating members would receive the same amount in a buyout as that member would receive if the UNLLO were dissolved. However, fair value dictates that the value of the UNLLO's goodwill should also be included in the calculation, and the buyout price for the member withdrawing should thus be the greater of that member's share of the liquidation value of the UNLLO or a value based on the sale of the entire UNLLO as a going concern.

52. It would also be prudent for members to decide in their members' agreement to use alternative dispute resolution (including arbitration and mediation) for matters that cannot be resolved through the application of the members' agreement or the default rules.[36] Agreement on the fair valuation of a withdrawing member's interest could be one of the issues that might be referred for alternative dispute resolution.

Recommendation 25: The law should provide that, unless otherwise agreed, members may withdraw from the UNLLO and be paid over a reasonable period of time the fair value of their interest in the UNLLO.

K. Record-keeping, inspection and disclosure

53. Open communication and transparency are important issues for any business entity, but they are arguably of even greater importance in respect of the UNLLO. Members of the UNLLO are likely to share equal ownership and management rights, and establishing and maintaining trust among them is of great importance. Access to and proper dissemination of information to all members will further enhance trust among members and will permit them to be meaningfully involved in decision-making processes, thus providing a strong basis for the positive performance of the UNLLO.

54. Mandatory rules for the establishment of these principles are set out in draft recommendation 26, which requires the UNLLO to keep certain information, and draft recommendation 27, which ensures that each member has the right to inspect the information kept by the UNLLO, as well as the right to access any other reasonable information regarding the UNLLO, including information on its activities,

[36] This approach would cover disputes arising between members of the UNLLO, but it might not sufficiently cover the issue of disputes involving the UNLLO and third parties. As discussed by the Working Group at its twenty-second session (New York, February 2014), various other models could be considered for dispute resolution involving UNLLOs and third parties, including the establishment of special dispute resolution bodies, or examining ways to make existing dispute resolution mechanisms more accessible for MSMEs, for example, in respect of arbitration, mediation and insolvency (see paras. 60 to 62, A/CN.9/800 and paras. 38 to 40, A/CN.9/WG.I/WP.82). It is suggested that in order to avoid unnecessary complexity in this draft UNLLO legislative guide, such issues could be considered in relation to matters as they may arise in other UNCITRAL Working Groups, for example, in respect of the MSME work of Working Group V on insolvency, as already mandated by the Commission.

operations and financial situation.[37] The importance of sharing and disseminating information on the UNLLO among its members is emphasised in that the members cannot contract out of the mandatory rules established in draft recommendations 26 and 27. However, members can agree by contract that the UNLLO should retain information in addition to that required in draft recommendation 26.

55. While the focus of the UNLLO is on MSMEs and facilitation of their growth, disclosure and transparency of information are naturally important issues facing any business entity. While some States apply broad disclosure requirements to privately held entities (but allow exceptions to be made for MSMEs), others restrict mandatory disclosure to public business entities. The approach taken in this legislative guide is that only the information required for formation of the UNLLO in draft recommendation 9(a) must be made public, and that the information that must be retained by the UNLLO further to draft recommendation 26 need not be publicly disclosed,[38] although it should be shared with all members and subject to their inspection.

56. The list of records that must be kept pursuant to draft recommendation 26 should not be particularly burdensome for UNLLOs, even when they are MSMEs, in that it consists of the most basic information necessary for entrepreneurs of all levels of sophistication to run their business. Moreover, the records that must be kept need only be "reasonable records", i.e. recorded in a timely fashion and in a medium that could be expected of a similar business operating in a comparable context. The draft recommendation does not specify when or how that information must be kept, and it would be open to the UNLLO to simply rely on electronic or other records that are reasonable for a business of its size and complexity.

57. For example, many MSMEs use various mobile applications that are available on electronic devices to run their commercial enterprises, and are thus able easily to track and access all types of information relevant to the business, including inventory, simple balance sheets, and even tax returns. An UNLLO operating in that context could then satisfy the requirements of draft recommendations 26 and 27 through retaining and permitting access to the information electronically available via that mobile application.

Recommendation 26: The law should provide that the UNLLO must keep reasonable records in respect of:

(a) Its formation information;

(b) Any record of the members' agreement;

(c) A current list of managers and members, as well as their contact details;

(d) Financial statements (if any);

(e) Tax returns or reports; and

(f) The activities and operations of the UNLLO, as well as its financial information.

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[37] As agreed by the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 93(b), A/CN.9/860).

[38] While privately held businesses, like UNLLOs, are not required to provide the same flow and rate of information as publicly held firms generally, they may have strong incentives for doing so, particularly as they develop and progress. Indeed, businesses wishing to improve their access to credit or to attract investment may wish to signal their accountability by supplying information about: (1) the business' objectives; (2) principal changes; (3) balance sheet and off-balance sheet items; (4) its financial position and capital needs; (5) the composition of any management board and its policy for appointments and remuneration; (6) forward-looking expectations; and (7) profits and dividends. Such considerations are not likely to trouble the smaller enterprises contemplated as the main users of the UNLLO, but could be important for those businesses as they grow. See, also, the agreement of the Working Group at its twenty-fifth session (Vienna, October 2015) (para. 84(d), A/CN.9/860).

Recommendation 27: The law should provide that each member has the right to inspect and copy any of the records required to be kept by the UNLLO in recommendation 26, and to obtain from the UNLLO information concerning its activities, operations and financial information, as well as any other reasonable information in respect of the UNLLO.[39]

[39] As agreed by the Working Group at its twenty-fifth session in respect of its financial information (Vienna, October 2015) (para. 93(b), A/CN.9/860).

Annex I

Draft recommendations on an UNLLO

I. General Provisions

Recommendation 1: The law should provide that an UNCITRAL Limited Liability Organisation ("UNLLO") is governed by this law and by the members' agreement, if any.

Recommendation 2: The law should provide that an UNLLO may be organised for any lawful activity.

Recommendation 3: The law should provide that the UNLLO has a legal personality.

Recommendation 4: The law should provide that, unless otherwise agreed,[40] a member is not liable for any obligation of the UNLLO solely by reason of being a member of that UNLLO.

Recommendation 5: The law should not contain a minimum capital requirement for the formation of an UNLLO.

Recommendation 6: The law should provide that the name of the UNLLO must include a phrase or abbreviation that identifies it as an UNLLO.

II. Formation of the UNLLO

Recommendation 7: The law should provide that the UNLLO must have at least one member from the time of its formation until its dissolution, and that any person may be a member of the UNLLO.

Recommendation 8: The law should specify the time of formation of the UNLLO.

Recommendation 9: The law should provide that only the following information is required for valid formation of the UNLLO:

(a) Information that will be made public:

(i) The name of the UNLLO;

(ii) The business address or precise geographical location of the UNLLO;

(iii) A statement of whether the UNLLO is member-managed or manager-managed; and

(iv) The name of each manager;[41] and

(b) Information that will not be made public: the name and address of each member.

Recommendation 10: The law should provide that the formation information may be amended by any manager, unless otherwise agreed by the members.

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[40] If the Working Group is of the view that the draft recommendation would be clearer if these two concepts were separated from each other (see also the discussion of the Working Group reflected in para. 52 of A/CN.9/831), the draft recommendation could appear in two parts as follows:
"Recommendation 4.1: The law should provide that a member is not personally liable for the obligations of the UNLLO solely by reason of being a member of the UNLLO."
"Recommendation 4.2: The law should provide that members may agree that one or more members will be personally liable for the obligations of the UNLLO in the circumstances specified in the members' agreement."

[41] Of course, the term "manager" in this draft legislative guide refers to both a member-manager and a manager-manager.

III. Organization of the UNLLO

Recommendation 11: The law should provide that the members of the UNLLO may adopt a members' agreement in any form, including an agreement that is written, oral or established by way of conduct. The members may agree in their members' agreement on any matter relating to the UNLLO, except in respect of the mandatory rules set out in recommendations 1, 2, 3, 6, 7, 8, 9, 14, 15, 20, 21, 24(c), 26 and 27.

Recommendation 12: The law should provide that the UNLLO is member-managed by all members, unless otherwise agreed.

Recommendation 13: The law should provide that, unless otherwise agreed:

(a) The members of the UNLLO have equal rights to manage the UNLLO;

(b) Any difference arising between members as to matters in the ordinary course of the activities and affairs of the UNLLO shall be decided by simple majority; and

(c) Any difference arising between members as to matters outside of the ordinary course of the activities and affairs of the UNLLO shall require unanimous consent.

IV. Managers

Recommendation 14: The law should provide that a manager[42] of the UNLLO must act with the care that a person in a like position would reasonably exercise under similar circumstances and in a manner that the manager reasonably believes to be in the best interests of the UNLLO.

Recommendation 15: The law should provide that each manager[43] individually has the authority to bind the UNLLO.

Recommendation 16: The law should provide that, unless otherwise agreed by the members, a manager or managers may be elected and removed by a simple majority decision of the members.

V. Contributions

Recommendation 17: The law should provide that, unless otherwise agreed, a member of the UNLLO is not required to make a contribution to it in order to be a member.

Recommendation 18: The law should provide that members are permitted to agree upon contributions made to the UNLLO, including the amount and type of such contributions, but that in the absence of such agreement, contributions that are made to the UNLLO should be made in equal amounts by the members.

VI. Distributions

Recommendation 19: The law should provide that, unless otherwise agreed, any distribution by the UNLLO shall be made equally among its members.

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[42] Again, it should be recalled that the term "manager" refers to both a member-manager and a manager-manager.

[43] Once more, it should be noted that the term "manager" refers to both a member-manager and a manager-manager.

Recommendation 20: The law should prohibit distributions from being made to any member if upon giving effect to such distribution:

(a) The UNLLO would not be able to pay its debts as they become due in the usual course of business; or

(b) The UNLLO's total assets would be less than the sum of its total liabilities.

Recommendation 21: The law should provide that each member who received a distribution, or any portion of a distribution, made in violation of recommendation 20 is liable to reimburse the UNLLO for the entire amount of that distribution.

VII. Transfer of rights

Recommendation 22: The law should provide that members may transfer their financial rights in the UNLLO, but that they may not transfer their non-financial rights in the UNLLO. Members of the UNLLO may vary this rule by agreement.

VIII. Restructuring or conversion

Recommendation 23: The law should provide that the members of an UNLLO may restructure it or convert it into another business form by agreement.

IX. Dissolution and winding-up

Recommendation 24: The law should provide that the UNLLO shall be dissolved and wound up in the following circumstances:

(a) On the occurrence of any event that is specified in the members' agreement as causing the dissolution of the UNLLO;

(b) On the unanimous consent of the members; or

(c) Upon the rendering of a judicial or administrative decision that the UNLLO is dissolved.

X. Dissociation or withdrawal

Recommendation 25: The law should provide that, unless otherwise agreed, members may withdraw from the UNLLO and be paid over a reasonable period of time the fair value of their interest in the UNLLO.

XI. Record-keeping, inspection and disclosure

Recommendation 26: The law should provide that the UNLLO must keep reasonable records in respect of:

(a) Its formation information;

(b) Any record of the members' agreement;

(c) A current list of managers and members, as well as their contact details;

(d) Financial statements (if any);

(e) Tax returns or reports; and

(f) The activities and operations of the UNLLO, as well as its financial information.

Recommendation 27: The law should provide that each member has the right to inspect and copy any of the records required to be kept by the UNLLO in recommendation 26, and to obtain from the UNLLO information concerning its activities, operations and financial information, as well as any other reasonable information in respect of the UNLLO.[44]

[44] As agreed by the Working Group at its twenty-fifth session in respect of its financial information (Vienna, October 2015) (para. 93(b), A/CN.9/860).

D. Report of the Working Group on MSMEs on the work of its twenty-eighth session (New York, 1-9 May 2017)

(A/CN.9/900)

[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 to 14 February 2014), Working Group I (MSMEs) commenced its work according to the mandate received from the Commission. 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] and business registration was said to be of particular relevance in the future deliberations of the Working Group.[5]

3. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of Working Group I, as set out above in paragraph 1.[6]

4. At its twenty-third session (Vienna, 17 to 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, the Working Group requested the Secretariat to prepare further materials based on parts IV and V of that working paper for discussion at a future session. In its discussion of the legal questions surrounding

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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.97, paras. 5-20.
[3] A/CN.9/800, paras. 22-31, 39-46 and 51-64.
[4] Ibid., paras. 32-38.
[5] Ibid., paras. 47-50.
[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134.

the simplification of incorporation, the Working Group considered 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.

5. At its twenty-fourth session (New York, 13 to 17 April 2015), the Working Group continued its discussion of the legal questions surrounding the simplification of incorporation. After initial consideration of the issues as set out in Working Paper A/CN.9/WG.I/WP.86, the Working Group decided 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. Further to a proposal from several delegations, the Working Group agreed to continue its discussion of the issues included in A/CN.9/WG.I/WP.89, bearing in mind the general principles outlined in the proposal, 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.

6. At its forty-eighth session, in 2015, 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 reaffirmed the mandate of the Working Group under the terms of reference established by the Commission at its forty-sixth session in 2013 and confirmed at its forty-seventh session in 2014.[7] In its discussion in respect of the future legislative activity, the Commission also 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.[8]

7. At its twenty-fifth session (Vienna, 19 to 23 October 2015), the Working Group continued its preparation of legal standards aimed at the creation of an enabling legal environment for MSMEs, exploring the legal issues surrounding the simplification of incorporation and on good practices in business registration. In terms of the latter, following a presentation by the Secretariat of documents A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2 on key principles of business registration and subsequent consideration by the Working Group of A/CN.9/WG.I/WP.93, it was decided that a document along the lines of a concise legislative guide on key principles in business registration should be prepared, without prejudice to the final form that the materials might take. To that end, the Secretariat was requested to prepare a set of draft recommendations to be considered by the Working Group when it resumed its consideration of Working Papers A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2 at its next session.[9] In respect of the legal issues surrounding the simplification of incorporation, the Working Group resumed its consideration of the draft model law on a simplified business entity as contained in working paper A/CN.9/WG.I/WP.89, starting with Chapter VI on organization of the simplified business entity, and continuing on with Chapter VIII on dissolution and winding up, Chapter VII on restructuring, and draft article 35 on financial statements (contained in Chapter IX on miscellaneous matters).[10] The Working Group agreed to continue discussion of the draft text in Working Paper A/CN.9/WG.I/WP.89 at its twenty-sixth session, commencing with Chapter III on shares and capital, and continuing with Chapter V on shareholders' meetings.

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[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 220 and 225; *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 134; and *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321.

[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 340.

[9] See Report of Working Group I (MSMEs) on the work of its twenty-fifth session, A/CN.9/860, para. 73.

[10] Ibid., paras. 76 to 96.

8. At its twenty-sixth session (New York, 4 to 8 April 2016), Working Group I continued its consideration of the legal issues surrounding the simplification of incorporation and on key principles in business registration. In respect of the former, the Working Group resumed its deliberations on the basis of working paper A/CN.9/WG.I/WP.89. Following its discussion of the issues in Chapters III and V,[11] the Working Group decided that the text being prepared on a simplified business entity should be in the form of a legislative guide, and requested the Secretariat to prepare for discussion at a future session a draft legislative guide that reflected its policy discussions to date (see A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1).[12] In respect of key principles in business registration, the Working Group considered recommendations 1 to 10 of the draft commentary (A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2) and recommendations (A/CN.9/WG.I/WP.96 and A/CN.9/WG.I/WP.96/Add.1) for a legislative guide, and requested the Secretariat to combine those two sets of documents into a single draft legislative guide for discussion at a future session.[13] In addition, the Working Group also considered the general architecture of its work on MSMEs, and agreed that its MSME work should be accompanied by an introductory document along the lines of A/CN.9/WG.I/WP.92, which would form a part of the final text and would provide an overarching framework for current and future work on MSMEs.[14] The Working Group also decided at its twenty-sixth session[15] that it would devote its 27th session to deliberations on a draft legislative guide on a simplified business entity, and its deliberations at its twenty-eighth session (New York, 1 to 9 May 2017) to a consideration of a draft legislative guide reflecting key principles and good practices in business registration.

9. At its forty-ninth session (New York, 27 June to 15 July 2016), the Commission commended the Working Group for its progress in the preparation of legal standards in respect of the legal issues surrounding the simplification of incorporation and to key principles in business registration, both of which aimed at reducing the legal obstacles faced by MSMEs throughout their life cycle. The Commission also noted the decision of the Working Group to prepare a legislative guide on each of those topics and States were encouraged to ensure that their delegations included experts on business registration so as to facilitate its work.[16]

10. At its twenty-seventh session (Vienna, 3 to 7 October 2016), the Working Group continued its deliberations. As decided at its twenty-sixth session,[17] the Working Group spent the entire twenty-seventh session considering a draft legislative guide on a simplified business entity, leaving consideration of the draft legislative guide on key principles of a business registry for the first week of its twenty-eighth session (New York, 1-9 May 2017). The Working Group considered the issues outlined in working papers A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1 on an UNCITRAL limited liability organization (UNLLO), beginning with section A on general provisions (draft recommendations 1 to 6), section B on the formation of an UNLLO (draft recommendations 7 to 10), and section C on the organization of an UNLLO (draft recommendations 11 to 13). The Working Group also heard a short presentation of working paper A/CN.9/WG.I/WP.94 of the French legislative approach known as an "Entrepreneur with Limited Liability" (or EIRL), which represented a possible alternative legislative model applicable to micro and small businesses.

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[11] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 22 to 47.
[12] Ibid., paras. 48 to 50.
[13] Ibid., paras. 51 to 85 and 90.
[14] Ibid., paras. 86 to 87.
[15] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, para. 90.
[16] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17).
[17] A/CN.9/866, para. 90.

II. Organization of the session

11. Working Group I, which was composed of all States Members of the Commission, held its twenty-eighth session in New York from 1 to 9 May 2017. The session was attended by representatives of the following States Members of the Working Group: Austria, Argentina, Brazil, Burundi, Canada, China, Colombia, Cote d'Ivoire, Czechia, El Salvador, France, Germany, India, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Namibia, Nigeria, Poland, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Switzerland, Thailand, Turkey and United States of America.

12. The session was attended by observers from the following States: Congo, Croatia, Finland, Iraq, Netherlands, Niger, Saudi Arabia, Syrian Arab Republic and Tunisia.

13. The session was also attended by observers from the Holy See.

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

Invited international non-governmental organizations: American Society of International Law (ASIL); Conseil des Notariats de l'Union Europeene (CNUE); Fondation pour le droit continental (FDC); Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI); Jerusalem Arbitration Centre (JAC); the 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).

15. The Working Group elected the following officers:

Chair: Ms. Maria Chiara Malaguti (Italy)

Rapporteur: Ms. Andrea Laura Mackielo (Argentina)

16. In addition to 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.100);

(b) Note by the Secretariat on a draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101);

(c) Proposal by the Government of Italy on contractual networks (A/CN.9/WG.I/WP.102);

(d) Note by the Secretariat on compilation of draft recommendations on key principles of a business registry (A/CN.9/WG.I/WP.103); and

(e) Observations and model provisions from the Government of Colombia on the dissolution and liquidation of MSMEs (A/CN.9/WG.I/WP.104).

17. 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.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

18. 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 a draft legislative guide on key principles of a business registry on the basis of Secretariat documents A/CN.9/WG.I/WP.101 and A/CN.9/WG.I/WP.103. The Working Group also continued its consideration of a draft legislative guide on an UNCITRAL limited liability organization on the basis of Secretariat documents A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1. In addition, the Working Group considered the proposals by States in documents A/CN.9/WG.I/WP.102 and A/CN.9/WG.I/WP.104. 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. Draft legislative guide on key principles of a business registry

1. Presentation of A/CN.9/WG.I/WP.101 and A/CN.9/WG.I/WP.103 and introductory observations

19. The Working Group was reminded that the draft legislative guide in A/CN.9/WG.I/WP.101 was a compilation of documents that had previously been before the Working Group, i.e. the draft commentary on key principles of business registration in A/CN.9/WG.I/WP.93, A/CN.9/WG.I/WP.93/Add.1 and A/CN.9/WG.I/WP.93/Add.2 (A/CN.9/860, paras. 17 to 68), and the draft recommendations on key principles of business registration in A/CN.9/WG.I/WP.96 and A/CN.9/WG.I/WP.96/Add.1 (A/CN.9/866, paras. 51 to 85). Decisions made by the Working Group in respect of those documents were reflected in A/CN.9/WG.I/WP.101, as were the original locations of the consolidated paragraphs and the original numbering of the draft recommendations. Moreover, it was noted that document A/CN.9/WG.I/WP.103 merely reproduced the draft recommendations in A/CN.9/WG.I/WP.101 in order to facilitate the reading and consideration of the latter text, which included a number of cross-references.

20. The Working Group recalled a number of the themes underlying the draft legislative guide, including: (a) that encouraging MSMEs to operate in the legally regulated economy was a key goal; (b) that the primary conduit through which businesses might enter the legally regulated economy was through registration, particularly if an approach based on the "one-stop shop" was adopted; (c) that all businesses should be permitted to register, but it was left to the State to determine which businesses were required to register; (d) that registration would permit the State to identify MSMEs and to provide them with assistance and incentives; (e) that the draft legislative guide was intended to be aspirational and meant for those economies engaging in major reforms and those that wished to improve their business registries; (f) that although the focus of the work was on MSMEs, any improvements to a State's business registry system would also assist businesses of other sizes; (g) that three key factors in the draft text were to recommend a fully electronic registry, the use of a "one-stop shop", and the use of unique business identifiers; and (h) that since the text was a legislative guide, it was intended to be a highly flexible text that States could refer to according to their needs.

21. It was further highlighted that throughout the draft recommendations, the term "Regulation" had been used to indicate the body of rules adopted by the enacting State with respect to the business registry, whether such rules were found in administrative guidelines or in the specific law governing business registration. The term "law of the enacting State", on the other hand, had been used to denote those provisions of domestic law in the broader sense that were somehow relevant to and touched upon issues related to business registration. The Working Group was of the view that it was not necessary to distinguish in the legislative guide between the law specific to the business registry and the broader applicable law that might touch upon business

registration, nor between primary or secondary legislation. Instead, it was suggested that the term "law" might be sufficient, leaving other aspects to the enacting State to decide, but that the Secretariat might have regard to recent treatment of a similar issue in the draft guide to enactment of the UNCITRAL model law on secured transactions in order to identify an appropriate solution. It was further observed that consequential changes would need to be made to the relevant definitions in paragraph 12 of the draft text.

2. Objectives of a Business Registry

Purposes of the business registry: paragraphs 25 and 26 and recommendation 1

22. It was again suggested that draft recommendation 12 on a single interface for business registration and registration with other authorities ("one-stop shops") should be moved to the beginning of the legislative guide (see also para. 54 of A/CN.9/866, when the Working Group had decided to leave structural considerations to be discussed at a later stage). After discussion, the Working Group agreed that the commentary related to recommendation 1 should instead refer to the concept of "one-stop shops", focusing on the importance of the concept, particularly in terms of assisting MSMEs.

23. A suggestion was made that the commentary to recommendation 1 should contain greater emphasis on the importance of MSMEs and the underlying reasons for the work being undertaken by Working Group I. It was noted that paragraphs 2 (and the introduction generally) and 26 of the draft legislative guide contained such information. In addition, the Working Group was reminded that it had agreed in general terms with the approach set out in A/CN.9/WG.I/WP.92 (see paras. 86 to 88 of A/CN.9/866), wherein a document along the lines of A/CN.9/WG.I/WP.92 would establish the overarching reasons for the MSME work and the policy support that States could provide to MSMEs, while the draft legislative guides being prepared by Working Group I and other working groups represented the legal pillars that would support that overarching policy approach. The Working Group agreed to add any necessary detail to the commentary on the importance of assisting MSMEs.

24. A concern was expressed that draft recommendation 1(a) did not sufficiently clarify that it should be left for enacting States to decide which businesses should be required to register (see also para. 56 of A/CN.9/866), and that businesses in some States operated in the legally regulated economy without registering. A suggestion to add the phrase "that is required to register" to recommendation 1(a) was not supported by the Working Group. It was also observed that paragraphs 125 to 128 and recommendation 19 of the draft legislative guide focused in detail on this issue and the Working Group decided that any necessary clarification or cross-reference in this respect could be made to the commentary, possibly as an additional paragraph, and that adjustments might be made to assist the understanding of recommendation 1, such as substituting the word "facilitates" for "entitles".

25. A suggestion was made to add the phrase "and/or public institutions" after the word "public" in recommendation 1(b) in order to ensure that information relevant for public procurement initiatives was available to public entities. The Secretariat was requested to consider whether an adjustment could be made to the commentary to ensure clarity on that point.

26. Another suggestion was made to add to recommendation 1(b) the phrase "receiving, storing and" before the phrase "making accessible" so as to mirror the definition of "business registry" in paragraph 12. That suggestion was not taken up by the Working Group.

Simple and predictable legislative framework permitting registration for all businesses: paragraphs 27 to 30 and recommendation 2

27. In light of its earlier discussion in respect of clarifying the concept that the draft legislative guide left it to the enacting State to decide which businesses should be required to register (see para. 24 above), the Working Group agreed that the second sentence in paragraph 28 should be modified by deleting the phrase "may wish to

consider requiring or enabling" and replacing it with "should enable". Further, the Working Group agreed to add the phrase "or type of business" at the end of paragraph 29.

28. A suggestion was made to clarify recommendation 2(a) by including in it a cross-reference to the section in the legislative guide dealing with the correction of errors by registry staff and to the fact that electronic filings might be automatically rejected if the information was incorrectly completed. Those proposals were not taken up by the Working Group.

29. It was suggested that recommendation 2(b) should include reference to MSMEs, as well as to "businesses of all sizes and legal forms". It was observed that the emphasis of the legislative guide on MSMEs was already evident in the introduction and ought not be unnecessarily repeated, and the Working Group did not support the suggested addition. Another proposal was made to add to the end of recommendation 2(b) the phrase "stipulated under the legislation of the enacting State", but the Working Group agreed that that concept was already reflected in the introductory portion of the guide, which could be amplified, if necessary.

30. The Working Group supported a suggestion to delete as redundant the closing phrase of recommendation 2(c) "except where such a business is subject to additional requirements under the law of the enacting State as a consequence of its particular legal form."

Key features of a business registration system: paragraphs 31 to 35 and recommendation 3

31. A delegation suggested the deletion of paragraphs 32 and 33 from the draft legislative guide, because it was of the view that the concept of reliability was adequately defined in paragraph 12 of the text and by way of the examples provided in paragraph 34, subparagraphs (a) to (d). It was further suggested that the square brackets around subparagraph (d) of recommendation 3 could then be deleted and the text retained.

32. Other delegations were of the view that recommendation 3(d) should be retained in the text without eliminating paragraphs 32 and 33. It was observed that retaining the discussion of reliability in paragraphs 32 and 33 could be helpful for States that might consider reforming their business registry systems based upon the recommendations of the draft legislative guide. It was suggested that if the discussion in paragraph 32 in respect of the term "reliability" caused confusion in being too similar to the definition in paragraph 12, paragraph 32 might instead include text along the lines of "according to the definition of reliable in paragraph 12". Further, it was noted that the term "reliable" might appear in other places throughout the legislative guide and that care should be taken to ensure that it was used consistently. After discussion, the Working Group agreed that paragraphs 32 and 33 should remain in the legislative guide and requested the Secretariat to adjust paragraph 32 based on the guidance provided by the delegations and to eliminate any duplication of the definition of "reliable".

33. Although it was suggested that the phrase "of good quality and" could be deleted from paragraph 34 as it already appeared in the definition of "reliable" in paragraph 12, the Working Group agreed to retain it in order to ensure that adequate emphasis was given to the concept. A suggestion made to insert the phrase "good quality" into recommendation 3(d) to be consistent with the language of paragraph 34 was also accepted by the Working Group.

34. Several delegations expressed the view that subparagraph 34(c), which noted the example in some jurisdictions that businesses might be required to re-register at certain intervals to keep the registry reliable, should be deleted because the example was not considered to be good practice. In addition, it was thought that such a practice could be viewed as unduly burdensome on MSMEs. Although it was noted that certain jurisdictions required some process of periodic renewal of a business's registration in order to ensure the accuracy of information in the registry, the Working Group agreed to delete subparagraph 34(c).

35. Further to a question regarding whether updating the registry in subparagraph 34(d) would be a task for the registry or for the registered business, it was clarified that the text was intended to refer to the registry. Some concern was expressed about the frequency of the updates to the registry and it was observed that technology might not always be available in all States to update the registry in real time. Nevertheless, it was thought that it would be useful to encourage regular updates in the draft legislative guide.

36. There was support in the Working Group for a suggestion to redraft paragraph 34 and focus on the general concepts of verification and security of information as well as on best practices for updating the registry. The Secretariat was also encouraged to include cross-references to later sections of the legislative guide that considered those aspects, including a reference to recommendation 28(a) on automated periodic update requests, and to recommendations 40 and 41 on recourses available to the State when businesses did not provide reliable information to the registry.

37. The Working Group agreed to delete the square brackets around recommendation 3(d) and to retain the text.

3. Establishment and functions of the business registry

Responsible authority: paragraphs 37 to 39 and recommendation 4

38. There was agreement in the Working Group that the reference to the enacting State retaining "ownership" of the registry record in paragraph 39 might not be sufficiently accurate, and that the Secretariat should consider the use of alternative text, possibly referring instead to "responsibility" or "rights".

39. After discussion, the Working Group agreed that recommendation 4 should be clarified to indicate that the State should retain responsibility over the organization of the business registry, but that it could entrust the operation of the registry to an authority established for that purpose. There was support in the Working Group for a drafting suggestion of the recommendation along the following lines: "The law should establish that the organization of the business registry is within the competence of the enacting State. The business registry should be operated by the enacting State or by an authority appointed by that State".

40. The Working Group further agreed to request the Secretariat to clarify the meaning of the term "authority" (as used in recommendations 4 and 5) and the term "designated authority" (as used in recommendations 6 and 8) and possibly to include a definition of both terms in paragraph 12 of the draft legislative guide.

Appointment of the registrar: paragraphs 40 and 41 and recommendation 5

41. The Working Group agreed with the substance of paragraphs 40 and 41 and recommendation 5 of the legislative guide as drafted.

Transparency in the operation of the business registration system and accountability of the registrar: paragraphs 42 to 44 and recommendation 6

42. There was support in the Working Group for the suggestion that paragraph 44 should cross-refer to the principles of liability of the registrar and registry staff, discussed in paragraphs 196 to 200 of the draft legislative guide.

Use of standard registration forms: paragraph 45 and recommendation 7

43. A comment was made that use of standard registration forms may not be the only way through which States could implement a transparent registration system. There was agreement in the Working Group that in the commentary to recommendation 7, it could be added that States may allow the submission of instruments of incorporation or contracts other than the standardized registration form.

Capacity-building for registry staff: paragraphs 46 to 49 and recommendation 8

44. There was agreement in the Working Group that the phrase "any improvement of the registry's standing in international rankings" in paragraph 47 should be deleted and replaced with the notion that States pursued capacity-building for registry staff in order to be meet "global best practices and trends".

45. The Working Group also expressed its support for the suggestion to include the phrase "service standards" in the third line of recommendation 8 after the phrase "business registration procedures".

Core functions of business registries: paragraphs 50 to 58 and recommendation 9

46. In accordance with its deliberation at its twenty-sixth session in April 2016 (para. 82 of A/CN.9/866), the Working Group agreed to postpone the review of this draft recommendation until it had reviewed the rest of the draft recommendations and commentary.

Structure of the business registry: paragraphs 59 and 60 and recommendation 10

47. A concern was expressed that centralized registration systems might not be appropriate for developing States that needed to facilitate access to registration services for businesses in remote locations and possibly through multiple off-site access points. It was, however, noted that in many States, centralized and decentralized approaches to business registration coexisted, since the registration systems were structured as central systems accessible from multiple decentralized access points.

48. After discussion, the Working Group agreed to request the Secretariat to redraft the commentary in paragraphs 59 and 60 to focus less on the contrast between centralized and decentralized systems, and more on how the registry system should be interconnected, regardless of its structure, and have multiple access points.

4. Operation of the business registry

Electronic, paper-based or mixed registry: paragraphs 62 to 65

49. A question was raised in the Working Group whether any delegation was aware of a jurisdiction that had implemented blockchain technology in its business registry system. It was observed that Dubai may be introducing the use of blockchain technology into its registry systems, but that no information on additional jurisdictions was available. It was noted that the issue of blockchain technology was increasingly under discussion globally and that it was on the programme of UNCITRAL's 50th Anniversary Congress (4 to 6 July 2017, Vienna). The Working Group agreed that the technology and its potential impact would be of interest in its current work on MSMEs and should be considered, but decided to defer discussion of it until a later stage.

50. The Working Group agreed with the substance of paragraphs 62 to 65 of the legislative guide as drafted.

Features of an electronic registry: paragraphs 66 to 70

51. The Working Group agreed with the substance of paragraphs 66 to 70 of the legislative guide as drafted.

Phased approach to the implementation of an ICT-based registry: paragraphs 71 to 79

52. A question was raised whether the term "Internet penetration", found in paragraphs 72 and 75 of the draft legislative guide, was the proper terminology in light of the increasing levels of Internet access globally. The view was expressed that other factors, such as cost, might also be relevant to how an ICT-based registry was appropriately phased in. The experience of some delegations indicated that in developing States in particular, additional factors may be of importance, including

literacy rates, infrastructure issues (e.g. power outages), the types of intended users, and access to and reliance on mobile payment systems. The Working Group requested the Secretariat to review the commentary to ensure that such issues were adequately reflected. In addition, it was observed that business registries should also have contingency plans, and while reference to such plans appeared later in the text, the Working Group agreed to include a cross reference in this section of the draft.

53. Other than the adjustments noted in the paragraph above, the Working Group agreed with the substance of paragraphs 71 to 79 of the legislative guide as drafted.

Other registration-related services supported by ICT solutions: paragraphs 80 to 83 and recommendation 11

54. The Working Group agreed with the substance of paragraphs 80 to 83 and recommendation 11 of the legislative guide as drafted.

A single interface for business registration and registration with other authorities ("one-stop shop"): paragraphs 84 to 93 and recommendation 12

55. Several States informed the Working Group of legislative reforms they had enacted which had adopted a single interface for business registration and registration with other authorities ("one-stop shops"), and of the overall positive impact of those reforms in facilitating the registration of businesses. There was broad agreement in the Working Group on the benefits of establishing a "one-stop shop" and of the important advantages that could be gained by users of that single interface.

56. A suggestion was made that reference could be made in the last sentence in paragraph 86 to access for MSMEs to public and private banking as additional services that could be linked to the "one-stop shop", and reference was also made to obtaining municipal licences through the "one-stop shop". Another suggestion was made to add to the commentary, possibly in paragraph 87, reference to the practice of using mobile offices (i.e. offices on wheels) as additional access points for the "one-stop shops", particularly in States with remote areas.

57. A reference was made to the section entitled "B. Definitions" from a document (A/CN.9/WG.I/WP.98) by the United Nations Conference on Trade and Development (UNCTAD) secretariat, and a suggestion was made that that section of the paper should be included in the draft legislative guide as a definition for "business registration". There was support in the Working Group for concerns that were expressed that adopting the passage from the UNCTAD paper as a definition for "business registration" might not be appropriate, and that such an approach could have a negative impact on the remainder of the text and its scope in general. Further, it was indicated that the content of the passage from the UNCTAD paper was already found in the "one-stop shop" section of the legislative guide. The Working Group decided to delay its decision on the suggestion until it had had an opportunity to consider the consequences that such an approach might have on the legislative guide and the overall approach of the project.

58. Some concern was expressed that draft recommendation 12 should ensure clarity that it was not advocating the establishment of a single government agency with authority over all of the other agencies related to the "one-stop shop", but rather that it was recommending that a single agency should have authority over the single integrated interface; government agencies would retain their autonomy.

59. Following discussion in the Working Group, the Secretariat was requested to make the necessary adjustments to clarify the commentary. Decisions in respect of the suggestion to move recommendation 12 to the beginning of the legislative guide (see para. 22 above) and to include a definition of "business registration" along the lines of the UNCTAD paper were deferred to a later stage.

Use of unique business identifiers: paragraphs 94 to 102 and recommendation 13

60. The Working Group was reminded that the purpose of a unique business identifier was to provide each business with a single identifier that the business could use for identification purposes across various agencies within a jurisdiction. At the

same time, it was recognized that an agency might still assign a separate identifier to be used for internal purposes.

61. A suggestion was made by some delegations that paragraph 100 might refer to the fact that a State could assign a separate business identifier to a sole proprietor in both a business and an individual capacity.

62. A concern was raised that recommendations 13 and 14 had an inherent contradiction with respect to the time at which an identifier would be assigned because recommendation 13 provided that a "unique business identifier should be allocated to each registered business" whereas recommendation 14 contemplated that a unique business identifier could also be allocated before registration. It was noted that in some jurisdictions, a public agency might provide a unique identifier for businesses that were permitted to operate before registration, but that States could make it possible for the same identifier to be used as its unique business identifier after registration. It was also noted that in some jurisdictions the registry and the issuer of the unique business identifier might not be the same agency.

63. It was agreed by the Working Group that it would be left to the enacting State to determine the format of the unique business identifier and which agency would have the authority to assign it. The Secretariat was requested to make any necessary adjustments to the commentary.

Allocation of unique business identifiers: paragraphs 103 and 104 and recommendation 14

64. The Working Group agreed with the substance of paragraphs 103 and 104 and recommendation 14 of the legislative guide as drafted.

Implementation of a unique business identifier: paragraphs 105 to 109 and recommendation 15

65. The Working Group agreed with the substance of paragraphs 105 to 109 and recommendation 15 of the legislative guide as drafted. The Working Group also supported a suggestion to combine recommendations 13 through 15 into three consecutive recommendations after one single commentary.

Sharing of private data between public agencies: paragraph 110 and recommendation 16

66. Concern was expressed with respect to the use of the term "private data" in paragraph 110 and in recommendation 16, noting that the concept was unknown in some jurisdictions, or referred to as "personal data" in others. It was suggested that the text might use the term "protected data" as a possible alternative in order to be more precise. There was, however, general agreement in the Working Group that enacting States should establish and adhere to their own rules for the sharing and use of such protected data among public agencies.

67. In addition, it was noted that although the commentary and recommendation were intended to regulate the sharing of data between government agencies, there were several confusing references to disclosure of information to the public. It was suggested that such issues should instead be considered in connection with draft recommendations 32 and 33 of the legislative guide.

68. After discussion, the Working Group agreed that the text of the recommendation should be amended (in particular, the chapeau and subparagraph (a)) so that it referred to "protected data" and recommended that such data should be shared among public authorities only in conformity with the law of the enacting State. There was further agreement that any necessary adjustments should also be made to paragraph 110, and that issues related to disclosure should be considered in relation to recommendations 32 and 33.

Exchange of information among business registries: paragraphs 111 to 116 and recommendation 17

69. Concern was raised whether paragraphs 111 to 116 and recommendation 17 should focus on the exchange of information among business registries, or whether the issue was instead one of cross-border access to information on businesses. It was observed that while the regional examples of information-sharing set out in paragraph 112 and footnote 229 were interesting and ambitious, both were examples of information-sharing as a component of larger projects involving significant economic integration among States. It was suggested that that aspect should be clarified in the text since most States would not share that characteristic, and that the more practical recommendation might be to recommend methods through which different jurisdictions could promote the cross-border accessibility of the information on their registry, for example through providing it in a widely understood language. There was support in the Working Group for that view and to remove references in the entire text to specific States or regional economic integration organizations. As a solution, it was suggested that recommendation 17 could be amended by adding the phrase "access to the" after the word "facilitate", and the phrase "by foreign businesses" after the word "information", and deleting the phrase "exchange between registries from different jurisdictions".

70. In addition, it was suggested that the example included in the closing sentence of paragraph 111 described an interesting use of shared information, but that the example might be more properly considered in conjunction with business entity law rather than with business registration.

71. In general, there was agreement in the Working Group that the approach in paragraphs 111 to 116 and recommendation 17 should be adjusted to one focusing more on cross-border access to information than of information-sharing. To that end, there was support for the suggestion that those issues might best be considered in conjunction with part VI of the draft legislative guide on accessibility and information-sharing.

5. Registration of a business

Scope of examination by the registry: paragraphs 117 to 119

72. A suggestion was made to delete paragraphs 117 through 119 because the discussion of the scope of examination by the registry was said to not be a necessary inclusion in a legislative guide. However, it was noted that an examination of the different types of registry systems would be useful for States which have not yet made a determination as to which system to select. Moreover, the Working Group recalled that it had discussed the advantages and disadvantages of the approval and declaratory systems of business registration at several previous sessions (see, for example, paras. 62 to 65 of A/CN.9/866 and paras. 31, 35 and 61 of A/CN.9/860), and that the Working Group had consistently agreed that the text should be very clear to avoid appearing to favour either system. There was support in the Working Group for the view that paragraphs 117 to 119 respected that view that the main goal of either system should be to simplify registration and thus to encourage the number of registered businesses.

73. It was observed that the approval and declaratory systems represented two distinct approaches, but that many jurisdictions actually used a more nuanced or hybrid approach somewhere between the two extremes and incorporating aspects of both systems. For example, not all approval systems were judicial in nature, and there were variations in the level and type of verification done in the various systems. There was support in the Working Group for the suggestion to include descriptions of such hybrid systems in paragraphs 117 through 119.

74. As a matter of drafting, it was observed that the phrase "verification of an event's legal status is made after it has taken place" in the final sentence of paragraph 118 might not be appropriate. A suggestion was made that the legislative guide could provide information on the minimum amount of information required for each system.

A proposal to define "approval systems" and "declaratory systems" was not taken up by the Working Group.

75. After discussion, the Working Group agreed that paragraphs 117 through 119 should remain in the legislative guide and requested the Secretariat to redraft those paragraphs of the commentary based on the guidance provided. Recalling previous discussions, it was determined by the Working Group that the legislative guide should not be viewed as endorsing one system over another and that care should be taken to draft the characterization of each system neutrally.

Accessibility of information on how to register: paragraphs 120 to 124 and recommendation 18

76. A suggestion was made to make a reference to the earlier discussion of "one-stop shops" in paragraphs 120 to 124. The Secretariat was encouraged to consider providing an appropriate cross reference to the discussion of "one-stop shops" found previously in the legislative guide. With that adjustment, the Working Group agreed with the substance of paragraphs 120 to 124 and recommendation 18 of the legislative guide as drafted.

Businesses required or permitted to register: paragraphs 125 to 128 and recommendation 19

77. The Working Group was reminded that the text of paragraph 125 should be adjusted to be consistent with the agreed text of paragraph 28 (see para. 27 above), in deleting the phrase "may wish to consider requiring or enabling" and replacing it with "should enable".

78. A suggestion was made to clarify in recommendation 19 that businesses could be required to register based on their legal form or the type of business in which they were engaged in paragraph 125.

79. Concerns were expressed regarding the clarity of the final phrase of the first sentence in paragraph 128 that "the separation of personal assets from assets devoted to business or limiting the liability of the owner of the business", since those advantages would be offered to businesses not simply as a result of their registration, but by virtue of them registering as a specific legal form. The Working Group agreed that the commentary should be clarified in that regard, either through deleting that phrase or through noting that such advantages were subject to the legal form chosen by the business.

80. In addition, it was observed that the final phrase of paragraph 126, "for example, because they are not economic entities or because they are not engaged in business activities" and the last sentence in paragraph 128 might need to be clarified.

81. After discussion, the Working Group agreed that clarifications were required to the commentary, and requested the Secretariat make the appropriate adjustments to the text.

Minimum information required for registration: paragraphs 129 to 132 and recommendation 20

82. There was support in the Working Group for the proposal to delete subparagraph 130(b). It was also suggested that reference could be made in the commentary to additional information that the registry might require for the purposes of controlling any illicit purposes or activities of the business that is being registered.

83. Concern was expressed that recommendation 20(b) was not sufficiently clear, in that the "person or persons registering the business" could be either the owner of the business or simply an agent registering a business. A strong preference was expressed that the identity of the owner(s) of the business be added to the list of information in recommendation 20. While there was some support for that suggestion, it was observed that since the legislative guide applied to all types of business, the identity of the owners could change frequently. In addition, it was observed that recommendation 20 merely listed the minimum information required for registration,

and that, in any event, paragraph 131 made it clear that enacting States could require additional information, including the identity of the owner(s) or beneficial owner(s). The Working Group did not support the addition of the identity of the owner(s) to recommendation 20, but it agreed to clarify recommendation 20(b) by referring to the defined term "registrant(s)" rather than to "person or persons registering the business". The Secretariat was also requested to make any necessary changes to paragraph 132 to reflect the view of those States that considered the identity of the business owner to be a key requirement for business registration.

Language in which information is to be submitted: paragraphs 133 to 135 and recommendation 21

84. The Working Group agreed with the substance of paragraphs 133 to 135 and recommendation 21 of the legislative guide as drafted.

Notice of registration: paragraph 136 and recommendation 22

85. It was observed that the translation of the phrase "as soon as practicable, and, in any event, without undue delay" in recommendations 22 and 25 needed to be standardized in the French text. The Working Group agreed with the substance of paragraph 136 and recommendation 22 of the legislative guide as drafted.

Content of notice of registration: paragraph 137 and recommendation 23

86. The Working Group agreed to add the phrase "at least" after the phrase "should contain" in recommendation 23 in order to clarify that reference was being made to a minimum requirement. With that adjustment, the Working Group agreed with the substance of paragraph 137 and recommendation 23 of the legislative guide as drafted.

Period of effectiveness of registration: paragraphs 138 to 141 and recommendation 24

87. It was proposed that the commentary should be clarified, particularly in paragraph 139, to indicate that simply because a business registry did not require businesses to renew their registration it did not mean that the information in the registry was any less reliable, since there were several other methods that were employed to ensure that businesses kept their registered information current, including the imposition of sanctions. A drafting suggestion was made to delete the phrase at the beginning of the second sentence, replacing it with text along the lines of "When the enacting State is taking this approach, it should take care to keep the information current" and including a reference to part V on "Maintaining a current registry". There was support in the Working Group for those suggestions and the Secretariat was requested to make the necessary adjustments.

88. It was also observed that the Working Group had previously agreed (see para. 34 above) that, although some jurisdictions required businesses to periodically renew their registration, requiring businesses to re-register might not be considered a good practice, particularly in terms of the potential burden that could be placed on businesses having to meet that requirement. There was support in the Working Group for the suggestion that the Secretariat be requested to ensure that the commentary in the legislative guide be consistent with that approach.

89. It was noted that recommendation 24 could cause uncertainty as drafted, since registries that required businesses to renew their registration would likely offer a grace period to businesses to complete that requirement prior to deregistering them, and the period of effectiveness might thus be uncertain. It was suggested that that uncertainty could be remedied by deleting the final phrase of the recommendation "or until such time as a renewal of the registration is required". There was support in the Working Group for that suggestion. It was also suggested that the definition of the term "deregistration" should be amended accordingly.

Time and effectiveness of registration: paragraphs 142 to 144 and recommendation 25

90. It was observed that in some jurisdictions, businesses may apply for the protection of certain rights, in particular, in the provisional registration of the trade name of the business in the period prior to registration. Such provisional registration protected that name from being used by any other entity until the registration of the business was effective. The Working Group agreed that a reference to such a pre-registration matter could be added to the text, bearing in mind paragraph 52, and that with that adjustment, the substance of paragraphs 142 to 144 and recommendation 25 of the draft legislative guide were agreed as drafted.

Refusal to register: paragraphs 145 to 148 and recommendation 26

91. It was recalled that, as noted in the commentary, the purpose of recommendation 26 was to prevent registries from arbitrarily rejecting businesses that had requested to be registered. The importance of requiring a clear and legally permissible justification for refusal to register a business was raised by several delegations along with a suggestion to include such language in recommendation 26(a). In addition, several delegations were of the view that translations of the English word "basis" in recommendation 26(a) were not strong enough to ensure that registrars would be required to provide to the company a clear rationale if the application were rejected. A suggestion was noted to consider adding commentary on the effect of instances when an application for registration should have been rejected but was not.

92. It was suggested that just as registrars could have the authority to correct application errors on their own, electronic forms could automatically require correction if submitted with an error. A proposal to further differentiate between electronic and paper registry systems in the commentary and recommendation 26 was not supported by the Working Group, but the Secretariat was encouraged to review the commentary to ensure that it would take into account paper, electronic and mixed systems, as well as the treatment of similar issues in the UNCITRAL Guide on the Implementation of a Security Rights Registry.

93. A concern was raised that the text of recommendation 26(a) referred to refusals to register on both formalistic and substantive grounds. The Working Group determined that recommendation 26 should focus solely on refusal to register based on the formalistic ground of error in the application. A proposal to modify the title of recommendation 26 to refer specifically to errors in the application was also approved by the Working Group, possibly adopting text along the lines of "Rejection of an application for registration".

94. A suggestion was made to create a second recommendation for instances when refusal to register was based on substantive grounds of the business being in violation of the laws of the State. That proposal was not taken up by the Working Group, due to the fact that errors of substance would be governed by other sets of laws in each jurisdiction. Instead, the Secretariat was asked to modify the commentary to elaborate on the difference between formalistic and substantive refusals.

Registration of branches: paragraphs 149 to 151 and recommendation 27

95. The Working Group agreed that the commentary should be clear in establishing that each State had its own requirements governing the rules for the operation of foreign businesses. In that respect, particular regard might be had to adjusting the final sentence of paragraph 149.

96. In addition, a number of proposals were made in order to make paragraphs 149 to 151 and recommendation 27 more consistent with the approach taken in the draft legislative guide including the following:

(a) The commentary should ensure proper use of terminology to indicate that in some States registration of branches of domestic companies was also required or permitted;

(b) Recommendation 27(c)(i) and (ii) should be redrafted. With regard to subparagraph (c)(i), a view was expressed that the issue of the time and registration of businesses was already covered in recommendation 25(b) and therefore recommendation 27(c)(i) should indicate when a branch was registered. As to recommendation 27(c)(ii), it was observed that the legal form of the foreign company that registered the branch should be included among the disclosure requirements listed there. In addition, the reference in recommendation 27(c)(ii) to "the copy of the notice of registration of the foreign company" should be replaced with a reference to any current proof of existence of the foreign company issued by the authority dealing with such matters in the State in which that company was registered; and

(c) Recommendation 27(c)(iv) should be deleted, since the issue of the language in which the information was to be submitted was dealt with in recommendation 21.

97. After discussion, the Working Group agreed to take up those proposals and requested the Secretariat to modify the commentary and recommendation 27 accordingly.

6. Post-registration

Maintaining a current registry: paragraphs 152 to 154 and recommendation 28

98. It was noted that recommendation 28(b) used the phrase "immediately … or as soon and practicable thereafter" whereas recommendations 22 and 25 used the phrase "as soon as practicable, and, in any event, without undue delay" and also provided greater detail on the meaning of the phrase in the commentary. It was agreed that a consistent approach should be taken in the text and commentary of recommendation 28(b).

99. It was also noted that paragraph 153 contained the word "re-register". It was observed that the Working Group had previously agreed (see paras. 34 and 88 above) that requiring businesses to re-register might not be considered good practice and the Secretariat was requested to ensure that the commentary in this section of the legislative guide be consistent with that approach.

100. As an additional method of keeping the information on the registry current, it was proposed that possible sanctions on businesses failing to comply would be more effective than sending reminders, and could be added to the commentary in paragraph 154. There was some support for that proposal, but concerns were expressed that not all errors should be subject to sanctions, particularly because a failure to update information could be inadvertent, and that applying strict sanctions for a relatively minor issue might inhibit MSMEs from registering and entering the legally regulated economy. It was also noted that such sanctions would be challenging to enforce as a practical matter. After discussion, it was determined that appropriate reference to the possibility of establishing sanctions on businesses failing to update their information could be added to the commentary to recommendations 40 and 41, and possibly in the recommendation as well, taking into account the concerns expressed in the Working Group the likelihood that such failures could be inadvertent.

Information required after registration: paragraphs 155 and 156 and recommendation 29

101. The Working Group determined to insert the phrase "at least" into the chapeau of recommendation 29 so that the text read "the registered business must file with the business registry at least the following information".

102. A proposal to eliminate recommendation 29(b) was not taken up by the Working Group, but it was agreed that because periodic returns were not required in all jurisdictions, the order of the clauses should be reversed along the lines of "When the law of the enacting State so requires, periodic returns …". It was suggested by several delegations to remove the reference to "annual accounts" as they might not be required from MSMEs and could be required to be filed with authorities other than registries. In that regard, the Working Group was encouraged to consider the definitions

of "annual accounts" and "periodic reports" in paragraph 12. A suggestion was also noted to make reference to the effect that a "one-stop shop" might have on the preceding obligations.

103. The Working Group agreed to switch the order of recommendations 28 and 29, and to reverse the order of recommendation 28(a) and (b), so that the legislative guide would focus first on the obligation of the business to update information and then on the obligation of the registry. A proposal to combine recommendations 28 and 29 was not taken up by the Working Group.

Time and effectiveness of amendments to registered information: paragraphs 157 and 158 and recommendation 30

104. It was observed that registries usually retained historical information on the business (see, for example, para. 205 in A/CN.9/WG.I/WP.101) and that changes to previously registered information should be added to the registry record. It was proposed that that aspect should be reflected in the commentary to recommendation 30.

105. In addition, a proposal was made to redraft recommendation 30(a) to reflect the order in which a registry actually proceeded when receiving and processing amendments to registered information. It was suggested that the text could reflect that the registry first processed the amendments received from a business in the order in which they were received (which could be dealt with as a subparagraph of recommendation 30(a)) and then entered such amendments into the registry record and informed the business (which could become a second subparagraph of recommendation 30(a)). Finally, it was observed that the phrase "time and date stamp" in subparagraph (a) of recommendation 30 applied to both electronic and paper media, and it was suggested that the text might clarify that point.

106. The Working Group agreed to those proposals and to making a consequential change to the title of recommendation 30 to text along the lines of "process of introducing amendments in the register".

7. Accessibility and information-sharing

Public access to the business registry: paragraphs 159 to 162 and recommendation 31

107. There was agreement in the Working Group to add the term "more" between the words "make" and "informed" in the penultimate sentence of paragraph 159 and to delete the last sentence of that paragraph.

108. It was observed that section A (Public access to the business registry) and section B (Public availability of information) of Chapter VI dealt with two different aspects of accessibility to information: the provision of a service for prospective registrants and access to registered information by the public. In this regard, paragraphs 159 to 162 were said to be more relevant to section B and recommendation 32 and should be moved to that part of the text, while new commentary should be prepared for recommendation 31 dealing with access to the registry by the registrant. It was further noted that paragraph 162 should be redrafted to make it clear whether it referred to access to the registry by the registrant or by the public.

109. There was support in the Working Group for those suggestions and for the suggestion that the phrase "and the information contained in the registry" in recommendation 31 could be deleted to be consistent with the new structure.

Public availability of information: paragraphs 163 to 169 and recommendation 32 and where information is not made public: paragraphs 170 and 171 and recommendation 33

110. It was observed that the general approach of the legislative guide was that in order to facilitate access to the public information on the business registry, users should not be required to provide personal or other details in order to gain access to that information. A suggestion that that principle should be reflected in

recommendation 32 was not supported. A proposal was made that the commentary in paragraph 167 should be clarified to state that a user should not be requested to provide additional information, such as the reason for desiring the information, prior to being granted access to it. The Working Group acknowledged that such an approach would be open to the enacting State in its domestic law.

111. It was suggested that the phrase "or for reasons of personal security" in recommendation 32 was too subjective and should be deleted. A proposal to move that phrase after the word "confidentiality" in order to make it subject to the law of the enacting State was accepted.

112. A suggestion made to delete reference to access to information by public authorities as having been already treated in recommendation 16 received some support. There was also support for a further drafting proposal to delete the final sentence of paragraph 170, since the sharing of such information should be dependent on the law of the enacting State rather than on the consent of the business or the registry. The Working Group agreed to those suggested amendments.

Hours of operation: paragraphs 172 to 174 and recommendation 34

113. A proposal to delete the reference in recommendation 34(a) to the days and hours of opening did not receive support. The Working Group agreed to reverse the order of subparagraphs (a) and (b) and with that change, agreed to the substance of paragraphs 172 to 174 and recommendation 34 of the legislative guide as drafted.

Direct electronic access to submit registration, to search and to request amendments: paragraphs 175 to 178 and recommendation 35

114. There was support for the strong concern expressed that the commentary in paragraphs 175 to 178 and recommendation 35 did not sufficiently take into account the important role of intermediaries in the business registry systems of some States. Although direct electronic access to search the business registry was said to be uncontroversial in the current text, recommending direct electronic access to submit business registrations and request amendments was thought to inappropriately recommend that intermediaries should not have a role in those processes. For example, the statement in paragraph 176 that "users bear the sole responsibility for any errors and omissions" and the statement in paragraph 177 that the registrant has "direct control over the timing of the business registration" were not thought to be representative of a system involving intermediaries. While the Working Group did not agree that the use of intermediaries should be recommended, there was agreement that resort to their services was an important facet of business registration and domestic legal systems in a number of economies and should be recognized in the legislative guide as an option. There was also agreement in the Working Group that the intention of the text had been to promote direct electronic access for business registration and registration services as opposed to requiring a physical presence in the registry premises, not in order to exclude intermediaries, but rather to ensure a reduction in opportunities for corruption or misconduct and to improve overall efficiency.

115. After discussion of various proposals to achieve the appropriate tone in the text, it was agreed that the Secretariat should revise the commentary in order to rebalance it, perhaps through reducing the emphasis on the verification aspects in paragraphs 176 and 177, and in possibly referring to paragraphs 117 to 119 of the text. In addition, the Working Group agreed that the recommendation could be redrafted along the following lines: "The submission of the application and information to register a business should be permitted using information and communication technology, where available, without requiring physical presence in the business registry office, and subject to the laws of the enacting State."

116. The Working Group further agreed that a separate recommendation on direct electronic access to search the business registry should also be included in the text.

Facilitating access to information: paragraphs 179 to 184 and recommendation 36

117. There was support in the Working Group for the suggestion that the final phrase in recommendation 36 ("or unduly limiting the languages in which the information on the registration process is available") should be deleted. It was observed that in some jurisdictions it would not be possible to make available information on the registration process in a non-official language of the State.

8. Fees

Paragraphs 185 and 186

118. The Working Group agreed with the substance of paragraphs 185 to 186 of the legislative guide as drafted.

Fees charged for registry services: paragraphs 187 to 189 and recommendation 37

119. There was broad agreement in the Working Group that registration should be provided free of charge to MSMEs or that fees for such businesses should be established at the lowest level possible. Several delegations noted that in their jurisdictions businesses could register at no cost. A suggestion was made to slightly redraft recommendation 37 so that it highlighted such an approach and there was support in the Working Group to insert the phrase "in particular of MSMEs" between the terms "registration" and "and that" in recommendation 37.

Fees charged for information: paragraph 190 and recommendation 38

120. A proposal was made that the drafting of recommendations 37 and 38 should be made more consistent by including the notion of cost recovery in recommendation 38, since services provided by the registry should be governed by the same principles. The Working Group took up that suggestion.

Publication of fee amounts and methods of payment: paragraph 191 and recommendation 39

121. The Working Group agreed with the substance of paragraph 191 and recommendation 39 of the legislative guide as drafted.

9. Sanctions and liability

Sanctions: paragraphs 192 to 194 and recommendation 40

122. It was noted that the Working Group had agreed during the discussion of recommendation 28 (see para. 100 above) to include within recommendation 40 or 41 a reference to the responsibility of a business to update its registry information. Concerns about the use of fines, particularly to sanction MSMEs, and a range of possible sanctions for different degrees of violation were also recalled.

123. It was suggested that since the final sentence in paragraph 192 addressed the liability of businesses, it could be moved to paragraph 195. There was a proposal to place paragraph 194 elsewhere in the legislative guide, and other delegations were of the view that notices, warnings, and education should be considered alongside sanctions, particularly when dealing with MSMEs.

Liability for submission of misleading, false or deceptive information: paragraph 195 and recommendation 41

124. The Working Group agreed with a proposal to eliminate the word "incomplete" from the text of recommendation 41, as it did not appear in the title and because incomplete information should lead to a rejection of the application.

125. A proposal to delete the word "knowingly" led to a discussion of legal codes and standards of liability under various legal systems. The text of recommendation 41 would be too restrictive in some legal systems while it would need to be stricter in others.

Similarly, concern was raised about the inclusion of "the registrant or the registered business" as the parties liable for misleading, false or deceptive information. The Working Group determined that the Secretariat should draft the recommendation in a manner that would be compatible with all legal systems. The following proposed text was approved by the Working Group: "The law of the enacting state should establish [appropriate] liability for any misleading, false, or deceptive information that is submitted to the registry", and the Secretariat was encouraged to modify the commentary based on the guidance provided by the delegations.

126. The Working Group also agreed to reverse the order of recommendations 40 and 41 in the legislative guide so that liability would be discussed before sanctions.

Liability of the business registry: paragraphs 196 to 200 and recommendation 42

127. It was suggested that, while a security rights registry was quite different from a business registry, the UNCITRAL Model Law on Secured Transactions might provide a model for discussing the liability of the business registry. The Secretariat was encouraged to consider that text in its consideration of possible adjustments to the legislative guide.

128. A proposal to include the second sentence from paragraph 197 into a recommendation was not taken up by the Working Group, which agreed with the text of the recommendation as drafted.

10. Deregistration

Deregistration: paragraphs 201 to 205 and recommendations 43 to 45

129. The definition of deregistration in paragraph 201 was discussed in light of the practice in many jurisdictions not to remove the business from the register, but rather to change its status on the register. It was noted that the term "deregistration" was defined in paragraph 12 and the Secretariat was requested to ensure that commentary throughout the text was consistent with the definition, including the footnote to it. A reference to "one-stop shops" was encouraged to be included in paragraph 201.

130. The Working Group agreed to modify the sixth sentence of paragraph 202 along the lines of: "Such a situation may arise, for example, when the State requires periodic reports or annual accounts, including renewal of registration and a business has failed to do so …". A suggestion to delete paragraph 204 was not supported by the Working Group, but it was observed that the section on deregistration should take care to differentiate "striking off" by the registrar from winding-up and dissolution of a business, since the latter would be a matter of company law and would vary by jurisdiction. The Working Group agreed that the Secretariat should clarify that difference throughout the entire deregistration section of the legislative guide.

131. It was noted that the practice of determining when a business was no longer in operation was difficult for a registrar to determine, but might be necessary in order to achieve the important goal that the registry was not cluttered with such businesses, and that each jurisdiction could determine how best to achieve that goal. A suggestion to delete the phrase "or when the business is no longer in operation" in recommendation 44(a) was not taken up by the Working Group, but it was agreed to amend the phrase to make such action subject to the law of the enacting State or possibly to use terminology such as "when a business is no longer registered".

132. It was suggested to remove the word "written" from recommendation 45(a) or to ensure that the term applied to both electronic and paper notices.

133. There was a concern expressed that recommendations 43 and 44 suggested that registries have independent decision-making ability to deregister businesses. The Secretariat was encouraged to ensure that the commentary reflected that the registry did not have discretion to deregister businesses outside of that stated in the applicable law, as well as to clarify the purpose and scope of the entire section.

Reinstatement of registration: paragraph 206 and recommendation 46

134. In keeping with the discussion in respect of recommendation 45 and its commentary, the Secretariat was requested to redraft paragraph 206 and recommendation 46 to clearly state what pertained to the processes and law of the business registry and what pertained to other areas of the law.

135. A suggestion was made to adjust the Spanish text in paragraph 206 and use the phrase "dejar sin efecto" rather than "restablecer la inscripción".

Time and effectiveness of deregistration: paragraph 207 and recommendation 47

136. The Secretariat was requested to make amendments as necessary recalling the discussion the Working Group had in respect of recommendations 45 and 46 and the relevant commentary.

11. Preservation of records

Preservation of records: paragraphs 208 to 210 and recommendation 48

137. While it was highlighted that the last two sentences of paragraph 210 referred to the ability of States to apply their general rules on preservation of public documents to the business registry, the Secretariat was asked to address concerns expressed in respect of the recommendation's reference to "perpetuity" and the difference between the time requirements for print and electronic preservation. It was suggested that it was important to stress that the preservation of information was important, and that the preservation of electronic records might be easier and less costly than that of paper records, but to avoid suggesting a time period for either type.

Amendment or deletion of information: paragraphs 211 and 212 and recommendation 49

138. In response to a concern about the use of the word "amendment" in recommendation 49 versus its use in recommendation 30, the Working Group agreed to change the text of paragraphs 211 and 212 and recommendation 49 to "alteration." The Secretariat was also asked to consider adding "limits to" to the title.

139. There was some concern expressed about whether subparagraphs (b) and (c) were properly placed within the context of paragraph 212 because the rest of the section pertained to the alteration of information. The Secretariat was requested to consider a cross-reference to recommendation 42 or to move the text. It was agreed to retain subparagraph 212(a), and to consider a cross-reference to paragraph 233 and recommendation 56.

Protection against loss of or damage to the business registry record: paragraphs 213 and 214 and recommendation 50

140. The Working Group agreed with the substance of paragraphs 213 and 214 and recommendation 50 as drafted.

Safeguard from accidental destruction: paragraph 215 and recommendation 51

141. The Working Group agreed with the substance of paragraph 215 and recommendation 51 as drafted.

12. The underlying legislative framework

Changes to underlying laws and regulations: paragraphs 216 to 218; Clarity of the law: paragraphs 219 to 221 and recommendation 52; Flexible legal entities: paragraphs 222 to 225 and recommendation 53; Primary and secondary legislation to accommodate the evolution of technology: paragraph 226 and recommendation 54

142. The Working Group agreed with the substance of paragraphs 216 to 226 and recommendations 52 to 54, but decided to move them into an annex to the legislative guide.

Electronic documents and electronic authentication methods: paragraphs 227 to 230; Dispatch and receipt of electronic messages: paragraph 231; UNCITRAL Model Laws: paragraph 232 and recommendation 55; Electronic payments: paragraph 233 and recommendation 56

143. The Working Group agreed with the substance of recommendations 55 and 56 and the relevant commentary and to retain them in the legislative guide, locating an appropriate position for them in the text. The Secretariat was requested to consider whether it was necessary to include paragraph 231 in the text and to ensure that it had considered all relevant UNCITRAL e-commerce texts.

13. Structure of the legislative guide

144. A proposal was made to include text in the legislative guide along the following lines, but not to change the structure of the overall text:

> "I. Objectives of a simplified registration system and the Purposes of the business registry
>
> "Business registration is, in practice, a series of registration processes involving multiple public agencies. To enter the formal legal economy an enterprise has to register with various registries. In most countries these registries are:
>
> - Business registry (declaration of legal existence)
> - National tax administration (registration as a tax payer)
> - Social Security (registration as an employer)
>
> "The enacting State should look at simplified business registration holistically from the user's standpoint. When implementing the reforms to create a business registry, States should keep in mind that this is just one of elements of creating a legal environment to enable MSMEs to enter into the formal legal sector. (Make cross reference to recommendation 12.)
>
> "The following overarching principles should govern an effective system of business registration: (a) the goals at all times should be simple, efficient, low cost registration, and simple, cost-effective procedures, as seen from the user's point of view; (b) enabling businesses of all sizes and legal forms to be visible in the marketplace and to operate in the legally regulated commercial environment; and (c) enabling MSMEs to increase their business opportunities and to improve the profitability of their businesses.
>
> "Recommendation 1
>
> "The Regulation should provide that the business registry is established for the purposes of (a) providing to the business an identity that is recognized by the enacting State and (b) making accessible to the public information in respect of the registered business.
>
> "The enacting State should bear in mind that one key purpose of reforming the business registry system would be to facilitate the movement of businesses from the informal sector to the legally regulated economy, as part of the system of all mandatory registries, which also include tax, and social security authorities."

145. That proposal received some support in the Working Group, but concerns were reiterated similar to those raised in respect of an earlier suggestion regarding "one-stop shops" (see para. 57 above). The Working Group decided that the concepts expressed in the suggested inclusion and its general approach could be included in the commentary, along with a reference in recommendation 1 to the importance of "one-stop shops", and requested the Secretariat to prepare an appropriate draft, as well as to insert appropriate references in the remainder of the text.

B. Draft legislative guide on an UNCITRAL Limited Liability Organization (UNLLO)

1. Introductory observations

146. The Working Group was reminded of the work it had completed at its twenty-seventh session in considering the draft legislative guide on an UNCITRAL limited liability organization (UNLLO) contained in A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1 (see A/CN.9/895), noting that its discussion should start at the current session with the commentary in paragraphs 12 to 16 and recommendation 14 of A/CN.9/WG.I/WP.99/Add.1. The Working Group recalled that support had been expressed to use the term "UNLLO" on an interim basis on the understanding that it would be considered again at a later stage (para. 43 of A/CN.9/895) and that it had expressed support for the commentary in A/CN.9/WG.I/WP.99 to more fully discuss the list of considerations found in footnote 19 of that document and other sources (subpara. 20(c) of A/CN.9/895).

2. Section D. Managers

Paragraphs 12 to 16 and recommendation 14

147. After discussion of the "opt-in" nature of the final sentence of paragraph 13, a proposal to reverse the proposition to require members to owe fiduciary duties to other members unless otherwise agreed was accepted by the Working Group. Although some concern was expressed that the term "fiduciary duty" was not used in all legal traditions, it was observed that the term was commonly used internationally in discussions of company law. The Working Group agreed to continue to use "fiduciary duty" in the legislative guide as a means to conveniently express the principles encompassed by the term, possibly noting in the text that using the term was by no means intended to import law from one legal tradition into another.

148. It was observed that, as noted in the first sentence of paragraph 15, the prohibition against self-dealing in subparagraph 12(2) (and subpara. 16(2)) was not ordinarily absolute. Text along the lines of "unless there was authorization from an independent body" was suggested to the Secretariat in order to adjust the text, taking into consideration the specific situation of MSMEs and the fact that an independent body might not be an appropriate mechanism to obtain such approval. There was some support for that suggestion.

149. The Working Group further agreed that the commentary to recommendation 14 should also include a paragraph on the enforcement of such fiduciary duties. The Secretariat was requested to include a discussion of how legal claims could be brought against managers in breach of their fiduciary duties (through actions brought individually or collectively, as a derivative action on behalf of the UNLLO), regardless of whether the action was brought before a court or by way of an alternative dispute settlement mechanism. The Working Group also agreed to include a separate recommendation in the legislative guide encouraging the use of alternative dispute settlement in respect of the UNLLO, bearing in mind existing references in the current text (para. 52 and footnote 36) and in previous texts (for example, in draft art. 38 of A/CN.9/WG.I/WP.89).

150. A concern was also expressed that the use of a subjective standard such as that currently in recommendation 14 might not be appropriate and that the sole standard used should be that the manager must act in the best interests of the UNLLO. Several delegations expressed concern that the text of recommendation 14 did not include enough detail from the commentary, particularly in respect of the duties described in paragraph 12. Text along the lines of adding "good faith and loyalty" was suggested for inclusion in recommendation 14, but a problem of linking the concepts of good faith and loyalty was noted, in that the relevant duties were thought to be a duty of care and a duty of loyalty, but that good faith should be the standard for both duties.

151. In addition to the various amendments agreed to above, the Working Group also agreed that recommendation 14 should be redrafted by including the detail found in

paragraph 12 of the commentary, possibly linking the duty of disclosure to recommendation 27.

Paragraphs 17 and 18 and recommendation 15

152. The Working Group recalled that recommendation 9 required that the name of each manager of the UNLLO be publicly disclosed, and that the intention of recommendation 15 was to provide a default rule that each manager could individually bind the UNLLO in its dealings with third parties. Moreover, it was observed that the commentary as drafted in paragraph 18 envisaged that members could agree to restrictions on the authority of managers to bind the UNLLO, or to limit that authority to certain managers, but that such a members' agreement would only be binding on third parties who had notice of it.

153. The Working Group agreed that deletion of the phrase "publicly disclosed" from recommendation 15 was necessary to reflect the intention of recommendation 15 and to avoid suggesting that the names of some managers might not be made public. In addition, it was agreed that the content of the commentary in paragraph 18 should be reflected in the recommendation itself, so as to clarify that members could agree to vary the default rule, but that providing notice of such a change to third parties dealing with the UNLLO was mandatory in order to be effective against them.

Paragraphs 19 and 20 and recommendation 16

154. A previous decision generally to replace the phrase "simple majority" with "majority" in the legislative guide was recalled by the Working Group (para. 63 of A/CN.9/895). With that correction, the Working Group agreed with the substance of paragraphs 19 and 20 and recommendation 16 as drafted.

3. Section E. Contributions

Paragraphs 21 and 22 and recommendation 17; paragraphs 23 to 27 and recommendation 18

155. The Working Group commenced its discussion on paragraphs 21 and 22 and recommendation 17. Some delegations were of the view that recommendation 17 was inappropriate since membership in an UNLLO without making a contribution ought not to be permitted, and that at least a contribution in kind, in provision of services or a future contribution was necessary. Other delegations were of the view that contributions, regardless of their type, should not be required from members of the UNLLO, even over time, and it was further noted that that practice was already established in the domestic law of some jurisdictions. In addition, it was recalled that "freedom of contract" was the guiding principle of the entire draft legislative guide, and that members of the UNLLO should be granted the freedom to determine whether a contribution was required to become a member, as well as deciding on the value of a contribution, if any.

156. In order to introduce the principles discussed in the paragraph above into recommendation 18, the Working Group agreed to ensure maximum flexibility for enacting States by inserting the qualifier "if any" into recommendation 18 after the phrase "agree upon contributions", as well as to include the term "value", so that recommendation 18 would read, in part, "including the amount, type and value of such contributions …". In addition, there was support in the Working Group to delete recommendation 17 as unnecessary in light of recommendation 18, and to incorporate the content of paragraphs 21 and 22 into the commentary for recommendation 18.

4. Section F. Distributions

Paragraphs 28 and 29 and recommendation 19

157. It was suggested that distributions by an UNLLO should be governed according to the amount of a member's contribution, but it was noted that the Working Group should instead consider recommendation 19 in light of the decisions it had made in respect of recommendations 13, 17 and 18 in order to retain consistency with its

earlier approach. It was recalled that that approach relied on a default rule of equality, which could be varied by the agreement of the members of the UNLLO. Moreover, it was suggested that relying on a member's contribution to assess distributions and other rights could be unfair for those that made no contribution or for members that joined the UNLLO at different times and whose proportionate contribution might thus be valued differently.

158. Following discussion, there was support for the suggestion that it might be clearer for recommendation 13 to refer to the percentage or ratio of a member's ownership to assess its rights of control, rather than referring to the proportion of the member's contribution as had been decided at the last session of the Working Group (para. 67 of A/CN.9/895). To that end, a proposal was made to replace recommendations 13 and 18 with text along the following lines, and to provide the new text along the following lines for recommendation 17 (which had been deleted) as the overarching principle:

> "Recommendation 13 (a)
>
> "The members of the UNLLO have rights of control in proportion to their respective amount/percentage of the ownership of the UNLLO, as stated in the formation document or members' agreement. When the amount/percentage of the ownership of the UNLLO is not stated in the formation document or members' agreement, the members of the UNLLO have equal rights of control.
>
> "E. Amount/percentage of the ownership of the UNLLO and contribution by members
>
> "Recommendation 17
>
> "The law should provide that members of the UNLLO should agree upon their respective amount/percentage of the ownership of the UNLLO in the formation document or members' agreement. When the amount/percentage of the ownership of the UNLLO is not stated in the formation document or members' agreement, it is deemed that the formation document or members' agreement states that the members of the UNLLO share the ownership of the UNLLO equally.
>
> "Recommendation 18
>
> "The law should provide that, when deciding the members' respective amount/percentage of the ownership of the UNLLO, the members of the UNLLO are permitted to agree upon contributions, if any, made to the UNLLO, including the amount, type and value of such contributions."

159. Following discussion, there was support in the Working Group for that proposal, and the following additional suggestions were made:

(a) Text could be inserted into recommendation 13(a) or (b) to indicate that voting rights of members should be proportionate to ownership;

(b) The closing phrase of recommendation 18 in the current legislative guide could be retained for greater clarity ("but that in the absence of such agreement, contributions that are made to the UNLLO should be made in equal amounts by the members");

(c) Recommendation 19 should then follow the logic of recommendation 13 and indicate that distributions would be made to members in proportion to their ownership unless the members had agreed otherwise;

(d) Any need for the establishment of more complex ownership structures or voting rights could be established by the members in their agreement according to the overarching freedom of contract principle, and in any event, was contemplated in paragraph 27;

(e) The use of the term "ownership" might not be sufficiently clear, as it required the identification of the rights that members had (which could include rights to vote, to participate in management, to distribution and to income);

(f) The drafting of the recommendations under discussion should be coordinated with the text in recommendation 9, for example, choosing to refer to either "members' agreement" or "formation document"; and

(g) The Working Group was reminded that the legislative guide made a conscious attempt to use neutral terminology rather than corporate-related terminology such as "shares" (para. 23 of A/CN.9/WG.I/WP.99).

160. Following discussion, there was support in the Working Group for the proposal and the Secretariat was requested to adjust the commentary and recommendations in order to reflect that agreement. The Working Group also agreed that the text of recommendation 19 should reflect the approach taken in the revised version of recommendation 13.

Paragraphs 30 to 32 and recommendation 20; paragraphs 33 to 35 and recommendation 21

161. Support was expressed for paragraphs 30 to 32 and recommendation 20 and for paragraphs 33 to 35 and recommendation 21 as drafted. It was suggested that the word "knowingly" should be inserted after the phrase "each member who …", but it was observed that that could make the burden of proof too onerous. In response to a suggestion that managers should be held responsible for improper distributions, it was observed that drawing the distinction between managers and members (where they were not the same person) could make the text too complex and that since the legislative guide made the members rather than the managers responsible for making decisions regarding distributions, that care should be taken to be consistent in approach. It was further suggested that the insolvency and balance sheet tests in recommendation 20 were linked to the issue of financial statements in recommendation 26, but that any necessary link could be dealt with in discussing that recommendation in due course.

162. Additional comments were made that paragraphs 32 and 35 dealt with the liability of managers when an UNLLO made improper distributions, and that recommendations 20 and 21 were concerned with the protection of creditors. It was suggested that reference should thus not be made to recommendation 14 in paragraph 35 (since that recommendation was intended to protect the UNLLO), and that the phrase "to the UNLLO" should be inserted after the phrase "also be held liable" in paragraph 35. Further, in response to a suggestion to ensure that distributions did not include payments of reasonable compensation for services or for bona fide debt owed to a member, the attention of the Working Group was drawn to paragraph 34.

163. The Secretariat was requested to consider those suggestions and to make any appropriate clarification to the commentary to recommendations 20 and 21.

V. Proposals by States

Proposal by the government of Italy (A/CN.9/WG.I/WP.102)

164. The Working Group heard a short introduction of working paper A/CN.9/WG.I/WP.102 which included a proposal of the Italian delegation on a topic that might be considered for future work to support development of MSMEs. It was noted that participation of MSMEs in global trade was made difficult by fragmented legal frameworks and that an international legal instrument, structured as a multiparty contract between MSMEs located in the same or in different jurisdictions may assist in facilitating collaboration among businesses with a relatively low level of initial capital, low entry and exit costs, and a light governance infrastructure. It was further noted that such a multiparty contract may facilitate access: (a) to capital by providing joint collateral to credit institutions; (b) to new technologies with the creation of common technological platforms, where common intellectual property rights may be used; and (c) to a qualified labour force through the possibility of sharing employees who may rotate among the businesses participating in the network.

165. It was also observed that a legislative text with a similar scope had been enforced in Italy since 2009 under the definition of business network contract (or *contratto di rete)* and the main features of such text, outlined in greater detail in A/CN.9/WG.I/WP.102, were highlighted. In response to questions, it was clarified that the networks, as established in Italian legislation, were legal entities resulting from contracts, whose governance was left to contractual freedom, that they needed to be registered, they might allow for segregation of assets and that they facilitated MSMEs accessing global trade and global supply chains of transnational corporations. It was further noted that such networks would differ from cooperatives as they were more flexible and wider in scope (for instance, in several jurisdictions cooperatives may be established only for non-profit purposes) and could also be established just to exchange information or services among the participating entities. It was also observed that contractual networks differed from contract farming, a topic discussed by the International Institute for the Unification of Private Law (Unidroit), in that contractual networks were wider in scope as they did not just address farming issues (although such networks could be widely used in agriculture, or agrifood industry) and they were not limited to the contract aspect but also considered the organizational structure and functioning of the network.

166. Finally, it was noted that the Italian delegation would submit the proposal to the attention of the Commission at its 50th session in July 2017.

Observations and model provisions from the Government of Colombia (A/CN.9/WG.I/WP.104)

167. The Working Group heard a presentation of A/CN.9/WG.I/WP.104 containing observations and model provisions from the Government of Colombia on the dissolution and liquidation of MSMEs. Such businesses were said to need simplified processes to ensure that their liquidation and dissolution could be carried out clearly and rapidly, and that the model provisions in the working paper had been drafted with that aim. It was suggested that detailed provisions on the liquidation and dissolution of MSMEs could complement and expand on the principles expressed in recommendation 24 of the UNLLO draft legislative guide, and might be attached as an annex to the legislative guide. There was some support for the proposal submitted in the working paper. Some concern was expressed that the current text of A/CN.9/WPI/WG.104 seemed to use terminology that focused on corporate business forms rather than the neutral terms adopted in the UNLLO text, and that such model provisions presented in the paper could be too detailed to be attached to the legislative guide when compared with the general approach taken in that text.

168. After discussion, the Working Group agreed that any further consideration of the proposal should be first subject to domestic consultation by delegations and that the Working Group would consider the proposal in conjunction with its future discussion of recommendation 24 of the legislative guide.

VI. Other matters

169. The Working Group recalled that its twenty-ninth session was tentatively scheduled to be held in Vienna from 16 to 20 October 2017. The Working Group confirmed that it would consider the draft legislative guide on key principles of business registration at its twenty-ninth session, with a view to its possible adoption by the Commission at its fifty-first session in 2018.

E. Note by the Secretariat on draft legislative guide on key principles of a business registry

(A/CN.9/WG.I/WP.101)

[Original: English]

Contents

I. Introduction

1. The present legislative guide has been prepared on the understanding that, for the reasons described in document A/CN.9/WG.I/WP.92, it is in the interests of States and of micro, small and medium-sized enterprises (MSMEs) that such businesses migrate to or be created in the legally regulated economy. In addition, this guide is also intended to reflect the idea that entrepreneurs that have not yet commenced a business may be persuaded to do so in the legally regulated economy if the requirements for formally starting their business are not considered overly burdensome. Finally, these materials are prepared on the understanding that, regardless of the particular nature or legal structure of the business, the primary means for an MSME to enter the legally regulated economy in most cases is through registration of their business.[1]

2. As the Working Group may recall, document A/CN.9/WG.I/WP.92 was prepared as an introductory document that, once adopted, was intended to form a part of the final text and provide an overarching framework for current and future work by UNCTRAL to assist MSMEs in overcoming the legal barriers faced by them during their life cycle. Underpinning that contextual framework would be a series of legal pillars, which would include both legislative guides currently under preparation by the Working Group — the present guide on key principles of a business registry and the other guide on an UNCITRAL limited liability organization[2] — as well as any other materials adopted by UNCITRAL in respect of MSMEs. In summary,

[1] Para. 1, A/CN.9/WG.I/WP.93.
[2] See A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

A/CN.9/WG.I/WP.92 currently outlines the following themes as key to UNCITRAL's approach to its MSME work:

(a) The importance of MSMEs in the global economy;

(b) Each State should decide what constitutes a micro, small or medium-sized business in its own economic context, the common factor being that the smallest and most vulnerable businesses require assistance;

(c) Although MSMEs are incredibly disparate in their size, goals, the commercial sector in which they operate and their general nature, they usually face a number of common obstacles;

(d) Improving the business environment assists businesses of all sizes, not only MSMEs;

(e) Participation by MSMEs in the legally regulated economy can assist them in successfully negotiating the obstacles they face;

(f) States should make it simple and desirable for MSMEs to participate in the legally regulated economy by:

(i) Explaining what it means and by setting out the advantages for entrepreneurs, as well as by ensuring appropriate communication and education on those advantages and opportunities;

(ii) Making it desirable for MSMEs to enter the legally regulated economy, for example, by offering them incentives for doing so; and

(iii) Making it easy for MSMEs to enter the legally regulated economy through:

a. Creating flexible and simplified business forms for MSMEs;[3] and

b. Ensuring that business registration is accessible, simple and streamlined.

3. In light of that general approach, in order to encourage entrepreneurs to start their business in, or to migrate their business into, the legally regulated economy, States may wish to take steps to rationalize and streamline their system of business registration. The recommendations in this legislative guide are intended to be implemented by States that are reforming or improving their system of business registration. Further, as noted above, the present guide takes the approach that since business registration is the primary conduit through which MSMEs can become visible in the legally regulated economy and be able to access programmes intended to assist them, the business registry should continue to *require* only certain types of businesses to register, but it should enable all businesses to register. Moreover, general improvements made by a State to its business registration system may be expected to assist not only MSMEs, but businesses of all sizes, including those already operating in the legally regulated economy. Many studies support the approach that faster and simpler procedures to start a business will assist in business formation and migration to the legally regulated economy. For these reasons, simplification and streamlining of business registration has become one of the most pursued reforms by States in all regions and at all levels of development. This trend has generated several good practices, whose features are shared among the best performing economies.[4] In order to assist States wishing to reform their business registration procedures so as to take into consideration the particular needs of MSMEs, or simply to adopt additional good practices to streamline existing procedures, this guide sets out key principles and good practices in respect of business registration, and how to achieve the necessary reforms.[5]

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[3] The Working Group is currently preparing a draft legislative guide aimed at this goal, see A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1.

[4] See also A/CN.9/WG.I/WP.85, which provides information on several best practices in respect of business registration.

[5] Para. 2, A/CN.9/WG.I/WP.93.

4. Further to discussion in the Working Group and decisions made at its twenty-fifth (October 2015) and twenty-sixth sessions (April 2016)[6] of the Working Group, the Secretariat has prepared this draft legislative guide, which addresses legal, technological, administrative and operational issues involved in the creation and implementation of a business registration system. It combines into a single text the draft commentary (A/CN.9/WG.I/WP.93, Add.1 and Add.2) and recommendations (A/CN.9/WG.I/WP.96 and Add.1) considered by the Working Group at its twenty-fifth and twenty-sixth sessions. In addition, the Secretariat has made certain light editorial adjustments necessary to facilitate the creation of a single text, as well as including changes to the text arising from decisions made by the Working Group in those sessions. The footnotes contained throughout the text guide the reader in identifying where each paragraph appeared in the previous texts, as well as changes made as a result of decisions made by the Working Group. Further, although this text has in some cases changed the order of the recommendations, in order to avoid confusion, each recommendation in the present draft guide bears the same number that it did in document A/CN.9/WG.I/WP.96 and Add.1. Once the Working Group has settled upon the preferred order of the recommendations, they will be renumbered consecutively and any cross-references will be adjusted accordingly.

A. Purpose of the present guide

5. Business registries are public entities, established by law, that record and update information on new and existing businesses that are operating in the jurisdiction of the registry, both at the outset and throughout the course of their lifespan.[7] This process not only enables such businesses to comply with their obligations under the domestic legal and regulatory framework applicable to them, but it empowers them to participate fully in the legally regulated economy, including enabling them to benefit from legal, financial and policy support services not otherwise available to unregistered businesses. Moreover, when information is appropriately maintained and shared by the registry, it allows the public to access business information, thus facilitating the search for potential business partners and/or clients and reducing risk when entering into business partnerships.[8] In performing its functions, the registry can thus play a key role in the economic development of a State.[9] In addition, since businesses, including MSMEs, are increasingly expanding their activities beyond national borders, registries efficiently performing their functions can play an important role in a cross-border context[10] by facilitating access to business information of interested users from foreign jurisdictions (see also paras. 111-116 below).[11]

6. Business registration systems vary greatly across States and regions, but a common thread to all is that the obligation to register can apply to businesses of all sizes depending on the legal requirements applicable to them under domestic legislation. Approaches to business registration reforms are most often “neutral” in that they aim at improving the functioning of the registries without differentiating between large scale business activities and much smaller business entities. Evidence suggests, however, that when business registries are structured and function in accordance with certain features, they are likely to facilitate the registration of MSMEs, as well as operating more efficiently for businesses of all sizes.[12] These features are reflected as recommendations in this legislative guide.

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[6] See para. 73, A/CN.9/860 and para. 51, A/CN.9/866.

[7] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, page 8.

[8] See World Bank and International Finance Corporation, Doing Business, 2015, page 47 and para. 35, A/CN.9/WG.I/WP.92.

[9] Para. 4, A/CN.9/WG.I/WP.93.

[10] See European Commission, Green Paper, The interconnection of business registers, 4 November 2009, page 2.

[11] Council of the European Union, Council conclusions on the interconnection of business registers, 25 May 2010.

[12] Para. 5, A/CN.9/WG.I/WP.93.

7. This draft legislative guide draws on the lessons learned through the wave of reforms of business registration systems implemented since 2000 by various developed and developing economies.[13] Through this approach, the guide intends to facilitate not only efficient domestic business registration systems, but also cooperation among registries in different national jurisdictions, with a view to facilitating cross-border access to the registries by all interested users. Promoting the cross-border dimension of business registration contributes to foster transparency and legal certainty in the economy and significantly reduces the cost of businesses operating beyond their national borders (see also paras. 111-116 below).[14]

8. This guide supports the view that transitioning to an electronic or mixed (i.e. paper and electronic) registration system, providing registration and post-registration services at no cost or at low cost, and collecting and maintaining high quality information on registered businesses greatly contribute to promote the registration of MSMEs. Establishing a single interface for business registration and registration with other authorities such as tax authorities, social services and the like also increases the likelihood that MSMEs will enter the legally regulated economy. In this regard, it should be noted that the terms "business registry" and "single interface for business registration" (or "one-stop shop") as used in this draft guide are not intended to be interchangeable. When these materials refer to the "business registry", it means the system for receiving, storing and making accessible to the public certain information about business entities. When the term "single interface" (or "one-stop shop") is used, it refers to a single entry point, physical or electronic, that a business can use to achieve not only its registration as a business, but a single entry point to all other regulatory functions in the State that relate to starting and operating a business, including, for example, registering for tax purposes and for social services associated with the operation of a business.[15]

9. These materials have benefitted from various tools prepared by international organizations that have supported those reform processes, in particular, in developing and middle income economies. Data made available through the activity of international networks of business registries that, among other activities, survey and compare the practices of their affiliates in various States around the world have also been referenced. The main sources used in the preparation of this draft legislative guide include:[16]

- How Many Stops in a One-Stop Shop? (Investment Climate World Bank Group, 2009vestment Climate World Bank Group, 2009)
- Innovative Solutions for Business Entry Reforms: A Global Analysis (Investment Climate, World Bank Group, 2012)
- Reforming Business Registration: A Toolkit for the Practitioners (Investment Climate, World Bank Group, 2013)
- The annual International Business Registers Report (prepared previously by ECRF, and currently by ASORLAC, CRF, ECRF and IACA)[17]

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[13] The opening sentence of this paragraph is the opening sentence of para. 6, A/CN.9/WG.I/WP.93. For further reference, see para. 8, A/CN.9/WG.I/WP.85.

[14] See European Commission, Green Paper, The interconnection of business registers, 4 November 2009, pages 2 ff.

[15] At its twenty-sixth session, the Working Group requested that the Secretariat clarify the meaning of "business registry" and "single interface for business registration" and should clearly establish the overall approach of providing a single interface for all businesses to enter the legally regulated economy in the introductory paragraphs of the draft legislative guide (see para. 55, A/CN.9/866).

[16] Para. 6, A/CN.9/WG.I/WP.93 (the second part of the paragraph has been slightly modified by inserting the sentence "in various States around the world" between the terms "their affiliates" and "referenced").

[17] The report is prepared by the following registry organizations: Association of Registrars of Latin America and the Caribbean (ASORLAC); Corporate Registers Forum (CRF); European Commerce Registers' Forum (ECRF); and International Association of Commercial Administrators (IACA). These organizations include State registry officials from around the globe.

- The Business Facilitation Programme website (developed by UNCTAD)[18]

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[*The Working Group may wish to note that other resources may be added as the materials are further developed*.]

10. This legislative guide is addressed to States interested in the reform or improvement of their business registry systems, including all stakeholders in the State that are interested or actively involved in the design and implementation of business registries, as well as to those that may be affected by or interested in the establishment and operation of such a registry, such as:

(a) Policymakers;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with the fulfilment of the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry clientele, including business persons, consumers, and creditors, as well as the general public and all others with an interest in the appropriate functioning of the business registry;

(e) Credit agencies and other entities that will provide credit to a business;

(f) The general legal community, including academics, judges, arbitrators and practising lawyers; and

(g) All those involved in company law reform and the provision of technical assistance in the simplification of business registration, such as international organizations, bilateral donors, multilateral development banks and non-governmental organizations active in the field of business registration.[19]

11. The present guide uses neutral and generic legal terminology so that its recommendations can be adapted easily to the diverse legal traditions and drafting styles of different States. This draft legislative guide also takes a flexible approach, which will allow its recommendations to be implemented in accordance with local drafting conventions and legislative policies regarding which rules must be incorporated in principal legislation and which may be left to subordinate regulation or to ministerial or other administrative rules.[20]

B. Terminology

12. The following paragraphs explain the meaning and use of certain expressions that appear frequently in this draft legislative guide:[21]

- *Annual accounts*: The term “annual accounts” means financial information on the business’ activities prepared at the end of a financial year of the business.[22]

- *Periodic returns*: The term “periodic returns” means a statement provided annually or at other prescribed intervals which gives essential information about a business’ composition, activities, and financial status, and which, subject to applicable law, active registered businesses may be required to file with an appropriate authority.

- *Branch*: The term “branch” means an entity carrying on business in a new location either within the jurisdiction in which it was formed or in another

[18] UNCTAD is the United Nations Conference on Trade and Development. See http://businessfacilitation.org/index.html.
[19] Para. 7, A/CN.9/WG.I/WP.93.
[20] Para. 8, A/CN.9/WG.I/WP.93.
[21] Para. 9, A/CN.9/WG.I/WP.93.
[22] See Guide to the International Business Registers Surveys 2015, page 2.

jurisdiction.[23] The branch is not a subsidiary and does not have a separate legal personality from the original or main business.[24]

- *Business name*: The term "business name" means a name registered on behalf of a business.[25]

- *Business registry or business registration system*: The term "business registry or business registration system" means a State's system for receiving, storing and making accessible to the public certain information about businesses; and "business" does not include those professions otherwise regulated by professional bodies.

- *Deregistration*: The term "deregistration" means the removal of a business from the registry, or an indication that the business is no longer registered, once that business, for whatever reason, has permanently ceased to operate, including as a result of a merger or forced liquidation due to bankruptcy.[26]

- *Electronic signature*: The term "electronic signature" means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.[27]

- *ICT*: The term "ICT" means information and communications technology.

- *Jurisdiction*: The term "jurisdiction" means the territory over which a State exercises its authority.

- *Law of the enacting State*: The term "the law of the enacting State" means the applicable law in the enacting State and is intended to include the broader body of domestic law that may be relevant to issues related to the business registry outside of the specific law or regulation establishing the business registry (referred to below as the "Regulation").

- *Micro, small and medium-sized enterprises (MSMEs)*: The term "MSMEs" means micro, small and medium-sized enterprises as they are defined in the laws and regulations of the State undertaking the business registration reforms.

- *One-stop shop*: The term "one-stop shop" means a physical office, an electronic platform (see "single interface") or an organization that carries out more than one function relating to register a business with the business registry and other government agencies (e.g. the taxation and social services authorities and the pension fund).

- *Registered business*: The term "registered business" means those businesses that, further to filing an application for registration, have been officially registered in the business registry.

- *Registered information*: The term "registered information" means information contained in the registry.

- *Registrant*: The term "registrant" means the natural or legal person that submits the prescribed application form and documents to a business registry.

- *Registrar*: The term "registrar" means the person appointed pursuant to domestic law to supervise and administer the operation of the registry.

- *Registration*: The term "registration" means the entry of information required by domestic law into the registry.

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[23] This draft legislative guide deals with the registration of branches of foreign companies.

[24] See The International Business Registers Report, 2015, page 43.

[25] See Guide to the International Business Registers Surveys 2015, page 2.

[26] When a business is deregistered, the public details about the business usually remain visible on the register, but the current status of the business indicates that it has been "removed".

[27] See UNCITRAL Model Law on Electronic Signatures (2001), article 2.

- *Registration number*: The term "registration number" means a unique number assigned by the business registry to a registered business and that is associated with that business during its life cycle.

- *Regulation*: The term "Regulation" means the body of rules adopted by the enacting State to establish the business registry, whether such rules are found in specific legislation or in administrative regulations or guidelines.

- *Reliable*: A business registry system and the information it contains is "reliable" when the data and the system may be considered positively in terms of quality and performance. "Reliable" does not refer to the system used pursuant to the legal tradition of the State to ensure quality and performance, nor to whether the information is legally binding on the registry, the registrant or third parties.

- *Single interface*: A single interface is the electronic version of a one-stop shop.

- *Unregistered business*: The term "unregistered business" means those businesses that are not included in the business registry.

- *Unique identifier*: The term "unique identifier" means a uniform and unique identifier that is used consistently by the public agencies of a State, and may be used internationally, and that consists of a set of characters (numeric or alphanumeric) that is allocated only once to a business and that will not change throughout the lifetime of that business.

[*The Working Group may wish to note that the list of defined terms will be adjusted as the materials are further developed*.]

C. Legislative drafting considerations

13. States implementing the principles contained in this legislative guide should consider whether to include them in a law, in a subordinate regulation, in administrative guidelines or in more than one of those texts. This matter would be for enacting States to decide in accordance with their own legislative drafting conventions.[28] However, it should be noted that this guide distinguishes between those concepts by referring to "the Regulation" and the "law of the enacting State". As noted in the section on terminology, the "Regulation" is intended to mean the body of rules adopted by the enacting State with respect to the business registry, whether such rules are found in administrative guidelines or in the law of the enacting State governing business registration. The term "law of the enacting State" is intended to denote those provisions of domestic legislation in the enacting State in the broader sense that are somehow relevant to and touch upon issues related to business registration.[29]

D. The reform process[30]

14. Streamlining business registration in order to meet the key objective of simplifying the registration process as well as making it time and cost efficient and user friendly (both for registrants and stakeholders searching the registry) usually requires undertaking reforms that address the enacting State's legal and institutional framework. It may also be necessary to reform the business processes that support the registration system. Sometimes reforms are needed in all of these areas. The approach taken in these reforms may vary considerably among States as the design and features of a registration system are influenced by the State's level of development, priorities and legal framework. There are, however, several common issues that States should

[28] Para. 31, A/CN.9/WG.I/WP.93.
[29] Para. 3, A/CN.9/WG.I/WP.96.
[30] The Working Group agreed at its twenty-fifth session that subject to future deliberation, the section formerly called "Implementation considerations" might be moved to a more prominent position in the text, such as to the introduction (see para. 64, A/CN.9/860).

consider and several similar recommended steps for reform regardless of jurisdictional differences that may exist. These issues are examined below.[31]

1. The reform catalysts

15. Business registration reform is a multifaceted reform process that addresses various aspects of the State apparatus; its implementation requires the participation of a broad range of stakeholders and a thorough understanding of the State's legal and economic conditions, as well as of the practical needs of registry personnel and the intended users of the registry. To be successful, the reform must be driven by the need to improve private sector development and, for this reason, it is advisable that the reform be part of a larger private sector development or public sector modernization programme.[32] It is thus essential to gain an understanding of the importance of business registration in relation to other business environment challenges and of its relationship to other potential reforms. This analysis will require, as crucial preliminary steps, ensuring that domestic circumstances are amenable to a business reform programme, that incentives for such a reform exist and that there is support for such initiatives in the government and in the private sector prior to embarking on any reform effort.[33]

(a) Relevance of a reform advocate

16. Support or even leadership from the highest levels of the State's government is of key importance for the success of the reform process. The engagement of relevant government ministries and political leadership in the reform effort facilitates the achievement of consensus on the steps required. This can be particularly important to facilitate access to financial resources, to make and implement decisions or when it is necessary to move business registry functions from one branch of government to another or to outsource them.[34]

(b) The reform committee

17. In order to oversee the day-to-day progress of the reform and to manage difficulties as they may arise, it is advisable that a steering committee be established to assist the State representative or body leading the reform. In addition to experts with technological, legal and administrative expertise, this committee should be composed of representatives of the public and private sector and should include a wide range of stakeholders, including those who can represent the perspectives of intended users. It may not always be necessary to create such a committee, since it may be possible to use existing mechanisms; in any event, a proliferation of committees is to be avoided, as their overall impact will be weakened.[35]

18. Experience indicates that reform committees should have clearly defined functions and accountability; it is advisable that their initial setup be small and that they grow progressively as momentum and stakeholder support increase. Although linked to the high level government body spearheading and advocating for the reform, the committee should operate transparently and independently from the executive branch. In certain jurisdictions, regulatory reform bodies have later been transformed into more permanent institutions that drive ongoing work on regulatory governance and regulatory impact analysis.[36]

19. The reform committee must nurture the reform process and consider how to address concerns raised in respect of it.[37] Concerns could include those arising from

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[31] Para. 32, A/CN.9/WG.I/WP.93.

[32] See A. Mikhnev, Building the capacity for business registration reform, 2005, page 16.

[33] Para. 36, A/CN.9/WG.I/WP.93.

[34] Para. 37, A/CN.9/WG.I/WP.93. For further reference, see Investment Climate, (World Bank Group) Reforming Business Registration: A Toolkit for the practitioners, 2013, page 23.

[35] Para. 38, A/CN.9/WG.I/WP.93. For further reference, see 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 39.

[36] Para. 39, A/CN.9/WG.I/WP.93.

[37] See Investment Climate, (World Bank Group) Reforming Business Registration: A Toolkit for the

bureaucratic inertia, or fears that registry employees may lose their jobs if their ICT skills are weak or if technology replaces human capital. Thus, it is likely to be important for the body overseeing the reform to be able to consider diverse interests and fully inform potential beneficiaries and political supporters.[38]

(c) The project team

20. In collaboration with the reform committee, it is advisable that a project team be assigned the task of designing a reform programme tailored to an enacting State's circumstances and providing technical expertise to implement the reforms. A successful reform will require a team of international and local specialists, with expertise and experience in business registration reform, in legal and institutional reform, and in a variety of ICT matters (for example, software design, hardware, database and Web specialists).[39]

(d) Awareness-raising strategies

21. States embarking on a reform process should consider appropriate communication strategies aimed at familiarizing businesses and other potential registry users with the operation of the registry and of the legal and economic significance of business registration. This effort should include informing business about the benefits of registration and participation in the legally regulated economy (e.g. visibility to the public, the market and the banking system; opportunity to participate in public procurement; legal validation of the business; access to flexible business forms and asset partitioning; possibility to protect the business' unique name and other intangible assets; opportunities for the business to grow and to have access to a specialized labour force and access to government assistance programmes). The awareness-raising strategy should also ensure that information on compliance with the law, fulfilment of obligations taken on by registration (e.g. payment of taxes) and penalties for non-compliance is similarly clear and easily available.[40]

22. Effective communication may also be expected to encourage the development of new enterprises and the registration of existing unregistered businesses, as well as providing signals to potential investors about the enacting State's efforts towards improvement of the business environment. Awareness-raising strategies should commence early in the reform process and should be maintained throughout it, including after the enactment of the legal infrastructure and implementation of the new business registry system. In coordination with the reform committee, the project team should determine which cost-effective media can best be used: these can include private-public dialogues, press conferences, seminars and workshops, television and radio programmes, newspapers, online and print advertisements, and preparing detailed instructions on submitting registration information and conducting searches.[41] In order to raise MSME awareness of the reforms to the business registry system, it may be advisable to consider communication strategies tailored specifically to that audience (see, for example, paras. 36 to 38, A/CN.9/WG.I/WP.92).[42]

(e) Incentives for businesses to register

23. In addition to an efficient awareness-raising campaign, States should consider adding incentives for MSMEs and other businesses to register through the provision of ancillary services for registered businesses (see para. 2(f)(ii) above). The types of incentives will clearly vary according to the specific economic, business and regulatory context. By way of example they may include: promoting access to credit for registered businesses; offering accounting training and services as well as

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practitioners, 2013, page 25.

[38] Para. 40, A/CN.9/WG.I/WP.93.

[39] Para. 41, A/CN.9/WG.I/WP.93.

[40] For a more detailed presentation of these issues see para. 35, A/CN.9/WG.I/WP.92 and A/CN.9/WG.I/WP.98, Section D.2. See also para. 128 of this working paper.

[41] See Investment Climate, (World Bank Group) Reforming Business Registration: A Toolkit for the practitioners, 2013, pages 26-27.

[42] Para. 42, A/CN.9/WG.I/WP.93.

assistance in the preparation of a business plan; providing credits for training costs; establishing lower and simplified taxation rates and tax mediation services; providing business counselling services; providing monetary compensation, government subsidies or programmes to foster MSME growth and providing low-cost technological infrastructure.[43]

2. Phased reform process

24. The duration of a reform process can vary considerably, depending on the types of reforms implemented and on other circumstances relevant to the particular economy. While the most comprehensive approach may entail a complete reform of the business registry and the legislation establishing it, this may not be realistic in all cases and enacting States may wish to consider a phased implementation of their reform. Lessons learned from experience in various jurisdictions demonstrate, for instance, that in States with a large number of unregistered businesses, a reform process that adopts a "think small" approach at the outset of the reform process, might be more effective than a reform with a broader focus, which could be introduced at a later stage.[44] For example, if the main objective is to promote the registration of MSMEs at the outset, simple solutions addressing the needs of MSMEs operating at the local level may be more successful than introducing sophisticated automated systems that require high-level technological infrastructures, changes in the legal and institutional framework and that may be more appropriate to larger businesses or businesses operating in the international market. Even when the reform is carried out in more developed jurisdictions, it may be advisable to "start small" and pilot the reforms at a local level (for example, in a district or the capital) before extending them state-wide. Success in a pilot stage can have a strong demonstration effect, and is likely to build support for continued reform.[45]

I. Objectives of a business registry

A. Purposes of the business registry

25. The opening provisions of the law or regulation which set the foundation of a business registry should provide for the establishment of the registry and set out explicitly the purpose of a system for the registration of businesses.[46]

26. The following overarching principles should govern an effective system of business registration: (a) enabling businesses[47] of all sizes and legal forms to be visible in the marketplace and to operate in the legally regulated commercial environment; and (b) enabling MSMEs to increase their business opportunities and to improve the profitability of their businesses.[48]

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[43] For a more comprehensive list of incentives, see para. 42, A/CN.9/WG.I/WP.92 and A/CN.9/WG.I/WP.98, Section C.6(c).

[44] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 26.

[45] Para. 43, A/CN.9/WG.I/WP.93. For further reference, see 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 45.

[46] Para. 5, A/CN.9/WG.I/WP.96.

[47] The Working Group suggested at its twenty-fifth session (para. 32, A/CN.9/860) that the term "commercial entities" would be broad enough to cover different types of enterprises, and that it would be for domestic legislation to decide which business forms must be registered. The Secretariat has suggested using the word "business" in order to be consistent throughout the draft guide.

[48] These concepts were formerly found in subparas. 10(a) and (b), A/CN.9/WG.I/WP.93. At its twenty-fifth session, the Working Group considered those subparagraphs and made slight drafting suggestions (to change "the key" to "a key" in (a) and to delete "particularly" from (b) (para. 30, A/CN.9/860). Those subparagraphs have been rephrased in the current text.

Recommendation 1: Purposes of the business registry[49]

The Regulation should provide that the business registry is established for the purposes of:

(a) Providing to a business an identity that is recognized by the enacting State and entitles the business to participate in, and receive the benefits of participating in, the legally regulated economy of the State;[50] and

(b) Making accessible to the public information in respect of registered businesses.

B. Simple and predictable legislative framework permitting registration for all businesses[51]

27. States should set the foundations of their business registry either by way of law or regulation.[52] In order to foster a transparent and reliable business registration system, with clear accountability of the registrar (see also paras. 43-44 below), such law or regulation should be simple and straightforward. Care should be taken to limit or avoid any unnecessary use of discretionary power, and to provide for appropriate safeguards against its arbitrary use.[53] However, some discretion should be permitted to the registry in order to ensure the smooth functioning of the system. For instance, subject to the requirements of the law or the regulation and prior notice to the registrant, the registrar may be allowed to correct material errors in the information registered (see also paras. 146 and 211 below).

28. The applicable law in each State should determine which business forms are required to register, and which additional conditions they may have to fulfil as part of that requirement.[54] Since business registration is considered the key means through which all businesses, including MSMEs, can participate effectively in the legally regulated economy,[55] States may wish to consider requiring or enabling businesses of all sizes and legal forms to register in an appropriate business registry, or creating a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.[56]

29. The law or regulation[57] governing business registration should also provide for simplified registration and post-registration procedures in order to promote registration of MSMEs.[58] The goal should be for States to establish registration procedures with only the minimum necessary requirements for MSMEs and other businesses to operate in the legally regulated economy. Of course, businesses with more complex legal forms would be subject to additional information requirements under the law of the enacting State as a consequence of their particular legal form.[59]

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[49] Former recommendation 2, A/CN.9/WG.I/WP.96.

[50] At its twenty-sixth session (para. 59, A/CN.9/866), the Working Group requested the Secretariat to clarify recommendation 2 as set out in A/CN.9/WG.I/WP.96, in particular subpara. (a) thereof, which read: "(a) Providing an identity recognized by the enacting State to a business that fulfils the requirements established by law".

[51] As decided by the Working Group at its twenty-sixth session (paras. 56 to 58, and 70, 71 and 74, A/CN.9/866), this section combines recommendations 7, 1 and 4 of A/CN.9/WG.I/WP.96 (and the accompanying commentary found in paras. 10 and 33, A/CN.9/WG.I/WP.93; paras. 5, 13, 22 and 28, A/CN.9/WG.I/WP.93/Add.1; and paras. 24, 25 and 59 to 71, A/CN.9/WG.I/WP.93/Add.2).

[52] Opening sentence of para. 33, A/CN.9/WG.I/WP.93.

[53] This sentence is based on former recommendation 7.

[54] Second and third sentences of para. 33, A/CN.9/WG.I/WP.93.

[55] Para. 4, A/CN.9/WG.I/WP.96.

[56] Para. 5, A/CN.9/WG.I/WP.93/Add.1.

[57] This paragraph and the following one referred to former recommendation 4 now merged in new recommendation 1.

[58] See also paras. 61-67, A/CN.9/WG.I/WP.99.

[59] Para. 13, A/CN.9/WG.I/WP.93/Add.1.

30. Further, regardless of the approach chosen to maintain updated information in the business registry, it would be advisable that updating MSME records be made as simple as possible. This could involve a number of different approaches examined in greater detail below, such as extending the period for such businesses to declare a change; harmonizing the information needed when the same information is repeatedly required; or exempting MSMEs from certain obligations in specific cases.[60]

Recommendation 2[61]: Simple and predictable legislative framework permitting registration for all businesses

The Regulation or the law of the enacting State should:

(a) Adopt a simple structure for rules governing the business registry and avoid the unnecessary use of exceptions or granting of discretionary power; [former recommendation 7]

(b) Establish a system for the registration of businesses that permits[62] registration of businesses of all sizes and legal forms; and [first half of former recommendation 1]

(c) Ensure that micro, small and medium-sized enterprises (MSMEs) are subject to the minimum procedural requirements except where such a business is subject to additional requirements under the law of the enacting State as a consequence of its particular legal form. [former recommendation 4]

C. Key features of a business registration system

31. To be effective in registering businesses of all sizes, a business registration system should ensure that, to the extent possible,[63] the registration process is simple, time and cost efficient, user-friendly and publicly accessible. Moreover, care should be taken to ensure that the registered information on businesses is easily searchable and retrievable, and that the process through which the registered information is collected and maintained as well as the registry system are kept as current, reliable and secure as possible.[64]

32. The concept of "reliable" business registry systems and the information contained in the registry is a recurring theme in the present guide. In the context of this legislative guide, the "reliability" of information or the system used to collect and store it refers to information or systems in which the data are consistently good in quality or performance and are able to be trusted. The term does not refer to the method that a State uses to ensure such reliability, and leaves it to each enacting State to determine how best to ensure the reliability of that information or system in light of its own context and legal tradition. "Reliability" in this guide does not refer to whether or not the information in the business registry is legally binding on the registry, on registrants or on third parties, nor to whether the enacting State relies upon a declaratory or approval approach in respect of its business registration system; however, the extent to which information in the registry is legally binding and whether the State

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[60] Para. 28, A/CN.9/WG.I/WP.93/Add.1. See also paras. 152-154 in this working paper on "Maintaining a current registry".

[61] Former recommendations 7, 1 and 4 of A/CN.9/WG.I/WP.96. See also footnote 51 above.

[62] The Working Group agreed at its twenty-sixth session that the phrase "and facilitates" should be deleted and the concept of facilitation expressed elsewhere (A/CN.9/866, para. 58). The Secretariat suggests that the concept of facilitation may be adequately reflected in subpara. (c) of former recommendations 7, 1 and 4, as consolidated in current recommendation 2.

[63] The phrase "as … as possible" has been removed from its previous placement in subpara. 10(c), A/CN.9/WG.I/WP.93 and replaced with "to the extent possible". The Working Group agreed at its twenty-fifth session that it was important to retain in the text the concept that different levels of development could result in some States not achieving the highest levels of effectiveness (A/CN.9/860, para. 33).

[64] Para. 10(c), A/CN.9/WG.I/WP.93.

uses a declaratory or approval system are aspects that should be made clear by the enacting State in its business registry legislation and on the business registry itself.[65]

33. Regardless of which registration system is adopted, maintaining high quality, current and reliable information is imperative for the business registry in order to make the information useful for the registry users and to establish users' confidence in business registry services. This applies not only to the information provided when applying to register a business, but also to the information that the entrepreneur submits during the lifetime of the business.[66] It is thus important that the information meet certain requirements in the way it is submitted to the registry and then made available to the public. For these reasons, States should devise provisions that allow the registry to operate according to principles of transparency and efficiency in the way information is collected, maintained and released.[67]

34. The registry can implement certain actions in order to ensure that the information maintained in the registry is of good quality and reliable. By way of example, those actions, which will be further discussed in the following sections of the present guide, may include:

(a) The prevention of corporate identity theft[68] through the use of monitoring systems, checks by an intermediary, or establishing access through the use of passwords;

(b) The adoption of identity verification methods for those who deliver information to the business register and secure signature requirements for the provision of that information (such as through the use of electronic signatures or electronic certificates);[69]

(c) Requiring businesses to reregister at certain intervals, which would provide a means of confirming whether the information in the register is up to date;[70] and

(d) Updating the registry in real time or where this is not possible, ensuring daily updates of the registry.[71]

35. Moreover, in order to enhance the quality and reliability of the information deposited in the registry, enacting States should preserve the integrity and security of the registry record itself. Steps to achieve those goals include: (a) requiring the registry to request and maintain the identity of the registrant; (b) obligating the registry to notify promptly the applicant business about the registration and any changes made to the registered information; and (c) eliminating any discretion on the part of registry staff to deny access to registry services.[72]

Recommendation 3: Key features of a business registration system

The Regulation should ensure that the system for business registration contains the following key features:

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[65] This paragraph has been inserted in order to address a concern that had been raised in the Working Group at its twenty-fifth and twenty-sixth sessions in respect of the meaning of "reliability" (A/CN.9/860, paras. 18, 22, 27, 31, 35, 42 and 61 and A/CN.9/866, paras. 60 to 64).

[66] Para. 21, A/CN.9/WG.I/WP.93/Add.1.

[67] The last sentence of this paragraph is from para. 21, A/CN.9/WG.I/WP.93/Add.1.

[68] See para. 30, A/CN.9/WG.I/WP.93/Add.2.

[69] See paras. 27 to 30, A/CN.9/WG.I/WP.93/Add.2.

[70] See The International Business Registers Report 2015, page 134.

[71] Para. 78, A/CN.9/WG.I/WP.93/Add.1. For further reference, see The International Business Registers Report 2015, pages 119 ff.

[72] Para. 39, A/CN.9/WG.I/WP.93/Add.1; the paragraph has been edited as follows: the opening sentence "Other steps to ensure the integrity and security of the registry record include …" has been replaced with the sentence "Moreover, in order to enhance … and security of the registry record itself" and the final sentence ("With regard to (b), however, it can be noted … it is considered to be registered") has been removed. Para. 38, A/CN.9/WG.I/WP.93/Add.1 has been deleted since it appeared to be a duplication of previous paragraphs.

(a) The registration process is publicly accessible, simple, user-friendly and time- and cost-efficient;

(b) The registration process is adapted to the needs of MSMEs;

(c) The registered information on businesses is easily searchable and retrievable; and

[(d) The registry system and the registered information are kept as current, reliable and secure as possible.][73]

II. Establishment and functions of the business registry[74]

36. In order to establish an effective business registration system, several approaches may be taken. However, despite the fact that approaches vary in different States, there is broad agreement on certain key objectives of effective business registration systems. Regardless of differences in the way business registries may operate, efficient business registries have a similar structure and perform similar functions when carrying out the registration of a new business or in recording the changes that may occur in respect of an existing business.[75]

A. Responsible Authority

37. In establishing or reforming a business registry, enacting States will have to decide how the business registry will be organized and operated. Different approaches can be taken to its form,[76] the most common of which is based on oversight by the government. In such States, a government department or agency, staffed by civil servants, and usually established under the authority of a particular government department or ministry, operates the registration system. As previously noted, another type of organization of a business registry is one that is subject to administrative oversight by the judiciary. In such contexts, the registration body might be a court or a judicial registry whose function, usually specified in the applicable commercial code, is strictly concerned with verifying the business requisites for registration but does not require prior judicial approval of a business seeking to register.[77]

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[73] At its twenty-fifth session, there was support in the Working Group for the view that three important themes running through the draft business registry materials formed an appropriate foundation for the continuation of work in the area: efficiency, reliability and transparency (para. 27, A/CN.9/860). At its twenty-sixth session (para. 65, A/CN.9/866), the Working Group agreed that subpara. (d) should be placed in square brackets for inclusion in a future iteration of the text, along with additional information in the commentary (see para. 32 of this working paper) referring to the consideration of the issues in respect of "reliability" as set out in paras. 60 to 64, A/CN.9/866 and 31, 35 and 61, A/CN.9/860. In light of the inclusion of a definition of "reliable" in para. 12 of this working paper and a discussion of this issue generally in para. 32 above, the Working Group may wish to revisit that decision. The Working Group also reiterated its agreement (para. 65, A/CN.9/866) that the text should be very clear so as to avoid appearing to favour either the declaratory system or the approval system of business registration.

[74] A section titled "Minimum regulatory burden on micro, small and medium-sized enterprises (MSMEs) was previously placed before this chapter of the draft and contained recommendation 4 from A/CN.9/WG.I/WP.96 which read: "The Regulation should ensure that micro, small and medium-sized enterprises (MSMEs) are subject to the minimum obligations necessary pursuant to the Regulation, except where such a business is subject to additional requirements under the law of the enacting State as a consequence of its particular legal form." The Working Group decided at its twenty-sixth session (para. 66, A/CN.9/866) that the principle should be retained but that the recommendation should be deleted, ultimately agreeing that it should be included along with recommendations 1 and 7 from A/CN.9/WG.I/WP.96 in a new recommendation (paras. 71 and 74, A/CN.9/866), included as recommendation 2 in the present text.

[75] Para. 14, A/CN.9/WG.I/WP.93.

[76] According to The International Business Registers' Report 2015, registries are organized in the following ways: 82 per cent of business registries are state-governed; 7 per cent are organized as public-private partnerships; 5 per cent are governed by the judiciary; and 1 per cent are operated by privately owned companies.

[77] Para. 23, A/CN.9/WG.I/WP.93.

38. States may also decide to outsource some or all of the registry operations through a contractual or other legal arrangement that may involve public-private partnerships or the private sector.[78] When registration is outsourced to the private sector, it remains a function of the government, but the day-to-day operation of the system is entrusted to privately-owned companies. In one jurisdiction, for instance, such an outsourcing was accomplished by way of appointing a private company, in accordance with the law, as the assistant registrar with full authority to run the registration function.[79] However, operating the registry through public-private partnerships or private sector companies does not yet appear to be as common as the operation of the registry by a government agency. One reason might be that arrangements involving contracting with the private sector to provide business registration services require careful consideration of several legal and policy issues, such as the responsibilities of the government and the private provider, the form of the arrangements, the allocation of risk, and dispute resolution.[80] States may also decide to form entities with separate legal personality, such as chambers of commerce, with the object of managing and developing the business registry,[81] or to establish by law registries as autonomous or quasi-autonomous agencies, which can have their own business accounts and operate in accordance with the applicable regulations governing public agencies. In one State, for example, the business registry is a separate legal person that acts under the supervision of the Ministry of Justice,[82] while in another State the registry is an administratively separate executive agency of a government department, but does not have separate legal status.[83] In deciding which form of organization to adopt, States will have to consider their specific domestic circumstances, evaluate the challenges and trade-offs of the various forms of organization and then determine which one best meets the State's priorities and its human, technological and financial resources.[84]

39. While the day-to-day operation of the registry may be delegated to a private sector firm, the enacting State should always retain the responsibility of ensuring that the registry is operated in accordance with the applicable law or regulation. For the purposes of establishing public trust in the business registry and preventing the unauthorized commercialization or fraudulent use of information in the registry record, the enacting State should retain ownership of the registry record.[85] Furthermore, the State should also ensure that, regardless of the daily operation or the structure of the business registry, the State retains the right to control the access to and use of the data in the registry.

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[78] See European Commerce Registers' Forum, International Business Registers Report, 2014, page 15.

[79] For instance, Gibraltar, cited in Investment Climate (World Bank Group), Outsourcing of Business Registration Activities, Lessons from Experience, 2010, pages 55 ff.

[80] The Working Group may wish to consider whether further details on the implications of operating the registry by way of private-public partnership should be included in a future annex to this draft legislative guide.

[81] See Luxembourg, cited in Investment Climate (World Bank Group), Outsourcing of Business Registration Activities, Lessons from Experience, 2010, pages 52 ff. In Luxembourg, the State, the Chamber of Commerce and the Chamber of Crafts formed an economic interest grouping, i.e. an entity with separate legal personality, with the object of managing and developing the business registry.

[82] See Latvia; for further reference see also A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of the EU Accession Countries, 2007, page 44.

[83] See the United Kingdom of Great Britain and Northern Ireland; for further reference see also Lewin and others, cited above, page 44.

[84] Para. 24, A/CN.9/WG.I/WP.93.

[85] Para. 44, A/CN.9/WG.I/WP.93, the paragraph has been slightly edited: the opening sentence ("It will be necessary at an early stage to determine whether the registry is to be operated by a State entity, such as governmental agency or the judicial system, or whether it will be operated in partnership with a private sector firm with demonstrated technical experience and a proven record of financial accountability (see para. 24 above). However …") has been deleted.

Recommendation 4[86]: Responsible authority[87]

The Regulation should establish that the organization and operation of the business registry is a function of the enacting State.[88]

B. Appointment of the registrar

40. The law or the regulation established by the State should set out, either directly or by reference to the relevant primary or secondary legislation (for further discussion on the topic of primary and secondary legislation, see para. 216 below),[89] the procedure to appoint and dismiss the registrar, as well as the duties of the registrar, and the authority empowered to supervise the registrar in the performance of those duties.[90]

41. To ensure flexibility in the administration of the business registry, the term "registrar" should be understood as referring to a natural or legal person appointed to administer the business registry. States should permit the registrar to delegate its powers to persons appointed to assist the registrar in the performance of its duties.[91]

Recommendation 5[92]: Appointment of the registrar[93]

The Regulation should:

(a) provide that [*the person or entity authorized by the enacting State or by the law of the enacting State*] has the authority to appoint and dismiss the registrar and to monitor the registrar's performance; and

(b) determine the registrar's powers and duties and the extent to which those powers and duties may be delegated.

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[86] Former recommendation 5, A/CN.9/WG.I/WP.96.

[87] The Secretariat has considered merging former recommendations 5 and 6 as requested by the Working Group at its twenty-sixth session (para. 69, A/CN.9/866), but was of the view that those two recommendations should remain separate as they addressed different aspects that ought to be considered when establishing or reforming the business registry.

[88] As decided by the Working Group at its twenty-sixth session (para. 67, A/CN.9/866), subparas. (a) and (b) have been removed from the previous version of recommendation 5 (in A/CN.9/WG.I/WP.96) but their content has been retained in para. 35 of the present text.

[89] Primary legislation concerns texts such as laws and codes that must be passed by the legislative bodies of a State. Secondary legislation is that body of texts composed of regulations, directives and other similar acts made by the executive branch within the boundaries laid down by the legislature.

[90] Para. 34, A/CN.9/WG.I/WP.93. At its twenty-fifth session, the Working Group observed that care should be taken not to appear to dictate who the State might name as registrar by specifying too restrictively a registrar's attributes. The Working Group expressed agreement on the principles expressed in the paragraph and suggested that additional insight might be gained from additional work undertaken by Working Group VI on similar provisions in the secured transactions materials (see para. 62, A/CN.9/860).

[91] As requested by the Working Group at its twenty-fifth session, the Secretariat has amended para. 34, A/CN.9/WG.I/WP.93 in order to avoid any restrictive specifications of the registrar's attributes, which should be left to the discretion of the State (See para. 62, A/CN.9/860 and footnote 90 above).

[92] Former recommendation 6, A/CN.9/WG.I/WP.96.

[93] While some drafting suggestions in respect of former recommendation 6 were made by the Working Group at its twenty-sixth session (paras. 68 and 69, A/CN.9/866), there was no agreement on how to proceed. The Secretariat has left the text untouched from the version in A/CN.9/WG.I/WP.96, but for the insertion of square brackets so as to better mirror recommendation 2 of the UNCITRAL Guide on the Implementation of a Security Rights Registry (on which recommendation 6 was based) which reads as follows: "The Regulation should provide that [the person authorized by the enacting State or by the law of the enacting State] appoints the registrar, determines the registrar's duties and monitors the registrar's performance."

C. Transparency in the operation of the business registration system and accountability of the registrar

42. A legal framework that fosters the transparent and reliable operation of the system for business registration has a number of features. It should allow registration to occur with a limited number of steps, and it should require limited interaction with registry authorities, as well as provide short and specified turn-around times, be inexpensive, result in registration of a long-term or unlimited duration, apply throughout the jurisdiction and make registration very accessible for registrants.[94]

43. In addition, the legal framework should clearly set out the functions of the registrar in order to ensure the registrar's accountability in the operation of the registry and the minimization of any potential for corruption. In this regard, it should be ensured that the applicable law of the enacting State establishes principles for the liability of the registrar and the registry staff to ensure their appropriate conduct in administering the business registry.

44. Registries should also establish "service standards" that would define the services to which users are entitled and may expect to receive, while at the same time providing the registry with performance goals that the registry should aim to achieve. Such service standards could include, for example, rules on the correction of errors (see paras. 27 above, and 146 and 211 below), rules governing the maximum length of time for which a registry may be unavailable (such as for electronic servicing) and providing advance notice of any expected down time. Service standards contribute to ensure further transparency and accountability in the administration of the registry, as such standards provide benchmarks to monitor the quality of the services provided and the performance of the registry staff.

Recommendation 6[95]: Transparency of the business registration system and accountability of the registrar

The designated authority should ensure that rules or criteria that are developed are made public to ensure transparency of the registration procedures and the accountability of the registrar in terms of respecting those procedures.[96]

D. Use of standard registration forms

45. Another approach that is often used in association with the previous one to promote transparency and reliability in the operation of the business registry, is the use of standard registration forms paired with clear guidance to the registrant on how to complete them. Such forms can easily be 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. These forms also help prevent errors in entering the data by business registry personnel, thus speeding up the overall process. In some jurisdictions, the adoption of standardized registration forms has been instrumental in streamlining the registration requirements and disposing of unnecessary documents.[97]

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[94] Para. 62, A/CN.9/WG.I/WP.93/Add.2.

[95] Former recommendation 8, A/CN.9/WG.I/WP.96.

[96] At its twenty-sixth session, the Working Group expressed concern (para. 75, A/CN.9/866) in respect of the meaning of "accountability", and the phrase "in terms of respecting those procedures" has been added to the recommendation to clarify the meaning of the term. See Working Group decision para. 75, A/CN.9/866. See also Working Group decision para. 79, A/CN.9/866. In addition, after considering whether recommendation 8 should also include the availability of online information to registrants, the Working Group observed that recommendation 17 or other recommendations might adequately cover that aspect, and that no decision should be made in this regard until the Working Group had further examined the text (para. 79, A/CN.9/866).

[97] Para. 64, A/CN.9/WG.I/WP.93/Add.2. In regard to this paragraph, the Working Group may wish to note its decision to prepare standard forms in respect of its work on a legislative text on simplified business entities (see para. 63, A/CN.9/800).

Recommendation 7[98]: Use of standard registration forms

The Regulation should provide that standard registration forms are introduced to request the registration of a business and that guidance is available to registrants on how to complete those forms.[99]

E. Capacity-building for registry staff

46. Once a reform of the business registration system has been initiated, developing the capacity of the personnel entrusted with business registration functions is an important aspect of the process. Poor service often affects the efficiency of the system and can result in errors or necessitate multiple visits to the registry by users.[100] Capacity development of registry staff could not only focus on enhancing their performance and improving their knowledge of the new registration processes, ICT solutions and client orientation, but staff could also be trained in new ways of improving business registration.[101]

47. As seen in various States, different approaches to capacity-building can be followed, from the more traditional training methods based on lectures and classroom activities, to more innovative ways that can be driven by the introduction of new business registration systems. In some jurisdictions, team-building activities and role-playing have been used with some success, since reforms often break barriers between various government departments and require the improvement of the flow of information among them, as well as an understanding of different aspects of the procedures with which specific registry staff may not be familiar.[102] In other cases, States have opted for developing action plans with annual targets for improvement of the registry's standing in international rankings, and linking promotions and bonuses for staff to the achievement of the action plan's goals. In still other cases, States have decided to introduce new corporate values in order to enhance the public service system, including business registration.[103] Although the relevant governmental authority will usually take the lead in organizing capacity development programmes for the registry staff, the expertise of local legal and business communities could also be enlisted to assist.[104]

48. Peer-to-peer learning as well as national and international networks are also effective approaches to build capacity to operate the registry. These tools enable registry staff to visit other jurisdictions and States with efficient and effective business registration systems. In order to maximize the impact of such visits, it is important that they occur in jurisdictions familiar to the jurisdiction undergoing the reform. This approach has been followed with success in several jurisdictions engaging in business registration reform. International forums and networks also

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[98] Former recommendation 7 (from A/CN.9/WG.I/WP.96), titled "Simple and predictable legislative framework" has been deleted. It read: "The Regulation should adopt a simple structure for rules governing the business registry and should avoid the unnecessary use of exceptions or discretionary power." The Working Group decided at its twenty-sixth session (paras. 70, 71 and 74, A/CN.9/866) that that principle should be retained and combined along with recommendations 1 and 4 from A/CN.9/WG.I/WP.96 in a new recommendation which appears in the present text as recommendation 2.

[99] The Working Group requested at its twenty-sixth session (para. 77, A/CN.9/866) that the Secretariat prepare a recommendation on the use of standard registration forms.

[100] The technical assistance experience of international organizations, in particular of the World Bank, has provided most of the background material upon which section "E" is based. See, in particular, Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, page 37.

[101] Para. 81, A/CN.9/WG.I/WP.93/Add.2. For further reference, see para. 60, A/CN.9/WG.I/WP.85.

[102] See K. Rada and U. Blotte, Improving business registration procedures at the sub-national level: the case of Lima, Peru, 2007, page 3.

[103] See para. 60, A/CN.9/WG.I/WP.85 and Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, page 21.

[104] Para. 82, A/CN.9/WG.I/WP.93/Add.2.

provide platforms for sharing knowledge and exchanging ideas among registry personnel around the world for implementing business registration reform.[105]

49. In order to facilitate business registration, it may be equally important to build capacity on the part of intermediaries in States where the services of those professionals are required to register a business (see paras. 118 and 119 below).

Recommendation 8: Capacity-building for registry staff[106]

The designated authority should ensure that appropriate programmes are established to develop and/or strengthen the knowledge of the registry staff on business registration procedures and the operation of ICT supported registries, as well as the ability of registry staff to deliver requested services.

F. Core functions of business registries

50. There is no standard approach in establishing a business registry or in streamlining an existing one: models of organization and levels of complexity can vary greatly depending on a State's level of development, its priorities and its legal framework. However, regardless of the structure and organization of the registry, certain core functions can be said to be common to all registries.[107]

51. In keeping with the overarching principles governing an effective business registration system (see para. 26 above), the core functions of business registries are to:[108]

(a) Facilitate trade and interactions between business partners, the public and the State, including when such interactions take place in a cross-border context, through the publication of reliable (see paras. 32 and 33 above), current and accessible information that business must provide in order to be registered;[109]

(b) Record the identity and disclose the existence of a business to other businesses, to the public and to the State (ideally in a comprehensive database);

(c) Provide a legal form to a business which, depending on the applicable law of a State, may include legal personality and limited liability; and

(d) Provide a commercial identity recognized by the State[110] to enable a business to interact with business partners, the public and the State.

52. In a standard registration process, the entry point for entrepreneurs to business registries may be the support provided to them in choosing a unique name for the new business that they wish to establish. When registering, businesses are usually required to have a name which must be sufficiently distinguishable from other business names within that jurisdiction so that the business will be recognized and identifiable under that name.[111] Enacting States are likely to establish their own criteria for determining how to decide whether business names are sufficiently distinguishable from other business names, and in any event, the assignment of a unique business identifier will assist in ensuring the unique identity of the business within and across jurisdictions (see also paras. 94 to 116 below).[112] Business registries usually assist entrepreneurs

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[105] Para. 83, A/CN.9/WG.I/WP.93/Add.2.

[106] At its twenty-sixth session (para. 76, A/CN.9/866), the Working Group requested the Secretariat to reflect the concepts in paras. 81 to 83 of A/CN.9/WG.I/WP.93/Add.2 as a new draft recommendation. This is now reflected in paras. 41 to 43 and recommendation 8.

[107] Para. 11, A/CN.9/WG.I/WP.93.

[108] Para. 12, A/CN.9/WG.I/WP.93.

[109] In keeping with the suggestion of the Working Group at its twenty-fifth session (para. 34, A/CN.9/860), subpara. (d) of this paragraph was thought to be a more general statement and has been moved to become the first subparagraph.

[110] At its twenty-fifth session, there was support in the Working Group for the suggestion that the phrase "provide authority" should be replaced with a different term that did not imply the exercise of State power (see para. 34, A/CN.9/860).

[111] Para. 15, A/CN.9/WG.I/WP.93.

[112] At its twenty-fifth session, the Working Group agreed that registration of a business name should

at this stage with a procedure that can be optional or mandatory, or they may provide business name searches as an information service. Registries may also offer a name reservation service prior to registering a new business, so that no other business can use that name. Such a name reservation service may be provided either as a separate procedure (again, which can be optional or mandatory), or as a service integrated into the overall business registration procedure.[113]

53. Business registries also provide forms (either in paper or electronic form) and various types of guidance to entrepreneurs preparing the application and other necessary documents for registration. Once the application is submitted, the registry performs a series of checks and control procedures to ensure that all the necessary information and documents are included in the application. In particular, a registry verifies the chosen business name as well as any requirements for registration that have been established in the State's applicable law, such as the legal capacity of the entrepreneur to operate the business. Some legal regimes may require the registry to perform simple control procedures (such as establishing that the name of the business is sufficiently unique), which means that if all of the basic administrative requirements are met, the registry must accept the information as filed and record it. Other legal regimes may require more thorough verification of the information filed, such as ensuring that the business name does not violate any intellectual property requirement or that the rights of businesses with similar names are not infringed before the registry can allocate a business name (in those regimes where the registry is mandated to do so). All such information is archived by the registry, either before or after the registration process is complete.[114]

54. Payment of a registration fee (if any — see paras. 185 to 191 below) must usually be made before the registration is complete. Once a business registration is complete, the registry issues a certificate that confirms the registration and contains information about the business. Since the registered information must be disclosed to interested parties, registries make it publicly available through various means, including through publication on a website, or in publications such as the National Gazette or newspapers. Where the infrastructure permits, registries may offer, as an additional non-mandatory service, subscriptions to announcements of specific types of new registrations.[115]

55. Registered information made available to the public can include basic information about the business, such as the telephone number and address, or, depending on the requirements of applicable law, more specific[116] information on the business structure, such as who is authorized to sign on behalf of the business or who serves as the enterprise's legal representative.[117] In some States, public access to certain information in the business registry is provided free of charge (in respect of fees for information, see para. 185 below).[118]

56. A new business must usually register with several government agencies, such as taxation and social services authorities, which often require the same information as that gathered by the business registry. In certain States, the business registry provides to entrepreneurs information on the necessary requirements of other agencies and

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be mandatory, and that States should determine on what basis names would be distinguishable, such as on the basis of the type of business being conducted. It was further observed that assigning a unique business identifier to a business would enhance its distinguishability, particularly across jurisdictions and borders (paras. 38 to 39, A/CN.9/860).

[113] Para. 16, A/CN.9/WG.I/WP.93. For further reference, see paras. 50-52, A/CN.9/WG.I/WP.99.

[114] Para. 17, A/CN.9/WG.I/WP.93. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 9.

[115] Para. 18, A/CN.9/WG.I/WP.93.

[116] At its twenty-fifth session, the Working Group agreed to change the word "sophisticated" to "specific" (para. 41, A/CN.9/860).

[117] See, for instance, paras. 62-67, A/CN.9/WG.I/WP.99.

[118] At the twenty-fifth session of the Working Group, it was suggested that at least some information be provided to the public free of charge (para. 41, A/CN.9/860).

refers them to the relevant agencies.[119] In States with more developed registration systems, businesses may be assigned a registration number that also functions as a unique identifier across public agencies (see paras. 94 to 116 below), which can then be used in all of the interactions that the business has with government agencies, other businesses and banks. This greatly simplifies business start-up since it allows the business registry to exchange more easily information with the other public institutions involved in the process. In several States that have reformed their registration systems, business registries function as "one-stop shops" 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 such licences and refer the entrepreneur to the relevant agency.[120] This legislative guide takes the view (see paras. 84 to 93 below) that establishing such "one-stop shops" for business registration and registration with other public authorities is the best approach for States wishing to streamline their business registration system.[121]

57. One important aspect that States should take into account when establishing a business registration system is whether the registry should also be required to record certain procedures that affect the status of the business, for example bankruptcy, merger, winding up, or liquidation. The approach to such changes in status appears to vary from State to State.[122] For instance, in some States, registries are often also entrusted with the registration of bankruptcy cases. In developing States or economies in transition, registries tend not to perform this function. In certain jurisdictions, registries are also given the task of registering mergers as well as the winding-up and liquidation of businesses.[123] In any event, business registries naturally also record the end of the life span of any business that has permanently ceased to do business by deregistering it.[124]

58. The opening provisions of the law or regulation governing business registration may include a provision that lists the various functions of the registry, with cross references to the relevant provisions of the law or the regulation in which those functions are addressed in detail. The advantage of this approach is clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the law or regulation. The possible disadvantage is that the list may not be comprehensive or may be read as implying unintended limitations on the detailed provisions of the law or regulation to which cross reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies[125] as well as to allow for the registry's interoperability with other registries in the jurisdiction, and for access to the information maintained in the registry.[126]

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[119] The original sentence read: "The business registry normally provides to entrepreneurs information on the necessary requirements of other agencies and refers them to the relevant agencies." Changes were made in response to a concern raised in the Working Group: see para. 44, A/CN.9/860.

[120] Para. 20, A/CN.9/WG.I/WP.93.

[121] This sentence reflects the broad view of the Working Group as expressed at its twenty-fifth session (para. 44, A/CN.9/860).

[122] Para. 18, A/CN.9/WG.I/WP.93/Add.1.

[123] Para. 19, A/CN.9/WG.I/WP.93/Add.1. For further reference, see European Commerce Registers' Forum, International Business Registers Report 2014, pages 33 ff.

[124] See paras. 201-205 of this working paper.

[125] Para. 35, A/CN.9/WG.I/WP.93.

[126] At its twenty-fifth session, the Working Group supported the suggestion that care should be taken in drafting this paragraph so that it was not seen as imposing excessive limitations on the registry, which could make it more difficult to establish the registry's interoperability with other registries in the jurisdiction and to access the information maintained in the registry (see para. 63, A/CN.9/860).

Recommendation 9: Core functions of business registries

The Regulation should establish that the functions of the business registry include:[127]

(a) Publicizing the means of access to the services of the business registry, and the opening days and hours of any office of the registry (see paras. 122 to 124 and 172 to 174, and recommendations 18 and 34);

(b) Providing access to the services of the business registry (see paras. 179 to 184 and recommendation 36);

(c) Providing guidance on choosing the appropriate legal form for the business, on the registration process and on the business's rights and obligations in connection thereto (see para. 45 and recommendation 7);

(d) Listing all the information that must be submitted in support of an application to the registry (see paras. 129 to 132 and recommendation 20);

(e) Assisting businesses in searching and reserving a business name (see para. 52);

(f) Providing the basis for any rejection of an application for business registration (see paras. 145 to 148 and recommendation 26);

(g) Registering the business when the business fulfils the necessary conditions established by the law of the enacting State (see para. 136 and recommendation 22);

(h) Ensuring that any required fees for registration have been paid (see paras. 185 to 189 and recommendation 37);

(i) Assigning a unique business identifier to the registered business (see paras. 103 to 104 and recommendation 14);

(j) Ensuring the entry of the information contained in the application submitted to the registry, any amendments thereto and any filing related to that business into the registry record, and indicating the time and date of each registration (see paras. 144, 157 and 158, and recommendations 25 and 30);

(k) Providing the person identified in the application as the registrant of the business with a copy of the notice of registration (see para. 136 and recommendation 22);

(l) Providing public notice of the registration in the means specified by the enacting State (see para. 137 and recommendation 23);

(m) Indexing or otherwise organizing the information in the registry record so as to make it searchable (see paras. 182 and 183 and recommendation 36);

(n) Providing information on the point of contact of the business as established by the law of the enacting State (see paras. 130 and 151 and recommendations 20 and 27);

(o) Sharing information among the requisite public agencies (see para. 110 and recommendation 16);

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[127] Para. 1, A/CN.9/WG.I/WP.93/Add.1 has been deleted from the text as its elements are already reflected in this recommendation. The Working Group may wish to note that this recommendation is based upon recommendation 3 of the UNCITRAL Guide on the Implementation of a Security Rights Registry, which similarly lists the functions of the registry that the law establishing the registry is recommended to include, without designating them as more or less mandatory. The Working Group considered at its twenty-sixth session (paras. 81 to 82, A/CN.9/866) whether to divide the recommendation into a list of mandatory and less mandatory functions, but decided that that decision should be postponed until the Working Group had considered the entire draft text.

(p) Monitoring that a registered business has fulfilled and continues to fulfil any obligation to file information with the registry throughout the lifetime of the business (see paras. 155 to 158 and recommendations 29 and 30);[128]

(q) Ensuring the entry of information on the declaration of deregistration of a business from the registry record, including the date of and any reasons for the deregistration (see paras. 201 to 205 and recommendations 43 to 45);

(r) Ensuring that the information in the registry is kept as current as possible (see paras. 152 to 153 and recommendation 28);

(s) Promoting compliance with the Regulation (see paras. 42 to 44 and recommendation 6);

(t) Protecting the integrity of the information in the registry record (see paras. 213 to 215 and recommendations 50 and 51);

(u) Ensuring that information from the registry record is archived as necessary (see paras. 208 to 210 and recommendation 48); and

(v) Offering services incidental to or otherwise connected with business registration (see paras. 80 to 83 and recommendation 11).

G. Structure of the business registry[129]

59. When organizing the storage of and access to the information contained in the business registry, it may be structured in one of two ways. The first approach would be to adopt a centralized registration system with an electronic format. Such a registry allows for consistency in identifying and classifying businesses, which usually permits more efficient collection of data from business and avoids duplication of procedures. In order to function efficiently, an electronic central registry should be accessible by terminals in the various regions and/or cities of a State, where other registry offices are located. This central system should also be able to process and store information from the local registries, even if this information is provided to those registries in paper format. Centralized registry systems with such features will allow equality of access for users in remote locations who otherwise might be at a great disadvantage, assuming they have Internet or other electronic access. In one State, for instance, registration is conducted at the local commercial courts which are connected via a network to the central registry.[130] Recent international experience of States that have undertaken a reform of their business registration system shows that maintaining a central registry (in electronic format) is the most common approach.[131]

60. When the establishment of an electronic central registry is not possible, States may turn to a decentralized structure where registries can be organized as either autonomous or non-autonomous local offices (although autonomous local offices in a jurisdiction are not common and organizing the registry through such an arrangement does not facilitate access to information).[132] However, decentralization of the registration system may pose problems. In States where the conduct of the registration process and its regulatory oversight are delegated to the local level,

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[128] At its twenty-fifth session, the Working Group requested the Secretariat to clarify that subpara. (p) of the list did not intend to grant discretion to the business registry to arbitrarily delay the registration of a business (para. 34, A/CN.9/860).

[129] The Secretariat suggests that the original title ("Storage of and access to information contained in the registry") be changed to "Structure of the business registry" which is thought to better reflect the content of the commentary and the recommendation.

[130] See Austria in A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of the EU Accession Countries, 2007, page 46.

[131] Para. 25, A/CN.9/WG.I/WP.93.

[132] The International Business Registers Report 2015, shows that while in all of the observed regions (i.e. Africa and Middle East, Asia-Pacific, Europe and the Americas) there are a few decentralized business registry systems, a very low percentage of those systems are organized as autonomous local offices. See the Report at pages 16 and 17.

confusion can arise if each locality follows its own approach rather than adhering to a central vision. In States with a federal system that requires companies to register in the locality where they regularly conduct their business, companies may have to undertake the cumbersome process of registering in every locality where they would like to open an office.[133] While it is possible to imagine the physical integration of decentralized registries, the goals of efficiency, accessibility and transparency in the registration system are more fully achieved through consolidation and centralization of an electronic-form registry through the interconnection of those registries. This approach has the advantage of combining simplified access to registry services with the rapid exchange of information among the interconnected business registries.[134] Regardless of the chosen architecture of the business registration system, however, it is advisable that information on registered businesses be stored and made accessible in digital format through a single jurisdictional database that would allow the exchange of such information, possibly in real time, among different government agencies.[135]

Recommendation 10: Structure of the registry

The Regulation should establish an interconnected registry system that would process and store all information received from registrants and/or entered by registry staff. Where such a system of interconnected business registries is set up, the registries should possess mutually consistent technical features so that stored information is accessible throughout the system.[136]

III. Operation of the business registry

61. As previously noted, business registration can be implemented through many different organizational tools that vary according to jurisdiction. States embarking on a reform process to simplify registration will have to identify the most appropriate and efficient solutions to deliver the service, given the prevailing domestic conditions. Regardless of the approach chosen by the State, aspects such as the general legal and institutional framework affecting business registration, the legal foundation and accountability of the entities mandated to operate the system and the budget needed by such entities should be carefully taken into account. Evidence[137] shows that reform efforts rely to a different extent on a core set of tools, including: establishment of single interfaces for business start-up (better known as "one-stop shops"); the use of ICT; and ensuring interconnectivity between the different authorities involved in the registration process (with the possible adoption of a unique business identifier). Other important components include a domestic legal framework that is generally supportive of business registration, establishing appropriate pricing policies for the use of business registry services and developing the capacity of registry operators.[138]

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[133] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, page 11.

[134] Para. 26, A/CN.9/WG.I/WP.93. The phrase "through the interconnection of those registries." and the final two sentences have been added to the text in this current draft.

[135] At its twenty-sixth session, the Working Group expressed support for the view that reference to interconnected registries should be included in the draft paragraph and that the need for such registries to be mutually consistent should be emphasized. Furthermore, support was also expressed for the comment that information on registered businesses should be stored and made accessible in digital format through a single jurisdictional database (see para. 84, A/CN.9/866).

[136] Adjustments have been made to the text of recommendation 10 as originally set out in A/CN.9/WG.I/WP.96 in order to accommodate the views the Working Group expressed at its twenty-sixth session (paras. 83 to 86, A/CN.9/866).

[137] See J. Olaisen, Business Registration Reform Case Studies, Malaysia, 2009, page 3.

[138] Para. 1, A/CN.9/WG.I/WP.93/Add.2.

A. Electronic, paper-based or mixed registry

62. An important aspect to consider when streamlining a business registration system is the form in which the application for registration should be filed and the form in which information contained in the registry should be stored. Paper-based registration requires sending the documents (usually completed in handwritten form) by mail or delivering them by hand to the registry for manual processing. Hand delivery and manual processing are not unusual in developing States due to a lack of advanced technological infrastructure. In such States, entrepreneurs must personally visit registration offices that are usually located in municipal areas which may not be easily reachable for many MSME entrepreneurs, particularly for those in rural areas.[139] In addition, any copies of the documents required must usually be provided on paper. Paper-based registry systems can facilitate "face-to-face" communication between the registrant and the registry, and thus may offer an opportunity to clarify aspects of the requirements for registration.[140] However, the labour-intensive nature of this procedure normally results in a time-consuming and expensive process (for example, it may require more than one visit to the business registry), both for the registry and for users, and it can easily lead to data entry errors. Furthermore, paper-based registry systems require considerable storage space as the documents with the registered information may have to be stored as hard copies (although some States using a mixed system may also scan documents and then destroy the paper versions after the expiry of a minimum legal period for their preservation, in this regard see paras. 208 to 210 below). Finally, business registrations transmitted by paper or fax also give rise to delays, since registrants must wait until registry staff manually carry out the business registration and certify it.[141]

63. In comparison, ICT-supported registration systems allow for improved efficiency of the registry and for more user-friendly services. This approach requires, at a minimum, that the information provided by the registrant be stored in electronic form in a computer database; the most advanced electronic registration systems, however, permit the direct electronic submission of business registration applications and relevant information as well as searches of the registry data over the Internet or via direct networking systems as an alternative to paper-based submissions. The adoption of such systems enhances data integrity, information security, registration system transparency, and verification of business compliance, as well as permitting the avoidance of unnecessary or redundant information storage. Furthermore, when electronic submission of applications is allowed, business registries can produce standard forms that are easier to understand and therefore easier to complete correctly. Although the use of ICT solutions can carry with them risks of software errors, electronic systems do more to reduce those risks by providing automated error checks and other appropriate solutions. ICT is also instrumental in the development of integrated registration systems and the implementation of unique identification numbers.[142]

64. In addition to these features, which result in a more streamlined process and user-friendly services, electronic business registration and access to the business registry also offer the following advantages:

(a) Improved access for smaller enterprises that operate at a distance from the registrar's offices;

(b) A very significant reduction in the time and cost required of the entrepreneur to perform the various registration steps, and consequently in the time

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[139] See para. 43, A/CN.9/WG.I/WP.85.

[140] At its twenty-fifth session, the Working Group agreed that a balanced presentation of paper-based and mixed paper and electronic registries should be presented in the draft materials and that the materials should recognize that in several developing States, paper-based registries might be the only option available due to a lack of advanced technological infrastructure (see para. 67, A/CN.9/860).

[141] Para. 47, A/CN.9/WG.I/WP.93 and para. 11, A/CN.9/WG.I/WP.93/Add.2.

[142] Para. 48, A/CN.9/WG.I/WP.93. For further information, see also paras. 38-49, A/CN.9/WG.I/WP.93/Add.2.

and cost required before successful registration of a business, as well as in the day-to-day cost of operating the registry;

(c) It permits the handling of increasing demands for company information from other government authorities;

(d) A reduction in the opportunity for fraudulent or corrupt conduct on the part of registry staff;

(e) A reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter accurately registration information;

(f) When direct electronic registration and access to an electronic public registry are allowed, it provides the possibility for the user to access registration and information services outside of normal business hours; and

(g) It provides possible revenue opportunities from other businesses and financial institutions that seek company information to inform their risk analysis of potential trading counterparties and borrowers.[143]

65. Introducing ICT-based registration processes, however, often requires an in-depth re-engineering of the way the service is delivered, which may involve several core aspects of the State's apparatus in addition to their level of technological infrastructure, including: financial capability, organization and human resources capacity, legislative framework (e.g. commercial code and company law)[144] and institutional setting. Therefore, States launching a reform process aiming at the automation of business registries would be advised to carry out a careful assessment of the legal, institutional and procedural dimensions (such as legislation to allow for electronic signatures or information security laws, or establishing complex e-government platforms or other ICT infrastructure) in order to identify those areas where reforms are needed and to adopt those technology solutions that are most appropriate to their current needs and capabilities.[145] In several developing States and mid-level economies, only information about registering a business is currently available online, and a functioning electronic registry has not yet been implemented. Making information electronically available is certainly less expensive and less difficult to achieve than is the establishment of an electronic registry, and it does not require any legislative reform or specialized ICT.[146] While the adoption of a mixed registration system that combines electronic processing and paper-based manual submission and processing (see para. 79 below) might thus be an appropriate interim solution, it does involve higher maintenance costs, and the ultimate goal should remain the progressive development of fully ICT-based registration systems (see section C below).[147]

B. Features of an electronic registry

66. When the business registry record is computerized, the hardware and software specifications should be robust and should employ features that minimize the risk of data corruption, technical error and security breaches. Even in a paper-based registry, measures should be taken to ensure the security and integrity of the registry record, but this is more efficiently and easily accomplished if the registry record is electronic. In addition to database control programs, software will also need to be developed to manage such aspects as user communications, user accounts, payment of any required

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[143] Para. 49, A/CN.9/WG.I/WP.93; subparas. (a), (c), and (g) are from para. 29, A/CN.9/WG.I/WP.93.

[144] At its twenty-fifth session, the Working Group reiterated its support for the use of ICT technology as a good practice in business registration and for the suggestion that reference to changes that could be required to the commercial code and company law of a State could be included in the draft (see para. 57, A/CN.9/860).

[145] Para. 30, A/CN.9/WG.I/WP.93.

[146] Para. 13, A/CN.9/WG.I/WP.93/Add.2.

[147] See footnote 140 above.

fees, financial accounting, computer-to-computer communication, internal workflow and the gathering of statistical data. Software applications enabling data collection would also assist the registry in making evidence-based decisions which would facilitate efficient administration of the system (for example, the collection of data on more frequent requests by registry users would enable evidence-based decisions on how to allocate registry resources).[148] When the State's technological infrastructure is not sufficiently advanced to allow the features mentioned above to be implemented, it is nevertheless important that the software put in place be flexible enough to accommodate additional and more sophisticated features as they become more feasible in the future.[149]

67. Implementing an online business registration system will require defining the technical standards of the online system, a careful evaluation of the hardware and software needs of the business registry to make those standards operational in the context of the national technological infrastructure, and deciding whether it is feasible to develop the necessary hardware and software in-house or whether it must be purchased from private suppliers. In making that determination, it will be key to investigate whether a ready-made product is available that can easily be adapted to the needs of the State. If different suppliers are used for the hardware and the software, it is important that the software developer or provider is aware of the specifications for the hardware to be supplied, and vice versa.[150]

68. Following more recent technological advances, one option States may want to consider is whether to rely on traditional software or to move to more sophisticated applications such as cloud computing, which is an Internet-based system that allows the delivery of different services, such as storing and processing of data, to an organization's computers through the Internet. The use of cloud computing allows for considerable reduction in the resources needed to operate an ICT-supported registration system, since the registry does not have to maintain its own ICT infrastructure. However, data and information security can represent an issue when introducing such a system and it would be advisable for States to conduct a careful risk analysis before establishing a system exclusively based on cloud applications.[151]

69. Additional aspects that States may consider when adopting an ICT-supported registry should include:

(a) Scalability of the ICT infrastructures, so that the system can handle an increasing volume of clientele over time as well as traffic peaks that may occasionally arise;

(b) Flexibility: the ICT infrastructure of the registry should be easily adaptable to new user and system requirements, and the migration of data from one technology to another may require data-cleansing aspects;

(c) Interoperability: the registry should be designed to allow (even at a later stage) integration with other automated systems, such as other governmental registries operating in the jurisdiction[152] and online or mobile payment portals;

(d) Costs: the ICT infrastructure should be financially sustainable both in term of initial and operating costs; and

(e) Intellectual property rights: in order to avoid risks deriving from adverse circumstances affecting the intellectual property rights owner, for example, if the

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[148] For example, "application programming interfaces" (APIs) may be adopted. APIs have a wide variety of possible uses, such as enabling the submission of applications to the registry through simplified procedures, for instance by pre-filling certain fields by default, or allowing users, and equipping systems with the proper software to connect directly to the registry and retrieve information automatically.

[149] Para. 51, A/CN.9/WG.I/WP.93.

[150] Para. 52, A/CN.9/WG.I/WP.93.

[151] Para. 53, A/CN.9/WG.I/WP.93. For further reference see International Finance Corporation (World Bank Group), Task Manager's ICT Toolkit for Designing and Implementing Online Registry Applications (draft 8/3/2015), page 28.

[152] See, for instance, paras. 105 to 109 of this working paper.

owner ceases to operate or is prohibited from doing business with the government, the State should always either be granted ownership of the system or an unrestricted licence to the source code. [153]

70. With regard to the cost of the ICT infrastructure, it should be noted that the level of security needed by an electronic registration system and its relevant cost must be carefully addressed. In particular, it is important to align the risk attached to a specific interaction (between the registry and the business or the registry and other public agencies) with the costs and administration required to make that interaction secure. Low security may deter parties from using electronic services (unless it is mandatory), but costly high security measures could have the same effect. [154]

C. Phased approach to the implementation of an ICT-based registry [155]

71. The methods used to establish the online system should be consistent with the reforms required as they would determine the success or the failure of the initiative. Moving directly to a full online solution before reengineering registry business processes would be a mistake in many cases, as the solutions designed would not be able to capture the technology's full benefits. [156] Moreover, subject to the level of development of the implementing State, technical and capacity-building assistance programmes coordinated by international organizations might be necessary in order to progress towards the goal of a fully automated electronic registry. [157]

72. In locations where Internet penetration is not extensive, a phased-in approach may be an appropriate way forward. Automation would start with the use of simple databases and workflow applications for basic operations, such as name searches or the sharing of information with other government agencies, and then would progress to more sophisticated web-based systems that would enable customers to conduct business with the registry entirely online. These web-based systems could be quite convenient for smaller businesses operating at a distance from the registry, provided that those entrepreneurs were able to access the system. The final phase of the approach would be to accommodate ICT interoperability between those agencies involved in business registration. [158]

73. The simplest approach for States beginning their activity in this area would be to develop a content-rich website that consolidates registration information, provides downloadable forms, and enables users to submit feedback. This simple resource would allow users to obtain information and forms in one place and would make registries more efficient by enabling users to submit e-mail inquiries before going to registry offices with the completed forms. Since this solution does not require a stable Internet connection, it may appeal to States with limited Internet access.

74. If only limited Internet bandwidth is available, then automating front-counter and back-office operations prior to moving online would be a suitable approach. If

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[153] Para. 54, A/CN.9/WG.I/WP.93. For further reference see International Finance Corporation (World Bank Group), Task Manager's ICT Toolkit for Designing and Implementing Online Registry Applications (draft 8/3/2015), page. 29.

[154] Para. 37, A/CN.9/WG.I/WP.93/Add.2. For further reference see also supra, note 153, page 12.

[155] At its twenty-fifth session, the Working Group supported comments on the importance of the implementation of a phased-in approach (which should start with the adoption of more simple electronic solutions and then progress to more sophisticated solutions) and on the importance for developing States to receive technical and capacity-building assistance in order to move from paper-based to electronic registries (see para. 68, A/CN.9/860).

[156] The technical assistance experience of international organizations, in particular of the World Bank, has provided most of the background material upon which sections "C" and "D" are based. See, in particular, Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, pages 12 ff.

[157] Para. 15, A/CN.9/WG.I/WP.93/Add.2. It may be noted that at its twenty-fifth session, the Working Group supported the view that achieving a completely electronic system was the goal to which all registries could aspire (see para. 67, A/CN.9/860).

[158] Para. 14, A/CN.9/WG.I/WP.93/Add.2.

the registry has sub-offices outside its main location (for instance, in rural areas), it would be important to establish a dedicated Internet connection with them. This approach would still require entrepreneurs to visit the registry, but at least it would establish a foundation on which the registry could later develop a more sophisticated web platform. A key factor even at this basic stage would be for the system to be able to digitize historical records and capture key information, such as the names of members or owners and directors, in the registry database.

75. Once the State's capacity in ICT and Internet penetration allows for digital commerce, then platforms that enable businesses to apply and pay for registration online as well as to file annual accounts and update registration details as operations change can be developed. With regard to online payment of a registration fee, it should be noted that ICT supported solutions would depend on a State's available modes of payment and on the regulatory framework that establishes the modes of payment a public authority can accept. When the jurisdiction has enacted laws that allow for online payment, experience shows that the most efficient option is to combine the filing of the electronic application and the fee payment into one step. ICT systems incorporating this facility should include error checks, so that applications are not submitted before payments are completed and registry officials can see payment information along with the application.[159] When fee payment is required before registration of the business, this constitutes a separate procedural step and the use of ICT solutions in order to be user-friendly would require streamlining the procedures for filing the applications and for payment.[160]

76. As noted above (see para. 65) when introducing ICT-based registration systems, States should adopt legislation that facilitates the implementation of these electronic solutions, although the obligation to use these solutions should be considered only when the various stakeholders concerned with the registration process (including the registrant, government agencies, and other relevant authorities) are prepared to comply. Furthermore, when developing such legislation, States should take into account that while certain elements of a legal framework can be checked electronically, the most complex aspects of the process may need to be addressed by a registry official.[161]

77. Enacting States should also be aware that establishing an ICT-supported registration system requires a well-designed legal and regulatory framework that supports simplicity and flexibility and avoids, to the greatest extent possible, discretionary power and the making of exceptions (see para. 27 above). For instance, provisions requiring the interpretation of several documents and the collection of several pieces of information are difficult to adapt to electronic processing; the same applies to the use of discretionary power and complex structures of rules and exceptions.[162]

78. When a State has developed the ICT infrastructure to achieve full business registry automation, integration of other online registration processes for taxation, social services and other purposes could be considered. Even if no integration with other registrations is built into the system, it would nevertheless be advisable that States implement data interchange capabilities so that the relevant company information could be shared across government agencies (see para. 69 above). A final improvement would be the development of mechanisms for disseminating business information products to interested parties. Such products could substantially contribute to the financial sustainability of the registry; in States with highly developed online registration systems, registries can derive up to 40 per cent of their operating revenues by selling such information.[163]

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[159] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 13.

[160] Para. 18, A/CN.9/WG.I/WP.93/Add.2.

[161] Para. 25, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 14.

[162] Para. 24, A/CN.9/WG.I/WP.93/Add.2.

[163] Para. 19, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, page 13.

79. One issue that would likely arise when the online registry is able to offer full-fledged ICT services would be whether to abolish any paper-based submission or to maintain both paper-based and online registration. In many jurisdictions, registries choose to have mixed solutions with a combination of electronic and paper documents or electronic and manual processing during case handling.[164] This approach may result in considerable cost for registries,[165] since the two systems require different tools and procedures. Moreover, if this option is chosen, it is important to establish rules to determine the time of registration as between paper-based and electronic submissions. Finally, paper applications must be processed in any case, so that the information included in a hard document can be transformed into data that can be processed electronically; this can be done by scanning the paper-based application for registration (possibly using optical character recognition technology so to make the scanned document electronically searchable). However, in order to ensure that the record made by scanning correctly represents the paper application, the registry will likely have to employ staff to check that record, thus adding a step that increases costs and reduces the benefits of using an online system.[166]

D. Other registration-related services supported by ICT solutions

80. Automation should enable the registry to perform other functions in addition to the processing of applications. Where jurisdictions require user-friendly electronic filing and repopulated forms,[167] for instance, it can assist businesses in the mandatory filing of periodic returns and/or annual accounts. Electronic filing and automated checks also help reduce processing time by the registry.[168]

81. ICT supported registration could also assist the registry in deregistration procedures, i.e. notations on the registry that a particular business is no longer registered (see paras. 201 to 205 below). Such procedures usually require an official announcement that a business will be deregistered.[169] ICT can provide for automation of such announcements, from initiating the process to producing a standard notice, thus helping registries to ensure that businesses are not deregistered before any time limit has elapsed and to reduce processing time. In order to be fully effective, however, adoption of an ICT-based system needs to be supported by streamlined procedures that enable the deregistration of businesses in a simplified and quick way.[170]

82. Further, ICT solutions could be applied to assist in the filing of financial information in machine-readable format (such as eXtensible Business Reporting Language, or XBRL). For example, a platform could be provided to assist in the conversion of paper-based financial statements to XBRL format. Machine-readable financial data facilitates the aggregation and analysis of financial information, which could be of significant value to users of the registry.

83. ICT solutions could also support follow-up and enforcement procedures of business registries when businesses fail to comply with registration requirements. In one jurisdiction, for instance, the back-office system of the registry monitors the records of businesses and detects whether certain circumstances suggest that the

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[164] Para. 55, A/CN.9/WG.I/WP.93.

[165] See also paras. 47 to 55, A/CN.9/WG.I/WP.93.

[166] Para. 20, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 13. See also para. 14, A/CN.9/WG.I/WP.93/Add.1.

[167] Repopulated forms allow selected fields to be automatically filled based on information previously provided by the registrant or maintained in their user account. When changes in the registrant's information occur, the registrant is not required to fill out the entire form again, but only to enter the relevant changes. Information included in the repopulated form is stored and may be made accessible to and exchangeable with other relevant agencies.

[168] Para. 20, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 15.

[169] See para. 22 of A/CN.9/WG.I/WP.93 and para. 20, A/CN.9/WG.I/WP.93/Add.1.

[170] Para. 22, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 16.

business is not in compliance with statutory requirements. An automatic notice to the business is then produced in order for it to remedy the situation. Should the business fail to do so within the statutory deadline, the ICT solution starts a new procedure to forward the case to the district court, which may make a decision on the compulsory liquidation of the business. Upon an order for compulsory liquidation, the court notifies the registry which deregisters the business.[171]

Recommendation 11: Electronic, paper-based or mixed registry

The Regulation should provide that the optimal medium to operate an efficient business registry is electronic. Should full adoption of electronic services not yet be possible, such an approach should nonetheless be implemented to as great an extent as permitted by the current technological infrastructure of the enacting State, as well as its institutional and legal framework, and expanded as that infrastructure improves.

E. One-stop shop: a single interface for business registration and registration with other authorities

84. As discussed above (see para. 56), a business is usually required to register with several different government agencies, which often require the same information that has already been gathered by the business registry. Entrepreneurs must often personally visit each agency and fill out multiple forms. Taxation, justice, employment and social services agencies are usually involved in this process; other administrative offices and institutions, specific to each jurisdiction, may also be involved. This often results in multiple procedures governed by different applicable laws, duplication of information and lack of ownership or full control of the process by the agencies involved. Possibly worse for MSMEs wishing to register, the overall process can require weeks, if not months.[172]

85. Establishment of "one-stop shops" has thus become one of the most popular reforms to streamline business registration in recent years. One-stop shops are single interfaces where entrepreneurs receive all of 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.[173]

86. Beyond this general definition, the scope of one-stop shops can vary according to the services offered. Some one-stop shops only provide business registration services, which may still be an improvement if the registration process previously involved a number of separate visits to the relevant authorities; others carry out other functions related to business start-up.[174] The most common of these other functions is tax registration, although there are also examples of one-stop shops dealing with registration for social services and statistical purposes. In rare cases,[175] one-stop shops assist entrepreneurs not only with business licences and permits but also with investment, privatization procedures, tourism-related issues and State-owned property management.[176]

87. The functions of one-stop shops can be carried out through physical offices or an electronic platform. Physical premises, when in rural areas, are particularly

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[171] Para. 23, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Norway in Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 16.

[172] Para. 2, A/CN.9/WG.I/WP.93/Add.2. For further reference, see 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 30.

[173] Para. 3, A/CN.9/WG.I/WP.93/Add.2. The paragraph has been clarified through the removal of the final sentence, "Some States have several one-stop shops throughout their territory."

[174] Investment Climate (World Bank Group), How Many Stops in a One-Stop Shop? A Review of Recent Developments in Business Registration, 2009, pages 1 ff.

[175] See Georgia, in World Bank and International Finance Corporation, Doing Business 2011, page 21; see also para. 38, A/CN.9/WG.I/WP.85.

[176] Para. 4, A/CN.9/WG.I/WP.93/Add.2.

appropriate for businesses with limited access to municipal centres. Of course, online business registration can also be offered as one option available for registering, the other being visiting the one-stop shop (or the registration office). Online one-stop shops, or single interfaces, take advantage of solutions supported by ICT, which allows for rapid completion of several formalities due to the use of dedicated software. Such online portals may provide a fully integrated facility or may still entail separate registration in respect of some requirements, for example taxation services.[177]

88. When establishing one-stop shops, in particular those performing functions in addition to business registration, States can choose among different approaches. In the "one door" approach, representatives of different government agencies involved in registration are brought together in one physical place, but the applicant must deal separately with each representative (for example, the business registry official dealing with the approval of the business name, the clerks checking the documents, and the taxation official), although the different agencies liaise among themselves.[178] As may be apparent, this solution is relatively uncomplicated and would normally not require any change in legislation or ministerial responsibilities, but it would involve establishing effective cooperation between the different government ministries. One issue States should consider when opting for this approach would be how much authority the representatives of each agency should have; for example, should they have the discretion to process the registration forms on site or would they simply be acting on behalf of their agencies and be required to take the documents to their home agencies for further processing?[179] Similarly, it is also important to consider clarifying the lines of accountability of the various representatives from the different agencies to the one-stop shop administrator.[180]

89. Another form of one-stop shop is the so-called "one window" or "one table" version, which offers a higher level of integration of the different agencies involved in the start-up of a business.[181] In this case, the one-stop shop combines the process for obtaining business and other registrations, such as for taxation and social services, with other arrangements, like publishing the registration in a National Gazette or newspapers, when required. All relevant documents are submitted to the one-stop shop administrator who is authorized, and properly trained, to accept them on behalf of the various government agencies involved. Documents are then dispatched, electronically or by hand or courier, to the competent agency for processing. This type of one-stop shop requires detailed coordination between the different government agencies, which must modify their procedures to ensure an effective flow of information. A memorandum of understanding between the key agencies involved may be needed in order to establish the terms in respect of the sharing of company information.[182] In some cases, taking such an approach may also require a change in legislation.[183]

90. A third approach, which is less common, is based upon the establishment of a separate entity to coordinate the business registration function and to deal with other requirements that entrepreneurs must meet, such as making tax declarations, obtaining the requisite licences, and registering with social services authorities. Pursuant to this model, the entrepreneur would apply to the coordinating entity after having registered with the business registry in order to fulfil the various additional

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[177] Para. 5, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), How Many Stops in a One-Stop Shop? A Review of Recent Developments in Business Registration, 2009, page 4.

[178] Ibid., page 3.

[179] Ibid., page 2, and see para. 42, A/CN.9/WG.I/WP.85.

[180] Para. 6, A/CN.9/WG.I/WP.93/Add.2. For further reference, see para. 42, A/CN.9/WG.I/WP.85.

[181] Supra, note 177, page 3.

[182] See 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 31.

[183] Para. 7, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), How Many Stops in a One-Stop Shop? A Review of Recent Developments in Business Registration, 2009, page 3.

aspects of the procedures necessary prior to commencing business. Although this approach results in adding a step, it could be useful to some States since it avoids having to restructure the bodies with the main responsibility for business registration. On the other hand, the adoption of such a structure could involve an increase in the cost of the administrative functions and may only reduce timeframes to the extent that it allows the various functions to take place successively or enables participants in the one-stop shop to network with the other agencies to speed up their operations. From the registrant's perspective, however, the advantage of being able to deal with a single organization remains.[184]

91. Finally, in States with developed ICT infrastructures, the functions of the agencies concerned with registration could be fully integrated through the use of a common database, which is operated by one of the agencies involved and provides simultaneous registration for various purposes, i.e. business registration, taxation, social services, etc. In some jurisdictions, a public agency (such as the tax administration) is responsible for the registration of business entities, or ad hoc entities have been set up to perform such simultaneous registration.[185]

92. One issue that States should consider when establishing a one-stop shop is its location. It is usually advisable for the one-stop shop to be directly connected to the business registry office, either because it is hosted there or because the registry is part of the one-stop shop. The organization(s) responsible for the one-stop shop could thus be the same as that/those which oversee(s) the business registration process. This approach should take into account whether such organizations are equipped to administer the one-stop shop. Examples from various jurisdictions indicate that where authorities such as executive agencies are responsible for business registration, they possess the skills to perform one-stop shop functions as well. The same can be said of chambers of commerce, government commissions, and regulatory authorities.[186] There are very few examples of courts that have adopted a one-stop shop approach in those States where business registration is court-based.[187]

93. Although one-stop shops do not necessarily require changes in the domestic legal framework, as seen in the paragraphs above, it is important for the operation of such mechanisms to be legally valid, which may involve adapting existing laws to the new structure and method of proceeding. For instance, effective functioning of the one-stop shops may require provisions governing the collection of information by public authorities as well as the exchange of information among such authorities. The extent of the changes will thus vary according to the different needs of States. In addition, one-stop shops should be given a sufficient budget, since they can be quite expensive to establish and maintain, they should be staffed with well-trained personnel, and they should have their performance regularly monitored by the supervising authority in accordance with client feedback.[188]

Recommendation 12: One-stop shop: a single interface for business registration and registration with other authorities

The Regulation or the law of the enacting State should establish a single interface for business registration and registration with other public agencies, including designating which public agency should have overall authority for the single interface. Such an interface:

(a) May consist of a web platform or physical offices; and

[184] Para. 8, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Benin and France, supra, note 183, page 4.
[185] Para. 9, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Albania's National Registration Center in Investment Climate (World Bank Group), supra, note 183, page 7.
[186] Supra, note 177, page 7.
[187] Para. 10, A/CN.9/WG.I/WP.93/Add.2.
[188] Para. 11, A/CN.9/WG.I/WP.93/Add.2.

(b) Should integrate the services of as many public agencies requiring the same information as possible, but at a minimum should include taxation and social services agencies.

F. Use of unique business identifiers

94. As discussed above (see paras. 56 and 84), in those jurisdictions where the government agencies with which businesses are required to register (for example, for taxation and social services) operate in isolation from each other, it is not unusual for this procedure to result in duplication of systems, processes and efforts. This approach is not only expensive but may also cause errors. Moreover, if agencies assign registration numbers to the businesses they register, and the use and uniqueness of those numbers is restricted to the authority assigning them, information exchange among the agencies requires each authority to map the different identification numbers applied by the other agencies. When electronic solutions are used, they can facilitate such mapping, but even they cannot exclude the possibility that different entities will have the same identifier, thus reducing the benefits (in terms of cost and usefulness) obtained from the use of such tools.[189]

95. In recent years, several jurisdictions have thus adopted integrated registration systems in which the application submitted for business registration includes all of the information required by the different agencies. Once completed, the information in the application for business registration is transmitted by the registry to all relevant authorities. Information and any necessary approvals from the other agencies are then communicated back to the registry, which immediately forwards the information and approvals to the entrepreneur.[190] While this is beneficial for all businesses, regardless of their size, it is particularly valuable for MSMEs, which may not have the resources necessary to cope with the compliance requirements of multiple government authorities in order to establish their business.[191]

96. States aiming at fostering such integration among different agencies may wish to consider that in recent years some international organizations have developed tools that facilitate inter-agency cooperation. For instance, one international organization has developed an online system that allows for the interoperability of the various public agencies involved in business registration with minimal or no change at all in the internal processes of the participating agencies nor in their computer systems.[192]

97. Some developed States have introduced a more sophisticated approach, which considerably improves information exchange throughout the life cycle of a business. This approach requires the use of a single unique business identification number or unique identifier, which ties information to a given business and allows for information in respect of it to be shared among different public and private agencies.[193]

98. A unique identifier is structured as a set of characters (they may be numeric or alphanumeric) which distinguishes registered entities from each other. When designing a unique identifier, it may be advisable to build some flexibility in the structure of the identifier (for instance, by allowing the addition of new characters to the identifier at a later stage) so that the identifier can be easily adaptable to new system requirements in a national or international context, or both (see also para. 69 above). The unique identifier is allocated only once (usually upon establishment) to

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[189] Para. 38, A/CN.9/WG.I/WP.93/Add.2. For further reference, see supra, note 177, page 22.

[190] See Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, page 9.

[191] Para. 39, A/CN.9/WG.I/WP.93/Add.2.

[192] Para. 40, A/CN.9/WG.I/WP.93/Add.2. The UNCTAD Business Facilitation Programme provides for an online tool designed to computerize simple or complex administrative procedures (eRegistration) and that can handle simultaneous operations involving multiple agencies (such as the business registry, tax office, and social services) thus promoting interoperability among these different agencies. See http://businessfacilitation.org/ and para. 40, A/CN.9/WG.I/WP.81.

[193] Para. 41, A/CN.9/WG.I/WP.93/Add.2.

a single business and does not change during the existence of that business,[194] nor after its deregistration. The same unique identifier is used for that business by all agencies, which permits information about that particular registered entity to be shared within or between the public and private sectors.[195]

99. The experience of States that have adopted unique identifiers has demonstrated their usefulness. As noted above, they permit all government agencies to identify easily new and existing businesses, and cross-check information in respect of them. In addition, the use of unique identifiers improves the quality of the information contained in the business registry, since the identifiers ensure that information is linked to the correct entity even if its identifying attributes (for example name, address, and type of business) change. Moreover, unique identifiers prevent the situation where, intentionally or unintentionally, businesses are assigned the same identification; this can be especially significant where financial benefits are granted to legal entities or where liability to third parties is concerned.[196] Unique identifiers have been found to produce benefits for 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 to provide the same or similar information to different authorities.[197]

100. One issue a State may have to consider when introducing unique identifiers is that of individual businesses that do not possess a separate legal status from their owners. In such cases, taxation or other authorities (such as social services) may prefer to rely on the identifier for the individual, who may be a natural person, rather than on the business identifier.[198]

101. Situations may arise in which different agencies in the same jurisdiction allocate identifiers to businesses based on the particular legal form of the enterprise. States should thus consider adopting a verification system to avoid multiple unique identifiers being allocated to the same business by different public agencies.[199] If the identifier is assigned through a single jurisdictional database the risk of several identifiers allocated to one business or several businesses receiving the same identifier is considerably reduced.[200]

102. The effective use of unique identifiers is enhanced by the adoption of full electronic solutions which do not require manual intervention. However, electronic solutions are not a mandatory prerequisite to introducing unique identifiers, as they can also be effective in a paper-based environment.[201] When unique identifiers are connected to an online registration system, it is important that the solution adopted fits the existing technology infrastructure.[202]

Recommendation 13: Use of unique business identifiers

The Regulation should provide that a unique business identifier should be allocated to each registered business and should:

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[194] While the unique identifier does not change throughout the lifetime of a business, if the business changes its legal form a new unique identifier must be allocated.

[195] Para. 42, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 20.

[196] Ibid., page 22.

[197] Para. 43, A/CN.9/WG.I/WP.93/Add.2.

[198] Para. 50, A/CN.9/WG.I/WP.93/Add.2.

[199] Para. 51, A/CN.9/WG.I/WP.93/Add.2. For further reference, see A/CN.9/WG.I/WP.85, paras. 36 ff. and Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 21.

[200] This paragraph and the previous one were the commentary to former recommendation 16: Unique business identifiers and individual businesses, which read as follows: "The Regulation or the law of the enacting State should adopt a verification system to avoid multiple unique business identifiers being allocated to the same business by different public agencies". In preparing this consolidated draft of the legislative guide, the Secretariat has deleted former recommendation 16 and incorporated the commentary under current recommendation 13.

[201] Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 22.

[202] Para. 44, A/CN.9/WG.I/WP.93/Add.2.

(a) Be structured as a set of numeric or alphanumeric characters;

(b) Be unique to the business to which it has been allocated; and

(c) Remain unchanged and not be reallocated following any deregistration of the business.

G. Allocation of unique business identifiers

103. The use of unique identifiers requires sustained cooperation and coordination among the authorities involved, and a clear definition of their roles and responsibilities, as well as trust and collaboration between the public and business sectors. Since the introduction of a unique identifier does not of itself prevent government agencies from asking a business for information that has already been collected by other agencies, States should ensure that any reform process in this respect start with a clear and common understanding of the reform objectives among all the stakeholders involved. Moreover, States should ensure that a strong political commitment is in place. Potential partners ideally include the business registry, the taxation authority, the statistics office, the social services agency, the pension fund, and any other relevant agencies. If agreement among these stakeholders is elusive, at a minimum, the business register and taxation authority should be involved. Information on the identifiers in use by the other authorities and within the business sector is also a prerequisite for reform, as is a comprehensive assessment to identify the needs of all stakeholders.[203]

104. In order to permit the introduction of a unique identifier, the domestic legal framework should include provisions on a number of issues including:

(a) Identification of the authority charged with allocating the unique identifier;

(b) Allocation of the unique identifier before or immediately after registration with the authorities involved in business entry;

(c) Listing of the information that will be related to the identifier, including at least the name, address and type of business;

(d) The legal mandate of the public authorities to use the unique identifier and related information, as well as any restrictions on requesting information from businesses;

(e) Access to registered information by public authorities and the private sector;

(f) Communication of business registrations and amendments among the public authorities involved; and

(g) Communication of deregistration of businesses that cease to operate.[204, 205]

Recommendation 14: Allocation of unique business identifiers

The Regulation or the law of the enacting State should specify that the allocation of a unique business identifier should be carried out either by the business registry upon registration of the business, or before registration by a legally-designated authority. In either case, the unique business identifier should then be made available to all other public agencies sharing the information associated with that identifier, and should be used in all official communication in respect of that business.

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[203] Para. 45, A/CN.9/WG.I/WP.93/Add.2.

[204] Para. 46, A/CN.9/WG.I/WP.93/Add.2.

[205] See Investment Climate (World Bank Group), Reforming Business Registration: A Toolkit for the practitioners, 2013, page 32.

H. Implementation of a unique business identifier

105. 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. This requirement can be a major obstacle when implementing this in practice if the technological infrastructure of the State is not sufficiently advanced.[206]

106. States can introduce the unique business identifier in one of two ways. In the first approach, business registration is the first step and includes the allocation of a unique identifier, which is made available (together with the identifying information) to the other authorities involved in the registration process (for instance, taxation and social services authorities), and which is re-used by those authorities. In the second approach, the allocation of a unique business identifier represents the beginning of the process. The unique identifier and all relevant information are then made available to the government agencies involved in business registration, including the business registry, and is then re-used by all agencies.[207] Either of these two approaches can be followed by the authority entrusted with allocating unique business identifiers, regardless of whether the authority is the business registry, a facility shared by public agencies or the taxation authority. It is important to note that in some States, the use of a unique identifier may be restricted: in some jurisdictions, certain government agencies still allocate their own identification number[208] although the business carries a unique identifier.[209]

107. Introducing a unique business identifier usually requires adaptation both by public authorities in processing and filing information and by businesses in communicating with public authorities or other businesses. A unique business identifier requires the conversion of existing identifiers, which can be accomplished in various ways. Taxation identifiers are often used as a starting point in designing a new identifier, since the records of the taxation authorities cover most types of businesses and are often the most current.[210] Examples also exist in which, rather than introducing a completely new number, the taxation number itself is retained as the enterprise's unique number. New identification numbers can also be created using other techniques according to a country's registration procedures. In such a situation, it is important that each business, once assigned a new number, verifies the related identifying information, such as name, address, and type of activity.[211]

108. In some jurisdictions, advanced interconnectivity among the different agencies involved in the registration process has resulted in a single form for registration with all agencies. Examples exist of consolidated (electronic) registration forms that can be repopulated [212] with information from the different authorities concerned. Integration of registration functions can be facilitated by the use of one common database. In jurisdictions where this approach has been developed, agencies perform regular file transfers to update the database as well as their own records; they have direct access to the common database and use the same back-office systems to update it; and the information registered is regularly verified by trusted staff of the agencies. Such strong coordination among the concerned agencies is often based on regulatory

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[206] Para. 47, A/CN.9/WG.I/WP.93/Add.2.

[207] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 20 and A/CN.9/WG.I/WP.85, paras. 34 ff.

[208] In certain cases, agencies may keep their own numbering system in addition to using the unique identifier because of "legacy data", i.e. an obsolete format of identifying the businesses which cannot be converted into unique identifiers. In order to access such information the registry must maintain the old identification number for internal purposes. In dealing with the public, however, the government agency should use for all purposes the unique identifier assigned to the business.

[209] Para. 48, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 20.

[210] See Belgium in para. 35, A/CN.9/WG.I/WP.85.

[211] Para. 49, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Norway, in para. 35, A/CN.9/WG.I/WP.85.

[212] For details on repopulated forms, see footnote 167 above.

provisions that allocate roles and responsibilities among the various agencies involved. Appropriate funding should also be allocated from the State's budget.[213]

109. As discussed above (see paras. 70 and 96), the interoperability of the different agencies' ICT systems could be a major obstacle when implementing unique business identifiers. The ability of different information technology infrastructures to exchange and interpret data, however, is only one aspect of interoperability that States should consider. Another issue is that of semantic interoperability, which can also pose a serious threat to a successful exchange of information among the agencies involved as well as between relevant agencies and users in the private sector. For this reason, it is important to ensure that the precise meaning of the information exchanged is understood and preserved throughout the process and that semantic descriptions are available to all of the stakeholders involved. Measures to ensure interoperability would thus require State action on a dual level: agreement on common definitions and terminology on one hand, and development of appropriate technology standards and formats on the other. This approach should be based on a mutual understanding of the legal foundation, responsibilities and procedures among all those involved in the process.[214]

Recommendation 15: Implementation of a unique business identifier

The Regulation or the law of the enacting State should ensure that, when adopting a unique business identifier across different public agencies:

(a) There is interoperability between the technological infrastructure of the business registry and of the other public agencies sharing the information associated with the identifier; and

(b) That existing identifiers are linked to the unique business identifier.

I. Sharing of private data between public agencies

110. While facilitating information-sharing, it is important that unique business identifiers protect sensitive data and privacy. Legislation in each State 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 in order to avoid misuse of corporate vehicles for illicit purposes[215] has resulted from international efforts to fight money-laundering and terrorist and other illicit activities, as well as from the adoption of policies to know your customers and business counterparts. Such an enhanced quest for transparency has an impact on the way the information retained in the registry is shared among the different authorities. When a State introduces interoperability among different authorities, it should address issues of individual privacy[216] so that no protected information about the business is made public, but that information that must be made public by the registry can legally be made public (see also paras. 170 to 171 below).[217]

Recommendation 16[218]: Sharing of private data between public agencies

The Regulation should ensure that rules for the sharing of private data between public agencies pursuant to the unique business identifier system adopted:

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[213] Para. 54, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Norway in Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 23.

[214] Para. 53, A/CN.9/WG.I/WP.93/Add.2. For further reference, see supra, note 213, page 23.

[215] See also para. 75, A/CN.9/WG.I/WP.93/Add.1.

[216] See para. 37, A/CN.9/WG.I/WP.85.

[217] Para. 52, A/CN.9/WG.I/WP.93/Add.2. For further reference, see A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of EU Accession Countries, 2007, page 50.

[218] Former recommendation 36, A/CN.9/WG.I/WP.96/Add.1.

(a) Conform with the applicable rules in the enacting State on public disclosure of private data;

(b) Enable public agencies to access private data included in the unique business identifier system only in order to carry out their statutory functions; and

(c) Enable public agencies to access private data included in the unique business identifier system only in relation to those businesses with respect to which they have statutory authority.

J. Exchange of information among business registries

111. Introducing unique business identifiers that enable different public authorities to exchange information about the business among themselves is relevant not only at the national level, but also in an international context. Unique identifiers allow interoperability among business registries located in different States as well as between business registries and public authorities in different States. Implementation of cross-border exchange of data can result in more reliable information for consumers and existing or potential business partners, including small businesses that provide cross-border services. [219] Moreover, enhanced interoperability among business registries, coupled with appropriate national legislation, may result in enhanced protective measures for businesses, for example, by preventing business owners or managers sanctioned in one jurisdiction for "unfit conduct" in running a business from being allowed to become business owners or managers in other jurisdictions (see also paras. 50-58 above).[220]

112. In the European Union (EU), EU-Directive 2012/17[221] 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.[222] The intention is to facilitate exchanging information between the registry of a company and those of its branches in other member States on the opening and termination of any winding-up or insolvency proceedings of the company and on the deregistration of the company from the business registry. As a result, when a company has been dissolved or otherwise stricken from the registry, its foreign branches are likewise removed from the business register without undue delay.[223]

113. There are, at present, no other examples of similar initiatives[224] in other regions of the world. However, the adoption of unique identifiers by non-EU States could lay the groundwork for future coordination in the regulatory community in order to create international standards for a global unique identifier.[225]

114. Introducing unique identifiers does not only benefit businesses that have branches outside their State. It is also beneficial for local entrepreneurs since it enables those entrepreneurs to establish commercial relationships with multinationals or other foreign businesses that are active in the domestic markets where the local entrepreneurs operate. In a global economy, it is often difficult for a micro-entrepreneur to become a supplier or a customer of larger companies since it may not be easy for those companies to obtain information on the existence and the reliability (for instance, in terms of their financial situation) of the small businesses. A unique identifier, recognizable worldwide, would assist in creating a safe and reliable

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[219] Para. 55, A/CN.9/WG.I/WP.93/Add.2.

[220] For instance, in Singapore if a business director is disqualified by a foreign court from managing a business, that director can no longer be involved in the management of any company in the territory of the State unless certain requirements of domestic company law are satisfied. Available at: https://support.rikvin.com/faq/who-are-disqualified-directors/.

[221] See Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012.

[222] See para. 32, A/CN.9/WG.I/WP.85.

[223] Para. 56, A/CN.9/WG.I/WP.93/Add.2.

[224] However, see the collaboration between Australia and New Zealand reported in footnote 228.

[225] Para. 57, A/CN.9/WG.I/WP.93/Add.2.

"connection" between a business and all of the information that relates to it, thus making it possible for the small business to obtain visibility in bigger markets.[226]

115. The internationalization of businesses of all sizes creates an increasing demand for access to information on companies operating outside their national borders. Making the exchange of such information across borders as simple and fast as possible is of key importance in order to ensure the traceability of companies, the transparency of their operations and to create a more business-friendly environment. However, official information on registered businesses is not always readily available on a cross-border basis and business clients and other interested parties must search the register on a State-by-State basis when in need of information. This can result in a time-consuming and expensive effort that many interested users of the business registry may not be able to undertake due to travel distances, high costs and other potential obstacles.[227]

116. States are increasingly aware of the importance of improving the cross-border exchange of data between registries,[228] and sustained progress in respect of ICT now allows this aspect to be addressed. Accordingly, States implementing reforms to streamline their business registration system may wish to consider adopting solutions that will, in future, facilitate such information exchanges between registries from different jurisdictions and to consult with States that have already implemented approaches[229] that allow for such interoperability.[230] By way of example, one such reform could include developing a system of business prefixes that would make the legal form of the business immediately recognizable across jurisdictions.

Recommendation 17[231]: Exchange of information among business registries

The designated authority should ensure that systems for the registration of businesses should adopt solutions that facilitate information exchange between registries from different jurisdictions.

IV. Registration of a business

A. Scope of examination by the registry

117. The method through which a business is registered varies from State to State,[232] ranging from those that tend to regulate less and rely on the legal framework that governs business behaviour, to States that opt for ex ante screening of businesses before the business may be registered (see also para. 53 above).[233] In this regard, a jurisdiction aiming at reforming the registration system must first decide which approach it will take so as to determine the scope of the examination that will have to be carried out by the registry. The jurisdiction may thus choose to have a system where the registry only records facts or a system where the registry is required to

[226] Para. 58, A/CN.9/WG.I/WP.93/Add.2.
[227] Para. 27, A/CN.9/WG.I/WP.93.
[228] For instance, Australia and New Zealand have agreed to mutual exchanges of data and documents. The two States have also amended their legislation to help reduce duplicate entries for New Zealand companies operating in Australia. See the section "New Zealand companies registered as foreign companies with ASIC" at https://www.companiesoffice.govt.nz.
[229] See paras. 55-58, A/CN.9/WG.I/WP.93/Add.2. Australia and New Zealand have developed an application (NZAU Connect app) that allows users to carry out simultaneous searches of both the Australian and the New Zealand registries by using their smartphones or mobile devices. See the section "NZAU Connect App" in http://asic.gov.au/online-services.
[230] Para. 28, A/CN.9/WG.I/WP.93.
[231] Former recommendation 37, A/CN.9/WG.I/WP.96/Add.1.
[232] See para. 6, A/CN.9/WG.I/WP.85.
[233] See 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.

perform legal verifications and decide whether the business meets the criteria to register.[234]

118. Jurisdictions opting for ex ante verification of legal requirements and authorization before businesses can register often have court-based registration systems in which the judiciary, notaries and lawyers perform a key role in the registration process.[235] Other States structure their business registration as a declaratory system, in which no ex ante approval is required before business start-up and where registration is an administrative process. In such declaratory systems, verification of an event's legal status is made after it has taken place, and registration is under the oversight of a government department or agency,[236] which can choose whether to operate the business registry system itself or to adopt other arrangements (see paras. 38 to 39 above).[237]

119. Both the approval and the declaratory systems have their advantages and disadvantages. Approval systems are usually said to help prevent errors or omissions prior to registration. Notaries and/or lawyers and courts exercise a formal review and, when appropriate, also a substantive review of the pre-requirements for the registration of business. By contrast, declaratory systems are said to be easier to manage and better-suited to deter corruption by avoiding opportunities for official decisions to be made with a view towards personal gain; furthermore, they may reduce costs for registrants by negating the need to hire an intermediary and appear to have lower maintenance costs.[238]

B. Accessibility of information on how to register

120. In order for the business registry to facilitate trade and interactions between business partners, the public and the State, easy access to business services should be provided both to businesses that want to register and to interested stakeholders who want to search registered information.[239]

121. For businesses wanting to register, surveys often show that many microbusinesses operating outside of the legally regulated economy are not aware of the process of registering or of its costs: often they overestimate time and cost, even after efforts to simplify the registration process.[240] Easily retrievable information on the registration process (such information could include: a list of the steps needed to achieve the registration; the necessary contacts; the data and documents required; the results to be expected; how long the process will take; methods of lodging complaints; and possible legal recourse)[241] and the relevant fees can reduce compliance costs, and make the outcome of the application more predictable, thus encouraging entrepreneurs to register. Restricted access to such information, on the contrary, might require meetings with registry officials in order to be apprised of the registration requirements, or the involvement of intermediaries to facilitate the registration process.[242]

122. In jurisdictions with developed ICT infrastructures, information on the registration process and documentation requirements should be available on the registry website or the website of the government agency overseeing the process. As discussed below, States should consider whether the information included on the

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[234] Para. 2, A/CN.9/WG.I/WP.93/Add.1.
[235] See para. 9, A/CN.9/WG.I/WP.85 and Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, pages 25-26.
[236] See para. 24, A/CN.9/WG.I/WP.93.
[237] Para. 3, A/CN.9/WG.I/WP.93/Add.1. For further reference, see para. 24, A/CN.9/WG.I/WP.93 and 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 28.
[238] Para. 4, A/CN.9/WG.I/WP.93/Add.1.
[239] Para. 54, A/CN.9/WG.I/WP.93/Add.1.
[240] M. Bruhm, D. McKenzie, Entry Regulation and Formalization of Microenterprises in Developing Countries, 2013, pages 7-8.
[241] See for instance, Section C.4, A/CN.9/WG.I/WP.98.
[242] Para. 55, A/CN.9/WG.I/WP.93/Add.1.

website should be offered in a foreign language in addition to official and local languages. States with more than one official language should make the information available in all such languages (see para. 135 below).[243]

123. Lack of advanced technology, however, should not prevent access to information that could be ensured through other means, such as the posting of communication notes at the relevant agency or dissemination through public notices. In some jurisdictions, for instance, it is required to have large signs in front of business registry offices stating their processes, time requirements and fees.[244] In any event, information for businesses that want to register should be made available at no cost.[245]

124. It is equally important that potential registry users are given clear advice on the practical logistics of the registration and the public availability of the information on the business registry, for example, through the dissemination of guidelines and tutorials (ideally in both printed and electronic form) and the availability of in-person information and training sessions.[246] In some States, for instance, prospective users of the system are referred to classroom-based and/or eLearning opportunities available through local educational institutions or professional associations.[247]

Recommendation 18[248]: Accessibility of information on how to register[249]

The designated authority should ensure that information on the business registration process and the applicable fees, if any, should be widely publicized, readily retrievable, and available free of charge.

C. Businesses required or permitted to register[250]

125. States must also define which businesses are required to register under the applicable law. One of the key objectives of business registration is to permit businesses of all sizes and legal forms to be visible in the marketplace and to operate in the legally regulated commercial environment.[251] This objective is of particular importance in assisting MSMEs to participate effectively in the economy, and States may wish to consider requiring or enabling businesses of all sizes and legal forms to register in an appropriate business registry, or creating a single business registry that is tailored to accommodate registration by a range of different sizes and different legal forms of business.[252]

126. Laws requiring the registration of businesses vary greatly from State to State, but one common aspect is that they all require registration of a particular legal form of business. The nature of the legal forms of economic entity that are required or permitted to register in a given jurisdiction is, of course, determined by the applicable law.[253] In some legal traditions, it is common to require registration of all businesses, including sole proprietorships, professionals, and government bodies, since they are

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[243] Para. 56, A/CN.9/WG.I/WP.93/Add.1.
[244] See Bangladesh and Guinea cited in para. 31, A/CN.9/WG.I/WP.85.
[245] Para. 57, A/CN.9/WG.I/WP.93/Add.1.
[246] See also para. 7, A/CN.9/WG.I/WP.93/Add.1.
[247] Para. 84, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Service Alberta, Canada, at www.servicealberta.com/1005.cfm.
[248] Former recommendation 17, A/CN.9/WG.I/WP.96.
[249] The Working Group requested (see para. 79, A/CN.9/866) verification of any overlap between recommendation 8 and 17 as they appeared in A/CN.9/WG.I/WP.96. In this regard, the content of recommendation 8, which has been renumbered as recommendation 6 in this working paper, has been slightly modified to differentiate between the two. See footnote 96 above.
[250] The Working Group may wish to consider whether recommendation 18 and paras. 120 to 122 of the commentary should be added to recommendation 2 (i.e. combined former recommendations 1, 4 and 7) and to the commentary in paras. 27 to 30 above.
[251] Para. 12, A/CN.9/WG.I/WP.93.
[252] Para. 5, A/CN.9/WG.I/WP.93/Add.1.
[253] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, pages 6 ff.

all said to constitute an economic entity;[254] while in other legal traditions, only corporations and similar entities (with legal personality and limited liability) are required to register.[255] This approach can exclude businesses like partnerships and sole proprietorships from mandatory registration. However, variations on these regimes also exist, and some jurisdictions permit voluntary registration for businesses that would not otherwise be required to register, for example, because they are not economic entities or because they are not engaged in business activities.[256]

127. In several jurisdictions, when entrepreneurs decide to establish and to register their business, they tend to choose the simplest legal form available to them in order to minimize the regulatory and financial burden, as well as the expense of establishing the business. A sole proprietorship or similar type of business with low legal and regulatory requirements is thus often the most popular business form. Some jurisdictions require that even simple business forms such as these be registered, and some jurisdictions have carried out reforms to facilitate the registration process for sole proprietorships or for simplified new types of limited liability entities.[257]

128. As noted above (see para. 21), enabling the registration of businesses that would not otherwise be required to register allows such businesses to benefit from a number of services offered by the State and by the registry, including the protection of a business or a trade name, the separation of personal assets from assets devoted to business or limiting the liability of the owner of the business.[258] Businesses that voluntarily register must, however, fulfil the same obligations and will be subject to the same penalties for non-compliance with obligations taken on by registration as those businesses that are required to register.

Recommendation 19[259]: Businesses required or permitted to register[260]

The Regulation or the law of the enacting State should specify:

(a) Which businesses are required to register; and

(b) That all businesses are permitted to register.

D. Minimum information required for registration

129. As a general rule, businesses must meet certain requirements in order to be registered; those requirements are determined by the State based on its legal and economic framework. In addition, the registered information required usually varies depending on the legal form of business being registered — for example, sole proprietorships and simplified business entities may be required to submit relatively simple details in respect of their business,[261] while businesses such as public and private limited liability companies will be required to provide more complex and detailed information. Although the requirements for registration of each legal form of business will vary according to the applicable law of the relevant jurisdiction, there are, however, some requirements that can be said to be common for many businesses

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[254] See para. 23, A/CN.9/825.

[255] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, pages 6 ff.

[256] Para. 6, A/CN.9/WG.I/WP.93/Add.1. For further reference, see L. Klapper, R. Amit, M. F. Guillén,
J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, pages 6 ff.

[257] Para. 7, A/CN.9/WG.I/WP.93/Add.1. For further reference, see para. 51, A/CN.9/WG.I/WP.85.

[258] See para. 35, A/CN.9/WG.I/WP.92 and Section D.2, A/CN.9/WG.I/WP.98.

[259] Former recommendation 18, A/CN.9/WG.I/WP.96.

[260] The Working Group may wish to consider whether this recommendation should instead be included as a subparagraph in recommendation 2 of the present text (which combines former recommendations 1, 4 and 7 from A/CN.9/WG.I/WP.96), along the following lines: "The Regulation or the law of the enacting State should: … (d) Specify which businesses are required to register."

[261] On this matter, see also paras. 61-67, A/CN.9/WG.I/WP.99.

in most States, both during the initial registration process and throughout the business life of the enterprise.[262]

130. General requirements for the registration of all legal forms of enterprise are likely to include the following:[263]

(a) Providing information in respect of the business and its founders, such as:

(i) The name and address at which the business can be deemed to receive correspondence (such an address can be a "service address" and need not be the residential address of the registrants or the managers of the business);

(ii) The name(s) and contact details of the registrant(s);

(iii) The identity of the person or persons who may legally bind the business; and

(iv) The legal form of business that is being registered; and[264]

(b) Payment of any required fees to the registry.

131. Other information that may be required for registration, depending on the jurisdiction of the registry and the legal form of the business being registered, can include:

(a) The names and addresses of the persons associated with the business, which may include managers, directors and officers of the business;

(b) The name and the address of the owner(s) or the beneficial owner(s);

(c) The rules governing the organization or management of the business; and

(d) Information relating to the capitalization of the business.[265]

132. Depending on the legal form of the business being registered, other details may be required in order to finalize the registration process. In some jurisdictions, proof of the share capital, the name of the chairperson, information on the type of commercial activities engaged in by the business, and agreements in respect of non-cash property constitute information that may also be required by registries in respect of certain legal forms of business.[266] In addition, in several jurisdictions, registration of shareholder details and any changes therein may be required; in a few cases, registration of shareholder details is carried out by a different authority.[267] In some other jurisdictions, it is now practice to register beneficial ownership details and changes in those details,[268] although the business registry is not always the authority entrusted with this task.[269] Transparency in the beneficial ownership of businesses can help prevent the misuse of corporate vehicles, including MSMEs, for illicit purposes.[270]

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[262] Para. 8, A/CN.9/WG.I/WP.93/Add.1. It should be noted that information required for the registration of a simplified business is likely to be a less comprehensive list, and that this portion of the materials should be made consistent with what the Working Group agrees in respect of the requirements for a simplified business.

[263] See also paras. 60-67, A/CN.9/WG.I/WP.99.

[264] Para. 9, A/CN.9/WG.I/WP.93/Add.1.

[265] Para. 10, A/CN.9/WG.I/WP.93/Add.1.

[266] See The International Business Registers Report 2015, pages 26 ff.

[267] See European Commerce Registers' Forum, International Business Registers Report 2014, page 26.

[268] See The International Business Registers Report 2015, page 37.

[269] A "beneficial owner" is the natural person(s) who ultimately owns or controls a legal person or arrangement even when the ownership or control is exercised through a chain of ownership or by means of control other than direct control. These vehicles may include not only corporations, trusts, foundations, and limited partnerships, but also simplified business forms, and may involve the creation of a chain of cross-border company law vehicles created in order to conceal their ownership. See also, paras. 47 to 55, A/CN.9/825. The Working Group may wish to consider whether further details on this topic should be included in these materials, possibly as an annex.

[270] Para. 12, A/CN.9/WG.I/WP.93/Add.1. For further reference, see also paras. 65-66, A/CN.9/WG.I/WP.99.

Recommendation 20[271]: Minimum information required for registration

The Regulation or the law of the enacting State should establish the minimum information and supporting documents required for the registration of a business, including at least:

(a) The name and address at which the business can be deemed to receive correspondence or, in cases where the business does not have a standard form address, the precise description of the geographical location of the business;

(b) The identity of the person or persons registering the business;

(c) The identity of the person or persons who are authorized to act on behalf of the business; and

(d) The legal form of the business being registered.

E. Language in which information is to be submitted

133. When requiring the submission of information for business registration, one important issue for the State to consider is the language in which the required information must be submitted. Language can be a barrier and can cause delays in registration if documents need to be translated into the language of the registry.[272] On the other hand, a business can be registered only if the content of the information is legible to the registry staff. For this reason, it is not common for jurisdictions to allow documents or electronic records to be submitted in a non-official language. States, however, may consider whether such documents can be accepted. There are some States that allow all or some of the information relating to the business registration to be submitted in a non-official language. Should States opt for this approach, it would be advisable to establish that the documents or electronic records must be accompanied by a sworn-in court interpreter's translation into the registry's national language(s) or any other form of authenticating the documents or electronic records that is used in the State.[273]

134. Another issue is whether the documents submitted to the business registry include information, such as names and addresses, which uses a set of characters different from the characters used in the language of the registry. In this case, the State should provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry.[274]

135. A number of States have more than one official language. In these States, registration systems are usually designed to accommodate registration in all official languages. To ensure that information on businesses operating in the State is available to all registrants and searchers, different approaches can be adopted. States may require parties to make their registration in all official languages; or they may permit filing in one language only, but then require the registry to prepare and register duplicate copies in all official languages. Both these approaches, however, may be quite costly and invite error. A more efficient way of dealing with multiple official languages, any one of which may be used to register, would be to allow registrants to carry out registration in only one of those official languages. Such a language could be that of the province or the region where the registry office or the registry sub-office is located and where the registrant has its place of business. This approach would also take into account the financial constraints of MSMEs and, according to circumstances, possible literacy issues, as entrepreneurs may not be equally fluent in all official languages spoken in a State. When such an approach is chosen, however, States should ensure that the registration and public information relating to the registry are available in all official languages of the registry. Whatever approach is

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[271] Former recommendation 19, A/CN.9/WG.I/WP.96.

[272] See European Commerce Registers' Forum, International Business Registers Report 2014, page 23.

[273] Para. 51, A/CN.9/WG.I/WP.93/Add.1. For further reference, see also European Commerce Registers' Forum, International Business Registers Report 2014, page 24.

[274] Para. 52, A/CN.9/WG.I/WP.93/Add.1.

taken, however, States will have to consider ways to address this matter so as to ensure that the registration and any subsequent change can be carried out in a cost effective way for both the registrant and the registry and, at the same time, ensure that information can be understood by the registry's users.[275]

Recommendation 21[276]: Language in which information is to be submitted[277]

The Regulation should provide that the information and documents submitted to the business registry must be expressed in the language or languages specified by the enacting State, and in the character set as determined and publicized by the business registry.

F. Notice of registration

136. The enacting State is to choose the shortest possible appropriate time period within which the registrant should be notified of the effectiveness of the business registration.[278] Obligating the registry to promptly notify the applicant business about the registration helps to ensure the integrity and security of the registry record.[279],[280] In States where online registration is used, the registrant should receive an online notification of the registration of the business immediately after all of the requirements for the registration of that business have been successfully fulfilled.

Recommendation 22[281]: Notice of registration

The Regulation should establish that the business registry should notify the registrant whether or not its registration is effective as soon as practicable, and, in any event, without undue delay.

G. Content of notice of registration

137. The notice of registration should include the minimum information in respect of the registered business necessary to provide conclusive evidence that all requirements for registration have been complied with and that the business is duly registered according to the law of the enacting State.

Recommendation 23[282]: Content of notice of registration

The Regulation should provide that the notice of registration may be in the form of a certificate, notice or card, and that it should contain the following information:

(a) The unique business identifier of the business;

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[275] Para. 53, A/CN.9/WG.I/WP.93/Add.1.

[276] Former recommendation 20, A/CN.9/WG.I/WP.96.

[277] The Working Group may wish to note that this recommendation mirrors recommendation 22 of the UNCITRAL Guide on the Implementation of a Security Rights Registry, which reads as follows: "The Regulation should provide that the information 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." The Working Group may wish to insert square brackets into the recommendation to reflect fully the text on which it is based.

[278] Para. 24, A/CN.9/WG.I/WP.96.

[279] Para. 39, A/CN.9/WG.I/WP.93/Add.1. See also paras. 58-59, A/CN.9/WG.I/WP.99.

[280] The Secretariat suggests that para. 63, A/CN.9/WG.I/WP.93/Add.2 might best be placed in a footnote. The text of that paragraph is therefore reproduced as follows, with some editorial modifications: "In some cases, jurisdictions have introduced statutory time limits on business registration procedures and/or 'silence is consent' rules. As a result of the 'silence is consent' rule, when a business fails to receive a decision on its application for registration within the time limit established by law or regulation, the business is nonetheless considered to have been duly registered."

[281] Former recommendation 21, A/CN.9/WG.I/WP.96.

[282] Former recommendation 22, A/CN.9/WG.I/WP.96.

(b) The date of its registration;

(c) The name of the business;

(d) The legal form of the business; and

(e) The legislation under which the business has been registered.

H. Period of effectiveness of registration

138. States may adopt one of two approaches in terms of determining the period of effectiveness of the registration of a business. Under the first approach, the registration of the business is subject to a maximum period of duration established by law. It follows that unless the registration is renewed, the registration of the business will expire on the date stated in the certificate of registration or upon the termination of the business.[283] While this approach provides certainty as to the existence of the business and the reliability of the information provided, it imposes a burden on the registrant to regularly re-register or risk termination of the business. This danger could be particularly problematic for MSMEs, which often operate with minimal staff and limited knowledge of the applicable rules. Further, if additional information is required and not furnished by the applicant, renewal of the registration could also be refused, thus further threatening the existence of the business.[284]

139. Under the second approach, no maximum period of validity is established for the registered business and the registration is effective until the business ceases to operate and is deregistered. While this approach may provide less certainty in terms of the currency of the information in the registry, it simplifies the intake process and both encourages registration and reduces its burden on businesses, and in particular on MSMEs.[285]

140. In some cases, both approaches have been adopted: a maximum period of registration, subject to renewal, may apply to registered businesses that are of a legal form that does not have legal personality, while an unlimited period of registration may apply to businesses that have legal personality. This duality of approach reflects the fact that the consequences of the expiry of registration of a business that possesses legal personality are likely to be more serious and may affect the very existence of the business and the limited liability protection afforded its owners.[286]

141. When a registered business that is required to renew its registration fails to do so, the registry may be given the authority to deregister the business (see also para. 202 below) subject to providing an official notice to the business in accordance with the applicable law or regulation.

Recommendation 24[287]: Period of effectiveness of registration

The Regulation should clearly establish that the registration is valid until the business is deregistered or until such time as a renewal of the registration is required.

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[283] It should be noted that the general law of the enacting State for calculating time periods would apply to the calculation of the period of effectiveness, unless the applicable law or regulation provides otherwise. For example, if the general law of the enacting State provides that, if the applicable period is expressed in whole years from the day of registration, the year runs from the beginning of that day.

[284] Para. 29, A/CN.9/WG.I/WP.93/Add.1.

[285] Ibid., para. 30.

[286] See, for example, Singapore at http://www.guidemesingapore.com/incorporation/other/singapore-sole-proprietorship-registration-guide.

[287] Former recommendation 23, A/CN.9/WG.I/WP.96.

I. Time and effectiveness of registration

142. In the interests of transparency and predictability of a business registration system, States should determine the moment at which the registration of a business or any later change made to the registered information is effective. States usually determine that a business registration or any subsequent change made to it is effective either at the time of the entry of that information into the registry record or when the application for registration or a change of registered information is received by the registry. Whichever approach is chosen, the most important factor is that the State makes it clear at which moment the registration or change is effective. In addition, the effective time of registration of the business or any later change to the registered information should be indicated in the registry record relating to the relevant business.[288]

143. If the registry is designed to enable users to submit information electronically in respect of an application for registration or an amendment without the intervention of registry staff and to use online payment methods for the registration, the registry software should ensure that the information becomes effective immediately or nearly immediately after it is transmitted. As a result, any delay between the time of the electronic transmission of the information and the effective time of registration of the business will be eliminated.[289]

144. In registry systems that allow or require registration information to be submitted to the registry using a paper form, registry staff must enter the information on the paper form into the registry record on behalf of registrant. In such systems, there will inevitably be some delay between the time when the paper form is received in the registry office and the time when the information set out on the form is entered into the registry record. In these cases, the domestic legislative or regulatory framework should provide that the registry must enter the information received into the registry record as soon as practicable and possibly set a deadline by which the application or the changes should be registered. In a mixed registry system which allows information to be submitted in both paper and electronic form, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of registration.[290]

Recommendation 25[291]: Time and effectiveness of registration[292]

The Regulation should:

(a) Require the business registry to time and date stamp applications for registration and to process them in the order in which they are received and as soon as practicable, and, in any event, without undue delay;

(b) Establish clearly the moment at which the registration of the business is effective; and

(c) Specify that the registration of the business must be entered into the business registry as soon as practicable thereafter, and in any event without undue delay.

J. Refusal to register

145. A series of checks and control procedures are required to ensure that the necessary information and documentation is provided in order to register the business, however, the extent of such controls varies according to the jurisdiction. In those legal

[288] Para. 31, A/CN.9/WG.I/WP.93/Add.1.
[289] Ibid., para. 32.
[290] Ibid., para. 33.
[291] Former recommendation 24, A/CN.9/WG.I/WP.96.
[292] The Working Group may wish to note recommendation 11 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Time of effectiveness of the registration of a notice."

regimes where the registry performs simple control procedures, if all of the basic legal and administrative requirements established by the domestic legal and regulatory framework are met, the registry must accept the information as filed, record it, and register the business. When the legal regime requires a more thorough verification of the information filed, registries may have to check whether mandatory provisions of the law are met by the content of the application and information submitted, or any changes thereto. Whichever approach is chosen, States should define in their legislative or regulatory framework which requirements the information to be submitted to the registry must meet. In certain jurisdictions, the registrar is given the authority to impose requirements as to the form, authentication and manner of delivery of information to be submitted to the registry.[293] When registration concerns an MSME, it would be advisable that such requirements be kept at a minimum in order to facilitate the registration process for MSMEs. This will reduce administrative hurdles and help in promoting business registration among such businesses.[294]

146. Registration of MSMEs may also be facilitated if the registry is granted the power to accept and register documents that do not fully comply with the requirements for proper submission and to rectify clerical errors, including its own incidental errors, in order to bring the entry in the business registry into conformity with the documents submitted by the registrant. This will avoid imposing the potentially costly and time-consuming burden of requiring the registrant to resubmit an application for registration. Entrusting the registry with these responsibilities, may be of particular importance if registrants do not have direct access to electronic submission of documents and where their submission, or the entry of data, requires the intervention of the registry staff. In States where it is possible for registrants to submit applications for registration directly online, the ICT-based registration system is usually designed so as to allow built-in data error checks (see also paras. 175 to 178) and to reject automatically an application or a request if it does not comply with the prescribed requirements. When the registry is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, the law or the regulation should strictly determine under which conditions those responsibilities may be discharged (see also para. 211 below). Clear rules in this regard will ensure the integrity and security of the registry record and minimize any risk of abuse from or corruption by the registry staff (see also paras. 196 to 200 below). The Regulation should thus establish that the registry may only exercise its discretion to correct errors upon having provided prior notification of the intended corrections to the registrant and having received the consent of the registrant in return, although this approach could create a delay in the registration of the business while the registry seeks the consent of the registrant. When the information provided by the business is not sufficient to comply with the requirements for registration, the registry should be granted the authority to request from the business additional information in order to finalize the registration process.[295] The Regulation or the applicable law of the enacting State should specify an appropriate length of time within which the registry should make such a request.

147. States should provide that registries may reject the registration of a business if its application does not meet the requirements prescribed by the legislative and regulatory framework for registration. This approach is implemented in several jurisdictions regardless of their legal tradition. In order to prevent any arbitrary use of such power, however, the registry must provide, in writing, a notice of the rejection of an application for registration and the basis on which it was rejected, and the registrant must be allowed time to appeal against that decision.[296]

148. In cases where the application for business registration is submitted in paper form and the reason for its rejection is that the application was incomplete or illegible, there might be some delay between the time of receipt of the application by the

[293] See, for instance, Section 1068, UK Companies Act 2006.
[294] Para. 22, A/CN.9/WG.I/WP.93/Add.1.
[295] Para. 23, A/CN.9/WG.I/WP.93/Add.1.
[296] Para. 24, A/CN.9/WG.I/WP.93/Add.1.

registry and the time of communication of its rejection, and the reasons therefor, to the registrant. In a registry system that allows registrants to submit applications electronically and the relevant information directly to the registry, the system should be designed, when permitted by the State's technological infrastructure, so as to automatically reject the submission of incomplete or illegible applications and to display the basis of the rejection on the registrant's screen.[297]

Recommendation 26[298]: Refusal to register[299]

The Regulation should provide that the business registrar:

(a) Must refuse registration of the business if the application does not meet the requirements specified in the Regulation or the law of the State and is required to provide to the registrant the basis for refusal in written form; and

(b) Is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, provided that the conditions under which the registrar may exercise this authority are clearly established.

K. Registration of branches

149. Most States require the registration of national branches of a foreign company in order to permit those branches to operate in their jurisdiction and to ensure the protection of domestic creditors, businesses and other interested parties that deal with those branches. Registration of a company branch might not appear to be immediately relevant for MSMEs, whose main concern is more likely to be to consolidate their business without exceeding their human and financial capacity. However, this issue is relevant for those slightly larger business entities that, being of a certain size and having progressed to a certain volume of business, look to expand beyond their local or domestic market. In addition, even micro and very small businesses may be highly successful and may wish to expand their operations. For such businesses, establishing branches abroad may be both an attractive goal and a realistic option. Although it may seem to be a daunting prospect, in fact, when a business expands to another State, it may find that setting up a foreign branch is cheaper and requires fewer formalities than establishing a local subsidiary.[300]

150. There may be considerable differences among those jurisdictions that register foreign company branches in terms of what triggers the obligation of those companies to register their branches. Some approaches are based on a wide interpretation of the concept of foreign establishment, for example, those which include not only a branch, but also any establishments with a certain degree of permanence or recognizability, such as a place of business in the foreign State.[301] Other approaches define more precisely the elements that constitute a branch that needs to be registered. They may include the presence of some sort of management, the maintenance of an independent bank account, the relation between the branch and the parent company, or the requirement that the parent company has its main office registered abroad.[302] Not all States define the notion of branch in their legislation, or state under which circumstances a foreign establishment in the State should be registered: laws may simply refer to the existence of a foreign branch. In these cases, registries may fill the gap by issuing guidelines that clarify the conditions under which such a registration should be carried out.[303] When this occurs, the guidelines should not be seen as an

[297] Para. 25, A/CN.9/WG.I/WP.93/Add.1.
[298] Former recommendation 25, A/CN.9/WG.I/WP.96.
[299] The Working Group may wish to note recommendation 8 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Rejection of the registration of a notice".
[300] Para. 15, A/CN.9/WG.I/WP.93/Add.1. For further reference, see K. E. Sørensen, Branches of companies in the EU: balancing the Eleventh Company Law Directive, national company law and the right of establishment, 2013, page 9.
[301] K. E. Sørensen, ibid., page 12.
[302] Ibid., page 12.
[303] Ibid., page 13.

attempt to legislate by providing their own definition of branch, but rather as a tool to explain the features required by a branch of a foreign business in order to be registered.[304]

151. When simplifying or establishing their business registration system, States should consider enacting provisions governing the registration of branches of foreign companies. Those provisions should address, at minimum, issues such as timing of registration, disclosure requirements, information on the persons who can legally represent the branch and the language in which the registration documents should be submitted.[305] Duplication of names could represent a major issue when registering foreign company branches, and it would be important to ensure the identity of a business across jurisdictions. In this regard, an optimal approach could be for a business registry to use unique identifiers to ensure that the identity of a business remains consistent and clear within and across jurisdictions (see paras. 94 to 104 above).[306]

Recommendation 27[307]: Registration of branches

The Regulation should ensure that:

(a) Registration of a branch of a business is required or permitted;

(b) Any definition of "branch" for registration purposes is consistent with the definition provided in the law of the enacting State; and

(c) Provisions regarding branch registration should address the following issues:

(i) Time and date of registration of the branch;

(ii) Disclosure requirements, such as name, address of the person or persons registering the branch; name and address of the branch and copy of the notice of registration of the foreign company;

(iii) Information on the person or persons who can legally represent the branch; and

(iv) The language in which the registration documents should be submitted.

V. Post-registration

A. Maintaining a current registry

152. In addition to the function performed in the registration of an enterprise, business registries typically support businesses throughout their life cycle. Once the information is collected and properly recorded in the business registry, it is imperative that it be kept current in order to be of value to users of the registry. As noted above (see paras. 33 to 34), it would thus be advisable for States to have in place provisions that enable the registration system to achieve this purpose.

153. One approach through which information in the business registry may be kept current is for the State to require that the business re-register at regular intervals. A similar approach is to require the business to file at regular intervals, for example once a year, an updating declaration stating that certain core information contained in the register concerning the business is accurate or, as applicable, stating what changes should be made. Although these approaches may be valuable as a means of identifying

[304] Para. 16, A/CN.9/WG.I/WP.93/Add.1.

[305] Ibid., para. 17. The Working Group may wish to consider whether further details on this topic should be included in a future annex to these materials.

[306] The Working Group agreed at its twenty-fifth session that the duplication of business names could be a problem in the cross-border context and that the use of unique identifiers could assist in ensuring the identity of a business within and across jurisdictions (para. 39, A/CN.9/860).

[307] Former recommendation 26, A/CN.9/WG.I/WP.96.

companies that have permanently ceased to operate and may be deregistered, and may not necessarily be burdensome for larger business with sufficient human resources, they could be quite demanding for less generously staffed MSMEs, in particular if there is a cost associated with making such submissions. A third approach, which seems preferable as it better takes into account the needs of MSMEs, and in particular the less experienced ones, is for the business to update the information in the registry whenever a change in any of the registered information occurs. The risk of this approach, which is largely dependent on the business complying with the rules, may be that the filing of changes is delayed or does not occur. To prevent this, States could adopt a system pursuant to which regular prompts are sent, usually electronically, to businesses to request updated information. In order to minimize the burden for the registries and help them make the most effective use of their resources, prompts that registries regularly send out to remind businesses of the periodic returns required of them could also include generic reminders to update registered information. For the same reason, it would be desirable that prompts be sent in electronic format. If the registry is operated in a paper-based or mixed form, it would be desirable for the registry to identify appropriate means to perform this task: sending paper-based prompts to individual businesses would be time and resource consuming and may not be a sustainable approach. In one State, for instance, where the registry is not operated electronically, reminders to registered businesses to update the information contained in the registry are routinely published in newspapers.[308] Regardless of the approach chosen to ensure that businesses promptly inform the registry of any changes in their registered information, States could also adopt provisions declaring the liability of the registrant to a fine on conviction if changes are not filed with the business registry within the time prescribed by the law or the Regulation.

154. Other methods to help mitigate any potential deterioration of the information collected in the business registry would include enhancing the interconnectivity and the exchange of information between business registries and other public registries.[309]

Recommendation 28: Maintaining a current registry[310]

The Regulation should require the registrar to ensure that the information in the business registry is kept current, including through:

(a) Sending an automated request to registered businesses at periodic intervals requiring them to report whether the information maintained in the registry continues to be accurate or stating which changes should be made; and

(b) Updating the registry immediately upon receipt of the amending information or as soon as practicable thereafter.

B. Information required after registration

155. In many jurisdictions, entrepreneurs have a legal obligation to inform the registry of any changes occurring in the business, whether these are factual changes (for example, address or telephone number) or whether they pertain to the structure of the business (for example, a change in the legal form of business). Information exchange between business registries and different government agencies operating in the same jurisdiction also serves the same purpose. In some cases, registries publish annual accounts, financial statements or periodic returns[311] of enterprises that are useful sources of information on businesses in that jurisdiction for investors, clients, potential creditors and government agencies.[312] Although the submission and

[308] This is the practice in Sri Lanka. See, for example, http://www.sundaytimes.lk/090503/FinancialTimes/ft322.html.

[309] Para. 27, A/CN.9/WG.I/WP.93/Add.1.

[310] At its twenty-fourth session, there was broad agreement in the Working Group that information maintained in the registry should be kept as current as possible. Different views were expressed on how to accomplish that goal (para. 73, A/CN.9/831).

[311] It was noted in the twenty-fifth session of the Working Group (para. 45, A/CN.9/860) that annual returns should be included; the term "periodic returns" is a defined term and has been used here.

[312] Para. 21, A/CN.9/WG.I/WP.93.

publication of detailed financial statements might be appropriate for public companies, depending on their legal form, MSMEs should be required to submit far less detailed financial information, if any at all, and such information should only be submitted to the business registry and thus made public if desired by the MSME. However, to promote accountability and transparency and to improve their access to credit or attract investment, MSMEs may wish to submit and make public their financial information.[313] In order to encourage MSMEs to do so, States should allow MSMEs to decide on an annual basis whether to opt for disclosure of such information or not.

156. Once a business has been registered, in order for it to remain registered, certain information is typically required by the registry throughout the course of the life of the business. This information may be prompted by periodic returns that are required by the registry at regular intervals in order to keep the information on the registry current or it may be submitted by the business as changes to its registered information occur. Information required in this regard may include:

(a) Changes in any of the information that was initially required for the registration of the business as set out in recommendation 20;[314]

(b) Changes in the name(s) and address(es) of the person(s) associated with the business;

(c) The submission of financial information in respect of the business, depending on its legal form; and

(d) Depending on the jurisdiction, information concerning insolvency proceedings, liquidation or mergers (see para. 57 above).[315]

Recommendation 29[316]: Information required after registration

The Regulation should specify that after registration, the registered business must file with the business registry the following information:

(a) Any changes or amendments to the information that was initially required for the registration of the business pursuant to recommendation 20 or to the current information in the business registry as soon as those changes occur; and

(b) Periodic returns, which may include annual accounts, as required by the law of the enacting State.[317]

C. Time and effectiveness of amendments to registered information

157. In keeping with the previous discussion (see paras. 142 to 144 above), States should also determine the time when changes to the information recorded is effective in order to promote transparency and predictability of the business registration system. It would be advisable for the changes to become effective when the information contained in the notification of changes is entered into the registry record

[313] See Working Group comments in paras. 45-47, A/CN.9/860. See also paras. 62-67, A/CN.9/WG.I/WP.99 and paras. 53-55, A/CN.9/WG.I/WP.99/Add.1.

[314] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, page 7.

[315] Para. 11, A/CN.9/WG.I/WP.93/Add.1.

[316] Former recommendation 27, A/CN.9/WG.I/WP.96.

[317] The Secretariat suggests that former subpara. (b) of recommendation 27 (with some minor edits) be included in a footnote, which would read: "In order to comply with international standards promoting disclosure of the beneficial ownership of a business, States may wish to consider whether the business should also be required to provide information on the identity of the owner of the business if the owner is a person other than the registrant." See also paras. 132 and 180 of this working paper.

rather than when the information is received by the registry, and that the time of the change should be indicated in the registry record relating to the relevant business.[318]

158. As in the case of business registration, if the registry allows users to submit information electronically without the intervention of the registry staff, the information should become effective immediately or nearly immediately after it is transmitted, to avoid delay.[319] If the registry allows or requires paper-based information to be submitted to it and the registry staff enters the information into the registry on behalf of the registrant, it should be ensured that the registry enter the information received into the registry record as soon as practicable and possibly set a deadline by which the changes should be registered. In a mixed registry system which allows information to be submitted using both paper and electronic means, registrants who elect to use the paper form should be alerted that this method may result in some delay in the time of effectiveness of registration.[320]

Recommendation 30[321]: Time and effectiveness of amendments to registered information

The Regulation should:

(a) Require the business registry to time and date stamp amendments to registered information and to process them in the order in which they are received;

(b) Require the business registry to notify the registered business as soon as practicable that its registered information has been amended; and

(c) Establish when amendments to the registered information are effective.

VI. Accessibility and information-sharing

A. Public access to the business registry

159. In keeping with its functions as a collector and disseminator of business-related information, the registry should make publicly available all information on a registered business that is relevant for those that interact with the business (whether they be public authorities or private entities) to be fully aware of the business identity and status of that enterprise. This will allow interested users to make informed decisions about who they wish to do business with, and for organizations and other stakeholders to gather business intelligence. This function of a business registry is demonstrably valuable to the economy of a State.[322]

160. While providing public disclosure of the registered information is an approach followed in most States, the way in which stakeholders access information, the format in which the information is presented and the type of information available, varies greatly from State to State. This variation is not only a function of the technological development of a State, but of an efficient accessing framework, including that provided by national legislation.[323] For instance, an aspect on which States may differ concerns the criteria that may be used to search the registry.[324]

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[318] Para. 31, A/CN.9/WG.I/WP.93/Add.1.
[319] Ibid., para. 32.
[320] Ibid., para. 33.
[321] Former recommendation 29, A/CN.9/WG.I/WP.96.
[322] Ibid., para. 64. The Secretariat suggests that what was formerly the last sentence of para. 159 should instead be included in a footnote, which would read as follows: "[Moreover], in several States certain information deposited in the registry is of a legal nature and has third-party effectiveness, so that users of the registry can rely upon the information as it appears on the registry, and assert that information against third parties."
[323] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, page 8.
[324] Para. 65, A/CN.9/WG.I/WP.93/Add.1.

161. Further, in order to facilitate dissemination of the information, it should be made available at no cost or for a low cost. This approach may be greatly facilitated by the development of ICT supported registries that allow users to submit applications or make searches electronically without the need to rely on intermediation by registry personnel. Such an approach is also much cheaper for the registry. Where registration systems are paper-based, users must either visit the registry office and conduct the research on site (whether manually or using ICT facilities that are available) or the information is sent to them on paper. In both cases, registry staff may need to assist the user to locate the information and prepare it for disclosure. Again, paper-based information access is associated with delay, higher costs, and the potential for error and for information to be less current.[325]

162. The rules relating to access to business registry services are typically set out either in the applicable law or regulation, or both. They may also be addressed in the "terms and conditions of use" established by the registry. For example, the terms and conditions of access may address the concerns of registrants regarding the security and confidentiality of their financial and other data or the risk of changes being made to registered information without the authority of the registrant.[326] Assigning a unique user name and a password to the registrant, or employing other modern security techniques would help reduce such risks (see paras. 34 and 35 above),[327] as would require the registry to notify the registrant of any changes made by others in the deposited information. Since access to the registered information by the general users also enhances certainty of and transparency in the way the registry operates, the principle of public access to the information deposited in the registry should be stated in the law or the regulation governing business registration.[328]

Recommendation 31[329]: Public access to business registry services[330]

The Regulation should permit any person to access the services of the business registry and the information contained in the registry.

B. Public availability of information

163. Evidence shows that in most States, public access to the information on the registry is generally unqualified. Allowing full public access does not compromise the confidentiality of certain registered information, which can be protected by allowing users to access only certain types of information.[331]

164. It is not recommended that States restrict access to search the information on the business registry or that users be required to demonstrate a reason to request access. Such a policy could seriously compromise the core function of the registry to publish and disseminate information on registered entities. Moreover, if a discretionary element is injected into granting an information request, equal public access to the information in the registry could be impeded, and some potential users might not have access to information that was available to others.[332]

165. For these reasons, it is recommended that the registry should be fully accessible to the public, subject only to necessary confidentiality restrictions in respect of certain registered information.[333] In the same vein, States should be encouraged to abolish or

[325] Ibid., para. 67. See above, paras. 62 and 63.
[326] Para. 45, A/CN.9/WG.I/WP.93.
[327] See UNCITRAL Guide on the Implementation of a Security Rights Registry, paras. 80 and 257.
[328] Para. 66, A/CN.9/WG.I/WP.93/Add.1.
[329] Former recommendation 30, A/CN.9/WG.I/WP.96/Add.1.
[330] The Working Group may wish to note recommendation 4 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Public access".
[331] Para. 68, A/CN.9/WG.I/WP.93/Add.1.
[332] Ibid., para. 69.
[333] Ibid., para. 70. See also paras. 62-67, A/CN.9/WG.I/WP.99.

keep to a bare minimum fees to access basic information on the registered entities (see para. 54 above and paras. 185 to 186 below).[334]

166. The applicable business registration law or regulation can however make access to the registry subject to certain procedural requirements, such as requiring users to submit their information request in a prescribed form and pay, or make arrangements to pay, any prescribed fee. If a user does not use the prescribed registry form or pay the necessary fee, the user may be refused access to the search services of the registry. As in the case of refusing access to registration services, the registry should be obliged to give the specific reason for refusing access to information services as soon as practicable so that the user can remedy the problem.[335]

167. Unlike the approach adopted for registrants, the registry should not request and maintain evidence of the identity of a user as a precondition to obtaining access to the information on the business registry since a user is merely retrieving information contained in registered information from the public registry record. Accordingly, identification evidence should be requested of users only if it is necessary for the purposes of collecting information retrieval fees, if any.[336]

168. The applicable law or regulation should also provide that the registry may reject an information request if the user does not enter a search criterion in a legible manner in the designated field but that the registry must provide the grounds for any rejection as soon as practicable. In registry systems that allow registrants to submit information requests electronically to the registry, the software should be designed to prevent automatically the submission of information requests that do not include a legible search criterion in the designated field and to display the basis for the refusal on the electronic screen.[337]

169. Simply because information is made available for use does not necessarily equate with that information being used. It would be useful for the State to devise effective means that encourage customers actually to use the information services of the registry. Adoption of ICT supported registries that allow direct and continuous access for stakeholders (except for periods of scheduled maintenance) will promote the actual use of the information. Communication campaigns[338] on the services available at the registry will also contribute to the active take-up of registry services by potential users.[339]

Recommendation 32[340]: Public availability of information

The Regulation should specify that all registered information is available to the public unless it is restricted for reasons of confidentiality as set out in the law of the enacting State, or for reasons of personal security.

C. Where information is not made public

170. To maintain the integrity and reputation of the registry as a trusted collector of information that has public relevance and while access to the registries should be granted to all interested entities and to the public at large, access to sensitive data should be controlled to avoid any breach of confidentiality. States should thus put in place proper disclosure procedures. They can do so by adopting provisions that list which information is not available for public disclosure or they can follow the opposite approach and adopt provisions that list the information that is publicly accessible and at the same time state that information that is not listed cannot be

[334] At its twenty-fifth session, the Working Group expressed its support for the adoption of policies by business registries of no or of low registration fees (para. 40, A/CN.9/860).
[335] Para. 71, A/CN.9/WG.I/WP.93/Add.1.
[336] Ibid., para. 72.
[337] Ibid., para. 73.
[338] See para. 42, A/CN.9/WG.I/WP.93.
[339] Para. 77, A/CN.9/WG.I/WP.93/Add.1.
[340] Former recommendation 34, A/CN.9/WG.I/WP.96/Add.1.

disclosed.[341] States might also wish to determine to which public authorities or private entities (such as banks or credit bureaux) the registry may disclose information on the registered business that is not made public. When this approach is followed, information should only be shared subject to the authorization of the registrar and the prior consent of the business.

171. As previously noted (see para. 110 above), when establishing an ICT-supported registry, States must consider issues concerning the treatment of personal data that is included in the application for registration[342] and its protection, storage and use. Appropriate legislation should be in place to ensure that such data are protected. In the European Union, for instance, several Directives apply when data concerning individuals (for example, information on officers or directors) are included in the application for business registration.[343]

Recommendation 33[344]: Where information is not made public

In cases where information in the business registry is not made public, the Regulation should:

(a) Establish which information concerning the registered business is subject to the applicable rules in the enacting State on public disclosure of private data and require the registrar to list the types of information that cannot be publicly disclosed; and

(b) Specify the circumstances in which the registrar may use or disclose information that is subject to confidentiality restrictions.

D. Hours of operation

172. The approach to the operating days and hours of the registry depends on whether the registry is designed to allow direct electronic registration and information access by users or whether it requires their physical presence at an office of the registry. In the former case, electronic access should be available continuously except for brief periods to undertake scheduled maintenance; in the latter case, registry offices should operate during reliable and consistent hours that are compatible with the needs of potential registry users. In view of the importance of ensuring ease of access to registry services for users, these recommendations should be incorporated in the law or regulation governing business registration or in administrative guidelines published by the registry, and the registry should ensure that its operating days and hours are widely publicized.[345]

173. If the registry provides services through a physical office, the minimum hours and days of operation should be the normal business days and hours of public offices in the State. To the extent that the registry requires or permits the registration of paper-based submissions, the registry should be aimed at ensuring that the paper-based information is entered into the registry record and made available to searchers as soon as practicable, but preferably on the same business day that the information is received by the registry. Information requests submitted in paper form should likewise be processed on the same day they are received. To achieve this goal, the deadline for submitting paper-based information requests may be set independently from the business hours.[346] Alternatively, the registry office could continue to receive paper forms (regardless if they are applications for registration or for changes) and

[341] Para. 50, A/CN.9/WG.I/WP.93/Add.1.
[342] See also para. 8, A/CN.9/WG.I/WP.93/Add.1.
[343] Para. 33, A/CN.9/WG.I/WP.93/Add.2.
[344] Former recommendation 35, A/CN.9/WG.I/WP.96/Add.1.
[345] Para. 58, A/CN.9/WG.I/WP.93/Add.1.
[346] For example, the law, regulation or administrative guidelines of the registry could stipulate that, while the registry office is open between 9 a.m. and 5 p.m., all applications, changes and search requests must be received by an earlier time (for example, by 4 p.m.) so as to ensure that the registry staff has sufficient time to enter the information included in the application into the registry record or conduct the searches.

information requests throughout its business hours, but set a "cut off" time after which information received may not be entered into the registry record, or information searches performed, until the next business day. A third approach would be for the registry to undertake that information will be entered into the registry record and searches for information will be performed within a stated number of business hours after receipt of the application or information request.[347]

174. The law, regulation or administrative guidelines of the registry could also enumerate, in either an exhaustive or an indicative way, the circumstances under which access to registry services may temporarily be suspended. An exhaustive list would provide more certainty, but there is a risk that it might not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of registry services would include any event that makes it impossible or impractical to provide those services (such as force majeure, for example, fire, flood, earthquake or war, or where the registry provides users with direct electronic access, a breakdown in the Internet or network connection).[348]

Recommendation 34[349]: Hours of operation[350]

The designated authority should provide that:

(a) If access to the services of the business registry is provided through a physical office:

(i) Each office of the registry is open to the public during [the days and hours to be specified by the enacting State]; and

(ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office;

(b) If access to the services of the business registry is provided electronically, access is available at all times; and

(c) Notwithstanding subparagraphs (a) and (b) of this recommendation, the business registry may suspend access to the services of the registry in whole or in part in order to perform maintenance or provide repair services to the registry, provided that:

(i) The period of suspension of the registration services is as short as practicable;

(ii) Notification of the suspension and its expected duration is widely publicized; and

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[347] Para. 59, A/CN.9/WG.I/WP.93/Add.1.

[348] Ibid., para. 60.

[349] Former recommendation 31, A/CN.9/WG.I/WP.96/Add.1.

[350] The Working Group may wish to note that this recommendation mirrors recommendation 5 of the UNCITRAL Guide on the Implementation of a Security Rights Registry which provides as follows: "The Regulation should provide that: (a) If access to the services of the registry is provided through a physical office: (i) Each office of the registry is open to the public during [the days and hours to be specified by the enacting State]; and (ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office; (b) If access to the services of the registry is provided through electronic means of communication, electronic access is available at all times; and (c) Notwithstanding subparagraphs (a) and (b) of this recommendation: (i) The registry may suspend access to the services of the registry in whole or in part for a period of time that is as short as practicable; and (ii) Notification of the suspension and its expected duration is published on the registry's website, if any, or otherwise widely publicized, in advance when feasible and, if not feasible, as soon thereafter as reasonably practicable, and, if the registry provides access to its services through physical offices, the notification is posted at each office".

(iii) Such notice should be provided in advance and, if not feasible, as soon after the suspension as is reasonably practicable.

E. Direct electronic access to submit registration, to search the registry and to request amendments

175. If the State opts to implement an electronic registration system, the registry should be designed, if possible, to allow registry users to submit directly and to conduct searches from any private computer, as well as from computer facilities made available to the public at sub-offices of the registry or other locations. To further facilitate access to business registry services, the registry conditions of use may allow intermediaries (for instance, lawyers, notaries or private sector third-party service providers) to carry out registration and information searches on behalf of their clients when the applicable law allows or requires the involvement of such intermediaries. If the technological infrastructure of the State allows, or at a later stage of the reform, States should also consider adopting systems that allow registration to be carried out through the use of mobile technology. This solution may be particularly appropriate for MSMEs in developing economies where mobile services are often easier to access than electronic services.[351]

176. When the registry allows for direct electronic access, users bear the sole responsibility for any errors or omissions they make in the registration or in their information searches and carry the burden of making the necessary corrections or amendments. Consequently, the potential for corruption or misconduct on the part of registry staff is greatly minimized, since their duties are essentially limited to managing and facilitating electronic access by users, processing any fees, overseeing the operation and maintenance of the registry system and gathering statistical data.[352]

177. In addition, direct electronic access significantly reduces the costs of operation and maintenance of the system and also enhances the efficiency of the registration process by putting direct control over the timing of the business registration into the hands of the registrant. Direct electronic access also eliminates any time lag between submission of the information to the registry and the actual entry into the database of that information. In some States,[353] electronic access (either from a client's premises or from a branch office of the registry) is the only available mode of access for both registration and information searches. While in many States, where the registration system is both paper-based and ICT-based, electronic submission is by far the most prevalent mode of data submission and it is used in practice for the vast majority of registrations. As the data to be registered are submitted in electronic form, no paper record is ever generated. A fully electronic system of this kind places the responsibility for accurate data entry directly on registrants. As a result, staffing and operational costs of the registry are minimized and the risk of registry personnel making an error in transcribing documents is eliminated (see also para. 63 above).[354]

178. It is thus recommended that, to the extent possible, States should establish a business registry that is computerized and that allows direct electronic access by registry clientele. Nonetheless, given the practical considerations involved in establishing an electronic registry, multiple modes of access should be made available to registry clientele at least in the early stages of implementation in order to reassure users who are unfamiliar with the system. Finally, to facilitate use, the registry should be organized to provide for multiple points of access for both electronic and paper submissions and information requests. However, even where States continue to use paper-based registries, the overall objective is the same: that is, to make the registration and information retrieval process as simple, transparent, efficient, inexpensive and publicly accessible as possible.[355]

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[351] Para. 50, A/CN.9/WG.I/WP.93.
[352] Para. 45, A/CN.9/WG.I/WP.93/Add.1.
[353] See para. 44, A/CN.9/WG.I/WP.85.
[354] Para. 61, A/CN.9/WG.I/WP.93/Add.1.
[355] Ibid., para. 63.

Recommendation 35[356]: Direct electronic access to submit registration, to search and to request amendments

The Regulation should establish that, where information and communication technology is available, registrants should be allowed to enter and submit their information, and the public should be allowed to access the information on the business registry, without requiring the physical presence of the user in the business registry office or the intermediation of the registry staff.

F. Facilitating access to information

1. Type of information provided

179. Information can be of particular value to stakeholders if it is available to the public, although the type of registered information that is available will depend on the legal form of the business being searched. Information available from the business registry that may be of value includes: the profile of the business and its officers (directors, auditors); annual accounts (in both electronic and paper formats); a list of the business's divisions or places of business; the certificate of registration or incorporation; the publication of the business's memoranda, articles of association, or other rules governing the operation or management of the business; existing names and history of the business; insolvency-related information; information on the business registration process; any share capital; certified copies of registry documents; notifications of events (late filing of annual accounts, newly submitted documents, etc.) related laws and regulations; information on registry fees; and information on the expected turnaround time for the registry services.[357] In addition, some registries prepare reports relating to the operation of the business registry that may provide registry designers, policymakers and academic researchers with useful data (for example, on the volume of registrations and searches, operating costs, or registration and search fees collected over a given period).[358] According to a recent survey, information on business data, annual accounts and periodic returns, as well as information about fees for registry services, are the most popular pieces of information and the most requested by the public.[359]

180. If the State is one in which member or shareholder details must be registered, access to such information may also be advisable, as most States that register such details make the relevant information available to the public.[360] A similar approach can be recommended with regard to information on beneficial ownership, although, as previously noted, to date, not many jurisdictions collect information on beneficial ownership. A State may also consider making information on beneficial ownership available to the public in order to allay concerns over the potential misuse of business entities. However, the sensitive nature of the information on beneficial ownership may require the State to exercise caution before opting for disclosure of beneficial ownership without any limitation.[361]

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[356] Former recommendation 32, A/CN.9/WG.I/WP.96/Add.1.

[357] See, for instance, European Commerce Registers' Forum, International Business Registers Report 2014, pages 77 ff.

[358] See, for example, the Report of the Australian Business Registrar, 2013-2014, available at: abr.gov.au. Subpara. 46(c), A/CN.9/WG.I/WP.93.

[359] Para. 74, A/CN.9/WG.I/WP.93/Add.1. For further reference, see European Commerce Registers' Forum, International Business Registers Report 2014, page 131.

[360] Supra, note 359, [2014], pages 30 ff, and [2015] pages 35-36.

[361] Para. 75, A/CN.9/WG.I/WP.93/Add.1. For further reference, see para. 65, A/CN.9/WG.I/WP.99.

181. Some States not only provide for electronic registration and information searches but also give clients the option of submitting a registration or information search request in other forms. The information is distributed through other channels that can complement the use of the Internet or that may even represent the main method of distribution if an online registration system is not yet fully developed. The following means of sharing information are also used in some States:

(a) Telephone services to provide information on registered businesses and product ordering;

(b) Subscription services to inform subscribers about events pertaining to specified businesses or for announcements of certain kinds of business registrations;

(c) Ordering services to enable access to various products, most often using an Internet browser; and

(d) Delivery services to convey various products, such as transcripts of registered information on a business, paper lists, or electronic files with selected data.[362]

2. Unnecessary barriers to accessibility

182. The registry needs to ensure that searchable information is easily accessible. Even though the information is available, it does not always mean that it is easy for stakeholders to access. There are often different barriers to accessing the information, such as the format in which the information is presented: if special software is required to read the information, or if it is only available in one particular format, it cannot be said to be broadly accessible. In several States, some information is made available in paper and electronic formats; however, information available only on paper likely entails reduced public accessibility. Other barriers that may make information less accessible are charging fees for it, requiring users to register prior to providing access to the information, and if there is a fee connected to the user registration. States should find the most appropriate solutions according to their needs, their conditions and their legal framework.[363]

183. One often overlooked barrier to accessing information, whether in order to register a business or to review data on the registry, is a lack of knowledge of the official language(s). Providing forms and instructions in other languages is likely to make the registry more accessible to users. However, recent evidence shows that, with the exception of Europe, business registries seldom offer such services in languages additional to the official language(s).[364] Although making all information available in additional languages may incur some expense for the registry, a more modest approach may be to consider making information on only core aspects of registration, for instance in respect of instructions or forms, available in a non-official language. In deciding which non-official language would be most appropriate, the registry may wish to base its decision on historical ties, the economic interests of the jurisdiction and the geographic area in which the jurisdiction is situated.[365]

3. Bulk information

184. In addition to making information on individual business entities available, business registries in some jurisdictions also offer the possibility of obtaining “bulk” information,[366] i.e. a compilation of data on selected, or all, registered businesses. Such information can be requested for commercial or non-commercial purposes and is often used by public agencies as well as private organizations (such as banks) that deal with businesses and perform frequent data processing on them. Distribution of

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[362] Para. 62, A/CN.9/WG.I/WP.93/Add.1 and subparas. 46(b) and (c), A/CN.9/WG.I/WP.93.

[363] Para. 79, A/CN.9/WG.I/WP.93/Add.1.

[364] See The International Business Registers Report 2015, page 141.

[365] Para. 80, A/CN.9/WG.I/WP.93/Add.1. For further reference, see also paras. 122 and 133 to 135 of this working paper.

[366] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 14. See also The International Business Registers Report 2015, pages 140-141.

bulk information varies according to the needs and capability of the receiving entity. In performing this function, one approach would be for the registry to ensure the electronic transfer of selected data on all registered entities, combined with the transfer of data about all new registrations, amendments, and deregistration during a specified period. Another option for the registry would be to make use of web-based or similar services for system-to-system integration that provides both direct access to selected data on specific entities and name searches. Direct access avoids unnecessary and redundant storage of information by the receiving organization and States where such services are not yet available should consider it as a viable option when streamlining their business registration system.[367] Distribution of bulk information[368] can represent a practicable approach for the registry to derive self-generated funds (see para. 190 below).[369]

Recommendation 36[370]: Facilitate access to information

The Regulation should ensure the facilitation of access to business registration and registered information by avoiding the creation of unnecessary barriers such as requirements for the installation of specific software; charging prohibitively expensive access fees; requiring users of information services to register or otherwise provide information on their identity; or unduly limiting the languages in which information on the registration process is available.

VII. Fees

185. Payment of a fee in order to receive registration services can be said to be a standard procedure across jurisdictions. As previously noted, in return for that fee, registered businesses receive access to business registry services and to the many advantages that registration offers them, including receipt of a commercial identity recognized by the State that allows them to interact with business partners, the public and the State (see paras. 50 to 51 above). The most common types of fees are those payable for registration of a business and for the provision of information products, while fines may also generate funding to a lesser extent. In some jurisdictions, registries may also charge an annual fee to keep a company in the registry (these fees are unrelated to any particular activity), as well as fees to register annual accounts or financial statements.[371]

186. Although they generate revenue for the registries, fees can affect a business's decision whether to register, since such payments may impose a burden on businesses, in particular on MSMEs. Fees for new registration, for instance, can prevent businesses from registering, while annual fees to keep a company in the registry or to register annual accounts could discourage businesses from maintaining their registered status. States should take these and other indirect effects into consideration when establishing fees for registration services. A registration system aiming to support MSMEs and increase the number of them that register should thus consider the adoption of policies where registration and post-registration services, including access to the information on the business registry, are provided free of charge. Where it might be too onerous on States to implement such policies, States should adopt a balanced approach between recovering capital and operational costs within a reasonable period of time and encouraging MSMEs to register.[372] For instance, in several States that consider business registration as a public service intended to encourage enterprises to enter the legally regulated economy rather than as a revenue-generating mechanism, registration fees are often set at a level that encourages

[367] Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 14.
[368] See also para. 76, A/CN.9/WG.I/WP.93/Add.2.
[369] Para. 76, A/CN.9/WG.I/WP.93/Add.1.
[370] Former recommendation 33, A/CN.9/WG.I/WP.96/Add.1.
[371] Para. 72, A/CN.9/WG.I/WP.93/Add.2. For further reference, see European Commerce Registers' Forum Report 2013, page 72.
[372] Para. 73, A/CN.9/WG.I/WP.93/Add.2.

businesses to register. In such States, the use of flat fee schedules for registration, regardless of the size of the business, is the most common approach. There are also examples of States that provide business registration free of charge. [373]

A. Fees charged for registry services

187. Striking a balance between the sustainability of the registry operations and the promotion of business registration is a key consideration when setting fees, regardless of the type of fee. One recommended approach, followed in many States, is to apply the principle of "cost recovery" according to which there should be no profit from fees generated in excess of cost. When applying such a principle, States would be required to first assess the level of revenue needed from registry fees to achieve cost recovery. In carrying out that assessment, account should be taken not only of the initial start-up costs related to the establishment of the registry but also of the costs necessary to fund its operation. By way of example, these costs may include: (a) the salaries of registry staff; (b) upgrading and replacing hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users. In the case of ICT supported registries, if the registry is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is operational.[374]

188. Evidence shows, however, that even when the cost-recovery approach is followed, there is considerable room for variation among States, as that approach requires a determination of which costs should be included, which can be interpreted in many different ways. In one jurisdiction, for instance, 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 that companies pay for new registration. This approach is said to result in several benefits, such as: (a) rendering most amendments free of charge, which encourages compliance among registered businesses; (b) saving resources related to fee payment for amendments for both the registry and the businesses; and (c) using the temporary surplus produced by advance payment for amendments to improve registry operations and functions. In other cases, jurisdictions have decided to charge fees below the actual costs registries incur in order to promote business registration. In these cases, however, the services provided to businesses would likely be subsidized with public funds.[375]

189. In setting fees in a mixed registry system, it may be reasonable for the State to decide to charge higher fees to process applications and information requests submitted in paper form because they must be processed by registry staff, whereas electronic applications and information requests are directly submitted to the registry and are less likely to require attention from registry staff. Charging higher fees for paper-based registration applications and information requests will also encourage the user community to eventually transition to using the direct electronic registration and information request functionalities. However, in making this decision, States may wish to consider whether charging such fees may have a disproportionate effect on MSMEs that may not have easy access to electronic services.[376]

Recommendation 37[377]: Fees charged for registry services

The Regulation should establish fees for registration and post-registration services, if any, at a level that is low enough that it encourages business

[373] Ibid., para. 74.
[374] Ibid., para. 77.
[375] Ibid., para. 78.
[376] Ibid., para. 80.
[377] Former recommendation 38, A/CN.9/WG.I/WP.96/Add.1.

registration, and that, in any event, does not exceed a level that enables the business registry to cover the cost of performing those services.

B. Fees charged for information

190. In various jurisdictions, fees charged for the provision of information products are a more viable option for registries to derive self-generated funding. Such fees also motivate registries to provide valuable information to their clients, to maintain the currency of their records and to offer additional information services. A recommended good practice for jurisdictions aiming at improving this type of revenue generation would be to avoid charging fees for basic information services such as name or address searches, but to charge for more sophisticated information services (for example, direct downloading or providing bulk information). Since fees charged for information products are likely to influence users in their choice of products, such fees should be set at a level low enough to make the use of less expensive products attractive to users; otherwise, users may request information products that are more costly for the registry to produce (for example, ordering printed versions by telephone) and for which their cost recovery falls short.[378]

Recommendation 38[379]: Fees charged for information

The Regulation should establish that information contained in the business registry should be available to the public free of charge, but should permit modest fees to be charged for value-added information products produced or developed by the registry.

C. Publication of fee amounts and methods of payment

191. Regardless of the approach taken to determine the applicable fees, if any, States should clearly establish the registration and information fees charged to registry users, as well as acceptable methods of payment. Such methods of payment should include allowing users to enter into an agreement with the business registry to establish a user account for the payment of fees. States in which businesses can register directly online should also consider developing electronic platforms that enable businesses to pay online when filing their application with the registry (see para. 233 below). When establishing registration and information fees, one approach would be for the State to set out the fees in a "regulation", which could be either a formal regulation or more informal administrative guidelines that the registry can revise according to its needs. If administrative guidelines are used, this approach would provide greater flexibility to adjust the fees in response to subsequent events, such as the need to reduce the fees once the capital cost of establishing the registry has been recouped. The disadvantage of this approach, however, is that this greater flexibility could be abused by the registry to adjust the fees upwards unjustifiably. Alternatively, a State may choose not to specify the registry fees in such a regulation, but rather to designate the administrative or other authority that is mandated to set the registry fees.[380] The State may also wish to consider specifying in the law or the regulation on business registration the types of service that the registry may or must provide free of charge.[381]

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[378] Para. 76, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 17.

[379] Former recommendation 39, A/CN.9/WG.I/WP.96/Add.1.

[380] For instance, in the United Kingdom registry fees are set by statutory fee regulations and confirmed by the Parliament. See https://www.gov.uk/government/organisations/companies-house/about/about-our-services#about-fees.

[381] Para. 79, A/CN.9/WG.I/WP.93/Add.2.

Recommendation 39[382]: Publication of fee amounts and methods of payment

The designated authority should ensure that fees payable for registration and information services should be widely publicized, as should acceptable methods of payment.

VIII. Sanctions and liability

A. Sanctions

192. The State should have the ability to enforce proper compliance with initial and ongoing registration requirements. States with high quality registration systems usually possess enforcement mechanisms that may be used on businesses in respect of the information that the business is required to file throughout its life cycle (as well as additional required reporting).[383] In some jurisdictions, for instance, the law establishes sanctions on businesses that fail to submit timely or accurate and complete information.[384]

193. Fines for breaching obligations related to business registration, such as late filing of periodic returns, can represent a means of revenue generation. Their collection, however, again requires a balanced approach. Several jurisdictions use fines as disincentives for businesses to operate outside of the legally regulated economy. In some cases, legislative provisions link the company's enjoyment of certain benefits to the timely filing of required submissions; in others, a series of increasing fines for late filing is enforced that can ultimately result in compulsory liquidation. However, if fines are used as the main source of funding for the registry, as occurs in some jurisdictions, it can have a detrimental effect on the efficiency of the registry. Since registries in such jurisdictions lose revenue as a result of improved business compliance, they may have weak motivation to improve the level of compliance. It is thus recommended that States should not consider fines as the main source of revenue of a business registry, but that they determine fines at a level that encourages business registration without negatively affecting the funding of registries when compliance improves.[385]

194. One remedy States may wish to consider is to include in the registry information on sanctions imposed by a court or other designated public authority on directors that have breached their legal duties in managing the business, which may include barring a director from taking part in the management of the business. Recording information on a director's disqualification in the business registry not only may deter potential abuses by that director, but it may also represent a protective measure for third parties interacting with the business. As noted above, (see para. 111), the availability of such information in the business registry, in addition to enhanced interconnection among registries from different jurisdictions, may result in preventing disqualified directors from being appointed as directors of a business in another jurisdiction.

Recommendation 40[386]: Sanctions

The Regulation should establish and ensure broad publication of sanctions (including fines, deregistration and loss of access to services) that may be imposed on a business for a breach of its obligations under the Regulation. Such rules may include provisions pursuant to which a breach of obligation may be forgiven provided it is rectified within a specified time.

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[382] Former recommendation 40, A/CN.9/WG.I/WP.96/Add.1.

[383] See L. Klapper, R. Amit, M. F. Guillén, J. M. Quesada, Entrepreneurship and Firm Formation Across Countries, 2007, page 8.

[384] Para. 14, A/CN.9/WG.I/WP.93/Add.1. For further reference, see Ireland, in D. Christow, J. Olaisen, Business Registration Reform Case Studies, Ireland, 2009, pages 15 ff. Failure to notify the information required after registration, however, will not affect the validity of the registration, but will have legal consequences on the business pursuant to the applicable law of the enacting State.

[385] Para. 75, A/CN.9/WG.I/WP.93/Add.2.

[386] Former recommendation 41, A/CN.9/WG.I/WP.96/Add.1.

B. Liability for submission of misleading, false or deceptive information

195. In order to ensure that reliable information is submitted to the business registry, States should adopt provisions, whether of an administrative or legal nature, that establish the responsibility of the registrant for any misleading, false or deceptive information that the registrant has knowingly or recklessly submitted to the registry. Adoption of such provisions could be of particular importance in States that chose business registration systems in which the registry only records facts and does not perform any ex ante legal verification.[387]

Recommendation 41[388]: Liability for submission of misleading, false or deceptive information

The Regulation or the law of the enacting State should establish the liability of the registrant or the registered business for any misleading, false, incomplete or deceptive information that the registrant or business has knowingly submitted to the business registry.

C. Liability of the business registry

196. The State, by way of law or regulation, should provide for the allocation of responsibility for loss or damage caused by an error or through negligence in the administration or operation of the business registration and information system.[389]

197. As noted above, registrants or users bear the responsibility for any errors or omissions in the information contained in an application for registration or an amendment request they submit to the registry, and carry the burden of making the necessary corrections. If applications and amendment requests are directly submitted by users electronically without the intervention of registry staff, the potential liability of the enacting State would, therefore, be limited to system malfunction, since any other error would be attributable to users. However, if paper-based application forms or amendment requests are submitted, the State must address the existence or the extent of its potential liability for the refusal or failure of the registry to enter correctly information contained in the application into the registry record or to register correctly the amendment.[390]

198. Further, it should be made clear to registry staff and registry users, inter alia, that registry staff are not allowed to give legal advice on the legal requirements for effective registration and amendment requests, or on their legal effects, nor should staff make recommendations on which intermediary (if any) the entrepreneur should choose to perform its registration or any amendments thereto. However, registry staff should be able to give practical guidance with respect to the registration and amendment request processes. In States that opt for a judiciary-based registry system, this measure should of course not be applicable to the judges, notaries and lawyers entrusted with the registration procedures.[391]

199. While it should be made clear that registry staff are not allowed to give legal advice (subject to the type of registration system of the State), the State will also need to address whether and to what extent it should be liable if registry staff nonetheless

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[387] Para. 26, A/CN.9/WG.I/WP.93/Add.1.

[388] Former recommendation 42, A/CN.9/WG.I/WP.96/Add.1.

[389] Para. 46, A/CN.9/WG.I/WP.93/Add.1. In Norway, for instance, the registrar may be liable if it supplies incorrect information in transcripts, certificates or public notices, which causes damage to persons who relied on the incorrect information. See The Business Enterprise Registration Act (Act of 15 June 2001, No. 59 and Act of 19 December 2003, No. 120), § 10-3, available at www.brreg.no. In some legal traditions, the liability of the registrar for causing damage through the negligent performance of its obligations is usually dealt with under a general legal doctrine requiring a duty of care.

[390] Para. 47, A/CN.9/WG.I/WP.93/Add.1.

[391] Ibid., para. 44.

provide incorrect or misleading information on the requirements for effective registration and amendment requests or on the legal effects of registration.[392]

200. If States accept legal responsibility for loss or damage caused by system malfunction or error or misconduct by registry staff, they may consider whether to allocate part of the registration and information fees collected by the registry to a compensation fund to cover possible claims, or whether the claims should be paid out of general revenue. States might also decide to set a maximum limit on the monetary compensation payable in respect of each claim. [393]

Recommendation 42[394]: Liability of the business registry

The Regulation or the law of the enacting State should establish whether the business registry may be held liable for loss or damage caused by error or negligence in the registration of businesses or the administration or operation of the registry.

IX. Deregistration

A. Deregistration

201. Deregistration is the removal of a business from the register once the business, for whatever reason, has permanently ceased to operate, including in cases of merger, winding-up, forced liquidation due to bankruptcy, or in cases where applicable law permits the registrar to deregister the business for failing to fulfil certain legal requirements.[395]

202. States should consider the role of the registry in deregistering a business. In most jurisdictions, deregistration of a business is included as one of the core functions of the registry. It appears to be less common, however, to entrust the registry with the decision whether or not a business should be deregistered.[396] In jurisdictions where this function is included, statutory provisions determine the cause of the deregistration and the procedures to follow in carrying it out. In order to deregister a business, registries are generally required to have reasonable cause to believe that a registered enterprise has not carried on business or that it has not been in operation for a certain period of time. Such a situation may arise, for example, when a business has failed to submit its statutory periodic reports or annual accounts, including renewal of its registration when required (see para. 141 above), within a certain period following the filing deadline. In any case, the ability of the registrar to deregister a business should be limited to ensuring compliance with clear and objective legal requirements for the continued registration of a business. In several States, before commencing deregistration procedures, the registrar must inform the business in writing of its intended deregistration and allow time for the business to reply. Only if the registrar receives a reply that the business is no longer active or if no reply is received within the time prescribed by the law, will the business be deregistered.[397] A common requirement for a deregistration to become effective is that notice of it be published.[398]

203. Deregistration may also be carried out upon the request of the business (referred to here as "voluntary deregistration"), usually if the business ceases to trade or has

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[392] Ibid., para. 48.
[393] Ibid., para. 49.
[394] Former recommendation 43, A/CN.9/WG.I/WP.96/Add.1.
[395] Para. 22, A/CN.9/WG.I/WP.93.
[396] European Commerce Registers' Forum, International Business Registers Report 2014, page 26, and see The International Business Registers Report 2015, pages 40 ff.
[397] See note 26 above for a short description of deregistration.
[398] Para. 20, A/CN.9/WG.I/WP.93/Add.1. For further reference, see Lexis PSL Corporate, Striking off and dissolution overview, www.lexisnexis.com/uk/lexispsl/corporate/document/391387/55YB-2GD1-F186-H4MP-00000-00/Strikingoffanddissolutionoverview. See also T. F. MacLaren, in Eckstrom's Licensing in Foreign and Domestic Operations: Joint Ventures, 2015 [as it appears in Westlaw], page 30.

never traded; or by court order, as a consequence of proceedings to wind up the business. In cases of voluntary deregistration of a business, States should specify in which circumstances businesses can apply for deregistration (an alternative approach may be to specify in which circumstances the business cannot apply for deregistration) and which persons associated with the business are authorized to request deregistration on behalf of the business.

204. The registrar, upon receiving notification of a business dissolution, shall issue an announcement stating that creditors have a certain length of time during which to advance their claims. After that period has passed, a notation is made on the registry that the business is deregistered.[399] This procedure ensures that businesses are not deregistered without providing creditors the opportunity to protect their rights.[400] It should be noted that pending completion of the deregistration procedure, the business remains in operation and will continue to carry on its activities.

205. Registries should retain historical information on businesses that have been deregistered, leaving it to the State to decide the appropriate length of time for which such information should be preserved (see paras. 208 to 210).[401] The length of the period of preservation is likely to be influenced by the way in which the registry is structured and operated. ICT-based registries usually allow for the information to be preserved in perpetuity, if the registries have been developed according to technical standards of scalability and flexibility (see paras. 66 to 70 above). When the registry is paper-based or mixed, preserving documents indefinitely may not be a feasible approach, due to the high costs of storage involved. It may thus be desirable for States to establish a minimum period of time for the retention of such documents (see paras. 208 to 210 below). When the State has adopted a unique identifier system, the information related to the business will remain linked to that identifier even if the business is deregistered.[402]

Recommendation 43[403]: Voluntary deregistration

The Regulation should require the registrar to deregister a business on the application of the business for deregistration that fulfils the requirements according to the law of the enacting State**.**

Recommendation 44[404]: Compulsory deregistration

The Regulation should:

(a) Require the registrar to deregister a business when it is ordered to do so by a specified competent authority or the court or when the business is no longer in operation; and

(b) Provide that the decision or order for deregistration of the business must be placed on the registry.

Recommendation 45[405]: Process of deregistration

The Regulation or the law of the enacting State should provide that:

(a) A written notice of the deregistration is sent to the registered business; and

(b) The deregistration is publicized in accordance with the legal requirements of the enacting State.

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[399] See footnote 26 above.
[400] Para. 22, A/CN.9/WG.I/WP.93.
[401] At its twenty-fifth session, the Working Group agreed that historical information on businesses that had been deregistered should be maintained (para. 49, A/CN.9/860).
[402] This observation was made during the twenty-fifth session of the Working Group (para. 49, A/CN.9/860).
[403] Former recommendation 44, A/CN.9/WG.I/WP.96/Add.1.
[404] Former recommendation 45, A/CN.9/WG.I/WP.96/Add.1.
[405] Former recommendation 46, A/CN.9/WG.I/WP.96/Add.1.

B. Reinstatement of registration

206. In several States, it is possible to reinstate the registration of a business that has been deregistered either by way of a court order or upon request to the registrar when certain conditions are met (in some States this latter procedure is defined as "administrative restoration"). In certain States, both procedures are available and choosing either of them usually depends on why the business was deregistered and/or the purpose of restoring the business. The two procedures usually differ in some key aspects such as who can apply to have the business restored, which business entities are eligible for restoration and the time limit on filing an application for restoration. The requirements for "administrative restoration" in States which provide for both procedures are often stricter than those for restoration by court order. For instance, in such States, only an aggrieved person, which may include a former director or member, can submit an application to the registrar,[406] and the time limit within which the application can be submitted to the registry may be shorter than the time granted to apply for a court order.[407] Regardless of the method(s) chosen by the State to permit reinstatement of the registration of a business, once the registration has been reinstated, the business is deemed to have continued its existence as if it had not been deregistered, which includes maintaining its former business name. In cases where the business name is no longer available as having been assigned to another business registered in the interim, procedures are usually established by the State to govern the change of name of the reinstated business.

Recommendation 46[408]: Reinstatement of registration

The Regulation or the law of the enacting State should specify the circumstances under which and the time limit within which the registrar is required to reinstate a business that has been deregistered.

C. Time of effectiveness of business deregistration

207. The time of effectiveness of the deregistration should be established by way of law or regulation, which should distinguish between deregistration on the registrar's initiative, deregistration upon court order and deregistration at the request of the business. While the requirements for these three types would vary, in all cases it would be advisable that the notation of deregistration states the date of effect of the deregistration in addition to the reasons therefor. Moreover, in cases where deregistration is decided by the registrar, the registrant should be given sufficient time to oppose that decision. As in the case of the application for registration or a subsequent change, the effective date and time of registration of a notice of deregistration should be indicated on the registry record relating to that deregistration. If the notice of deregistration is provided electronically, the time between receipt of that notice and amendment of the information on the registry record should be very short. If the request for deregistration is provided in paper form, there will be a greater time lag before it is published in the business registry.[409]

Recommendation 47[410]: Time and effectiveness of deregistration

The Regulation should:

(a) Specify when the deregistration of a business has legal effect;

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[406] See, for instance, UK in Companies House, Strike off, dissolution & restoration, 2015, pages 12 and 17.

[407] See, for instance, Ireland, in https://www.cro.ie/Termination-Restoration/Overview.

[408] Former recommendation 47, A/CN.9/WG.I/WP.96/Add.1.

[409] Para. 34, A/CN.9/WG.I/WP.93/Add.1.

[410] Former recommendation 48, A/CN.9/WG.I/WP.96/Add.1.

(b) Specify that any required notice of the deregistration for that legal form of business has been publicized in accordance with the law of the enacting State; and

(c) Specify the legal effects of deregistration.

X. Preservation of records

A. Preservation of records

208. As a general rule, the information in the business registry is kept indefinitely. However, as noted in paragraph 205 above, the length of the preservation period for records is most often influenced by the way the registry operates, and whether the registry is ICT-supported, paper-based or a mixed system. Those States with paper-based or mixed registration systems, should adopt rules that specify a minimum period of time for which documents submitted in hard copy should be kept by the registry.[411]

209. In the case of ICT-supported registries, original documents submitted in hard copy could be kept for a short period (for example, not over 5 years after they were received by the registry) providing that the information contained in such documents has been recorded in the registry[412] or that the paper documents have been digitized (through scanning or other electronic processing).

210. In the case of a paper-based registry which cannot convert the documents received into an electronic form or other non-paper forms (for instance, microfilm) that allow transmission, storage, reading, and printing of the documents, the records should be preserved until the business is deregistered and for an appropriate period of time after deregistration has occurred (see also para. 205 above). The enacting State should decide on the appropriate length of time for such a period. States may also choose to apply their general rules on preservation of public documents.[413]

Recommendation 48[414]: Preservation of records[415]

The Regulation should provide that:

(a) Documents and information submitted electronically by the registrant and the registered business, including information in respect of deregistered businesses, should be preserved by the registry in perpetuity so as to enable the information to be retrieved by the registry and other interested users;

(b) Where paper documents have been submitted and the information contained in them has been entered into an electronic registry that meets the reliability standards established by the State, a minimum period of preservation of such documents should be specified by the enacting State; and

(c) Where paper documents have been submitted and the information contained in them has not been entered into an electronic registry the period of preservation of such documents should be specified by the enacting State, and should be for at least the life of the business, plus a reasonable time after any deregistration of that business.

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411 Para. 35, A/CN.9/WG.I/WP.93/Add.1.
412 Ibid., para. 36.
413 Ibid., para. 37.
414 Former recommendation 49, A/CN.9/WG.I/WP.96/Add.1.
415 The Working Group may wish to note recommendation 21 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Archiving of information removed from the public registry record".

B. Amendment or deletion of information

211. By way of law or regulation, it should be established that registry staff may not alter or remove registered information, except as specified in the law or the regulation and that any change can be made only in accordance with the law or the regulation. However, to ensure the smooth functioning of the registry, in particular when registrants submit registration information using paper forms, it would be advisable that registry staff be authorized to correct clerical errors (see paras. 27, 44 and 146 above) made by registry staff in entering the registration information from the paper forms into the registry record. If this approach is adopted, notice of this or any other correction should promptly be sent to the registrant (and a notification of the nature of the correction and the date it was effected should be added to the public registry record linked to the relevant business). Alternatively, the State could require the registrar to notify the registrant of its error and that person could then submit an amendment free of charge.[416]

212. Further, the potential for misconduct by registry staff should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any registered information entered by a registrant; (b) instituting financial controls that strictly monitor staff access to cash payments of fees and to the financial information submitted by clients who use other modes of payment; and (c) instituting audit mechanisms which regularly assess the efficiency and the financial and administrative effectiveness of the registry.[417]

Recommendation 49[418]: Amendment or deletion of information[419]

The Regulation should provide that the registrar does not have the authority to amend or delete information contained in the business registry record except in those cases specified in the Regulation or elsewhere in the law of the enacting State.

C. Protection against loss of or damage to the business registry record

213. To protect the business registry from the risk of loss or physical damage or destruction, the State should maintain back-up copies of the registry record. Any rules governing the security of other public records in the enacting State might be applicable in this context.[420]

214. The threats that can affect an ICT-supported registry also include criminal activities that may be committed through the use of ICT. Providing effective enforcement remedies would thus be an important part of a legislative framework aimed at supporting the use of electronic solutions for business registration. Typical issues that should be addressed by enacting States would include unauthorized access or interference with the electronic registry; unauthorized interception of or interference with data; misuse of devices; fraud and forgery.[421]

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[416] Para. 41, A/CN.9/WG.I/WP.93/Add.1.

[417] Ibid., para. 43, A/CN.9/WG.I/WP.93/Add.1. The Secretariat suggests that the current formulation of subpara. (c) is more consistent with the purpose of the section. In the former version, subpara. (c) read: "… designing the registry infrastructure so as to ensure that it can preserve the information and the documents concerning any business for as long as prescribed by the law or the regulation."

[418] Former recommendation 50, A/CN.9/WG.I/WP.96/Add.1.

[419] The Working Group may wish to note recommendation 17 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Integrity of the registry record".

[420] Para. 42, A/CN.9/WG.I/WP.93/Add.1.

[421] Para. 35, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 49.

Recommendation 50[422]: Protection against loss of or damage to the business registry record[423]

The Regulation or the law of the enacting State should:

(a) Require the business registry to protect the registry records from the risk of loss or damage; and

(b) Establish and maintain back-up mechanisms to allow for any necessary reconstruction of the registry record.

D. Safeguard from accidental destruction

215. An aspect that may warrant consideration by States is that of natural hazards or other accidents that can affect the processing, collection, transfer and protection of the data housed in the electronic registry and under the responsibility of the registry office. Given user expectations that the business registry will function reliably, the registrar will want to ensure that any interruptions in operations are brief, infrequent and minimally disruptive to users and to States.[424] For this reason, States should devise appropriate measures to facilitate protection of the ICT-based registry.[425] One such measure could be to develop a business continuity plan that sets out the necessary arrangements for managing disruptions in the operations of the registry and ensures that services to users can continue. In one State, for instance, the registry has established a "risk register", i.e. a dynamic document that is updated as changes in the operation of the registry occur. Such a "risk register" allows the registry staff to identify possible risks for the registration service as well as the appropriate mitigation measures. Designated staff are required to report on an annual basis the threats to the registry and the relevant actions taken to mitigate such threats.[426]

Recommendation 51[427]: Safeguard from accidental destruction

The Regulation or the law of the enacting State should provide that appropriate procedures should be established to mitigate risks from force majeure, natural hazards, or other accidents that can affect the processing, collection, transfer and protection of data housed in electronic or paper-based business registries.

XI. The underlying legislative framework[428]

A. Changes to underlying laws and regulations

216. As noted above (see para. 40), business registration reform can entail amending either primary legislation or secondary legislation or both. Primary legislation concerns texts such as laws and codes that must be passed by the legislative bodies of a State. Reforms that consider this type of legislation thus require the involvement of the legislature and, for this reason, can be quite time-consuming. Secondary legislation is that body of texts composed of regulations, directives and other similar acts made by the executive branch within the boundaries laid down by the legislature. Reform of secondary legislation does not need to be reviewed by the legislature and thus it can be carried out in a shorter time frame. Therefore, when domestic

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[422] Former recommendation 51, A/CN.9/WG.I/WP.96/Add.1.

[423] The Working Group may wish to note recommendation 17 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Integrity of the registry record".

[424] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 49.

[425] Para. 34, A/CN.9/WG.I/WP.93/Add.2.

[426] For instance, this is the practice in the United Kingdom Companies' House.

[427] Former recommendation 52, A/CN.9/WG.I/WP.96/Add.1.

[428] The Working Group may wish to consider moving Chapter XI from the main text into an Annex to the draft legislative guide, since the chapter highlights best practices in legal reform that contribute to improving business registration, but that would have broader application in the State.

circumstances allow, the use of secondary legislation may be a more attractive option than the reform of primary legislation.[429]

217. In addition to legislation that is meant to prescribe the conduct of business registration, States may need to update or change laws that may simply affect the registration process in order to ensure that such laws respond to the needs of MSMEs. There is no single solution in this process that will work for all States, since the reforms will be influenced by the State's legislative framework. However, the reforms should aim at developing a domestic legal framework that supports business registration with features such as: transparency and accountability, clarity of the law and use of flexible legal entities.[430]

218. Regardless of the approach chosen, i.e. whether to implement a reform using primary or secondary legislation, and the extent of the reform, changes in the domestic legal framework should carefully consider the potential costs and benefits of this process, as well as the capacity and the will of the government and the human resources available. An important preparatory step of a reform programme involves a thorough inventory and analysis of the laws that are relevant to business registration[431] with a view to evaluating the need for change, the possible solutions, and the prospects for effective reform. In some cases, this assessment could result in deferring any major legislative reform, particularly if significant gains to the process of simplification can be achieved by the introduction of operational tools[432] or, as mentioned above, by adopting or reforming secondary legislation. Once it has been decided what changes should be made and how, ensuring their implementation is equally important. In order to avoid the possible risk of unimplemented reforms, the government, the reform steering committee and the project teams should carefully monitor the application of the new legal regime. The following paragraphs offer some examples of approaches that can be taken to streamline domestic laws and regulations with a view to simplifying business registration and to making it more accessible to MSMEs.[433]

B. Clarity of the law

219. For jurisdictions wishing to facilitate business start-up, in particular of MSMEs, it is important to review the existing legal framework so as to identify possible impediments to the simplification of the registration process. The nature of the reform would depend on the status of the domestic legal framework and a variety of examples, based on States' experiences, are available.[434]

220. These reforms may include decisions by States to shift the focus of the law towards private companies (such as the simplified business entities being considered by the Working Group), as opposite to public limited companies, particularly if the former currently account for the majority of the firms in the State. Reforms could also include the decision to move the legal provisions pertaining to small companies to the beginning of any new company law in order to make them easier to find or to use simpler language in any updated company law.[435]

221. One particularly relevant reform that would especially serve the purpose of clarity of the law would be a comprehensive review of the legal framework on business registration and a resulting unification of the various rules into a single piece of legislation. This could also allow for some flexibility to be built into the system, with the adoption of certain provisions as regulations or simply providing for the

[429] Para. 59, A/CN.9/WG.I/WP.93/Add.2.
[430] Ibid., para. 60.
[431] See 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 40.
[432] Ibid., page 74.
[433] Para. 61, A/CN.9/WG.I/WP.93/Add.2.
[434] Ibid., para. 65.
[435] Ibid., para. 66. For further reference, see para. 56, A/CN.9/WG.I/WP.85.

development of the necessary legal basis in order to introduce legal obligations by way of regulation at a later stage.[436]

Recommendation 52[437]: Clarity of the law

The law of the enacting State should, to the extent possible, consolidate legal provisions pertaining to business registration in a single legislative text, which is clearly written and uses simple language that can be easily understood.

C. Flexible legal entities[438]

222. Evidence suggests[439] that entrepreneurs tend to choose for their business the simplest legal form available when they decide to register and that States with rigid legal forms have an entry rate considerably lower than States with more flexible requirements. In States that have introduced new and simplified legal forms for business, the registration process for those new business types is much simpler. Entrepreneurs are not required to publish the articles of association (or other rules governing the operation or management of the business) in the Official Gazette; instead, these can be posted online through the business registry; and the involvement of a lawyer, notary or other intermediary is not obligatory for the preparation of documents or conducting a business name search.[440]

223. Legislative changes to abolish or reduce the minimum paid in capital requirement[441] for businesses also tend to facilitate MSME registration, since micro and small businesses may have limited funds to meet a minimum capital requirement, or they may be unwilling or unable to commit their available capital in order to establish their business. Instead of relying on a minimum capital requirement to protect creditors and investors, States have implemented alternative approaches such as the inclusion of provisions on solvency safeguards in their legislation; conducting solvency tests; or preparing audit reports that show that the amount a company has invested is enough to cover the establishment costs.[442]

224. Introducing new simplified forms of limited liability and other enterprises is often coupled with a considerable reduction or complete abolition of the minimum capital requirements that other legal forms of enterprise are required to deposit upon formation. In several States that have adopted simplified business entities, the minimum capital requirement has been abolished completely, and in other cases, initial registration or incorporation has been allowed upon deposit of a nominal amount of capital. In other States, progressive capitalization has been introduced, requiring the business to set aside a certain percentage of its annual profits until its reserves and the share capital jointly total a required amount.[443] In other cases, progressive capitalization is required only if the simplified limited liability enterprise intends to graduate into a full-fledged limited liability company, for which a higher share capital would be required. There is however no obligation to do so.[444]

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[436] Para. 67, A/CN.9/WG.I/WP.93/Add.2. For further reference, see Investment Climate (World Bank Group), Business Registration Reform case study: Norway, 2011.

[437] Former recommendation 53, A/CN.9/WG.I/WP.96/Add.1.

[438] The Working Group may wish to note parallel work that it is undertaking in respect of an UNCITRAL limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1).

[439] See para. 7, A/CN.9/WG.I/WP.93/Add.1.

[440] Para. 68, A/CN.9/WG.I/WP.93/Add.2. For further reference, see, for example, Greece in V. Saltane, J. Pan, Getting Down to Business: Strengthening Economies through Business Registration Reforms, 2013, page 2, as well as other examples, such as Colombia (see A/CN.9/WG.I/WP.83).

[441] For a more thorough discussion on minimum capital requirements and simplified business entities, see paras. 75-79, A/CN.9/825 as well as paras. 46-47, A/CN.9/WG.I/WP.99/Add.1.

[442] Para. 69, A/CN.9/WG.I/WP.93/Add.2. For further reference, see para. 28, A/CN.9/WG.I/WP.85.

[443] See Italy, para. 29, A/CN.9/WG.I/WP.85.

[444] Para. 70, A/CN.9/WG.I/WP.93/Add.2. For further reference, see, for instance, Germany, by Dr. Leif Boettcher, Federal Ministry of Justice, “Simplified business forms in the context of small and medium enterprises, the German approach”, presentation at the UNCITRAL

225. Another reform that would be conducive to improved business registration is to provide freedom to entrepreneurs to conduct all lawful activities without requiring them to specify the scope of their venture.[445] This is particularly relevant in those jurisdictions where entrepreneurs are required to list in their articles of association the specific activity or activities in which they intend to engage so as to restrain firms from acting beyond the scope of their goals and, according to certain literature, to protect shareholders and creditors. Allowing for the inclusion in the articles of association (or other rules governing the operation or management of a business) of a so-called "general purpose clause" which states that the company's aim is to conduct any trade or business and grants it the power to do so, facilitates business registration. This approach is far less likely to require additional or amended registration in the future, as enterprises may change their focus since entrepreneurs could change activities without amending their registration, provided that the new business activity is a lawful one and that the appropriate licences have been obtained. Additional options to the inclusion of a general purpose clause, which would support the same goal, could be passing legislation that makes unrestricted objectives the default rule in the jurisdiction, or abolishing any requirement for businesses, in particular privately held companies, to state objectives for registration purposes.[446]

Recommendation 53[447]: Flexible legal forms

The law of the enacting State should permit flexible and simplified legal forms for business in order to facilitate and encourage registration of businesses of all sizes, including those forms considered in the [UNCITRAL legislative guide on an UNCITRAL limited liability organization].

D. Primary and secondary legislation to accommodate the evolution of technology

226. Since information technology is a field marked by rapid technological evolution, it would be advisable to establish guiding legal principles in the primary legislation, leaving secondary legislation to stipulate the specific provisions regulating the detailed functioning and the requirements of the system.[448] Once the business registration process is fully automated, States should establish provisions (preferably in the secondary legislation) or policies that discipline government-to-government data exchange in order to avoid any lack of cooperation among different agencies.[449]

Recommendation 54[450]: Primary and secondary legislation to accommodate the evolution of technology

The law of the enacting State should establish guiding legal principles in relation to electronic registration in primary legislation, and should set out specific provisions on the detailed functioning and requirements of the electronic system in secondary legislation.

E. Electronic documents and electronic authentication methods

227. Entering information into an ICT-supported registry is a business-to-government transaction that should be subject to the same treatment, under domestic

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International Colloquium on Microfinance (16-18 January 2013), available at http://www.uncitral.org/uncitral/en/commission/colloquia/microfinance-2013-papers.html.

[445] This is a feature on which the Working Group has already agreed in its discussion of a legislative text on a simplified business entity (see A/CN.9/825, para. 70). See also paras. 31-34, A/CN.9/WG.I/WP.99.

[446] Para. 71, A/CN.9/WG.I/WP.93/Add.2. For further reference, see para. 52, A/CN.9/WG.I/WP.85.

[447] Former recommendation 54, A/CN.9/WG.I/WP.96/Add.1.

[448] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 7.

[449] Para. 26, A/CN.9/WG.I/WP.93/Add.2.

[450] Former recommendation 55, A/CN.9/WG.I/WP.96/Add.1.

legislation, as any other electronic transaction.[451] Therefore, if an appropriate domestic legislative framework for electronic transactions is not in place, a preliminary step for a reform aimed at supporting electronic business registration would be to recognize and regulate the use of such electronic transactions. Among other things, States should adopt laws permitting electronic signatures and the submission of electronic documents.[452] In some States, for instance, the use of an advanced electronic signature is mandatory when transmitting information to a business registry. When laws on electronic communication are enacted, they should establish, at minimum, principles of non-discrimination, technological neutrality and functional equivalence allowing for equal treatment of paper-based and electronic information. The principle of non-discrimination ensures that a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form. The principle of technological neutrality mandates the adoption of provisions that are neutral with respect to the technology used. The principle of functional equivalence lays out criteria under which electronic communications and electronic signatures may be considered equivalent to paper-based communications and hand-written signatures.[453]

228. Further, it would be advisable that the laws include provisions to mitigate the risks that the use of ICT can carry with it and that can affect the validity, and in certain jurisdictions the legal validity, of the information transmitted through the electronic means. The most common risks include: confirming the identity of the entrepreneur filing for registration (referred to as "authentication"); preventing conscious or unconscious alteration of information during transmission (referred to as "integrity"); ensuring that sending and receiving parties cannot deny having sent or received the transferred message (referred to as "non-repudiation") and preventing disclosure of information to unauthorized individuals or systems (referred to as "confidentiality").[454] In those States where the law does not require business registries to check the veracity of the information submitted during the registration process, these risks may be more problematic as it can be relatively easy to manipulate registration systems and filing processes.[455]

229. Verifying the identity of the registrant and ensuring the integrity of the application and the supporting information are key elements to ensure trust in ICT supported registration systems and their corresponding use. Consequently, States should carefully consider the requirements that electronic signatures and electronic documents should have in order to minimize any risk of corporate identity theft[456] and the transmission of invalid information.[457]

230. Whether or not the adoption of legislation on electronic signatures is premature due to the technological infrastructure of the State, various other techniques can prevent corporate identity theft and ensure security. The experience of several States has laid the groundwork for practices that may be replicated in other regions. Simple methods include the use of appropriate user names and passwords; electronic certificates; biometric verification (for example, fingerprints); monitoring systems

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[451] See A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of EU Accession Countries, 2007, page 47.

[452] UNCITRAL has adopted several texts dealing with electronic commerce. Those texts and relevant information on them can be found on the UNCITRAL website at: http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

[453] Para. 27, A/CN.9/WG.I/WP.93/Add.2.

[454] See Investment Climate (World Bank Group), Innovative Solutions for Business Entry Reforms: A Global Analysis, 2012, page 12.

[455] Para. 28, A/CN.9/WG.I/WP.93/Add.2.

[456] Corporate identity theft can occur through the theft or misuse of key business identifiers and credentials, manipulation or falsification of business filings and records, and other related criminal activities. Despite the use of the term "corporate", corporations are not the only business entities that are victimized by this crime. Any type of business or organization of any size or legal structure, including sole proprietorships, partnerships and limited liability companies can be targets of business identity theft.

[457] Para. 29, A/CN.9/WG.I/WP.93/Add.2. For further reference, see para. 78, A/CN.9/WG.I/WP.93/Add.1.

and/or e-mail systems that notify registered users about changes or whenever documents are filed on their business record; and the implementation or increase of penalties for false and/or misleading information submitted to the commercial registries. An approach followed in some jurisdictions is to require the identity of the person registering the business to be checked by a notary public or by another designated authority. Where this is not possible, entrepreneurs may be required to visit the registry office in order for their identity to be verified. Another approach, employed in other jurisdictions, allows only those individuals expressly identified in the law to submit an application for entry into the register or to change an entry in the register. This application must then be legalized by a public notary or another designated authority (if submitted in paper form). However, recourse to a notary or other intermediary or personal visits to the registry office may present expensive and time-consuming barriers for businesses wishing to register, in particular for MSMEs. Therefore, in order to facilitate MSME registration, States may wish to opt for the adoption of simpler ways to ensure the authentication of business entrepreneurs, such as the use of appropriate user names and passwords. This could be particularly appropriate in the case of micro-businesses or in cases where MSMEs intend to register but choose a simplified business form.[458]

F. Dispatch and receipt of electronic messages[459]

231. Another issue to consider when implementing a business registry through the use of ICT solutions is that electronic registries may make it difficult to ascertain the time and place of dispatch and receipt of information. This is an aspect that may acquire relevance due to the time sensitivity of certain submissions, such as establishing the exact time and place at which a business has been registered. For this reason, it is important to have clear rules that define the time of "dispatch" and "receipt" of electronic messages. If such rules are not clearly defined in a State's legislative framework, or if they are not defined with the specificity required for the purposes of time-sensitive registration applications, then ad hoc laws addressing the issues of dispatch and receipt may be required.[460]

G. UNCITRAL Model Laws

232. States that enact legal regimes on electronic communications and electronic signatures may wish to consider the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.[461] These two legislative texts establish those principles of reliability, noted above, that are needed to ensure equal treatment between paper-based and electronic communications and deal extensively with provisions covering the issues of legal validity of electronic documents and signatures, authentication, and the time and place of dispatch and receipt of electronic messages. Because of the way these Model Laws, as well as all other UNCITRAL legislative texts, are negotiated and adopted, they offer solutions appropriate to different legal traditions and to States at different stages of economic development. Furthermore, domestic legislation based on the UNCITRAL Model Laws will greatly facilitate cross-border recognition of electronic documents and signatures.[462]

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[458] Para. 30, A/CN.9/WG.I/WP.93/Add.2.

[459] See A. Lewin, L. Klapper, B. Lanvin, D. Satola, S. Sirtaine, R. Symonds, Implementing Electronic Business Registry (e-BR) Services, Recommendations for policymakers based on the experience of EU Accession Countries, 2007, page 48.

[460] Para. 31, A/CN.9/WG.I/WP.93/Add.2.

[461] See http://www.uncitral.org/uncitral/uncitral_texts/electronic_commerce.html.

[462] Para. 32, A/CN.9/WG.I/WP.93/Add.2.

Recommendation 55[463]: Electronic documents and electronic authentication methods

The law of the enacting State should:

(a) Permit and encourage the use of electronic documents as well as of electronic signatures and other equivalent identification methods;

(b) Regulate such use pursuant to the following principles:

(i) Documents cannot be denied legal effect, validity or enforceability solely on the grounds that they are in electronic format, or that they are signed electronically;

(ii) The place of origin of the electronic signature should not determine whether and to what extent the electronic signature is legally effective;

(iii) Different technologies that may be used to communicate, store and/or sign information electronically should be subject to the same legal treatment; and

(iv) Electronic documents and electronic signatures have the same purpose and function as their paper-based counterparts and are thus functionally equivalent to them; and

(c) Establish criteria to reliably identify the person submitting an electronic document and/or using an electronic signature or equivalent authentication method.

H. Electronic payments

233. Once States have reached a certain level of technological maturity,[464] they could consider developing electronic platforms that enable businesses to pay online when filing their application with the registry. This will require enacting appropriate legislation concerning electronic payments in order to enable the registry to accept online payments. By way of example, such laws should address issues like who should be allowed to provide the service and under which conditions; access to online payment systems; liability of the institution providing the service; customer liability and error resolution. Furthermore, such laws should be consistent with the general policy of the country on financial services.[465]

Recommendation 56[466]: Electronic payments

The law of the enacting State should include legislation to enable and facilitate electronic payments.

[463] Former recommendation 56, A/CN.9/WG.I/WP.96/Add.1.
[464] See para. 51, A/CN.9/WG.I/WP.93.
[465] Para. 36, A/CN.9/WG.I/WP.93/Add.2.
[466] Former recommendation 57, A/CN.9/WG.I/WP.96/Add.1.

F. Note by the Secretariat: proposal by the Government of Italy: contractual networks

(A/CN.9/WG.I/WP.102)

[Original: English]

The Government of Italy has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following proposal for future work to support development of micro, small and medium-sized enterprises. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.

Contents

Annex

Contractual networks and economic development: a proposal for future work by Italy on alternative forms of organization to corporate-like models

I. Introduction

1. At the twenty-third session of Working Group I, held in Vienna on 17 to 21 November 2014, Italy and France submitted observations on Possible Alternative Legislative Models for Micro and Small Businesses (A/CN.9/WG.I/WP.87). Such observations aimed at presenting domestic legislative models applicable to micro and small businesses that could provide for the segregation of business assets without requiring the creation of an entity with legal personality, but that could offer limited liability protection. In particular, as for the Italian model, reference was made to cooperation among micro, small and medium-sized enterprises (MSMEs) through the so-called "network contract" (*contratto di rete*). This model not only offers the possibility of segregation of assets and consequently limited liability protection, but also facilitates internationalization of MSMEs and cross-border cooperation. Moreover, it provides a tool to link MSMEs to larger companies by permitting MSMEs to be connected to the supply chain of such companies.

2. Working Group I is currently working on two separate instruments, one on business registration (A/CN.9/WG.I/WP.101 — Draft legislative guide on key principles of a business registry) and another on the statute of a limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1 — Draft Legislative Guide on an UNCITRAL Limited Liability Organization). At its twenty-seventh session (Vienna, 3 to 7 October 2016), the Working Group agreed to devote some time at its twenty-eighth session (New York, 1 to 9 May 2017) on possible future work once the two mentioned instruments are completed. To complement the observations by Italy and France (A/CN.9/WG.I/WP.87), and being convinced that models to segregate business assets by entrepreneurs as well as to permit internationalization and cross-border cooperation between MSMEs would complement the texts the Working Group is currently working on, Italy submits the present observations to illustrate possible future work on alternative forms of organization to limited-liability entities, and its foreseen benefits for MSMEs. The aim is to fill a gap between issues of business registration, on the one hand, and the establishment of a limited-liability entity, on the other hand, with a flexible contractual instrument. As it will be explained, such a model would particularly fit those economies whose economic environment heavily relies on MSMEs.

3. It is the intention of Italy to submit a more articulated note on alternative forms of organization to the Commission at its 50th session, in July 2017, taking into consideration comments and recommendations that the Italian delegation will receive from Working Group I. Italy welcomes delegations that would like to join it in submitting such a note.

II. Business landscape

1. Global value chains offer many opportunities to small and medium-sized enterprises

4. Economic development is increasingly aimed at driving local economies towards global markets. Recent statistics show that, between 1995 and 2011, most developed and developing countries have significantly increased their contributions to global value chains (GVCs), taking advantage of lower trade costs and improved

communication technology.[1] Competitiveness of GVCs does not mirror one single national economy but builds on "*bundle of labor, capital and technology*".[2]

5. In this landscape, foreign investments have played a major role. However, even greater prominence has been achieved by the so called "non-equity modes" (NEMs) of international production, such as contract manufacturing, services outsourcing, contract farming, franchising, licensing, management contracts, and other types of "*contractual relationship through which transnational corporations (TNCs) coordinate the activities of host-country firms, without owning a stake in those firms*".[3] Indeed, participation in GVCs requires more and more explicit coordination and, through such coordination, developing countries are called upon to facilitate the upgrading of local economies.[4]

6. What is the role of MSMEs in this context? GVCs offer important opportunities to small and medium-sized enterprises, including those operating in low income and developing countries.[5] By learning from and interacting with other actors in the chain, these businesses can access new technologies and new markets, thereby contributing to the creation of value not only for the benefit of local economies but also for society at large.[6]

2. However, MSMEs experience a number of serious hurdles in accessing global trade and global supply chains

7. One of these is the lack of an appropriate common legal framework. Both micro enterprises (MiE) and SMEs[7] constitute the skeleton of domestic industrial and agricultural production systems.[8] They experience serious hurdles to access global trade and global supply chains.[9] These hurdles concern in particular: (1) access to capital, (2) access to technology, intellectual property rights, and know how, and (3) access to a qualified and well-trained labour force.[10] In order to ensure the participation of SMEs in global trade, access to critical resources has to be facilitated by promoting an appropriate common legal framework and new industrial policies.

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[1] See WTO, International trade statistics 2015: "In 2011, nearly half (49 per cent) of world trade in goods and services took place within GVCs, up from 36 per cent in 1995. The tendency of countries to specialize in particular stages of a good's production (known as vertical specialization), brought about by foreign direct investment, has created new trade opportunities, especially for small developing countries and eastern European economies. As a result, world trade in intermediate goods has grown with the rise of vertical specialization".

[2] R. Baldwin, Multilateralising 21st Century Regionalism, OECD Global Forum on Trade, February 2014, at 22.

[3] See UNCTAD, World Trade Investment Report, 2011, explaining that cross-border NEM activity worldwide is estimated to have generated over $2 trillion in sales in 2009. Contract manufacturing and services outsourcing accounted for $1.1-1.3 trillion, franchising for $330-350 billion, licensing for $340-360 billion, and management contracts for around $100 billion.

[4] See OECD, WTO and World Bank Group Report, Global Value Chains: Challenges, Opportunities and Implications for Policy, prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014

[5] See OECD and World Bank Group Report, Inclusive Global Value Chains Policy options in trade and complementary areas for GVC Integration by small and medium enterprises and low-income developing countries, prepared for submission to G20 Trade Ministers Meeting Istanbul, Turkey, 6 October 2015.

[6] See Inclusive Global Value Chains Policy options, cit.

[7] The differences between micro-enterprises and SMEs suggest that specific policies are required to support their activities and foster their growth both at the national and global levels. Whereas we believe that the objectives are similar, we maintain that legal instruments might differ depending on the size and capacity of the firms and the scope of their activities (whether global or local).

[8] In Italy, with regard to industry, services and construction sectors (no analogous data is available for agriculture), micro enterprises (0-9 employees) make up 95.3 per cent of the total, SMEs with 10-249 employees comprise 4.6 per cent and with 250+ employees represent 0.1 per cent of the total; in terms of value added, the ration is the following: micro enterprises 30.6%, SMEs 38.4%, large firms 31 per cent. In terms of the total number of firms, microenterprises are 83 per cent in the industrial sector, 96.7 per cent in services, and 96.1 per cent in construction; the percentage of SMEs is: 16.7 per cent in the industrial sector, 3.2 per cent in services, 3.9 in construction.

[9] See Inclusive Global Value Chains Policy options, cit.

[10] See ILO, Decent work global chains, International conference, 2016 available at www.ilo.org.

8. The participation of SMEs in global trade is made even more difficult by a fragmented legal framework. National legal systems have developed various instruments, primarily in company law, to promote the integration of SMEs but relatively little has been done to favour contractual collaboration both among SMEs and between them and global chain leaders like transnational corporations (TNCs). Fragmentation is even more problematic when considering national tax legislation, state aids and foreign direct investment (FDI) policies where differences are remarkable and regulatory arbitrage substantial. Harmonization of the law governing interfirm contractual collaboration may reduce regulatory fragmentation and help SMEs taking part in global trade to access resources and opportunities.

3. Complementarity between the establishment of companies and contractual collaboration

9. SMEs' growth is driven, among other factors, by the adoption of an appropriate legal framework to promote their coordination in order to favour economic growth and specialization. Such growth can occur through integration in corporate entities or via contractual collaboration in various degrees.

10. These two families of legal instruments are complementary. The corporate-like family (company, cooperative) supports the integration of existing different enterprises when the level of mutual trust and reciprocal knowledge is high and the industrial project is well defined from the very beginning. The contractual family provides a set-up for enterprises to start new collaborations, in particular when they might not otherwise enter into a demanding and burdensome common industrial project. Lack of steady availability of physical capital or uneven access to financial resources among potential partners may also discourage SMEs from entering into corporate-like forms of integration. The complementarity between corporate-like and contractual modes might establish a process whereby SMEs start with contractual collaboration and end with the creation of new companies that integrate some of their activities.

11. When SMEs have relative little knowledge about their partners, the degree of risk and uncertainty stemming from potential collaboration is higher, and the incentives to invest might initially be lower. In that case, the contractual approach is more appropriate than the creation of a new company. What is needed is a more flexible instrument that maximizes the benefits of cooperation while reducing the costs of conflict and opportunism.

12. Collaboration is a process that might require various steps. The first is through contractual collaboration that may or may not translate into the creation of a company with a higher degree of ownership integration of different types of assets including both tangible and intangible ones. Hence, the evolution of a contractual collaboration over time should be compatible with dissolution, preservation or transformation of the contract into a corporate entity. Contractual networks (i.e.: multiparty contracts between SMEs located in the same or in different jurisdictions) may provide such an instrument with a relatively low level of initial capital, low entry and exit costs, and a light governance infrastructure. Multiparty contracts may facilitate access to capital by providing joint collateral to credit institutions; they can facilitate access to new technologies with the creation of common technological platforms, where common intellectual property rights may be used. Access to qualified labour force may be enabled through the possibility of sharing employees who may rotate among the enterprises participating in the network, thus increasing specialization and the effective use of human capital.

4. Existing types of Contractual networks

13. Contractual networks include different existing forms of multiparty contracts ranging from joint ventures to consortia, franchises or patent pools; they can take the form of either a single contract with several parties, or of a set of interlinked bilateral contracts with high levels of coordination and interdependence. These contractual models include production and distribution and can be domestic or international. They can provide SMEs with the legal infrastructure to trade (for example, through

e-commerce platforms and payment systems like "Pay-pal"). Legal frameworks exhibit a great degree of differentiation between jurisdictions that make international SME collaboration very difficult. In addition, choice of law and forum rules are unclear for multiparty contracts;[11] and even less clear for interlinked contracts.

14. Essentially two forms of contractual networks are currently in place. **Vertical networks** operate along supply chains that include different stages of production/distribution. Participants in vertical networks (e.g. suppliers) perform activities (e.g. production of intermediate goods, supply of services) to be incorporated into the activity of another chain participant (e.g. an assembler) and the network is aimed at coordinating their interdependent activity along the lines of a chain project, often developed by a chain leader. TNCs often face high transaction costs when investing in developing countries because local enterprises operate in isolation and conventional local intermediaries (such as local leaders, trade associations, or local chambers of commerce, governmental agencies) do not operate very effectively. TNCs look for stable relationships that decrease coordination costs and increase the stability of the supply required by global markets. In order to stabilize the supply chain governance they need stronger coordination between local suppliers of inputs and intermediate goods and chain leaders. This process is reinforced by the increasing number of regulatory requirements, as on safety, environmental and social protection, to be applied along the global chain. In order to facilitate access to global trade, cross border contractual collaboration is necessary and specific legal forms tailored to SMEs are needed. Such forms may contribute to the process of the internationalization of SMEs through or independently from existing global chains. Consolidated international instruments related to sales and distribution currently provide an excellent toolkit for bilateral relationships but do not allow the promotion of multiparty coordination among SMEs contributing to the same production process but located in different jurisdictions.[12] Multiparty contracts linking several SMEs involved in global supply chains can provide a useful collaborative instrument as long as they are designed to make access to critical resources easier and cheaper.

15. **Horizontal networks** are networks in which various SMEs contribute to a common project with their *products or services*, playing a similar role along the supply chain or having similar expectations from the network programme (e.g. new trade opportunities for the sale of final products). The latter may, for example, concern the construction industry, where suppliers of electrical infrastructure may collaborate with plumbers and carpenters to complement the work of the main contractor, or the fashion and garment industry where product design and software in the initial stage of the production process have to be integrated. Horizontal networks can also be found in agriculture, or agri-food industry, where, for example, producers of different final products (such as wines) or commodities (e.g. rice, soy, or corn) collaborate to comprise a richer portfolio of products to enter a new foreign market.

16. Vertical networks of SMEs are part of broader supply chains that include one or multiple chain leaders. For example, in the agri-food industry supply chains, both a producer of the final product and a large retailer may share the leadership. The contractual relationships between the leader(s) and the SMEs are generally characterized by strong asymmetric power between enterprises located in different jurisdictions. The choice of applicable law and forum becomes very important and may influence the effectiveness of collaboration. Horizontal networks may include SMEs of the same jurisdiction (the majority) or different jurisdictions (more common in the high tech industry or e-commerce). Horizontal networks feature lower asymmetric power distribution.

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[11] See Hague Conference on Private International Law, Principles on choice of law in international commercial contracts (approved on 19 March 2015), available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf.

[12] There is some debate about revising the United Nations Convention on Contracts for the International Sale of Goods (CISG) in order to correlate sales contracts into global chains. UNCITRAL Working Group I might contribute to this debate by coordinating the proposal on contractual networks with proposals to revise existing international contractual instruments.

17. A third relevant dimension of contractual networks is their sheer number. Small collaborative networks (from 2 to 10 enterprises) of SMEs require a different governance structure than those encompassing hundreds or even thousands of SMEs (as it is the case for transnational e-commerce platforms devoted to SMEs).

18. Finally, creativity and innovation with intellectual property protection and management are among the key drivers of competitiveness, growth and development. This underscores the importance of network contracts in giving rise to platforms with a view to jointly exploit intellectual property rights. In particular, SMEs can share existing technology provided by one or more platform members, directly co-produce new technology within the platform itself or acquire technology licensed/transferred by subjects that are not party to the platform. Network contracts may also ease the provision of technical assistance given to SMEs related to intellectual property by business and government bodies, by facilitating the transfer of information and knowledge to a single collective subject and its subsequent dissemination among the network members.

5. Specific issues for micro enterprises

19. Compared to SMEs, MiEs exhibit financial, technological, trade weaknesses that are greater than for other types of enterprises. The role played by public institutions, non-governmental organizations (NGOs), trade or financial intermediaries and even MNCs is often pivotal to determine MiEs' chance to access GVCs. Such access requires a long-lasting process in which strategic collaboration, capacity-building and fair value allocation are key components. Networks aim at this type of collaboration, which is mostly focused on services rather than the mere exchange of goods.

20. Indeed, several types of networks may be distinguished among those involving MiEs:

(a) Those involving only MiEs;

(b) Those involving MiEs and non-business actors such as public entities, NGOs and the like;

(c) Those involving MiEs and business actors such as MNCs and/or trade intermediaries; and

(d) Various combinations of the above.

21. When dealing with networks involving MiEs, a uniform legal instrument should specifically address issues concerning the fairness on which network relations should be based and the guarantees that MiEs should enjoy vis à vis other GVC participants, regardless of whether these members belong to the same contractual network. Whereas such an instrument may envisage the adoption of mechanisms monitoring the fairness of contractual terms and practices in case (c), in the first two instances it could aim at empowering contracting parties (e.g. by establishing common negotiating platforms) in order to reduce power asymmetries along the chain.

22. A legal instrument facilitating collaboration among MiEs should focus on collective capacity-building in order to favour both individual and collective economic growth.

III. Legal framework

23. In light of the above, an international legal instrument could eliminate legal barriers and accommodate the specific needs arising from this model of cooperation. With the sole intent of presenting to the Working Group the issues that may be considered, and in the hope of making it easier to assess the potential use of such an instrument, Italy will discuss some of the main issues to be included in a legal framework. These are broad and preliminary considerations to be intended for discussion, with no intention of being exhaustive, nor by any means to suggest a specific policy choice to the Working Group.

1. Possible legal approaches to Contractual networks

24. The above-noted differences suggest that a legal framework to address contractual networks might be organized around some functional distinctions:

(a) Horizontal *versus* vertical;

(b) Domestic *versus* international;

(c) Small *versus* large networks;

(d) Networks of MiEe *versus* networks of SMEs; and

(e) For profit *versus* non-profit networks.

2. An integrated modular proposal of an international instrument on Contractual networks

25. Whereas we believe that instruments for MiEs might differ from those for SMEs and that the latter should definitely be part of global trade, we would envisage a modular legal instrument with common general principles and possibly two specific sections, one devoted to MiEs and one to SMEs.

26. These principles might be drafted having in mind a multilevel system: i.e., whatever is not explicitly regulated would be supplemented by national legislation, leaving scope for a certain level of differentiation in legal architecture. The international instrument would define the specific principles and provide the relevant definitions but some aspects (for example, mistake, fraud, or avoidance) could be left to applicable contract law.

27. Most importantly, the structure of such principles should identify the new roles of contract beyond pure exchange, focusing on organizational and regulatory functions in order to ensure that network contracts can also promote compliance with global standards related to environmental, social, and data protection requirements, and should be applicable to both domestic and transnational networks.

28. These rules should ensure both the stability and the flexibility of the contractual network, and distinguish between internal relationships among members and relationships between the network and third parties, in particular, with creditors. Such rules could provide for different degrees of complexity with increasingly structured forms of governance, which could take place inside the network or could use companies controlled by the network to perform specific activities that require limited liability and asset partitioning.

3. Governance, knowledge transfer and innovation

29. When defining a uniform legal framework, strategic importance might be devoted to knowledge transfers and innovation among the enterprises of the network and between the network and third parties. Contract rules become extremely important when knowledge cannot be “propertized” (i.e. cannot be made proprietary) either because no legal devices are available, or because the benefits of sharing are such that individual or even collective ownership would be inappropriate. In particular, two problems usually emerge within network governance: (1) Proportionality between investments, contributions and revenues, since lack of proportionality often emerges between individual investments and profits, and opportunistic behaviour by some members of the network might arise; and (2) The interest of the contractual networks might require protection against behaviour such as unfair competition, violations of trade secrets, or unauthorized transfers to third parties external to the network.

30. A special regime concerning trade secrets and intellectual property rights might also need to be devised so as to maximize incentives to produce innovation inside the network, but, at the same time, to generate strong safeguards against knowledge leaking outside the network. Since creation and use of intellectual property rights might be too expensive for individual MSMEs, forms of collective ownership and

licensed use might be regulated by multiparty contracts making innovation also possible for firms with limited capital.

31. Further, consideration should be given to instruments that permit the segregation of assets and the establishment of limited liability protection for the activities covered by the contractual network (or parts thereof), in order to offer an additional instrument to MSMEs.

32. Finally, specific rules concerning private international law might be appropriate in this context.[13] In multiparty contracts, when enterprises located in different jurisdictions want to collaborate there is a need to identify the applicable law to fill the gaps that are not explicitly regulated by the contract. Freedom of choice of applicable law should be encouraged along the lines of other initiatives established at the international level.[14] The international dimension may also require forms of mutual recognition when enterprises are registered in national registries with different requirements. To this latter extent, it would be advisable that the proposed international instrument permit coordination among the different business registration regimes in the countries of the network's members.

Annex

I. Italian Law on Network Contracts[15]

1. Main features

1. 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.[16] 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).[17] 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.

2. 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.

3. 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 creating business opportunities otherwise precluded to a single firm. Competitiveness is increased thanks to measures (such as — but not limited to — access to funding, existing fiscal facilitations, participation in public bids and labour law measures for companies in contractual

[13] The above considerations are without any prejudice to the competence of The Hague Conference on Private International Law.

[14] See The Hague Conference on Private International Law, Principles on choice of law in international commercial contracts (approved on 19 March 2015), available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf.

[15] This Annex is a slightly adjusted version of paras. 8 to 17, A/CN.9/WG.I/WP.87.

[16] 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).

[17] As of 3 January 2017, 3,320 of such contracts have been established, involving almost 17,000 entrepreneurs (http://contrattidirete.registroimprese.it).

networks) and from endogenous growth factors (such as the overcome of dimensional limits, the creation of marketing opportunities, knowledge exchange etc.). 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 of sale or of acquisition). Under the most recent amendment to the relevant legislation, business networks can also take part in public bids.[18]

4. 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.

2. Minimum content of the contract and registration

5. 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).

6. 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[19] 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. 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.

3. Separate fund

7. 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,

[18] Italian Authority for the Oversight of Public Contracts for Works, Services and Supplies (AVCP), Resolution No. 3/2013.

[19] 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.

which only serves to satisfy claims deriving from the activities performed within the scope of the network. Provisions in 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.

8. 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.[20]

4. Governance

9. 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.

5. Legal personality

10. 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.[21]

[20] DL 22 June 2012, No. 83 as converted into Law No. 134/2012.

[21] As of 3 January 2017, 474 business networks were established with legal personality (http://contrattidirete.registroimprese.it).

G. Note by the Secretariat on compilation of draft recommendations on key principles of a business registry

(A/CN.9/WG.I/WP.103)

[Original: English]

In order to assist the Working Group in its consideration of the draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101), the Secretariat has prepared this reference document consisting of a compilation of only the draft recommendations contained in that text. The draft recommendations in this document are the same as those in A/CN.9/WG.I/WP.101, but without footnotes. References to paragraph numbers in this compilation are to the paragraphs of the commentary in A/CN.9/WG.I/WP.101.

Contents

Draft recommendations on key principles of a business registry

I. Objectives of a business registry

Recommendation 1: Purposes of the business registry

The Regulation should provide that the business registry is established for the purposes of:

(a) Providing to a business an identity that is recognized by the enacting State and entitles the business to participate in, and receive the benefits of participating in, the legally regulated economy of the State; and

(b) Making accessible to the public information in respect of registered businesses.

Recommendation 2: Simple and predictable legislative framework permitting registration for all businesses

The Regulation or the law of the enacting State should:

(a) Adopt a simple structure for rules governing the business registry and avoid the unnecessary use of exceptions or granting of discretionary power; [former recommendation 7]

(b) Establish a system for the registration of businesses that permits registration of businesses of all sizes and legal forms; and [first half of former recommendation 1]

(c) Ensure that micro, small and medium-sized enterprises (MSMEs) are subject to the minimum procedural requirements except where such a business is subject to additional requirements under the law of the enacting State as a consequence of its particular legal form. [former recommendation 4]

Recommendation 3: Key features of a business registration system

The Regulation should ensure that the system for business registration contains the following key features:

(a) The registration process is publicly accessible, simple, user-friendly and time- and cost-efficient;

(b) The registration process is adapted to the needs of MSMEs;

(c) The registered information on businesses is easily searchable and retrievable; and

[(d) The registry system and the registered information are kept as current, reliable and secure as possible.]

II. Establishment and functions of the business registry

Recommendation 4: Responsible authority

The Regulation should establish that the organization and operation of the business registry is a function of the enacting State.

Recommendation 5: Appointment of the registrar

The Regulation should:

(a) Provide that [*the person or entity authorized by the enacting State or by the law of the enacting State*] has the authority to appoint and dismiss the registrar and to monitor the registrar's performance; and

(b) Determine the registrar's powers and duties and the extent to which those powers and duties may be delegated.

Recommendation 6: Transparency of the business registration system and accountability of the registrar

The designated authority should ensure that rules or criteria that are developed are made public to ensure transparency of the registration procedures and the accountability of the registrar in terms of respecting those procedures.

Recommendation 7: Use of standard registration forms

The Regulation should provide that standard registration forms are introduced to request the registration of a business and that guidance is available to registrants on how to complete those forms.

Recommendation 8: Capacity-building for registry staff

The designated authority should ensure that appropriate programmes are established to develop and/or strengthen the knowledge of the registry staff on business registration procedures and the operation of ICT-supported registries, as well as the ability of registry staff to deliver requested services.

Recommendation 9: Core functions of business registries

The Regulation should establish that the functions of the business registry include:

(a) Publicizing the means of access to the services of the business registry, and the opening days and hours of any office of the registry (see paras. 122 to 124 and 172 to 174, and recommendations 18 and 34);

(b) Providing access to the services of the business registry (see paras. 179 to 184 and recommendation 36);

(c) Providing guidance on choosing the appropriate legal form for the business, on the registration process and on the business's rights and obligations in connection thereto (see para. 45 and recommendation 7);

(d) Listing all the information that must be submitted in support of an application to the registry (see paras. 129 to 132 and recommendation 20);

(e) Assisting businesses in searching and reserving a business name (see para. 52);

(f) Providing the basis for any rejection of an application for business registration (see paras. 145 to 148 and recommendation 26);

(g) Registering the business when the business fulfils the necessary conditions established by the law of the enacting State (see para. 136 and recommendation 22);

(h) Ensuring that any required fees for registration have been paid (see paras. 185 to 189 and recommendation 37);

(i) Assigning a unique business identifier to the registered business (see paras. 103 to 104 and recommendation 14);

(j) Ensuring the entry of the information contained in the application submitted to the registry, any amendments thereto and any filing related to that business into the registry record, and indicating the time and date of each registration (see paras. 144, 157 and 158, and recommendations 25 and 30);

(k) Providing the person identified in the application as the registrant of the business with a copy of the notice of registration (see para. 136 and recommendation 22);

(l) Providing public notice of the registration in the means specified by the enacting State (see para. 137 and recommendation 23);

(m) Indexing or otherwise organizing the information in the registry record so as to make it searchable (see paras. 182 and 183 and recommendation 36);

(n) Providing information on the point of contact of the business as established by the law of the enacting State (see paras. 130 and 151 and recommendations 20 and 27);

(o) Sharing information among the requisite public agencies (see para. 110 and recommendation 16);

(p) Monitoring that a registered business has fulfilled and continues to fulfil any obligation to file information with the registry throughout the lifetime of the business (see paras. 155 to 158 and recommendations 29 and 30);

(q) Ensuring the entry of information on the declaration of deregistration of a business from the registry record, including the date of and any reasons for the deregistration (see paras. 201 to 205 and recommendations 43 to 45);

(r) Ensuring that the information in the registry is kept as current as possible (see paras. 152 to 153 and recommendation 28);

(s) Promoting compliance with the Regulation (see paras. 42 to 44 and recommendation 6);

(t) Protecting the integrity of the information in the registry record (see paras. 213 to 215 and recommendations 50-51);

(u) Ensuring that information from the registry record is archived as necessary (see paras. 208 to 210 and recommendation 48); and

(v) Offering services incidental to or otherwise connected with business registration (see paras. 80 to 83 and recommendation 11).

Recommendation 10: Structure of the registry

The Regulation should establish an interconnected registry system that would process and store all information received from registrants and/or entered by registry staff. Where such a system of interconnected business registries is set up, the registries should possess mutually consistent technical features so that stored information is accessible throughout the system.

III. Operation of the business registry

Recommendation 11: Electronic, paper-based or mixed registry

The Regulation should provide that the optimal medium to operate an efficient business registry is electronic. Should full adoption of electronic services not yet be possible, such an approach should nonetheless be implemented to as great an extent as permitted by the current technological infrastructure of the enacting State, as well as its institutional and legal framework, and expanded as that infrastructure improves.

Recommendation 12: One-stop shop: a single interface for business registration and registration with other authorities

The Regulation or the law of the enacting State should establish a single interface for business registration and registration with other public agencies, including designating which public agency should have overall authority for the single interface. Such an interface:

(a) May consist of a web platform or physical offices; and

(b) Should integrate the services of as many public agencies requiring the same information as possible, but at a minimum should include taxation and social services agencies.

Recommendation 13: Use of unique business identifiers

The Regulation should provide that a unique business identifier should be allocated to each registered business and should:

(a) Be structured as a set of numeric or alphanumeric characters;

(b) Be unique to the business to which it has been allocated; and

(c) Remain unchanged and not be reallocated following any deregistration of the business.

Recommendation 14: Allocation of unique business identifiers

The Regulation or the law of the enacting State should specify that the allocation of a unique business identifier should be carried out either by the business registry upon registration of the business, or before registration by a legally-designated authority. In either case, the unique business identifier should then be made available to all other public agencies sharing the information associated with that identifier, and should be used in all official communication in respect of that business.

Recommendation 15: Implementation of a unique business identifier

The Regulation or the law of the enacting State should ensure that, when adopting a unique business identifier across different public agencies:

(a) There is interoperability between the technological infrastructure of the business registry and of the other public agencies sharing the information associated with the identifier; and

(b) That existing identifiers are linked to the unique business identifier.

Recommendation 16 : Sharing of private data between public agencies

The Regulation should ensure that rules for the sharing of private data between public agencies pursuant to the unique business identifier system adopted:

(a) Conform with the applicable rules in the enacting State on public disclosure of private data;

(b) Enable public agencies to access private data included in the unique business identifier system only in order to carry out their statutory functions; and

(c) Enable public agencies to access private data included in the unique business identifier system only in relation to those businesses with respect to which they have statutory authority.

Recommendation 17: Exchange of information among business registries

The designated authority should ensure that systems for the registration of businesses should adopt solutions that facilitate information exchange between registries from different jurisdictions.

IV. Registration of a business

Recommendation 18: Accessibility of information on how to register

The designated authority should ensure that information on the business registration process and the applicable fees, if any, should be widely publicized, readily retrievable, and available free of charge.

Recommendation 19: Businesses required or permitted to register

The Regulation or the law of the enacting State should specify:

(a) Which businesses are required to register; and

(b) That all businesses are permitted to register.

Recommendation 20: Minimum information required for registration

The Regulation or the law of the enacting State should establish the minimum information and supporting documents required for the registration of a business, including at least:

(a) The name and address at which the business can be deemed to receive correspondence or, in cases where the business does not have a standard form address, the precise description of the geographical location of the business;

(b) The identity of the person or persons registering the business;

(c) The identity of the person or persons who are authorized to act on behalf of the business; and

(d) The legal form of the business being registered.

Recommendation 21: Language in which information is to be submitted

The Regulation should provide that the information and documents submitted to the business registry must be expressed in the language or languages specified by the enacting State, and in the character set as determined and publicized by the business registry.

Recommendation 22: Notice of registration

The Regulation should establish that the business registry should notify the registrant whether or not its registration is effective as soon as practicable, and, in any event, without undue delay.

Recommendation 23: Content of notice of registration

The Regulation should provide that the notice of registration may be in the form of a certificate, notice or card, and that it should contain the following information:

(a) The unique business identifier of the business;

(b) The date of its registration;

(c) The name of the business;

(d) The legal form of the business; and

(e) The legislation under which the business has been registered.

Recommendation 24: Period of effectiveness of registration

The Regulation should clearly establish that the registration is valid until the business is deregistered or until such time as a renewal of the registration is required.

Recommendation 25: Time and effectiveness of registration[1]

The Regulation should:

(a) Require the business registry to time and date stamp applications for registration and to process them in the order in which they are received and as soon as practicable, and, in any event, without undue delay;

(b) Establish clearly the moment at which the registration of the business is effective; and

(c) Specify that the registration of the business must be entered into the business registry as soon as practicable thereafter, and in any event without undue delay.

Recommendation 26: Refusal to register

The Regulation should provide that the business registrar:

(a) Must refuse registration of the business if the application does not meet the requirements specified in the Regulation or the law of the State and is required to provide to the registrant the basis for refusal in written form; and

(b) Is granted the authority to correct its own errors as well as any incidental errors that may appear in the information submitted in support of the registration of the business, provided that the conditions under which the registrar may exercise this authority are clearly established.

Recommendation 27: Registration of branches

The Regulation should ensure that:

(a) Registration of a branch of a business is required or permitted;

(b) Any definition of “branch” for registration purposes is consistent with the definition provided in the law of the enacting State; and

[1] The Working Group may wish to note recommendation 11 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on “Time of effectiveness of the registration of a notice”.

(c) Provisions regarding branch registration should address the following issues:

(i) Time and date of registration of the branch;

(ii) Disclosure requirements, such as name, address of the person or persons registering the branch; name and address of the branch and copy of the notice of registration of the foreign company;

(iii) Information on the person or persons who can legally represent the branch; and

(iv) The language in which the registration documents should be submitted.

V. Post-registration

Recommendation 28: Maintaining a current registry

The Regulation should require the registrar to ensure that the information in the business registry is kept current, including through:

(a) Sending an automated request to registered businesses at periodic intervals requiring them to report whether the information maintained in the registry continues to be accurate or stating which changes should be made; and

(b) Updating the registry immediately upon receipt of the amending information or as soon as practicable thereafter.

Recommendation 29: Information required after registration

The Regulation should specify that after registration, the registered business must file with the business registry the following information:

(a) Any changes or amendments to the information that was initially required for the registration of the business pursuant to recommendation 20 or to the current information in the business registry as soon as those changes occur; and

(b) Periodic returns, which may include annual accounts, as required by the law of the enacting State.

Recommendation 30: Time and effectiveness of amendments to registered information

The Regulation should:

(a) Require the business registry to time and date stamp amendments to registered information and to process them in the order in which they are received;

(b) Notify the registered business as soon as practicable that its registered information has been amended; and

(c) Establish when amendments to the registered information are effective.

VI. Accessibility and information-sharing

Recommendation 31: Public access to business registry services

The Regulation should permit any person to access the services of the business registry and the information contained in the registry.

Recommendation 32: Public availability of information

The Regulation should specify that all registered information is available to the public unless it is restricted for reasons of confidentiality as set out in the law of the enacting State, or for reasons of personal security.

Recommendation 33: Where information is not made public

In cases where information in the business registry is not made public, the Regulation should:

(a) Establish which information concerning the registered business is subject to the applicable rules in the enacting State on public disclosure of private data and require the registrar to list the types of information that cannot be publicly disclosed; and

(b) Specify the circumstances in which the registrar may use or disclose information that is subject to confidentiality restrictions.

Recommendation 34: Hours of operation

The designated authority should provide that:

(a) If access to the services of the business registry is provided through a physical office:

(i) Each office of the registry is open to the public during [the days and hours to be specified by the enacting State]; and

(ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office;

(b) If access to the services of the business registry is provided electronically, access is available at all times; and

(c) Notwithstanding subparagraphs (a) and (b) of this recommendation, the business registry may suspend access to the services of the registry in whole or in part in order to perform maintenance or provide repair services to the registry, provided that:

(i) The period of suspension of the registration services is as short as practicable;

(ii) Notification of the suspension and its expected duration is widely publicized; and

(iii) Such notice should be provided in advance and, if not feasible, as soon after the suspension as is reasonably practicable.

Recommendation 35: Direct electronic access to submit registration, to search and to request amendments

The Regulation should establish that, where information and communication technology is available, registrants should be allowed to enter and submit their information, and the public should be allowed to access the information on the business registry, without requiring the physical presence of the user in the business registry office or the intermediation of the registry staff.

Recommendation 36: Facilitate access to information

The Regulation should ensure the facilitation of access to business registration and registered information by avoiding the creation of unnecessary barriers such as requirements for the installation of specific software; charging prohibitively expensive access fees; requiring users of information services to register or otherwise provide information on their identity; or unduly limiting the languages in which information on the registration process is available.

VII. Fees

Recommendation 37: Fees charged for registry services

The Regulation should establish fees for registration and post-registration services, if any, at a level that is low enough that it encourages business registration, and that, in any event, does not exceed a level that enables the business registry to cover the cost of performing those services.

Recommendation 38: Fees charged for information

The Regulation should establish that information contained in the business registry should be available to the public free of charge, but should permit modest fees to be charged for value-added information products produced or developed by the registry.

Recommendation 39: Publication of fee amounts and methods of payment

The designated authority should ensure that fees payable for registration and information services should be widely publicized, as should acceptable methods of payment.

VIII. Sanctions and liability

Recommendation 40: Sanctions

The Regulation should establish and ensure broad publication of sanctions (including fines, deregistration and loss of access to services) that may be imposed on a business for a breach of its obligations under the Regulation. Such rules may include provisions pursuant to which a breach of obligation may be forgiven provided it is rectified within a specified time.

Recommendation 41: Liability for submission of misleading, false or deceptive information

The Regulation or the law of the enacting State should establish the liability of the registrant or the registered business for any misleading, false, incomplete or deceptive information that the registrant or business has knowingly submitted to the business registry.

Recommendation 42: Liability of the business registry

The Regulation or the law of the enacting State should establish whether the business registry may be held liable for loss or damage caused by error or negligence in the registration of businesses or the administration or operation of the registry.

IX. Deregistration

Recommendation 43: Voluntary deregistration

The Regulation should require the registrar to deregister a business on the application of the business for deregistration that fulfils the requirements according to the law of the enacting State.

Recommendation 44: Compulsory deregistration

The Regulation should:

(a) Require the registrar to deregister a business when it is ordered to do so by a specified competent authority or the court or when the business is no longer in operation; and

(b) Provide that the decision or order for deregistration of the business must be placed on the registry.

Recommendation 45: Process of deregistration

The Regulation or the law of the enacting State should provide that:

(a) A written notice of the deregistration is sent to the registered business; and

(b) The deregistration is publicized in accordance with the legal requirements of the enacting State.

Recommendation 46: Reinstatement of registration

The Regulation or the law of the enacting State should specify the circumstances under which and the time limit within which the registrar is required to reinstate a business that has been deregistered.

Recommendation 47: Time and effectiveness of deregistration

The Regulation should:

(a) Specify when the deregistration of a business has legal effect;

(b) Specify that any required notice of the deregistration for that legal form of business has been publicized in accordance with the law of the enacting State; and

(c) Specify the legal effects of deregistration.

X. Preservation of records

Recommendation 48: Preservation of records[2]

The Regulation should provide that:

(a) Documents and information submitted electronically by the registrant and the registered business, including information in respect of deregistered businesses, should be preserved by the registry in perpetuity so as to enable the information to be retrieved by the registry and other interested users;

(b) Where paper documents have been submitted and the information contained in them has been entered into an electronic registry that meets the reliability standards established by the State, a minimum period of preservation of such documents should be specified by the enacting State; and

(c) Where paper documents have been submitted and the information contained in them has not been entered into an electronic registry the period of preservation of such documents should be specified by the enacting State, and should be for at least the life of the business, plus a reasonable time after any deregistration of that business.

Recommendation 49: Amendment or deletion of information

The Regulation should provide that the registrar does not have the authority to amend or delete information contained in the business registry record except in those cases specified in the Regulation or elsewhere in the law of the enacting State.

Recommendation 50: Protection against loss of or damage to the business registry record[3]

The Regulation or the law of the enacting State should:

(a) Require the business registry to protect the registry records from the risk of loss or damage; and

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[2] The Working Group may wish to note recommendation 21 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Archiving of information removed from the public registry record".

[3] The Working Group may wish to note recommendation 17 of the UNCITRAL Guide on the Implementation of a Security Rights Registry on "Integrity of the registry record".

(b) Establish and maintain back-up mechanisms to allow for any necessary reconstruction of the registry record.

Recommendation 51: Safeguard from accidental destruction

The Regulation or the law of the enacting State should provide that appropriate procedures should be established to mitigate risks from force majeure, natural hazards, or other accidents that can affect the processing, collection, transfer and protection of data housed in electronic or paper-based business registries.

XI. The underlying legislative framework

Recommendation 52: Clarity of the law

The law of the enacting State should, to the extent possible, consolidate legal provisions pertaining to business registration in a single legislative text, which is clearly written and uses simple language that can be easily understood.

Recommendation 53: Flexible legal forms

The law of the enacting State should permit flexible and simplified legal forms for businesses in order to facilitate and encourage registration of businesses of all sizes, including those forms considered in the [UNCITRAL legislative guide on an UNCITRAL limited liability organization].

Recommendation 54: Primary and secondary legislation to accommodate the evolution of technology

The law of the enacting State should establish guiding legal principles in relation to electronic registration in primary legislation, and should set out specific provisions on the detailed functioning and requirements of the electronic system in secondary legislation.

Recommendation 55: Electronic documents and electronic authentication methods

The law of the enacting State should:

(a) Permit and encourage the use of electronic documents as well as of electronic signatures and other equivalent identification methods;

(b) Regulate such use pursuant to the following principles:

(i) Documents cannot be denied legal effect, validity or enforceability solely on the grounds that they are in electronic format, or that they are signed electronically;

(ii) The place of origin of the electronic signature should not determine whether and to what extent the electronic signature is legally effective;

(iii) Different technologies that may be used to communicate, store and/or sign information electronically should be subject to the same legal treatment; and

(iv) Electronic documents and electronic signatures have the same purpose and function as their paper-based counterparts and are thus functionally equivalent to them; and

(c) Establish criteria to reliably identify the person submitting an electronic document and/or using an electronic signature or equivalent authentication method.

Recommendation 56: Electronic payments

The law of the enacting State should include legislation to enable and facilitate electronic payments.

H. Note by the Secretariat: observations and model provisions from the Government of Colombia: dissolution and liquidation of MSMEs

(A/CN.9/WG.I/WP.104)

[Original: English]

Contents

Annex

Observations by the Government of Colombia

I. Introduction

1. The Government of the Republic of Colombia would like to submit the following observations concerning the dissolution and winding up of MSMEs. As a point of departure it must be highlighted that during its forty-sixth session in 2013, the United Nations Commission on international Trade Law (UNCITRAL) requested that work be initiated aimed at reducing the legal obstacles and barriers encountered by micro, small and medium-sized enterprises (MSMEs) *throughout their life cycle*, with a particular focus on their context in developing countries.[1] The life cycle of a business could be said to consist of several stages, which may be summarized as starting a business, operating it, undergoing its restructuring and dissolving and winding up a business.[2]

2. At its most recent sessions (Twenty-Sixth Session, New York, 4 to 8 April 2016 and Twenty-Seventh Session, Vienna, 3-7 October 2016), Working Group I continued its consideration of two main topics, namely, a discussion regarding a legislative guide on Simplified Business Entities as well as the key principles of business registration. These deliberations have taken place on the basis of the framework of issues drawn from the key features of simplified business regimes (outlined in A/CN.9/WG.I/WP.86), and as illustrated in the draft model law on simplified business entities (A/CN.9/WG.I/WP.89), as well as other possible models (such as the one contained in the annex to A/CN.9/WG.I/WP.83).

3. Until recently, most efforts by the WG have been focused on the useful simplification of business incorporation and registration. In that sense, the WG1 discussions have covered specifically the initial stages of business formation, registration and operation of an MSME.[3] Marginal discussions have also taken place on the topics related to the end stages of a corporation, which relate specifically to its dissolution and winding up. The Government of Colombia respectfully submits that it could be useful for the Working Group to consider an additional evaluation of the above-referred topic. For that purpose it is also suggested the possible adoption of an Annex to the draft legislative guide (A/CN.9/WG.I/WP.99/

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[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 321; reiterated at subsequent sessions of the Commission: ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 321 and Seventieth Session, Supplement No. 17 (A/70/17), paras. 220, 225, 340 and 321.

[2] The Commission stated that "such work should start with a focus on the legal questions surrounding the simplification of incorporation" and has confirmed Working Group I's approach that such work should proceed on two relevant issues: legal questions surrounding the creation of a simplified business entity and key principles in business registration. Supra, note 1, and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), under preparation.

[3] Report of Working Group I (MSMEs) on the work of its twenty-sixth session, A/CN.9/866, paras. 22 to 47.

and A/CN.9/WG.I/WP.99/Add.1) in order to include a few provisions that could be used to illustrate the manner in which the winding up process could be regulated.

II. Observations on Dissolution and Liquidation of MSMEs

4. The observations of Colombia are based on the premise that a vast majority of businesses in both the developing and the developed world are MSMEs,[4] and that it is important to consider both the legal framework for their formalization, as well as the rules relating to their dissolution and winding up.[5] Therefore, it would be useful to thoroughly evaluate the entire cycle of a business, so that it can be formalized at the outset in accordance with up-to-date legal provisions and also be able to close its operations and resolve all relations with creditors and shareholders at the end of such a cycle. This is particularly relevant in light of the obvious fact that many of the business entities will not be successful and therefore will need to close their operations and resolve all outstanding legal situations before extinction. In that sense, it could be useful to provide a set of suggested rules to govern its dissolution and liquidation. The Colombian Government believes that Recommendation 24 of the draft legislative guide could be expanded and further regulated by means of some legislation provisions as herein developed.

5. The global financial crisis of 2007-2008, that led to a recession in many parts of the world during the following 4 years is still being felt in many nations around the globe, and its effects will probably last for several more years. Many businesses were pushed into a state of instability and although some countries have slowly but greatly recovered, the annual number of business failures still remains above the levels that existed before the crisis in several countries.[6] Businesspeople, and entrepreneurs alike are now facing important decisions that need to be taken with regard to the viability of the business entity that they have created. This situation is particularly relevant in developing nations.

6. As mentioned before the proposed Annex provides provisions governing the stages of dissolution and winding up of a corporation. These rules, which could be particularly useful for corporations that have gone out of business, but need not resort to an insolvency proceeding to close their operations and resolve all situations with creditors and shareholders. This situation frequently takes place in MSMEs in cases in which the corporation's liabilities do not exceed the value of available assets after dissolution. In these situations it is necessary for those responsible for the business venture to provide publicity concerning the state of liquidation, appoint liquidators, prepare inventories and other financial statements, sell corporate assets, pay liabilities according to legal priorities and eventually return any remaining assets to the shareholders. Furthermore, it is also relevant to have access to mechanisms for the reactivation of a dissolved corporation and the reopening of the liquidation process after it has been completed when new assets are found. Pursuant to a contemporary approach, it would also be useful to provide a legal framework that allows for a corporation undergoing a winding up process to participate in restructuring proceedings such as mergers and divestitures.

7. Finally, it is important to note that the observations of Colombia on the topics of dissolution and winding up of corporations are drawn from best practices reflected in recent legislation, model acts, and directives including: Spanish Law 25/2011, which amended the Capital Companies Act Title X, Dissolution and Liquidation; the OHADA Uniform Act Relating to Commercial Companies and Economic Interest Groups; Regulation 1346/2000 of the European Union, which was updated by Regulation 2015/848, which will come into effect on June 26 of 2017; South Africa's

[4] 2nd OECD Conference Of Ministers Responsible For Small And Medium-Sized Enterprises (SMES) Promoting Entrepreneurship And Innovative SMES In A Global Economy: Towards A More Responsible And Inclusive Globalization Istanbul, Turkey 3-5 June 2004, Page 5.

[5] As it was done by means of Chapter 6 of document A/CN.9/WG.I/WP.83 as well as Recommendation 24, contained in A/CN.9/WG.I/WP.99/Add.1.

[6] Deloitte Legal. A Guide To pre Insolvency and Insolvency Proceedings Across Europe. January 2017.

Companies Act 71 of 2008, the Colombian Commercial Code, as well as Colombian Law 1429 of 2010.

8. Of course, as has been usual with discussions within the Working Group, the Colombian Delegation encourages all delegations that would like to comment on this Annex and welcomes those who would like to join it in supporting the proposal.

Annex

Draft Model Provisions on Dissolution and Liquidation of MSMEs

Article 1. **Dissolution as per the law, by laws or by a mandatory court decision**

1. Corporations shall be wound up as per the law upon the expiration of the term of duration set forth in the by-laws, provided that it has not been extended and provided further, that extension is duly registered before the Mercantile Registry, prior to such expiration.

2. The initiation of an insolvency process of a corporation shall not, necessarily, result in a cause of dissolution, unless liquidation in bankruptcy proceeding is instituted.

3. Corporations shall also be dissolved for the causes provided under the by-laws or the law, as follows:

(a) The termination or impossibility to fulfill the objects set forth in the corporation's purpose clause;

(b) The situation in which the corporation fails to carry out the objects set forth in the corporation's purpose clause for two consecutive years;

(c) When the general meeting of shareholders comes to a deadlock in a manner that it becomes impossible to carry out the objects set forth in the corporation's purpose clause;

(d) The occurrence of any other cause set forth in the corporation's by-laws.

4. Dissolution as a result of a court decision

(a) If the general meeting of shareholders shall not be called upon, or the meeting cannot take place or the decision is not adopted, any interested party may file a motion before a court that has jurisdiction over the corporation.

Article 2. **Winding up decisions**

In any of the causes of dissolution referred to above, the liquidation of the corporation shall be subject to a decision adopted by the general meeting of shareholders. During the same meeting, the shareholders, by majority vote, shall appoint one or more liquidators who can be legal or natural persons.

Article 3. **Public disclosure of dissolution**

The dissolution of the corporation shall have legal effects before third parties as of the moment of its publication by the notice in the corporation's official website. In the absence of such a website, the notice shall be published in a newspaper of broad circulation in the city where the corporation has its domicile. Furthermore, the dissolution of a corporation shall be filed before the Mercantile Registry.

Article 4. **Corporation in liquidation**

1. Any corporation that has been dissolved shall retain its legal personality during the liquidation proceedings. Furthermore it shall add the expression "in liquidation" to their corporate name whilst the winding up process takes place.

2. The name of the liquidator shall, as well, appear on all instruments and documents issued by the corporations to third parties, including letters, invoices, notices and various publications.

3. During the liquidation period, all provisions set forth in the by-laws concerning the manner in which general meetings of shareholders shall be conducted will continue to be in place.

Article 5. **Directors and Liquidators**

1. As of the date in which the dissolution has been declared by a decision rendered by the general meeting of shareholders or by court order the following legal consequences shall ensue:

(a) Except for the provision contained in article 13, the legal capacity of the corporation shall be restricted to carrying out acts aimed at the immediate liquidation of the corporation;

(b) The directors will cease in their duties and all powers of representation shall continue to be carried out by the liquidator who shall act as the sole legal representative of the corporation and its powers shall extend to all operations necessary for the corporation's liquidation, unless a different provision is set forth in the corporation's by-laws.

2. In the event of death or dismissal of any of the liquidators, the general meeting of shareholders shall appoint the natural or legal person who will replace the deceased or dismissed liquidator. Unless otherwise provided in the by-laws, liquidators shall be appointed for an indefinite tenure.

Article 6. **Duties of the Liquidators**

1. Within three months of starting the liquidation proceedings, the liquidator shall prepare the inventory and balance sheet as of the date of dissolution.

The liquidators shall finalize any operations outstanding and conduct new transactions as necessary for the winding up of the corporation. In particular, the liquidators shall be bound to sell all the corporate assets, irrespective of their nature, except for those that according to the by-laws shall be distributed in kind.

2. Within six months of the liquidators appointment, he or she shall convene a general meeting of shareholders in order to present a report on the current status, the corporations assets and liabilities, the liquidation process and the time needed to complete it. The liquidator shall also request, where appropriate, any authorizations that shall be needed for the purposes of the liquidation.

3. The liquidators shall collect any outstanding amounts on shares subscribed by shareholders before the initiation of the winding up proceeding.

4. The liquidators shall keep company accounts, books and records and keep custody of relevant documentation and correspondence.

5. Upon completion of the liquidation proceedings, the liquidators shall submit before the general meeting of shareholders, for its approval, the following documents:

(a) A final balance sheet;

(b) A complete report on the operations performed during the liquidation;

(c) A proposal for distribution of the remaining assets among shareholders;

(d) The above-mentioned documents shall be approved by an absolute majority of shares represented in the meeting;

(e) Dissenting shareholders may challenge the decision referred to in number 5, above, within two months from the date in which it was taken.

Article 7. **Liability of Liquidators**

The liquidators shall be liable to the corporation and third parties for damages arising from violation of his or her duties of care and loyalty. Shareholders' derivative lawsuits or individual suits for civil liability against the liquidators shall be timed-barred after two years, from the date of the damaging fact or, from the date of its disclosure, in case it was concealed. Nonetheless, when the damaging fact is subject to criminal liability, any legal action shall be time-barred after a period of 6 years.

Any lawsuit against shareholders, who did not act in their capacity as liquidators, shall be time-barred after three years from the date of the registration of the dissolution before the Mercantile Registry.

Article 8. **Payments and Distributions**

1. The liquidators shall proceed to the payment of liabilities with third parties in accordance with the priorities established under the law. For this purpose the liability of the liquidators shall be restricted by the assets and liabilities included in the balance sheet and inventory referred to in subsection 1, article 6.

2. After all liabilities with third parties have been paid in full, any remaining assets shall be distributed according to the provisions set forth under the corporation's by-laws or, in the absence of a specific provision in such by-laws, the distribution shall be made on a pro-rata basis.

3. Any amount allocated for distribution among the shareholders shall be paid to them within the following eight days after the meeting described in subsection 5 of article 6 of this law.

Article 9. **Right to payment of the liquidation dividend in cash**

Unless the shareholders, unanimously, decide otherwise in the meeting set forth in subsection 5 of article 6, they shall be entitled to receive their share of the remaining corporate assets in cash.

Article 10. **Simplified Liquidation Proceeding**

If it becomes clear that the corporation lacks liabilities with third parties once the inventory referred to in subsection 1 of article 6 has been approved, the liquidators shall convene a general meeting of shareholders to approve, along with the balance sheet and inventory, the documents referred to in subsection 5 of article 6. Approval of these decisions shall be taken by the absolute majority of the shares present or represented in the meeting, as soon as the approval has taken place, the liquidators shall proceed to the distribution of remaining assets among the shareholders.

If it is determined by the court that there are outstanding liabilities with third parties, that were not included in the inventory, the shareholders and liquidators, will be jointly and severally liable to the creditors.

This liability shall be time-barred after five years from the moment of the filing before the Mercantile Registry of the decisions set forth under subsections 5 of article 6.

Article 11. **Reopening of a Liquidation Process**

If, after filing of the documents provided under subsections 1 and 5 of article 6 of this law, new assets of the company shall appear, or by means of a judicial decision rendered after such a date, or due to any other circumstance, a reopening of the liquidation will take place.

Article 12. **Reactivation of a wound-up company**

1. The general assembly of shareholders may agree to revoke the solution in order to reactivate a wound-up company provided that the cause for which it was dissolved

has been remedied. A reactivation decision shall not be made where dissolution was instituted as per the law.

2. The decision on reactivation shall be adopted pursuant to the requirements established for any amendment of the by-laws.

3. Shareholders not voting in favor of reactivation shall be entitled to a dissenters remedy. By means of such remedy they will be allowed to demand their share of the corporate assets at the fair market value.

Article 13. **Restructuring Operations**

Any corporation which is undergoing a corporate liquidation shall have legal capacity to participate in restructuring operations such as mergers, sale of all or substantially all assets and corporate divestitures.

II. DISPUTE SETTLEMENT

A. Report of the Working Group on Dispute Settlement on the work of its sixty-fifth session (Vienna, 12-23 September 2016)

(A/CN.9/896)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, the Commission mandated the Working Group to commence work 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 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.[1]

2. At its sixty-third (Vienna, 7-11 September 2015) and sixty-fourth (New York, 1-5 February 2016) sessions, the Working Group considered that topic on the basis of notes by the Secretariat (A/CN.9/WG.II/WP.190 and A/CN.9/WG.II/WP.195, respectively). At its sixty-fourth session, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories.[2]

3. At its forty-ninth session, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions (A/CN.9/861 and A/CN.9/867, respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation and confirmed that the Working Group should continue its work on the topic.[3]

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.

[2] A/CN.9/867, para. 15.

[3] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162-165.

4. At that session, the Commission also held a preliminary discussion regarding possible future work in the area of international dispute settlement. The Commission considered the topics of (i) concurrent proceedings; (ii) code of ethics/conduct for arbitrators; and (iii) possible reform of the investor-State dispute settlement system.[4] After deliberation, the Commission decided to retain the three topics on its agenda for further consideration at its next session. It requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all the topics so that the Commission would be in a position to make an informed decision whether to mandate its Working Group II to undertake work in any of the topics, following the current work on the enforcement of settlement agreements resulting from conciliation. In that context, it was reaffirmed that priority should be given to the current work by Working Group II so that it could expeditiously complete its work on the preparation of an instrument on the topic.[5]

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its sixty-fifth session in Vienna, from 12-23 September 2016. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czechia, Denmark, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Kuwait, Mexico, Nigeria, Pakistan, Panama, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Algeria, Belgium, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Egypt, Finland, Malta, Netherlands, Norway, Portugal, Qatar, Republic of Moldova, Saudi Arabia, Slovakia, South Africa, Sweden 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) *Intergovernmental organizations*: Asian-African Legal Consultative Organization (AALCO) and Hague Conference on Private International Law (HCCH);

(b) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Society of International Law (ASIL), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Belgian Center for Arbitration and Mediation (CEPANI), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), Energy Community Secretariat, European Law Institute (ELI), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICACIC), International Academy of Mediators (IAM), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Mediation Institute (IMI), Korean Commercial Arbitration Board (KCAB), Law Association for Asia and the Pacific (LAWASIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University London School of International Arbitration (QMUL), *Union Internationale des Huissiers de Justice et Officiers Judiciaires* (UIHJ) and Vienna International Arbitral Centre (VIAC).

[4] Ibid., paras. 174-194.
[5] Ibid., para. 195.

9. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Mr. Alejandro Márquez García (Colombia)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.197); and (b) note by the Secretariat regarding the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/WG.II/WP.198).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. International commercial conciliation: enforceability of settlement agreements.
5. Organization of future work.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered agenda item 4 on the basis of the note prepared by the Secretariat (A/CN.9/WG.II/WP.198). The deliberations and decisions of the Working Group with respect to item 4 are reflected in chapter IV. The Secretariat was requested to prepare draft provisions, based on the deliberations and decisions of the Working Group (see para. 213 below).

IV. International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

13. The Working Group continued its deliberations on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation ("instrument") on the basis of document A/CN.9/WG.II/WP.198. The Working Group agreed to consider the draft provisions contained therein without prejudice to the final form of the instrument to be prepared, a matter that would be discussed at a later stage (for discussion on the form of the instrument, see paras. 135-143 and 211-213 below).

A. Scope of application, definitions and exclusions

Draft provision 1 (Scope of Application)

14. The Working Group considered draft provision 1, which dealt with the scope of application, as contained in paragraph 4 of document A/CN.9/WG.II/WP.198. It was generally agreed that draft provision 1 provided clear and simple criteria for determining whether or not a settlement agreement would fall under the scope of the instrument, and no further elaboration on the territorial scope would be required.

15. The following questions were left for consideration at a later stage of the current session: (i) whether draft provision 1 would be redundant with draft provision 6, which sets forth the substantive obligations for recognition and enforcement (see para. 81 below); (ii) whether the term "settlement agreement" was broad enough to encompass various forms of such agreements in different jurisdictions (see para. 38 below); and (iii) whether the notion of "recognition" should be omitted (see paras. 77-81, 145-157, and 200-204 below).

16. The Working Group confirmed the understanding that the instrument should apply to "commercial" settlement agreements, without providing for any limitation as to the nature of the remedies or contractual obligations. Yet, with regard to the suggestion that the instrument should contain a definition of the term "commercial" in the form of an illustrative list similar to footnote 2 of the Model Law on International Commercial Conciliation ("Model Law on Conciliation"), it was agreed that that should be further considered in light of the form of the instrument. It was clarified that a footnote could be included if the instrument were to take the form of model legislative provisions, but would not be appropriate in a convention.

Draft provision 2 (International)

17. The Working Group considered draft provision 2, which dealt with the notion of internationality, as contained in paragraph 7 of document A/CN.9/WG.II/WP.198.

Chapeau

18. As a matter of drafting, it was pointed out that draft provision 2 should be better aligned with draft provision 1.

19. As a matter of substance, it was suggested that the definition of "international" should apply to the conciliation process, rather than to the settlement agreement. It was said that the international nature of the settlement agreement would be derived from the international nature of the conciliation process. It was suggested that such an approach would be consistent with article 1(4) of the Model Law on Conciliation (see paras. 158-163 below).

Paragraph 1

20. Wide support was expressed to retain paragraph 1, as it provided for a clear criteria of the notion of "international" by referring to situations where the places of business of the parties were in different States.

Paragraph 2, subparagraphs (a) and (b)

21. Divergent views were expressed on whether to retain subparagraphs (a) and (b), which aimed at providing a further elaboration of the criteria to determine whether a settlement agreement was "international". Support was expressed to retain those provisions for the sake of consistency with article 1(4)(b) of the Model Law on Conciliation. However, views were expressed that those subparagraphs might result in expanding the scope of the instrument to settlement agreements concluded by parties that had their places of business in the same State. It was suggested that limiting the definition of "international" to paragraph 1 would be preferable for the sake of clarity and simplicity.

22. After discussion, it was widely felt that subparagraphs (a) and (b) could be retained provided that they were better aligned with article 1(4)(b) of the Model Law on Conciliation. Further, it was agreed that the form of the instrument might have an impact on whether to retain those subparagraphs in the instrument and that that matter should be left for further consideration.

Paragraph 2, subparagraph (c)

23. The Working Group agreed that the instrument should not apply to the enforcement of a settlement agreement concluded by parties that had their places of business in the same State, even if the enforcement were sought in another State. Therefore, it was agreed that subparagraph (c) should be deleted.

Paragraph 2, suggestions for additional subparagraphs

24. Suggestions were made to insert additional subparagraphs in paragraph 2 so that a settlement agreement or a conciliation would be international: (i) if the location of the conciliation institution where the settlement was reached was different from the places of business of the parties; or (ii) where the settlement agreement dealt with

matters of international trade. These proposals did not receive support for the reasons that they would unnecessarily broaden the scope of application of the instrument and create uncertainty.

Paragraph 3

25. The Working Group took note that paragraph 3 was based on article 1(6) of the Model Law on Conciliation, which aimed at expanding the notion of internationality and providing flexibility to parties. In the context of the preparation of the instrument, concerns were expressed that parties should not be in a position to determine whether or not the settlement agreement or the conciliation process was international, in particular if the instrument were to take the form of a convention. Furthermore, it was noted that such a provision, which amounted to an opt-in by parties could expand the scope of the instrument to purely domestic conciliation and settlement agreements.

26. After discussion, the Working Group agreed that paragraph 3 should be deleted if the instrument were to take the form of a convention. However, it was also noted that the matter might need to be considered further if the instrument were to take the form of model legislative provisions, which would complement the Model Law on Conciliation.

Paragraph 4

27. Paragraph 4 aimed at providing guidance on the determination of a party's place of business, where a party had more than one place of business or had none. With respect to that paragraph, a suggestion was made that the instrument could provide further guidance on, or a clear definition of, the term "place of business", possibly referring to the place where the party had substantive physical or economic presence or conducted substantial economic activity. It was further mentioned that subparagraph (a), in a sense, provided an indication of the meaning of that term and that it should be set out in a clearer fashion.

28. In response, it was suggested that there was no need for further guidance as the term was well-known and often used in the commercial law context and one that was acceptable in different legal traditions. It was also mentioned that it would be for the competent enforcing authority to determine the place of business and not for the instrument to elaborate further. It was also said that defining the "place of business" would fall outside the scope of the instrument.

29. It was generally felt that subparagraph (a) appropriately provided the link between the settlement agreement and the relevant place of business, in case a party had more than one place of business. Along the same lines, there was general support to retain the words "the dispute resolved by" and to delete the square brackets.

30. A question was raised whether the term "*établissement*" in the French version of draft provision 2 reflected situations where a party had representations in different locations. In response, it was recalled that the term "*établissement*" had been used consistently in the Model Law on Conciliation as well as in other UNCITRAL texts to translate the term "place of business".

31. After discussion, it was agreed that paragraph 4 could be retained, including the words "the dispute resolved by" outside square brackets.

Draft provision 3 (Settlement agreement)

32. A number of suggestions were made with respect to draft provision 3, which provided a definition of the term "settlement agreement", as contained in paragraph 13 of document A/CN.9/WG.II/WP.198.

33. One was to remove the requirement that settlement agreements be in writing ("writing requirement") in draft provision 3, yet the arguments were based on different grounds.

34. One argument was that the writing requirement would introduce an obstacle in the operation of the instrument, as it was often the case that settlement agreements

were concluded or amended orally, by conduct and also using electronic and other means. It was mentioned that the instrument should reflect such changes in trade usage and provide that the written form of a settlement agreement was mere proof of the existence of the agreement and not a requirement for its validity. In that context, reference was made to the deliberations at the thirty-ninth session of the Commission, when it adopted the amendments to article 7 (Definition and form of arbitration agreement) of the Model Law on International Commercial Arbitration ("Model Law on Arbitration").[6]

35. Yet another argument was that the writing requirement would not need to be repeated in both the definitions and the form requirements (draft provision 5). One view was that it would be better dealt with only as a form requirement. In response, it was said that there was merit in retaining the writing requirement in both the definitions and the form requirements, for the sake of clarity.

36. In general, there was significant opposition to removing the writing requirement entirely from the instrument. It was stated that because the purpose of the instrument was to facilitate enforcement of settlement agreements, it would be essential for the enforcing authority to be presented with a settlement agreement in writing in order to proceed with the enforcement process.

37. Another suggestion was to replace the words "that results from conciliation" with the words "after they have engaged in conciliation", as the former could be interpreted to require a strict causality between the conciliation process and the resulting settlement agreement. There was no support for that suggestion. Yet another suggestion was that retaining the words "in writing" in draft provision 3 and adding the words "is intended to" between the words "that" and "resolves" would eliminate the need for draft provision 5(1). That suggestion did not receive support because draft provision 5(1) dealt with form requirements and not with the objectives of the parties in concluding the settlement agreement. Another suggestion was that the definition of settlement agreement should in itself contain an international element, possibly defining it as an agreement concluded by international parties. That suggestion did not receive support, as the instrument already referred to the notion of "international" in both draft provisions 1 and 2.

38. After discussion, it was generally agreed that draft provision 3 could be retained without modification, with the understanding that whether the writing requirement was to be addressed in draft provision 3 or 5 or in both would be addressed at a later stage.

Draft provision 4 (Conciliation)

39. The Working Group considered draft provision 4, which dealt with the definition of conciliation, as contained in paragraph 15 of document A/CN.9/WG.II/WP.198. It was noted that draft provision 4 reflected the understanding of the Working Group at its sixty-third and sixty-fourth sessions that the scope of the instrument should be limited to settlement agreements resulting from conciliation, and that it was based on the definition of "conciliation" in article 1(3) of the Model Law on Conciliation.

40. One suggestion was made that the process whereby parties reached a settlement agreement should be defined more broadly so that the assistance of a third person would not be a requirement or a precondition. It was pointed out that such involvement could, in certain instances, be costly and burdensome. In response, it was stated that such an approach would broaden the scope of the instrument and be contrary to the understanding that the enforcement mechanism envisaged under the instrument should apply only to the extent that a settlement agreement resulted from conciliation, thus with the assistance of a third person (see also para. 70 below).

[6] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 146-176.

41. Nonetheless, the possibility of providing some flexibility to States was discussed. For example, if the instrument were to take the form of a convention, it could provide for a reservation whereby a State party could declare that it would either extend its application to settlement agreements reached without the assistance of a third person, or limit its application to only when a third person assisted the parties. It was also mentioned that if the instrument were to take the form of model legislative provisions, that possibility could be elaborated further, for instance, in a footnote. It was agreed that that matter could be discussed at a later stage in light of the deliberations on the form of the instrument.

42. A suggestion was made that "conciliation" should be qualified as a "structured/organized" process to emphasize that conciliation needed to be reliable and trustworthy. It was explained that such a qualification would rule out processes which took place in purely informal settings or mere negotiations. It was further explained that the objective of that suggestion was not to prescribe a specific technique of conciliation nor to introduce rigidity in the instrument, but to encompass processes that were: (i) governed by a legal framework; (ii) administered by an institution; or (iii) regulated in some manner (for example, conducted under specific conciliation rules), all of which could bring more confidence and certainty to the enforcing authority tasked with the enforcement procedure.

43. In that context, the Working Group recalled its discussion at its sixty-fourth session, where it had been stated that referring to a "structured/organized" conciliation process would constitute a departure from the definition contained in the Model Law on Conciliation (see A/CN.9/867, para. 117). It was reiterated that the terms "structured/organized" were not commonly used to qualify the conciliation process and could be understood differently. It was further stated that such qualification would likely introduce domestic requirements, which would reduce the attractiveness of the instrument. It was also mentioned that most provisions of the Model Law on Conciliation as well as the UNCITRAL Conciliation Rules were subject to party autonomy, providing much flexibility to the parties, and even in circumstances where those instruments were applicable, it would be difficult to determine whether the process had been structured or not.

44. Taking account of the divergence of views on the matter, the Working Group agreed to consider at a later stage of its current session: (i) whether to include such qualification in the instrument (for example, in draft provision 4, 5, or 6); (ii) if so, how to define "structured/organized"; and (iii) whether it should only be reflected in explanatory material accompanying the instrument. After discussion, it was agreed that draft provision 4 would be retained without such qualification until further consideration (see paras. 164-167 below).

45. Another suggestion with respect to draft provision 4 was that independence of the third person involved in the conciliation process should be highlighted (see also para. 168 below). No support was expressed for that suggestion because that matter would be better addressed in substantive provisions of the instrument, for example, draft provision 8(1)(e). It was pointed out that if the instrument were to take the form of model legislative provisions complementing the Model Law on Conciliation, that reference would be superfluous, as article 6(3) of the Model Law addressed the need for the conciliator to keep a fair treatment among the parties.

46. Regarding the words in square brackets in draft provision 4 ("irrespective of the basis upon which the conciliation is carried out"), it was clarified that they intended to address the question whether the instrument would apply to instances where the basis of conciliation was not an agreement by the parties to conciliate but for example, an obligation established by law or a suggestion of a court. There was general support for retaining those words outside square brackets, possibly including the additional wording as contained in article 1(8) of the Model Law on Conciliation.

47. As a drafting point, it was agreed that the words "(the "conciliator")" should be inserted after the words "third person or persons" in draft provision 4. Another general drafting point was that if the instrument were to take the form of model legislative

provisions complementing the Model Law on Conciliation, efforts should be made to not depart, to the extent possible, from the existing definitions in that Model Law.

Settlement agreements concluded in the course of judicial or arbitral proceedings

48. The Working Group considered whether the instrument should also apply to instances where parties had concluded a settlement agreement in the course of judicial or arbitral proceedings. Recalling its discussion at its sixty-fourth session, the Working Group confirmed its understanding that settlement agreements reached during judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award should fall within the scope of the instrument (see A/CN.9/867, para. 125).

49. The Working Group then considered whether settlement agreements concluded in the course of judicial or arbitral proceedings, and recorded as court judgments or arbitral awards should fall within the scope of the instrument, or be excluded in order to avoid possible overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention"), and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law.

50. Views were expressed that exclusion of those settlement agreements from the scope of the instrument would result in depriving the parties of the opportunity to utilize the enforcement regime envisaged by the instrument, and that possible complications resulting from multiple enforcement regimes could be handled by the competent enforcing authority. It was suggested that if the instrument were to take the form of a convention, States parties could be given the flexibility, through a reservation, to exclude settlement agreements recorded as court judgments or arbitral awards to the extent enforcement would be provided under another international instrument to which they were party. It was further suggested that if the instrument were to take the form of model legislative provisions, possible ways to articulate enforcement of settlement agreements recorded as court judgments or arbitral awards in relation to other relevant international instruments could be addressed.

51. Concerns were raised that such an approach might not be sufficient to guide the competent enforcing authorities regarding which instrument to apply in cases of overlap. Therefore, it was suggested to expressly exclude from the scope of the instrument settlement agreements recorded as court judgments or arbitral awards. The Working Group then undertook to consider the various options provided for in paragraph 21 of document A/CN.9/WG.II/WP.198.

52. Preference was expressed for option 2 in paragraph 21 (ii), which excluded settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards. It was further suggested that the language should be aligned with that in article 12 of the Choice of Court Convention, which dealt with judicial settlements (*transactions judiciaires*). It was underlined that the language used in the Choice of Court Convention could encompass procedures akin to homologation of settlement agreements, which were not necessarily rendered in the form of a judgment. It was noted that the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law, used similar terminology (see paras. 169-176 and 205-210 below).

53. In that connection, the Working Group then considered whether settlement agreements not concluded in the course of judicial or arbitral proceedings but recorded as court judgments or arbitral awards should fall within the scope of the instrument. Divergent views were expressed and the Working Group deferred consideration of that question to a later stage of its current session (see para. 169 below). Similarly, the Working Group agreed to consider at a later stage whether that matter could be dealt with in draft provision 1, 3 or 4.

54. The Working Group confirmed the understanding that the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument (see also A/CN.9/867, para. 131), and agreed to revisit that question in light of its decision on matters discussed in paragraph 53 above.

Exclusions (consumer, family and employment matters)

55. The Working Group considered draft formulations on exclusions of settlement agreements dealing with consumer, family and employment law matters, as contained in paragraph 23 of document A/CN.9/WG.II/WP.198. It was generally felt that the provision on exclusions should become part of draft provision 1 on the scope of application.

56. Nonetheless, it was questioned whether express exclusion of family and employment law matters was necessary, taking into account that a settlement agreement dealing with those matters would not be considered commercial. It was suggested that, if those exclusions were retained in the instrument, they should be presented as an illustrative list of possible exclusions. That suggestion did not receive support.

57. With respect to the words “for personal, family, or household purposes”, a suggestion was made that the instrument should instead refer to “consumers”, “consumption purposes”, or “consumer protection law”. In a similar context, a suggestion was made to delete the word “household”.

58. In response, it was recalled that the Working Group had considered the issue at its sixty-fourth session and the fact that the use of the term “consumer” might be too generic and could be understood differently in various jurisdictions was reiterated (see A/CN.9/867, para. 107). It was further recalled that those words were initially used in the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) (art. 4 (a)) as well as in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (article 2(a)) to provide an objective criterion for excluding from their scope sale of goods for consumer purposes.

59. While there was general support for retaining the current descriptive wording, it was suggested that the instrument could include explicit reference to “consumers”. Article 2 of the Choice of Court Convention was cited as an example that included both descriptive language and a reference to consumers in parentheses.

60. It was also agreed that subparagraph (b) in both formulations should be revised to make it clear that settlement agreements relating to “inheritance” or “succession” were excluded from the scope of the instrument.

Settlement agreements involving public entities

61. The Working Group then considered the provisions addressing the questions of liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*) and state immunity, as contained in paragraph 24 of document A/CN.9/WG.II/WP.198. The Working Group confirmed its understanding that the instrument would not have any impact or interfere with the public international law aspects of state liability or state immunity. As to the latter, a suggestion was made that that point could be explicitly stated in the instrument and reference was made to article 2(6) of the Choice of Court Convention as a possible basis for formulation.

62. The Working Group also reaffirmed its decision that settlement agreements involving States and other public entities should not be automatically excluded from the scope of the instrument. Suggestions were made to the possible formulations for a declaration on the basis of option 2 in paragraph 24 of document A/CN.9/WG.II/WP.198. One was that the possible exclusion should be broader, so that it not only dealt with settlement agreements where the declaring State or the government agency or any person acting on behalf of that State was a party, but rather where any State or a government agency or any person acting on behalf of a State was

a party to the settlement agreement. Another was to delete the reference to "or any person acting on its behalf" as that phrase could be interpreted broadly. While it was generally agreed that flexibility should be provided to States on the matter, the Working Group decided to consider that question further in light of its deliberations on the form of the instrument.

B. Form requirements of settlement agreements

Draft provision 5 (Form of settlement agreement)

63. The Working Group considered draft provision 5, which dealt with form requirements of settlement agreements, as contained in paragraph 25 of document A/CN.9/WG.II/WP.198.

Paragraph 1

64. The Working Group generally agreed that settlement agreements should be in writing, and be signed by the parties, so as to provide certainty in the enforcement procedure. The Working Group agreed to delete the phrase in the first square brackets, which referred to the intent of the parties to be bound by the terms of the agreement, as it would be redundant.

Paragraph 3

65. The Working Group agreed to delete the phrase in square brackets in subparagraph (a).

66. As a drafting point, it was suggested that subparagraphs (b) and (c) could be simplified or replaced by a cross reference to article 9(2) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005). After discussion, it was agreed that those subparagraphs provided for a functional equivalence rule for writing and signature requirements and should remain unchanged for the sake of consistency among UNCITRAL standards.

Other form requirements

A single document

67. A suggestion was made that the instrument should require that the settlement agreement should be a single document. In that respect, it was recalled that the Working Group had discussed the matter at its sixty-fourth session (see A/CN.9/867, para. 134). Doubts were expressed about introducing such a requirement as it would not necessarily reflect the current practice where the form and content of settlement agreements varied greatly. It was mentioned that settlement agreements might consist of more than one document including annexes, and might comprise of different forms which might not necessarily be captured in a single document. It was pointed out that introducing such a requirement would make the process rigid, putting additional burden on parties.

68. In response, it was said that introducing such a requirement would enhance certainty and make it possible to expedite the enforcement procedure, as the content of what was to be enforced would be fully set out in a single document.

69. After discussion, the Working Group agreed to further consider at a later stage of the current session whether the instrument would require that a settlement agreement should be in the form of "a complete set of documents" and whether that reference should be contained in draft provision 5 on form of settlement agreements or in draft provision 7 on application for enforcement (see paras. 177-185 below).

Paragraph 2

70. With regard to paragraph 2, while some doubts were expressed about including additional form requirements to those stipulated in paragraph 1, it was generally felt that the instrument would need to provide, in some fashion, that the settlement

agreement should indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation. It was generally felt that that indication would distinguish a settlement agreement from other contracts and provide for legal certainty, facilitate the enforcement procedure and prevent possible abuse. However, it was also emphasized that the additional requirement should not be burdensome and should be kept simple to the extent possible (see also paras. 40 and 41 above).

71. As to how to formulate the additional requirement, it was noted that a mere indication of the conciliator's identity in the settlement agreement would not be sufficient. Therefore, one view was that the conciliator should be required to sign the settlement agreement. In response, it was mentioned that requiring the conciliator to sign the settlement agreement posed difficulties, both legal and practical. It was said that, in certain jurisdictions, conciliators were advised not to sign such agreements as it could lead to liability issues, conflicts with professional obligations and questions about the intent of the parties to the settlement agreement.

72. It was suggested that the instrument should provide more flexibility in the means for a party to demonstrate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation. As an alternative to requiring the signature of a conciliator in the settlement agreement, it was suggested that a declaration, by which the conciliator would attest its involvement in the conciliation process, could suffice. It was explained that such a declaration would usually be attached to the settlement agreement, but not become part of it. Another suggestion was that the agreement to conciliate would provide sufficient evidence of the involvement of the conciliator in the process. However, that suggestion did not receive support.

73. During the discussion, attention was drawn to the fact that the Model Law on Conciliation did not include any provisions on form requirements of settlement agreements, and that introducing form requirements in the instrument would create a discrepancy with the Model Law. Along the same lines, suggestions were made that requiring a signature or an attestation need not necessarily be formulated as a form requirement in draft provision 5 but rather could be formulated as a requirement in the application process in draft provision 7. In support of that view, it was stated that the involvement of a conciliator should be a question of proof at the stage of application for enforcement and that parties should be left to provide evidence thereof. Based on similar grounds, it was mentioned that the requirement could be construed as a defence, where the party resisting enforcement would have the burden of proving that a conciliator was not involved in the process or that the settlement agreement had not resulted from conciliation.

74. During the discussion, a suggestion was made that in preparing the instrument, it would be useful to include standard forms or model declarations by conciliators. That suggestion did not receive support.

75. Recognizing the need to balance the necessity for certainty and to preserve flexibility, the Working Group agreed to provide that a settlement agreement should indicate that it had resulted from conciliation. It was further agreed that that indication could be achieved by the conciliator signing the settlement agreement or providing a separate declaration, which would attest its involvement in the conciliation process. In that context, it was also clarified that a signature or an attestation by the conciliator would simply be to prove its involvement in the process and should not be construed as an endorsement of the settlement agreement nor as an indication that the conciliator was a party to the agreement. The Working Group decided to consider the placement of such a provision at a later stage of its current session in light of the suggestion made in paragraph 73 above (see paras. 186-190 below).

C. Direct enforcement and application for recognition and enforcement

Draft provisions 6 (Recognition and enforcement) and 7 (Application for enforcement)

76. The Working Group considered draft provision 6, which addressed the principle of enforcement, as well as draft provision 7 on application for enforcement, both of which were contained in paragraph 31 of document A/CN.9/WG.II/WP.198.

77. Focusing on the notion of "recognition" of settlement agreements by courts, the Working Group recalled its discussion at its sixty-third and sixty-fourth sessions where divergent views were expressed on whether the instrument should address recognition of settlement agreements (see A/CN.9/861, paras. 71-79 and A/CN.9/867, para. 146).

78. At the current session, it was generally felt that in the interest of flexibility, the text of the instrument would not necessarily include a reference to "recognition" in light of the different procedures akin to recognition and the effects attached thereto in various jurisdictions. It was said that settlement agreements did not have res judicata effect, and if recognition were to be provided for in the instrument, it might, in certain jurisdictions, confer such res judicata or preclusive effect. In addition, it was said that recognition usually meant giving legal effect to a public act emanating from another State, such as court decisions, rather than to private agreements between parties.

79. Instead of using the term "recognition", it was suggested that the instrument could incorporate wording based on article 14 of the Model Law on Conciliation which referred to settlement agreements being "binding and enforceable", acknowledging the private nature of the settlement agreement to be enforced, and providing for neutral language. It was recalled that when the Commission adopted article 14 at its thirty-fifth session, it carefully considered the implications of using the words "binding and enforceable". At that session, the Commission agreed that: (i) those words were intended to reflect the common understanding that conciliation settlements were contractual in nature; and (ii) while the word "binding" reflected the creation of a contractual obligation as between the parties to the settlement agreement, the word "enforceable" reflected the nature of that obligation as susceptible to enforcement by courts, without specifying the nature of such enforcement.[7]

80. It was generally felt that the reference in the instrument to the binding nature of settlement agreements would accommodate various procedures that existed in different national procedural laws prior to enforcement, and that aimed at protecting or acknowledging rights of the parties. Noting that the non-binding nature of settlement agreements was a ground for resisting enforcement in draft provision 8(1)(b), it was agreed to consider at a later stage of the current session articulation between those provisions (see para. 87 below).

81. After discussion, the Working Group generally felt that draft provision 7(2) should provide that settlement agreements should be treated as binding and should be enforced or enforceable in accordance with the rules of procedures of the enforcing State, under the conditions laid down in the instrument. The Working Group agreed to delete draft provision 6, as it would be redundant with draft provision 7(2). It was also agreed that draft provision 7(3) could be retained in its current form (see paras. 147-157 and 200-204 below).

82. Suggestions were made that draft provision 7 could also provide that the enforcing authority (i) should act expeditiously, and (ii) should have the right to request any further documents from the parties to proceed with the enforcement, along the lines of article 13(2) of the Choice of Court Convention (see also para. 183 below).

83. In the context of those discussions and in relation to the question of direct enforcement of settlement agreements as indicated in paragraph 33 of document

[7] Ibid., *Fifty-seventh Session, Supplement No. 17* (A/57/17), para. 124.

A/CN.9/WG.II/WP.198, it was recalled that the notion of recognition in the context of international commercial arbitration found its origin in both the Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) ("Geneva Convention") and the New York Convention. In particular, it was recalled that the Geneva Convention required as a condition for recognition and enforcement of an award that proof be supplied that the award had become final in the country in which it was made (article 4(2) of the Geneva Convention). The omission of that requirement in the New York Convention, thereby permitting direct enforcement of awards in the country of enforcement, was considered as an important step to facilitating enforcement of arbitral awards. Along the same lines, it was reiterated that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek enforcement directly in the State of enforcement without a review or control mechanism in the State where the settlement agreement originated from as a precondition.

D. Defences to recognition and enforcement

Draft provision 8 (Grounds for refusing enforcement)

84. The Working Group considered draft provision 8, which addressed possible defences to enforcement, as contained in paragraph 35 of document A/CN.9/WG.II/WP.198.

Paragraph 1, subparagraph (a)

85. There was a general agreement in the Working Group to retain subparagraph (a), without the text in square brackets "[under the law applicable to it]". It was recalled that that phrase which had been initially contained in the New York Convention was omitted from the Model Law on Arbitration because it was viewed as providing an incomplete and potentially misleading conflict-of-laws rule.

Paragraph 1, subparagraph (b)

86. The Working Group considered the various grounds listed in subparagraph (b).

87. Regarding the ground that the settlement agreement was not binding on the parties, it was suggested that inclusion of that ground would be contrary to draft provision 7(2) as revised by the Working Group (see paras. 80 and 81 above) and should be deleted.

88. Regarding the ground that the settlement agreement was not a final resolution of the dispute, it was said that such a ground might be useful to retain, in particular to avoid situations where parties would submit a draft agreement, or a text that would not be considered as a final determination of the dispute by a party. It was questioned whether the finality of the settlement agreement should be dealt with in the definitions.

89. In relation to the phrase in square brackets "[or relevant part thereof]", it was said that that phrase should be retained without square brackets since a settlement agreement was defined as an agreement that might solve all or part of a dispute in draft provision 3. It was suggested to clarify the operation of that provision in complex settlements where parties would settle parts of their dispute over time but might wish to enforce the entire agreement after all matters had been resolved.

90. Regarding the ground that the settlement agreement had been subsequently modified by the parties, there was general agreement that that ground should be retained, and could possibly be merged with the grounds in subparagraph (c). It was suggested that that ground resonated with the form requirement that settlement agreements should be submitted in one complete set of documents for enforcement, and that, therefore, it might be further considered in light of that form requirement (see paras. 67-69 above and 177-185 below).

91. Regarding the ground that the settlement agreement contained conditional or reciprocal obligations, it was said that those terms had legal connotations, and could be interpreted differently in different jurisdictions. It was suggested that a more descriptive language could be used to refer to those obligations. Further, it was pointed out that it was usual for settlement agreements to contain such types of obligations. Therefore, the ground for refusing enforcement should not be that settlement agreements contained such obligations, but that the conditions stipulated in the agreement were not met or that the obligations had not been performed or complied with. It was suggested to clarify that the party either requesting or resisting enforcement should be given the right to avail itself of that ground. After discussion, the Working Group agreed to retain the ground "contains reciprocal or conditional obligations" with adequate modifications reflecting its deliberations. The Working Group agreed to consider at a later stage whether subparagraph (b) as amended should be merged with subparagraph (c).

Paragraph 1, subparagraph (c)

92. The Working Group considered the first ground provided in subparagraph (c) ("the enforcement of the settlement agreement would be contrary to its terms and conditions"). It was noted that that ground was based on party autonomy, meaning that the enforcement of the settlement agreement should not run contrary to what the parties had agreed in the settlement agreement, including any dispute resolution clause.

93. While there was support for retaining the text as currently drafted, a concern was raised that the text would need to be further clarified as it could open doors for a wide range of defences.

94. With regard to the question whether a party would be able to resist enforcement based on that ground if the settlement agreement contained a dispute resolution clause (see A/CN.9/WG.II/WP.198, para. 38), it was said that the purpose of a dispute resolution clause was generally to address matters pertaining to the performance of obligations in the settlement agreement and not those pertaining to enforcement.

95. It was also stated that the existence of a dispute resolution clause in the settlement agreement should not be a ground for resisting enforcement in the instrument, as there were existing mechanisms to address those issues. For example, it was mentioned that if there was an arbitration clause in the settlement agreement, the enforcing authority would generally refer the parties to arbitration in accordance with article II(3) of the New York Convention.

96. A suggestion was made that the ground should be limited to instances where the manner in which the enforcement was carried out would be contrary to the terms of the settlement agreement.

97. In response to a suggestion to add the words ", including any provision limiting the application of this instrument" at the end of that ground, questions were raised on how that would operate if the instrument were to require opt-in by the parties.

98. After discussion, it was agreed that the latter two grounds contained in subparagraph (c) ("the obligations in the settlement agreement have been performed" and "the party applying for enforcement is in breach of its obligations under the settlement agreement") should be retained. As to the first ground contained in subparagraph (c) ("the enforcement of the settlement agreement would be contrary to its terms and conditions"), it was agreed that the wording was acceptable but might need further elaboration to provide a clear meaning and scope in accordance with the deliberations, as it should not inadvertently introduce defences not contemplated.

Paragraph 1, subparagraph (d)

99. It was noted that subparagraph (d) was based on article II(3) and article V(1)(a) of the New York Convention. It was recalled that subparagraph (d) sought to reflect the understanding of the Working Group that the instrument should not give the enforcing authority the ability to interpret the validity defence to impose

requirements in domestic law, and that consideration of the validity of settlement agreements by the enforcing authority should not extend to form requirements (see A/CN.9/867, paras. 159-161).

100. A suggestion was made to add the words "voidable, or legally voided" after the word "void" to put it beyond doubt that the scope of subparagraph (d) covered instances of fraud, mistake, misrepresentation, duress and deceit. That suggestion did not receive support, as it was agreed that the current draft was sufficiently broad to encompass those elements.

101. Another suggestion was to delete the words "under the law to which the parties have subjected it" as it would be preferable to leave the determination of the applicable law to the enforcing authority. In support of that suggestion, it was said that mandatory laws, not necessarily the law chosen by the parties, could apply thereby limiting party autonomy. In response, it was said article V(1)(a) of the New York Convention contained a similar provision and that it would be preferable not to depart from such language. It was clarified that in any case party autonomy operated within the limits of mandatory laws and public policy. Therefore, it was agreed that those words would be retained in subparagraph (d).

102. In the context of the consideration of subparagraph (d), a question was raised whether the instrument should more clearly differentiate between the procedure for enforcement of settlement agreements on the one hand, and the procedure regarding the validity of the settlement agreement on the other, which might be carried out by a different authority.

Paragraph 1, subparagraph (e)

103. The Working Group considered subparagraph (e), which addressed the possible impact of the conciliation process, and of the conduct of conciliators, on the enforcement process. The Working Group recalled that when it considered that matter at its sixty-fourth session, the emerging view was that serious misconduct by the conciliator during the conciliation process, which had an impact on its outcome, could probably be covered by other defences in the instrument (see A/CN.9/867, para. 175).

104. At the current session, diverging views were expressed on that provision. In support of including, as a separate ground, failure to maintain fair treatment of the parties as well as failure to disclose circumstances likely to give rise to justifiable doubts about impartiality and independence of the conciliator, it was said that such defence would ensure consistency with articles 5(4), 5(5) and 6(3) of the Model Law on Conciliation, and that such elements were usually found in codes of ethics for conciliators. It was underlined that subparagraph (e) would underscore the importance of compliance with due process in the conciliation. Those in support of retaining subparagraph (e) clarified that the provision did not necessarily require the conciliator to be independent and impartial, but required it to disclose to the parties circumstances likely to give rise to justifiable doubts about impartiality and independence.

105. In the context of those discussions, the Working Group was referred to paragraphs 52 and 55 of the Guide to Enactment and Use of the Model Law on Conciliation. Paragraph 52 clarified that failure by the conciliator to disclose information likely to raise doubts as to its impartiality or independence did not, in and of itself, create a ground for setting aside a settlement agreement that would be additional to the grounds already available under applicable contract law. Paragraph 55 provided that the reference in the Model Law to maintaining fair treatment of the parties was intended to govern the conduct of the conciliation process and not the contents of the settlement agreement.

106. Doubts were expressed about subparagraph (e) on the basis that: (i) misconduct by the conciliator during the conciliation process, which had an impact on its outcome, could probably be covered by other defences in the instrument, such as those in subparagraph (d); (ii) conciliation was a voluntary process, from which parties were free to withdraw at any time, and therefore the misconduct of the

conciliator should not have an impact at the enforcement stage; (iii) subparagraph (e) could lead to many litigations, making the enforcement cumbersome, which would run contrary to the purpose of the instrument; and (iv) the court at the place of enforcement might not be best placed to consider issues pertaining to the conciliation process which, in most cases, would have taken place in a different State. On a practical note, views were expressed that it was rare for conciliators to make disclosures referred to in subparagraph (e), as conciliators did not have the power to impose any outcome on the parties.

107. To address those concerns, it was suggested to limit the scope of subparagraph (e) to instances where the conciliator's misconduct had a direct impact on the settlement agreement (see also para. 194 below). A further suggestion was to limit the scope to situations where the conciliator "manifestly" failed to maintain fair treatment of the parties. Another suggestion was to describe objectively, and give examples of, situations that were meant to be covered under subparagraph (e) in any explanatory material, or in a footnote to the provision if the instrument were to take the form of model legislative provisions.

108. As a matter of drafting, it was suggested that subparagraph (e) should be split into two separate subparagraphs: one dealing with fair treatment and the other dealing with disclosure.

109. After discussion, the Working Group agreed to further consider issues mentioned above at a later stage of its current session (see paras. 191-194 below).

Paragraph 2

110. With respect to the chapeau of paragraph 2, it was clarified that the wording of the chapeau covered situations where the enforcing authority would consider the defences on its own initiative (ex officio) and that it was based on language used in the New York Convention and the Model Law on Arbitration.

111. With respect to paragraph 2(a), a suggestion was made that the applicable law for considering whether the subject matter of the dispute was capable of settlement by conciliation should be the law chosen by the parties rather than the law of the State where enforcement was sought. Another suggestion was made to place paragraphs 1(a) and 1(e) in paragraph 2. Those suggestions did not receive support.

112. After discussion, the Working Group agreed to retain paragraph 2 in its current form.

Additional defences

Scope and other form requirements

113. As a general point, a suggestion was made that the instrument should clarify that parties would be able to raise issues with regard to the scope of application of the instrument as well as the non-compliance of form requirements at the enforcement stage.

114. It was generally agreed that if a settlement agreement did not fall within the scope or did not meet the form requirements, it would not be enforceable under the regime envisaged under the instrument. However, there were divergent views on how to reflect that understanding in the instrument.

115. One was that the different sections of the instrument (such as scope, definitions, form requirements, application to enforcement, grounds for refusal to enforcement) should be construed as being interrelated and therefore it would not be necessary to import elements in those sections into the defences.

116. Another was that it could be clearly stipulated in draft provision 7 on the application for enforcement that, to be admissible for enforcement, the settlement agreement must fall within the scope of the instrument and meet the requirements in the instrument. The possible inclusion in draft provision 7 of cross references to draft provision 5 on form requirements was mentioned. It was also mentioned that any

controversy on those matters would be addressed through rules of procedure of the State where enforcement was sought in accordance with draft provision 7(2). It was also noted that those matters should be treated differently from the defences provided in draft provision 8. Yet another view was that the parties would be able to raise them along with the defences provided in draft provision 8.

117. After discussion, a suggestion to introduce a term in the scope provision to be used throughout the instrument, which would include all of the components relating to the settlement agreement in the instrument (such as that it was commercial, international and resulting from conciliation), received support (see paras. 145-146 below).

Enforcement of the settlement agreement contrary to a decision of another court or competent authority

118. While it was suggested that the instrument could provide that the enforcing authority might refuse enforcement if it found that the enforcement would be contrary to a decision of another court or competent authority, it was generally felt that there was no need to include such a defence, as it would inadvertently complicate the enforcement procedure, invite forum shopping by parties and would generally be covered through the defences already provided in draft provision 8 (para. 8(1)(d) or 8(2)(b)).

Set-off

119. It was also agreed that there was no need to include a separate provision to deal with instances where the settlement agreement might be used for set-off purposes.

E. Other aspects

Confidentiality and the enforcement process

120. The Working Group then considered whether the instrument would need to address the possible contradiction that might arise between the confidential nature of conciliation and the need to disclose information during the enforcement process.

121. It was mentioned that articles 9 and 10 of the Model Law on Conciliation dealt with the matter in an appropriate manner, including possible exceptions to confidentiality (agreement by the parties, to the extent required by the law, or for the implementation or enforcement of a settlement agreement). It was suggested that if the instrument were to be a convention, those articles could be incorporated with some adjustments, as that would also provide guidance to less experienced practitioners and users of conciliation. However, the overwhelming view was that there was no need to include a provision on confidentiality in the instrument, as it was a matter that would be covered by the domestic legislation in the respective enforcing jurisdictions. After discussion, it was agreed that the instrument would not include a separate provision on confidentiality.

Relationship of the enforcement process with judicial or arbitral proceedings

122. The Working Group then considered draft provision 9, which addressed how an enforcing authority would treat a situation where an application (or claim), which might impact the enforcement, had been made to a court, an arbitral tribunal or any other competent authority, as provided for in paragraph 47 of document A/CN.9/WG.II/WP.198. It was recalled that draft provision 9 was based on article VI of the New York Convention which dealt with an application for setting aside or suspension of an arbitral award.

123. It was generally agreed that it would be appropriate for the enforcing authority to be given the discretion to adjourn the enforcement process, if an application (or claim) relating to the settlement agreement had been made to a court, arbitral tribunal or any other competent authority, which might affect the enforcement process.

124. Noting that the heading of the draft provision included the word "substantive", the Working Group considered three broad categories of applications (or claims), which the enforcing authority would have to take into account. The first category would be an application (or claim) about the substance or content of the settlement agreement. The second category would be an application (or claim) to annul the settlement agreement. The third category would be an additional application for enforcement of the same settlement agreement (in another State or in the same State) or an application by another party to the settlement agreement to enforce the same settlement agreement ("parallel enforcement applications"). A suggestion was made that if the draft provision were to include instances of parallel enforcement applications, the latter part of draft provision 9 in square brackets would need to be revised as the enforcing authority might also order the party applying for enforcement to give suitable security.

125. After deliberation, it was agreed that the discretion provided to the enforcing authority in draft provision 9 should be retained in the instrument and that the first square bracketed texts should remain outside square brackets. It was also agreed that draft provision 9 should not differentiate among the categories of applications (or claims), and the word "substantive" in the heading should be deleted. It was also agreed that the second square bracketed text should be revised to indicate that any party might be ordered to give security.

Parties' choice regarding the application of the instrument

126. A wide range of views were expressed on whether the application of the instrument would depend on the consent of the parties to the settlement agreement.

127. One view was that the parties' choice should not have any impact on the application of the instrument and therefore, the instrument should apply provided that the requirements therein were met and no grounds for resisting enforcement existed.

128. Another view was that parties should be given the choice to decide whether the settlement agreement would be enforceable under the instrument. In that context, the opt-in approach (which would require consent by the parties for the application of the instrument) and the opt-out approach (which would allow parties to exclude the application of the instrument) were discussed.

129. In support of the opt-in approach, it was mentioned that the enforceability of the settlement agreement would be a novel feature which parties might not be aware of, and that providing for mandatory enforceability could harm the amicable nature of the conciliation process. Further, it was said that the opt-in approach would be in line with the voluntary nature of the conciliation process. It was suggested that an opt-in mechanism could be incorporated in draft provision 8, as provided in paragraph 51 of document A/CN.9/WG.II/WP.198. As a practical suggestion, it was mentioned that the instrument could include standard forms for the parties to use when opting-in.

130. During the discussion on the opt-in approach, it was suggested that whether to require parties' consent to the application of the instrument was not necessarily a question to be dealt with in the instrument, but a question that could be addressed by each State when adopting or implementing the instrument. Therefore, it was suggested that each State party to the instrument should be given the flexibility to declare (if the instrument were to be a convention) that it would treat settlement agreements as binding and enforce them to the extent that the party applying for enforcement indicated the parties' agreement to enforcement under the instrument.

131. Views were expressed that the opt-in approach would run contrary to the underlying objective of widely promoting the use of international conciliation in trade, as it would narrow the use of the instrument. Further, it was pointed out that efforts to carefully define the scope, the form requirements, the application process as well as possible defences were on the basis that if those elements were fulfilled, a settlement agreement would be enforceable cross-border. If, at the end, enforceability was left to the discretion of the parties, it would have been possible to adopt a more

lenient approach in those provisions. In addition, it was said that an opt-in mechanism would be difficult for parties to implement as they would have to assess the various legal consequences of such a choice. It was further pointed out that when parties concluded a settlement agreement, they would generally expect the obligations therein to be performed, in accordance with the principle of pacta sunt servanda, and requiring an opt-in would run contrary to that expectation.

132. It was said that article 6 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) was a good example of a convention that provided parties to an international sale contract the autonomy to exclude the application of the Convention, and would be a good model for an opt-out approach.

133. A question that arose during the discussion was with regard to the means to record the possible opt-in or opt-out by the parties, including whether it could be done in the agreement to conciliate, in the settlement agreement itself or in a separate document (see para. 198 below).

134. It was also mentioned that the issue at hand was not free-standing but one that needed to be considered in a broader context, including the form of the instrument as well as the different approaches explored by the Working Group throughout the instrument. Therefore, the Working Group agreed to consider the matter further once it had discussed the form of the instrument, including the possible relation of the opt-in and opt-out approaches with other provisions in the instrument and the manner in which the consent of the parties would be captured (see paras. 195-199 below).

F. Form of the instrument

135. The Working Group had a preliminary discussion about the form of the instrument. While support was expressed for preparing either a convention or model legislative provisions, there was little support for preparing a guidance text.

136. Those in support of preparing a convention highlighted the cross-border nature of the enforcement process and the need for a binding instrument, which would bring certainty. It was mentioned that, compared to model legislative provisions, a convention would underscore the importance of conciliation as an alternative dispute resolution method and thus, greatly contribute to its promotion in international trade.

137. It was mentioned that the New York Convention had paved the path for cross-border enforcement of arbitral awards and that a similar path should be followed for enforcement of settlement agreements. It was also stated that the absence of a text similar to the New York Convention for conciliation was one of the reasons why conciliation was not so often used in commercial disputes. It was also stated that even if the instrument were to be a convention, States could be provided flexibility through declarations or reservations.

138. Those in support of preparing a convention also noted the possibility of preparing model legislative provisions that could support States in domestic implementation of the convention. It was further mentioned that while a convention would aim at cross-border aspects of enforcement, model legislative provisions could provide guidance to States in implementing a domestic legislative framework for enforcement of settlement agreements. In that context, it was stated that such model legislative provisions would not aim at harmonizing respective legislative frameworks on conciliation as its focus would be on enforcement aspects.

139. Those in support of preparing model legislative provisions highlighted the fact that there was currently a lack of a harmonized approach to enforcement of settlement agreements, both in legislation and in practice. It was further mentioned that the notion of conciliation, more so the concept of enforcement of settlement agreements resulting from conciliation, was quite new in certain jurisdictions and that providing a uniform regime through the preparation of a convention might not be desirable nor feasible. In short, it was argued that the current divergence and, in some cases, non-existence of practice did not lend itself to harmonization efforts through the preparation of a convention, but rather required a more flexible approach. It was

mentioned that model legislative provisions would be desirable in order to be consistent with the work previously developed by UNCITRAL in the field of conciliation. Further, it was mentioned that the aim should be to identify additional common denominators which would either add substance to article 14 of the Model Law on Conciliation or provide for a stand-alone legislative regime for enforcement.

140. It was said that model legislative provisions would also highlight the usefulness of conciliation in international trade and could effectively lead to harmonization. It was mentioned that a convention could be prepared at a later stage, reflecting how the model legislative provisions were adopted in various jurisdictions and addressing any difficulties that might arise in that practice. It was also stated that a convention once adopted would be of a normative nature and would be difficult to amend for reflecting possible developments.

141. Differing views were expressed as to whether model legislative provisions would take the form of amendments to the Model Law on Conciliation expanding its article 14 or a stand-alone text dealing with enforcement issues. It was said that if the Working Group were to adopt model legislative provisions, which would not be compatible with the provisions of the Model Law on Conciliation, that might require further confirmation from the Commission.

142. The Working Group also discussed the suggestion to possibly consider preparing two separate but parallel instruments, which would be complementary in nature. While some doubts were expressed about the effectiveness of such an approach, it was noted that there would not be significant difference in those two instruments and that it would be worth pursuing it.

143. After discussion, it was agreed that various options could be explored, including, for example, preparing both types of texts in parallel or preparing model legislative provisions first to be followed by a convention. Recognizing the divergence in views on the form of the instrument, the Working Group agreed to continue its discussion on the substantive provisions of the instrument and to revisit the issue of the form at a later stage of its current session (see paras. 211-213 below).

G. Further consideration of issues

144. After completion of its first reading of document A/CN.9/WG.II/WP.198, the Working Group continued its deliberation on issues left for further consideration.

Draft provision 1 (Scope of application)

Generic term to refer to settlement agreements covered by the instrument

145. The Working Group recalled its decision to possibly introduce a generic term to refer to settlement agreements that would fall under the scope of the instrument and that would include all of the relevant components mentioned in the instrument (see para. 117 above). A suggestion to use the term “covered settlement” did not receive support, as it would be introducing new terminology which would have to be further explained.

146. After discussion, the Working Group agreed that, subject to further consideration on the form of the instrument, draft provision 1 should introduce a generic term “settlement agreement”, which would refer to “an agreement in writing, that is concluded by parties to a commercial dispute, that results from international conciliation, and that resolves all or part of the dispute” (see para. 152 below).

“Treatment as binding”

147. On the use of the term “recognition” in the instrument, there was a suggestion to retain it in the instrument as it would provide for consistency with existing instruments including the New York Convention and as it would be broader than the term “binding”. The Working Group recalled its discussion on the use of the term “recognition”, and its decision to further consider whether to provide, in line

with article 14 of the Model Law on Conciliation, that settlement agreements should be treated as binding, thereby avoiding the use of the term "recognition" (see paras. 77-81 above).

148. The Working Group considered whether draft provision 1 should refer to the notion of treatment of settlement agreements as binding, in addition to enforcement. It was suggested that the instrument should not delve into the conditions for treating settlement agreements as binding, and therefore the scope provision should be limited to enforcement. However, it was said that if such an approach were to be adopted, the instrument would not cover, in certain jurisdictions, situations where settlement agreements were used, for instance, as a defence against a claim.

149. It was pointed out that article 14 of the Model Law on Conciliation already referred to settlement agreements being "binding and enforceable" and if the instrument were to take the form of model legislative provisions, it would not need to repeat those terms. However, it was pointed out that article 14 merely expressed that a contractual obligation, "binding" on the parties, should be "enforceable" by State courts, and only represented the smallest common denominator among States.

150. A suggestion was made to avoid referring to the notions of "recognition", "treatment as binding", or "enforcement" in draft provision 1 and to deal with those notions in a separate provision. It was suggested that that provision would state that a party might apply to have a settlement agreement enforced or treated as binding between the parties in accordance with the instrument.

151. However, it was felt that the purpose of the instrument would need to be clearly spelled out, preferably in draft provision 1. Further, it was pointed out that the notion of an agreement being binding between the parties would not necessarily mean that parties could use the agreement as a defence, as the term "binding" merely referred to a characteristic of a settlement agreement. A suggestion was made to refer to the legal effect of settlement agreements that could be used in defence against a claim to the same extent as in enforcement proceedings.

152. Accordingly, it was suggested draft provision 1 could read along the following lines: "(1) The [instrument] applies to an agreement in writing that is concluded by parties to a commercial dispute, that results from international conciliation and resolves all or part of the dispute ("settlement agreement"). (2) A settlement agreement shall be enforced in accordance with the rules of procedure of [this State][the State where enforcement is sought] and shall be given effect in defence against any claim to the same extent as in enforcement proceedings".

153. It was pointed out that a settlement agreement could be raised as a defence in different procedural contexts, which would be addressed differently in various jurisdictions, and that draft provision 1(2) was not comprehensive enough to cover all such possibilities. Therefore, it was suggested to indicate in draft provision 1(2) that the use of settlement agreements in defence against a claim should be in accordance with the national procedural framework of the State where the claim was brought, so as to comprehensively cover the various national procedural frameworks in relation thereto. In addition, as draft provision 1(2) addressed the modalities for enforcement, it was questioned whether draft provision 1(2) would be better placed under draft provision 7, which dealt with the applications for enforcement.

154. A different proposal was made to address the issue more generally, if the form of the instrument were to be a convention, by introducing text similar to article VII (1) of the New York Convention with relevant adjustments. It was said that such a provision would retain the reference to national procedural frameworks, with the added benefit of allowing States that would have more favourable conditions in their national legislation for enforcement than those provided under the instrument to apply such more favourable legislation.

155. After having heard a number of suggestions, the Working Group considered the following proposal in relation to draft provision 1(2): "A settlement agreement shall be enforced and shall be given effect in defence against any claim made by either party to the settlement agreement [as far as the defence is available in national law]

to the same extent as in enforcement proceedings [in accordance with the rules of procedure of the State where enforcement is sought and subject to (the provisions on defences in the instrument)]."

156. The Working Group also considered the proposal to add a new provision in the instrument along the following lines: "The [instrument] shall not deprive any interested party of any right it may have to avail itself to a settlement agreement in the manner and to the extent allowed by the law or the treaties of the State where such settlement agreement is sought to be relied upon."

157. The Working Group agreed to further consider those two proposals at a later stage of its current session (see paras. 200-204 below).

Draft provision 2 (international)

158. The Working Group considered the suggestion that the definition of "international" should apply to the conciliation process, rather than to the settlement agreement (see para. 19 above). It was said that the internationality of the settlement agreement would be derived from the international nature of the conciliation process. In support of that suggestion, it was said that that approach would be consistent with the Model Law on Conciliation.

159. However, it was noted that article 1(4) of the Model Law on Conciliation referred to the parties to "an agreement to conciliate", whereas the definition of "international" in draft provision 2 referred to the parties to "a settlement agreement". Support was expressed to refer to the parties to a "settlement agreement", as that approach would be more appropriate in light of the purpose of the instrument. It was further said that: (i) there were situations where a settlement agreement would be reached without necessarily an agreement to conciliate in the first place; (ii) the parties to the agreement to conciliate might be different from the parties to the settlement agreement; and (iii) places of business of parties might differ at the time of conclusion of the agreement to conciliate and at the time of conclusion of the settlement agreement. After discussion, it was agreed to address the internationality of "settlement agreements" and not of the "conciliation process", which shall be determined by reference to mainly the place of business of parties at the time of conclusion of the settlement agreement (see para. 161 below).

160. In that context, it was mentioned that the place where a substantial part of the obligation under the settlement agreement was to be performed (see draft provision 2(2)(a)) might not be known at the time of conclusion of the settlement agreement and therefore, it might raise uncertainty as to whether the instrument would apply.

161. With respect to internationality, the Working Group agreed to further consider draft provision 2 along the following lines: "A settlement agreement is international if: (1) At least two parties to a settlement agreement resulting from the conciliation have, at the time of the conclusion of that agreement, their places of business in different States; or (2) One of the following places is situated outside the State in which the parties have their places of business: (a) The place where a substantial part of the obligation under the settlement agreement is to be performed; or (b) The place with which the subject matter of the settlement agreement is most closely connected. For the purpose of this article: (a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement; (b) If a party does not have a place of business, reference is to be made to the party's habitual residence."

162. As a result of the discussion, it was agreed that draft provision 1(1) (see para. 152 above) should be adjusted along the following lines: "The [instrument] applies to an agreement in writing, that is international, that is concluded by parties to a commercial dispute, that results from conciliation and that resolves all or part of the dispute ("settlement agreement")."

163. At the close of the discussion, a suggestion was made that even if the instrument were to refer to the internationality of "settlement agreements", there was a need to qualify that the conciliation process was also international in accordance with article 1(4) of the Model Law on Conciliation, as the time when the parties agreed to or began conciliation would be of great significance and there was a need to consider the process that eventually led to the settlement agreement. It was further reiterated that internationality of the settlement agreement should derive from the international nature of the conciliation process.

Draft provision 4 (Conciliation)

164. The Working Group recalled its discussion on whether "conciliation" should be qualified as a "structured/organized" process (see paras. 42-44 above). A suggestion was made that the word "organized" might be an appropriate term to qualify the process to distinguish it from a purely informal process (see para. 42 above).

165. It was mentioned that if the term "organized" were to be included, its meaning would need to be further clarified in the instrument, as it was not a legal term and would be open to interpretation. In that context, suggestions were made to qualify the word "organized" with additional words such as "formal or informal" or "ad hoc or institutional".

166. However, doubts were expressed about qualifying the process as "organized" as that term: (i) was ambiguous; (ii) could be subject to interpretation by the enforcing authority possibly imposing domestic standards on conciliation during the enforcement procedure; (iii) could make it burdensome for the enforcing authority to determine whether the process was organized or not; (iv) could be used by parties as an additional ground to resist enforcement; and (v) would be a departure from the definition of "conciliation" in the Model Law on Conciliation (see para. 43 above). It was generally felt that such inclusion would unduly complicate the enforcement procedure and there was strong support for not including any term to qualify the process.

167. Recalling its discussion at the sixty-fourth session on the same issue (see A/CN.9/867, paras. 117 and 121), the Working Group agreed not to add any qualification to the word "process" in draft provision 4 and to revisit the issue once it had considered the form requirements of settlement agreements, including whether the need to qualify the process might be sufficiently handled in those requirements.

168. During that discussion, it was suggested that the independence and qualifications of the conciliator should also be highlighted in the definition of the conciliation process (see also para. 45 above). That suggestion did not receive support.

Settlement agreements concluded in the course of judicial or arbitral proceedings

169. The Working Group continued its consideration on whether to exclude from the scope of the instrument settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards and how it should be formulated in the instrument (see also paras. 48-52 above). Further, the Working Group was also invited to consider whether settlement agreements not concluded in the course of judicial or arbitral proceedings but recorded as court judgments or arbitral awards should fall within the scope of the instrument (see also para. 53 above).

170. Views were expressed that it was not necessary for the instrument to provide for such exclusions and that the matter could be left to practice. Nevertheless, there was willingness to accommodate concerns about possible overlaps, or gaps, between the instrument and other conventions. In that context, it was noted that article 26 (4) of the Choice of Court Convention allowed for more favourable recognition and enforcement to be pursued under another treaty.

171. A number of drafting suggestions were made, taking into account that the provision should be clear and simple, possibly providing enforcing authorities with some degree of flexibility.

172. Some support was expressed for providing that the instrument would not apply to settlement agreements concluded in the course of judicial or arbitral proceedings that were approved by a judicial authority or recorded as an arbitral award.

173. Another approach was to provide that the instrument would apply to settlement agreements concluded in the course of judicial or arbitral proceedings, as long as they were not recorded as court judgments or arbitral awards but that were capable of enforcement under the draft convention on the recognition and enforcement of foreign judgments currently being prepared by the Hague Conference or the New York Convention, respectively.

174. With respect to that approach, it was suggested that reference to specific conventions should be avoided in the instrument as a matter of simplification and to take into consideration other bilateral or regional instruments. Along that line, it was suggested that the instrument could provide that it would apply to settlement agreements concluded in the course of judicial or arbitral proceedings, as long as these were not enforceable as court judgments or arbitral awards. It was said that such an approach would take account of whether the State where enforcement was sought was a party to any other convention that provided for enforcement of court judgments or arbitral awards. It was further mentioned that that approach would allow a party to resort to multiple remedies in case the settlement agreement would not be enforceable as court judgments or arbitral awards.

175. Yet another approach was that the instrument would not apply to settlement agreements approved by a court or which had been concluded before a court, in the course of proceedings, and which were enforceable in the same manner as a judgment at the State of origin, or concluded in the course of arbitral proceedings and recorded as an arbitral award. While it was suggested that such an approach would clarify the scope of application of the instrument, providing clear guidance to the enforcing authority, it was also stated that the interpretation of such a provision could be complex. As a matter of drafting, it was suggested to delete the reference to "State of origin".

176. After discussion, the Working Group heard two drafting suggestions. The first formulation read as follows: "This instrument does not apply to settlement agreements approved by a court or which have been concluded before a court in the course of proceedings and which are enforceable in the same manner as a judgment, or concluded in the course of arbitral proceeding and recorded as an arbitral award." The second formulation read as follows: "This instrument also applies to settlement agreements concluded in the course of judicial or arbitral proceedings, as long as these are not enforceable as judgments or arbitral awards in the State where enforcement is sought". The Working Group agreed to consider those drafting suggestions at a later stage of its current session (see paras. 205-210 below).

Draft provision 5 (Form requirements)

A single document

177. The Working Group recalled its discussion on whether settlement agreements, to benefit from the enforcement procedure envisaged under the instrument, should be in the form of a complete set of documents (see paras. 67-69 above). A wide range of views were expressed about introducing such a requirement, including some doubts about the meaning of the words "a complete set of documents".

178. In that context, the suggestion that the settlement agreement should be in the form of a "single" document (rather than "a complete set of documents") was reiterated (see paras. 67-68 above). It was explained that such a requirement would make the enforcement easier from the perspective of the enforcing authority and would expedite enforcement, as it would avoid the procedure turning into one where parties would dispute the substantive contents of the settlement agreement. It was

further mentioned that an analogy with contracts would not necessarily be appropriate given that the instrument addressed enforcement of settlement agreements.

179. In response, a parallel was drawn with developments regarding form requirements of arbitration agreements. It was said that the New York Convention and the 1985 version of the Model Law on Arbitration provided for strict form requirements of arbitration agreements or clauses, which had the unintended effect of preventing their enforcement due to non-conformity with form requirements. It was further explained that the Commission had adopted amendments to the Model Law on Arbitration in 2006, responding to calls of the international business community to ensure that where the willingness of parties to arbitrate was not in question, the validity of the agreement would be recognized. The Working Group was cautioned not to follow the same pattern for settlement agreements and to provide relaxed form requirements in line with business practices. In line with that suggestion, views were expressed that the instrument should not include any such form requirement.

180. In response, it was mentioned that a comparison between arbitration and conciliation, as well as between an arbitration agreement and a settlement agreement had its limits as, first, the process of arbitration was adjudicative with an award being the result of that process, whereas the process of conciliation was facilitative with the settlement agreement recording the terms and conditions agreed by the parties and, second, the subject of enforcement in the context of the arbitration would be an arbitral award, of which form requirements had not been amended in 2006.

181. It was pointed out that agreements were usually formed by an exchange of offer and acceptance, and such meeting of the minds would not necessarily be materialized in a single document. Furthermore, it was said that requiring settlement agreements to be in a single document would be burdensome for the parties and contrary not only to business practices, but also to the flexibility that characterized conciliation. However, in response, it was noted that as the instrument would be introducing a novel mechanism for enforcing settlement agreements, it could suggest new practice as a condition for enforcement.

182. It was generally felt that the issue underlying the proposal that the settlement agreement be in a single document was the need for clarity of what the terms of the settlement agreement were, so that they could be expeditiously enforced by the competent authority. To accommodate such concerns without referring to a single document, it was suggested that the instrument could provide that the settlement agreement should include all the terms and conditions of the settlement, irrespective of whether those terms would be in a single document or multiple documents. It was also suggested that an appropriate placement for such a provision might be in draft provision 7 on application for enforcement. However, it was pointed out that those requirements were usually set out in the procedural rules of the State where enforcement was sought and requiring such elements in the instrument might have an inadvertent impact on domestic rules governing enforcement. It was suggested that a simple reference in the relevant provision to "the rules of procedure at the State where enforcement was sought" would be sufficient.

183. As a drafting matter, it was suggested that the provision on form requirements should not include any reference to a "single" document or a "complete set of documents" but alternatively the provision dealing with the application for enforcement (draft provision 7) could read as follows: "A party […] shall, at the time of application, supply the settlement agreement, subject to requirements of (provision on form requirements), together with any necessary document that the competent enforcing authority may require" (see also para. 82 above). There was general support for including such wording. It was suggested that the language could be adjusted to ensure that the competent authority would only require from the parties documents that were strictly necessary.

184. During the deliberation, it was reiterated that if the instrument were to provide for opt-in by the parties, there would be no need for such strict formal requirements (see also para. 131 above).

185. After discussion, it was generally felt that no additional form requirement would need to be included in draft provision 5(1) other than that the settlement agreement should be in writing and signed by the parties. The Working Group agreed to further consider the proposal in paragraph 183 above in the context of its deliberations on application for enforcement (draft provision 7).

Paragraph 2, Indication that the settlement agreement resulted from conciliation

186. The Working Group then considered the question of how the settlement agreement would indicate that it resulted from conciliation (see paras. 70-75 above).

187. As a drafting suggestion, the following was proposed: "A settlement agreement shall indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation, either by (1) including the conciliator's signature on the settlement agreement or (2) including a separate statement by the conciliator attesting to his or her involvement in the conciliation process." It was explained that such drafting aimed at accommodating diverse practices. In that context, a suggestion to simplify the chapeau by replacing the words "a conciliator was involved in the process and that the settlement agreement" by the word "it" received support.

188. During the discussion, the need to address circumstances where the conciliator might not be available to sign or provide a separate statement was mentioned. In that context, it was suggested that the two options in the drafting suggestion in paragraph 187 above should not be construed as an exhaustive list. The possibility of an attestation by an institution that administered the conciliation process (or by a witness) was mentioned. Therefore, it was suggested that if specific examples were to be provided in draft provision 5(2), a third subparagraph should be added, which would be broad enough to encompass any other method that a party could use to demonstrate that the settlement agreement resulted from conciliation, particularly when the conciliator was not available to sign the settlement agreement. It was further mentioned that the questions regarding acceptability should be left to the discretion of the enforcing authority. The following drafting suggestion was made: "A settlement agreement shall indicate that it resulted from conciliation, by including the conciliator's signature on the settlement agreement or if not possible, by any other evidence, for example, a separate statement by the conciliator or an institution attesting to its involvement in the conciliation process."

189. Another suggestion was to simply require an indication by the parties that a conciliator had been involved, unless the domestic legislation where enforcement was sought required otherwise. It was mentioned that such a provision would only be acceptable if the instrument were to take the form of a convention and similar comments were made that the instrument should not make reference to domestic laws of States concerning substantive matters as the aim of the instrument was to provide uniform rules.

190. During the discussion, a question was raised about the possible legal consequences of non-compliance with the form requirements in draft provision 5(2). It was said that there was no sanction in case of non-compliance with those conditions on form and that the consequence of non-compliance with such conditions should rather be assessed in relation to the acceptability of the application for enforcement (see also para. 73 above). It was mentioned that the enforcing authority could have flexibility in determining such acceptability as long as the parties were able to show that the settlement agreement resulted from conciliation. In that context, it was suggested that the requirement as set out in paragraph 188 above might be better placed in the provision on application for enforcement.

Draft provision 8 (Grounds for refusing enforcement)

Paragraph 1, subparagraph (e) (conciliation process and conduct of conciliators)

191. The Working Group turned its attention to draft provision 8, paragraph 1 (e), which addressed the possible impact of the conciliation process, and of the conduct

of conciliators, on the enforcement procedure. It was recalled that divergent views were expressed on whether to include that subparagraph and whether the grounds mentioned therein were covered by other defences in draft provision 8 (see paras. 103-109 above). Views both in support of (see para. 104 above) and against (see para. 106 above) retaining that subparagraph were reiterated.

192. During that discussion, the differences between conciliation and arbitration process were underlined and a wide range of examples of practices and conduct of conciliators, such as confidential ex parte communication, were given to highlight how difficult it would be to assess whether the parties were treated fairly. It was also noted that compared to arbitration, there were a limited number of procedural rules that governed conciliation providing a basis for assessing "fair treatment". It was said that subparagraph (e) would be superfluous as conciliators were already subject to terms of the agreement to conciliate and codes of conduct. It was further stated that inclusion of such a defence might inadvertently restrict the selection process of a conciliator and the manner in which conciliation was conducted.

193. In response, it was said that, as the settlement agreement resulted from conciliation, the significant role of the conciliator in the conclusion of the settlement agreement needed to be acknowledged, and that that defence needed to be retained, even if it might be difficult to prove that a party had been treated unfairly in the process. It was stated that parties should be informed of any conflict of interest and if the parties were not fully informed or there had been some misconduct by a conciliator, it should have some legal consequences, particularly at the enforcement stage. Unlike arbitration, there was no means to challenge the process or the conduct of the conciliator, particularly if the misconduct or unfair treatment was not known to the parties. It was also stated that parties might not necessarily be in a situation to withdraw from the process.

194. To find a compromise solution, the suggestion to limit the scope of subparagraph (e) to instances where the conciliator's misconduct had a direct impact on the settlement agreement was reiterated (see para. 107 above). It was also suggested that any revised draft of subparagraph (e) should separate the questions of fair treatment and disclosure. Further, it was said that the language of subparagraph (e) would need to be adjusted, for instance, to highlight the exceptional circumstances in which the defence could be raised, or to refer to notions such as impropriety of, or severe misconduct by, the conciliator, which had a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.

Parties' choice regarding the application of the instrument

195. The Working Group recalled its discussion on whether the application of the instrument would depend on the consent of the parties, during which a wide range of views were expressed (see paras. 126-134 above). Similarly, views were reiterated regarding opt-in (requiring parties' express consent for the application of the instrument) and opt-out (providing that parties may exclude the application of the instrument) approaches. As an alternative, it was suggested that the instrument could be silent on the matter as it would be counter-intuitive to request parties to confirm their consent to enforce their obligations under a settlement agreement. Reservations were expressed that the appropriate approach would depend on the form of the instrument.

196. The suggestion was reiterated to include in the instrument a declaration to the effect that each State would treat settlement agreements as binding and enforce them to the extent that the party applying for enforcement indicated the parties' agreement to enforcement under the instrument (see para. 130 above). It was explained that if the instrument were to take the form of model legislative provisions, it would also be possible to include such an opt-in mechanism as an option for States to consider when enacting such legislative provisions. In response to concerns expressed, it was stated that such a provision would not necessarily lead to forum shopping as parties to the

settlement agreement would, in any case, apply for enforcement at the place where assets were located.

197. Noting that it might be difficult to reach a consensus on the topic, some interest was expressed for that suggestion. However, it was pointed out that it would be preferable to set out the opt-in or opt-out rule in the instrument and subsequently allow States to deviate or to make a declaration. It was also mentioned that the application of such a declaration could become complex, might give rise to uncertainty as to whether a settlement agreement would be enforceable, and could result in imbalance between jurisdictions as a settlement agreement might be enforceable in one but not in another. With respect to the last point, it was suggested that a solution could be to provide for a reciprocal application of such a declaration.

198. During the discussion, some preliminary suggestions were made that: (i) with regard to the means to record the opt-in or opt-out by the parties, it should be in writing; (ii) with regard to the time when opt-in or opt-out would be expressed, it could be at any time including after the conclusion of the settlement agreement; (iii) with regard to the placement in the instrument, the provision on defences would be appropriate; and (iv) to assist the parties, a standard form should be prepared for parties to use to indicate their consent to the application of the instrument as an accompanying document.

199. After discussion, the Working Group agreed to further discuss the various options, taking account of the impact of the form of the instrument on the possible formulations.

Draft provision 1 (Scope of application)

Treatment as binding

200. The Working Group recalled its discussion on the possible use of the term "binding" to replace the notion of "recognition" of settlement agreements in the instrument, as the use of that notion could pose problems in a number of jurisdictions (see paras. 77-81 and 147-157 above).

201. The suggestion that the term "recognition" should be retained in the instrument as it would provide for consistency with existing treaties including the New York Convention was reiterated. However, it was recalled that the Working Group considered at length the issues that could be raised by the use of the term "recognition" and had decided to consider a different formulation (see para. 155). In relation to the first square bracketed text in that formulation, it was questioned which law was being referred to, and whether that reference would have the effect of limiting the application of defences in draft provision 8.

202. In response to a suggestion to delete the reference to national law or to clarify which national law would apply, it was recalled that a settlement agreement could be raised as a defence in different procedural contexts and that the first square bracketed text sought to indicate that the use of settlement agreements in defence against a claim should be in accordance with the national procedural framework so as to cover the various national procedural frameworks. It was further said that the provision should not result in precluding the enforcing authority to consider the grounds for refusing enforcement in draft provision 8.

203. After discussion, it was generally felt that the formulation contained in paragraph 155 above should be considered further, in conjunction with draft provision 8 on defences. It was agreed that the text should be revised to better express the idea that a settlement agreement could be used as a defence, and would produce effects between the parties.

204. In relation to the formulation in paragraph 156 above, it was recalled that it was inspired by article VII(1) of the New York Convention, and would permit application of more favourable national legislation to enforcement. There was general support for including such a provision in the instrument, as a separate provision, even though reservation was expressed.

Settlement agreements concluded in the course of judicial or arbitral proceedings

205. The Working Group resumed its deliberation on the treatment of settlement agreements concluded in the course of judicial or arbitral proceedings (see paras. 48-52 and 169-176 above), on the basis of the two formulations contained in paragraph 176 above.

206. With respect to the first formulation, it was explained that it was based on the fact that settlement agreements were private agreements and deserved a different treatment than court judgments (including judicial settlements) and arbitral awards. It was further explained that that formulation would clarify the scope of the instrument and avoid any overlap with other instruments. In support, it was stated that: (i) the grounds for refusing enforcement in the instrument were not appropriate for application to court judgments or arbitral awards; (ii) it would be inappropriate for the instrument to deal with issues on how such judgments and arbitral awards were to be treated; and (iii) the formulation expressed that once a court judgment or an arbitral award was rendered with regard to a settlement agreement, it should not be enforceable under the instrument. In that context, the need to take into account the existence of treaties giving cross-border effect to court judgments and the fact that a court judgment could be appealed was mentioned.

207. It was said that if the instrument were to include a provision along the lines provided in paragraph 156 above, States would be able to apply a more favourable treatment to settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards.

208. It was mentioned that the second formulation could be further developed to take into account concerns about possible overlap. A suggestion was made to amend that formulation as follows: "This instrument applies to settlement agreements concluded in the course of judicial or arbitral proceedings, or which are approved as an order of court, as long as they are not enforceable as judgments or awards in the State where enforcement is sought [under an applicable instrument to which the State is a party]." It was suggested that the phrase "under an applicable instrument to which the State is a party" could be omitted so as to refer to all cases of enforcement of foreign judgments and arbitral awards including enforcement on the basis of applicable domestic law. A further suggestion was made to add the words ", recorded as court judgments or arbitral awards," after the words "arbitral proceedings."

209. In comparing the two formulations, it was said that both excluded from the scope of the instrument a settlement agreement that had been converted into a court judgment or an arbitral award. One of the differences between them arose when the conversion did not have effect or was not acceptable in the State where enforcement was sought. It was said that, according to the first formulation, the effectiveness of settlement agreements would be extinguished once they were converted, whereas the effectiveness of settlement agreements would be preserved under certain circumstances in the second formulation.

210. After discussion, it was reiterated that the objective of any provision on the matter should be to avoid any overlap and gap. It was noted that the first formulation in paragraph 176 above could achieve that objective, while the second formulation in paragraph 208 above provided multiple opportunities for parties to seek enforcement of settlement agreements under certain circumstances at the State where enforcement was sought. It was generally felt that the first formulation was preferable, although elements of the second formulation might deserve further consideration. The Working Group agreed to further consider the provision, including how to express inclusions and exclusions in the scope provision.

Form of the instrument

211. Recalling its previous discussion on the form of the instrument, the Working Group then considered how to proceed with the various options considered

(see paras. 135-143 above). Views were reiterated in support of preparing a convention or model legislative provisions.

212. One alternative was to prepare a convention and model legislative provisions in parallel to preserve flexibility, with a decision on the form to be made at a later stage. It was suggested that a document that set out how each of the provisions would be reflected in a convention and in model legislative provisions would make it possible to discuss the issues simultaneously. There was support for that suggestion. However, it was mentioned that such an approach had practical drawbacks because without a decision on the form, it would be difficult to resolve some of the outstanding issues. Therefore, it was suggested that model legislative provisions could be prepared first, which would form a basis for preparing a convention at a later stage. There was also support for that suggestion.

213. After discussion, it was generally felt that it would be premature for the Working Group to make a decision on the final form of the instrument, as well as whether work should commence first on a convention or on model legislative provisions. To accommodate the divergence in views, it was agreed that work would proceed with the aim of preparing a uniform text on the topic of enforcement of international commercial settlement agreements resulting from conciliation. The Secretariat was requested to prepare draft provisions showing how they would be adjusted depending on whether the instrument would take the form of a convention or model legislative provisions. It was reaffirmed that such work should be without any prejudice to the final form of the instrument. In that context, it was generally agreed that, for the next session, in respect of model legislative provisions, the aim was to prepare provisions to supplement the Model Law on Conciliation and therefore, the need to align relevant provisions was highlighted.

B. Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

(A/CN.9/WG.II/WP.198)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] The Commission agreed that the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[2]

2. At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic of enforcement of international settlement agreements resulting from conciliation by the Working Group at its sixty-second session (A/CN.9/832, paras. 13-59) and agreed that the Working Group should commence work at its sixty-third session on that topic to identify relevant issues and develop possible solutions, including the 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.[3]

3. Accordingly, at its sixty-third and sixty-fourth sessions, the Working Group undertook work on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation.[4] As requested by the Working Group at its sixty-fourth session, this note outlines the issues considered so far by the Working Group and sets out draft provisions to be included in a possible instrument on enforcement of settlement agreements resulting from conciliation (referred to below as the "instrument"). The draft provisions have been prepared without prejudice to the final form of the instrument (A/CN.9/867, para. 15) and on the working assumption that the instrument would be a stand-alone legislative text (i.e.,

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123-125.

[2] Ibid., para. 129.

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 142.

[4] The reports of the Working Group on the work of its sixty-third and sixty-fourth sessions are contained in documents A/CN.9/861 and A/CN.9/867, respectively.

a convention or a model law). If a decision is made that the work should instead complement the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation"), the draft provisions would need to be adjusted accordingly. Similarly, if a decision is made that the work should focus on preparing guidance texts, the draft provisions contained in this note may serve as possible examples, and the overall drafting style would need to be adjusted accordingly.

II. Preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation: annotated draft provisions

A. Scope of application, definitions and exclusions

1. Scope of application

4. The Working Group may wish to consider the following formulation regarding the scope of application of the instrument:

Draft provision 1 (Scope of application)[5]

The [instrument] applies to the [recognition and] enforcement of international commercial settlement agreements resulting from conciliation.

5. Draft provision 1 reflects the understanding that the instrument should apply to the enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/861, paras. 19, 39 and 40; A/CN.9/867, paras. 92, 94, 102 and 115). Definitions contained in paragraphs 7 to 22 below aim at providing clear and simple criteria for determining whether or not a settlement agreement would fall under the scope of the instrument (A/CN.9/867, para. 94). The Working Group may wish to consider whether the territorial scope of application, if the instrument were to take the form of a convention, should be further elaborated. For example, it may include a provision stating that regardless of any other possible criteria (place of business of the parties or place of origin of the settlement agreement), the instrument applies to enforcement of settlement agreements if the enforcement is sought in the State Party to the convention.

6. The term "commercial" is not defined separately, reflecting the preference expressed by the Working Group that the instrument should apply to "commercial" settlement agreements, without providing for any limitation as to the nature of the remedies or contractual obligations (A/CN.9/861, paras. 47 to 50), and without necessarily defining the term (A/CN.9/867, para. 103). The Working Group may wish to confirm this understanding (see A/CN.9/867, paras. 104 and 105).

2. Definitions/terminology

(1) "International"

7. The Working Group may wish to consider the following formulation for the definition of the term "international":

Draft provision 2 (International)

A settlement agreement is international if:

(1) At least two parties to a settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(2) [The State in which the parties have their places of business is different from]/[One of the following places is situated outside the State in which the parties have their places of business]:

[5] See paras. 21, 23 and 52 for possible additional formulations.

(a) The [State][place] where a substantial part of the obligation under the settlement agreement is to be performed; or

(b) The [State][place] with which the subject matter of the [dispute][settlement agreement] is most closely connected; or

[(c) [This State][The [State][place] where enforcement of the settlement agreement is sought]].

(3) The parties to a settlement agreement have expressly agreed that [the subject matter of the agreement relates to more than one State][the settlement agreement is international].

(4) For the purpose of this article:

(a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to [the dispute resolved by] the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

8. Draft provision 2 reflects the understanding that the scope of the instrument should be limited to "international" settlement agreements (A/CN.9/867, paras. 93-96). The definition of the term "international" as provided in draft provision 2 is based on article 1(4) of the Model Law on Conciliation as well as article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration").

9. Draft provision 2(1) takes into account situations where there are more than two parties to a settlement agreement. The Working Group may wish to consider whether a similar drafting formulation should be adopted in other provisions (for example, draft provision 2(2)).

10. Draft provision 2(2) provides a further elaboration of the criteria to determine whether a settlement agreement is "international". It is partly based on article 1(4)(b) of the Model Law on Conciliation as well as article 1(3)(b) of the Model Law on Arbitration. It should, however, be noted that those articles deal with the "international" nature of the conciliation or arbitration process rather than the outcome of that process. Subparagraph (c) of draft provision 2(2) is in square brackets because the Working Group generally felt that the instrument should not apply to the enforcement of a settlement agreement concluded by parties that have their places of business in the same State, even if the enforcement was sought in another State (A/CN.9/867, para. 98). In that context, the Working Group may wish to consider whether subparagraphs (a) and (b) could also result in expanding the scope of the instrument to settlement agreements concluded by parties that have their places of business in the same State.

11. Draft provision 2(3) provides that the internationality criteria could be met when the parties have expressly agreed that the subject matter of the settlement agreement relates to more than one State or that the settlement agreement is international, similar to article 1(6) of the Model Law on Conciliation and article 1(3)(c) of the Model Law on Arbitration (A/CN.9/867, para. 99).

12. Draft provision 2(4) is intended to supplement other paragraphs of draft provision 2 by providing guidance on the determination of a party's place of business (A/CN.9/867, paras. 100-101).

(2) "Settlement agreement"

13. The Working Group may wish to consider the following formulation for the definition of "settlement agreement":

Draft provision 3 (Settlement agreement)[6]

"Settlement agreement" means an agreement in writing that is concluded by parties to a commercial dispute, that results from conciliation, and that resolves all or part of the dispute.

14. Draft provision 3 is based on a suggestion made during the sixty-fourth session of the Working Group (A/CN.9/867, para. 132). Questions for consideration include how this definition would articulate with form requirements (see draft provision 5 in para. 25 below), and whether it is necessary to qualify a settlement agreement as one concluded by "parties to a commercial dispute" and one "resulting from conciliation", if those elements were to be expressly stipulated in the scope provision (see draft provision 1 in para. 4 above). It may be noted that the finality of the settlement agreement is not mentioned in draft provision 3. Rather the non-finality of the settlement agreement is presented as a possible defence to enforcement (see draft provision 8 (1)(b) in para. 35 below).

(3) "Conciliation"

15. The Working Group may wish to consider the following formulation for the definition of the term "conciliation":

Draft provision 4 (Conciliation)[7]

"Conciliation" means a process, regardless of the expression used, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons lacking the authority to impose a solution upon the parties to the dispute[, irrespective of the basis upon which the conciliation is carried out].

16. Draft provision 4 reflects the understanding that the scope of the instrument should be limited to settlement agreements that result from conciliation (A/CN.9/861, para. 19; A/CN.9/867, para. 115), and that the definition of "conciliation" in article 1(3) of the Model Law on Conciliation should be used as a basis (A/CN.9/861, para. 21; A/CN.9/867, paras. 116, 119 and 121). It should be noted that a suggestion that the instrument should apply to settlement agreements regardless whether they resulted from conciliation or not, as long as the parties to the settlement agreement expressly agreed to the application of the instrument, did not receive support (A/CN.9/867, para. 115).

17. The Working Group may wish to consider whether the term "mediation" should replace the term "conciliation" throughout the instrument and, if so, the possible implications on existing UNCITRAL texts, which had been prepared using the term "conciliation" (A/CN.9/867, para. 120).

(4) Settlement agreements concluded in the course of judicial or arbitral proceedings

18. The Working Group considered whether the instrument should also apply to instances where the parties had concluded a settlement agreement in the course of judicial, arbitral or any other proceedings (A/CN.9/861, paras. 24-28; A/CN.9/867, paras. 122-131).

19. With respect to settlement agreements concluded in the course of judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award, it was widely felt that they should fall within the scope of the instrument (A/CN.9/867, para. 125). The Working Group may wish to confirm that understanding.

20. With respect to settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as a judicial decision or an arbitral award, differing views were expressed. One view was that such agreements should not fall within the scope of the instrument as inclusion could lead to overlap or conflict with the Judgments Project of the Hague Conference on Private International Law as well as

[6] See also paras. 21, 23 and 30 for possible additional formulations.

[7] See also paras. 21 and 22 for possible additional formulations.

the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ''New York Convention'') (A/CN.9/867, para. 123). Another view was that exclusion of those settlement agreements from the scope of the instrument would result in depriving the parties of the opportunity to utilize the enforcement regime envisaged by the instrument, and that possible complications resulting from multiple enforcement regimes could be handled by the competent authority where enforcement is sought (A/CN.9/867, para. 124). One approach to implement the latter view would be to not address this issue in the instrument (A/CN.9/867, paras. 124 and 130).

21. The Working Group may wish to determine the approach to be taken in the instrument with regard to settlement agreements concluded in the course of judicial or arbitral proceedings, on the basis of the following optional formulations:

(i) Additional paragraph in draft provision 1 (Scope of application) (A/CN.9/867, para. 127):

"The [instrument] also applies to settlement agreements concluded in the course of judicial or arbitral proceedings [as long as the settlement agreements are not recorded as court judgments or arbitral awards]."

(ii) Additional paragraph in draft provision 3 (Settlement agreement) (A/CN.9/867, paras. 118 and 128):

Option 1: *"This definition includes settlement agreements concluded in the course of judicial or arbitration proceedings [as long as the settlement agreements are not recorded as court judgments or arbitral awards]."*

Option 2: *"This definition excludes settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as court judgments or arbitral awards."*

(iii) Additional paragraph in draft provision 4 (Conciliation) (A/CN.9/867, para. 127):

"This definition includes instances where the conciliation took place in the course of judicial or arbitral proceedings[, as long as the settlement agreement is not recorded as a court judgment or an arbitral award]."

(iv) If the instrument were to take the form of a convention, as possible declarations (A/CN.9/867, para. 129):

Option 1: *"A Party may declare that it shall apply this Convention to the [recognition and] enforcement of settlement agreements concluded in the course of judicial or arbitral proceedings as long as the settlement agreement is not recorded as a court judgment or an arbitral award."*

Option 2: *"A Party may declare that it shall not apply this Convention to the [recognition and] enforcement of settlement agreements concluded in the course of judicial or arbitral proceedings[, and recorded as court judgments or arbitral awards]."*

22. The Working Group may wish to confirm the understanding that the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument (A/CN.9/867, para. 131). The Working Group may wish to consider whether to include an additional paragraph in draft provision 4 (Conciliation) clarifying that the instrument would apply to instances: (i) where a judge or an arbitrator initiated the conciliation process with a third party acting as the conciliator, and (ii) where the judge or the arbitrator initiated the conciliation process and facilitated an amicable settlement. The Working Group may wish also to confirm that court judgments or arbitral awards in the formulations provided in paragraph 21 above, refer to those that were rendered during the judicial or arbitral proceedings that led to the settlement.

3. Exclusions

23. The Working Group generally agreed that settlement agreements dealing with consumer, family and employment law matters should be excluded from the scope of the instrument, and that there was no need to mention any other exclusions in the instrument (A/CN.9/867, para. 106). In that light, the Working Group may wish to consider the following optional formulations:

(i) Additional paragraph in draft provision 1 (Scope of application):

"The [instrument] does not apply to settlement agreements: (a) concluded by one of the parties for personal, family or household purposes; or (b) relating to family or employment law."

(ii) Additional paragraph in draft provision 3 (Settlement agreement):

"This definition does not include settlement agreements: (a) concluded by one of the parties for personal, family or household purposes; or (b) relating to family or employment law."

24. The Working Group may wish to further consider the suggestion that the instrument should not apply to liability of a State for its acts or omissions in the exercise of its authority (*Acta jure imperii*) and that the instrument should not refer to notions of State immunity (A/CN.9/867, para. 113). In line with the decision of the Working Group that settlement agreements involving public entities (States, government entities and other entities acting on their behalf) should not be automatically excluded from the scope of the instrument (A/CN.9/861, para. 46; and A/CN.9/867, paras. 109-112 and 114; see also para. 36 below), the formulation below provides States the flexibility to decide whether to exclude such agreements from the scope of the instrument, if the instrument were to take the form of a convention:

Option 1: *"A Party may declare that it shall not apply this Convention to settlement agreements to which it is a party, or to which any of its governmental agencies or any person acting on its behalf is a party [unless otherwise indicated in the declaration]."*

Option 2: *"A Party may declare that it shall apply this Convention to settlement agreements to which it is a party, or to which any of its governmental agencies or any person acting on its behalf is a party, only to the extent specified in the declaration."*

B. Form requirements of settlement agreements

25. The Working Group may wish to consider the following formulation regarding the form requirements of settlement agreements, should it decide to include a stand-alone provision on the matter:

Draft provision 5 (Form of settlement agreement)[8]

(1) A settlement agreement shall be in writing and [indicate the intent of the parties to be bound by the terms of the agreement][shall be signed by the parties].

[(2) A settlement agreement shall indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation.]

(3) For the purposes of this article:

(a) A settlement agreement is in writing if its content is recorded in any form, [whether or not the agreement has been concluded orally, by conduct or by other means]; and

(b) The requirement that a settlement agreement be in writing is met by an electronic communication if the information contained therein is accessible

[8] See also paras. 13, 29 and 30 for possible alternative formulations.

so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy; and

(c) The requirement that a settlement agreement be signed by a party [or a conciliator] is met in relation to an electronic communication if: (a) a method is used to identify the party and to indicate that party'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.

1. Minimum form requirements

26. Draft provision 5(1) reflects the understanding of the Working Group that form requirements of settlement agreements in the instrument should not be prescriptive and should be set out in a brief manner preserving the flexible nature of the conciliation process. It also reflects the understanding that settlement agreements should be in writing and indicate the agreement of the parties to be bound by the terms of the settlement agreement (A/CN.9/867, para. 133).

27. Draft provision 5(3) supplements other paragraphs of draft provision 5 and incorporates the principle of functional equivalence embodied in UNCITRAL texts on electronic commerce, allowing for the use of electronic and other means of communication to meet the form requirements therein (A/CN.9/867, para. 133). It should be noted that draft provision 5(3)(c) would only be relevant if the draft provision 5 requires settlement agreements to be signed by the parties or the conciliator.

2. Other form requirements

28. Regarding other form requirements, the Working Group considered whether there should be some indication in the settlement agreement that (i) a conciliator was involved in the process; and (ii) the settlement agreement resulted from conciliation (A/CN.9/867, paras. 136 and 137). During the deliberations at the Working Group, the need to find a balance between, on the one hand, the formalities that would be required to ascertain that the settlement agreement resulted from conciliation and, on the other, the need for the instrument to preserve the flexible nature of the conciliation process, was underlined (A/CN.9/867, para. 144).

29. Draft provision 5(2) reflects the view that additional form requirements should be provided for in the instrument (such as that the conciliator should indicate his or her identity in the settlement agreement or sign the settlement agreement certifying that conciliation took place, or submit a separate document for that purpose) (A/CN.9/867, paras. 138-140). An alternative approach would be to address the matter in the provision on application for enforcement (see draft provision 7 (1)(b) and (c) in para. 31 below), requiring the parties to show through appropriate means when applying for enforcement that a conciliator was involved in the process and that the settlement agreement resulted from conciliation. This approach may allow for more flexibility, while giving the necessary level of certainty as to the process that led to the settlement agreement (A/CN.9/867, para. 140).

30. The Working Group may wish to further consider whether minimum and other form requirements discussed above could be formulated as part of the definition of settlement agreements (to complement draft provision 3 above).

C. Direct enforcement and application for recognition and enforcement

31. The Working Group may wish to consider the following formulation regarding application for enforcement:

Draft provision 6 (Recognition and enforcement)

Option 1: *International commercial settlement agreements resulting from conciliation shall be recognized and be given legal effect under the conditions laid down in this [instrument].*

Option 2 (if the instrument were to take the form of a convention): *A Party to this Convention shall recognize international commercial settlement agreements resulting from conciliation and give legal effect to them under the conditions laid down in this Convention.*

Draft provision 7 (Application for enforcement)

(1) To obtain the [recognition and] enforcement of a settlement agreement, the party applying for [recognition and] enforcement shall, at the time of the application, supply:

(a) The settlement agreement;

[(b) [Proof][Evidence] that a conciliator was involved in the process; and

(c) [Proof][Evidence] that the settlement agreement resulted from conciliation.]

(2) A settlement agreement shall be [recognized and] enforced in accordance with the rules of procedure of [this State][the State where [recognition and] enforcement is sought], under the conditions laid down in this [instrument].

(3) If the settlement agreement is not in the official language(s) of [this State][the State where [recognition and] enforcement is sought], the party applying for the [recognition and] enforcement shall produce a certified translation of the settlement agreement into such language.

32. Draft provision 6 sets out the principle that settlement agreements within the scope of the instrument are to be given legal effect. Option 1 is a general formulation regardless of the form of the instrument, while option 2 is a formulation if the instrument were to take the form of a convention, obliging States parties to the convention to recognize settlement agreements and give them legal effect. A similar approach can be found, for instance, in article II of the New York Convention (A/CN.9/861, paras. 71-79; A/CN.9/867, para. 146).

33. Draft provision 7 mirrors article IV of the New York Convention and reflects the understanding that the instrument should provide a mechanism where a party to a settlement agreement would be able to seek enforcement directly in the State of enforcement (referred to as "direct enforcement") without a review or control mechanism in the State where the settlement agreement originated from as a pre-condition (A/CN.9/861, para. 80; A/CN.9/867, para. 147).

D. Defences to recognition and enforcement

34. The Working Group agreed that defences to recognition and enforcement in the instrument should: (i) be limited and not cumbersome for the enforcing authority to implement; (ii) allow for a simple and efficient verification of the grounds for refusing recognition and enforcement; (iii) be exhaustive and be stated in general terms, giving flexibility to the enforcing authority with regard to their interpretation (A/CN.9/861, para. 93, A/CN.9/867, para. 148). As a general comment, it was said that the standard for recognition and enforcement, including the defences to be provided in the instrument, should not be less favourable than that provided for recognition and

enforcement of arbitral awards under the New York Convention (A/CN.9/867, para. 148).

35. The Working Group may wish to note that draft provision 8 below differentiates defences that could be raised by the parties and those that could be raised by the enforcing authority at its own initiative (A/CN.9/867, para. 148). Defences have also been broadly categorized into those relating to the parties (draft provision 8(1)(a)), to the settlement agreement (draft provisions 8(1)(b) to (d)), to the conciliation process (draft provision 8(1)(e)) and to mandatory laws and public policy at the place of enforcement (draft provision 8(2)).

Draft provision 8 (Grounds for refusing [recognition and] enforcement)

(1) [Recognition and] enforcement of a settlement agreement may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent authority of [this State][the State where [recognition and] enforcement is sought], proof that:

(a) A party to the settlement agreement was under some incapacity [under the law applicable to it]; or

(b) The settlement agreement is not binding on the parties; is not a final resolution of the dispute [or relevant part thereof]; has been subsequently modified by the parties; or contains conditional or reciprocal obligations; or

(c) The enforcement of the settlement agreement would be contrary to its terms and conditions; the obligations in the settlement agreement have been performed; or the party applying for [recognition and] enforcement is in breach of its obligations under the settlement agreement;

(d) The settlement agreement is null and void, inoperative or incapable of being enforced under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of [this State][the State where [recognition and] enforcement is sought]; or

(e) The conciliator failed to maintain fair treatment of the parties, or did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence.

(2) [Recognition and] enforcement of a settlement agreement may be refused, by the competent authority of [this State][the State where [recognition and] enforcement is sought], if it finds that:

(a) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of [this State][that State]; or

(b) [Recognition or] enforcement of the settlement agreement would be contrary to the public policy of [this State][that State].

36. Paragraph (1)(a) reflects the general understanding that incapacity should be retained in the list of defences (A/CN.9/867, paras. 151-152). The Working Group may wish to consider that, in jurisdictions where public entities are not authorized to conclude settlement agreements, paragraph (1)(a) may provide a defence to enforcement of settlement agreements involving such entities (A/CN.9/861, para. 44; see also para. 24 above). The words “under the law applicable to it” are placed in square brackets for consideration by the Working Group, whether they should be deleted in line with article 36(1)(a)(i) of the Model Law on Arbitration.

37. Paragraph (1)(b) reflects the understanding that recognition and enforcement may be refused if the settlement agreement is not binding on the parties, is not final, or has been subsequently modified (A/CN.9/867, para. 162).

38. Paragraph (1)(c) includes as a defence where the recognition and enforcement would be contrary to the terms and conditions of the settlement agreement (A/CN.9/867, para. 158). In this context, the Working Group may wish to consider whether that defence could be raised when the settlement agreement contains a

dispute resolution clause (such as an arbitration clause or a choice of court provision) (A/CN.9/867, para. 177-179). If a party were to seek recognition and enforcement of a settlement agreement which contains a dispute resolution clause, a question for consideration is whether the party against whom the recognition and enforcement is invoked would be able to resist recognition and enforcement on that basis under paragraph (1)(c).

39. Paragraph (1)(d) seeks to reflect the view of the Working Group that the instrument should not give the enforcing authority the ability to interpret the validity defence to impose requirements in domestic law, and that consideration of the validity of settlement agreements by the enforcing authority should not extend to form requirements (A/CN.9/867, paras. 159-161). The drafting is based on article II(3) and article V(1)(a) of the New York Convention. The Working Group may wish to consider whether the formulation of paragraph (1)(d) would be sufficiently broad to cover instances of fraud (A/CN.9/867, para. 153), mistake, misrepresentation, duress and deceit (A/CN.9/867, para. 167).

40. Paragraph 1(e) addresses the possible impact of the conciliation process and of the conduct of conciliators on the enforcement process with the purpose of protecting the parties' right to self-determination through a fair process. When the Working Group considered that question, it recalled article 6(3) of the Model Law on Conciliation, which requires the conciliator to maintain fair treatment of the parties (A/CN.9/867, para. 174). The emerging view in the Working Group was that serious misconduct by the conciliator during the conciliation process, which had an impact on its outcome, could probably be covered by the other defences in the instrument (A/CN.9/867, para. 175). During the discussions, the voluntary nature of the conciliation process, as well as the freedom of the parties to withdraw from the process at any time were underlined (A/CN.9/867, para. 172). In that light, the Working Group may wish to consider whether paragraph (1)(e) should be retained.

41. Paragraph (2)(a) deals with instances where the subject matter of the settlement agreement is not capable of settlement in the State where enforcement is sought (A/CN.9/867, para. 154). The Working Group indicated that this defence could be considered by the enforcing authority ex officio.

42. Paragraph (2)(b) deals with instances where the enforcement of the settlement agreement would be contrary to public policy (A/CN.9/867, paras. 155-157). It was noted that public policy covered both substantive and procedural aspects. There was general agreement that public policy as a defence could be considered by the enforcing authority ex officio.

Additional defences for possible consideration

- *Absence of conciliation and non-commercial settlement agreements*

43. The scope provision (draft provision 1) and the provision on application for enforcement (draft provision 7) require that the settlement agreement result from conciliation. Therefore, including the absence of conciliation process to the list of defences might be redundant. The same would apply to non-commercial settlement agreements not falling within the scope of the instrument.

- *Enforcement of the settlement agreement contrary to a decision of another court or competent authority*

44. The Working Group may wish to consider whether the fact that the enforcement of the settlement agreement would be contrary to a decision of another court or competent authority should also be construed as a defence in the instrument. Diverging views were expressed with respect to whether such a defence should be provided (A/CN.9/867, paras. 163-166). One view was that there was merit in providing such a defence, if it were to be presented in a permissive manner ("may be refused") and it could accommodate the interest of States that have obligations under certain treaties regarding recognition of decisions by foreign courts (A/CN.9/867, para. 165). Another view was that there was no need to provide such a defence in the

instrument as that might invite forum shopping by parties and inadvertently expand the principle of res judicata to those decisions that did not have such effect. In addition, it was stated that a refusal of enforcement by a court or competent authority in another State should not have an impact on the decision to be made by an enforcing authority (A/CN.9/867, para. 166).

Set-off

45. This note does not include formulations for a provision dealing with instances where the settlement agreement might be used for set-off purposes. That matter was left open by the Working Group for further consideration (A/CN.9/867, para. 176).

E. Other aspects

1. Confidentiality and the enforcement process

46. During the enforcement process, certain information in the settlement agreement as well as the process that led to it might have to be disclosed. Such disclosure may be at odds with the confidential nature of the conciliation process (article 9 of the Model Law on Conciliation) and the confidentiality obligation arising from that process (article 10 of the Model Law on Conciliation).[9] The Working Group may wish to consider how this should be addressed in the instrument including whether a specific provision is necessary.

2. Relationship of the enforcement process with judicial or arbitral proceedings

47. The Working Group may wish to consider the following formulation regarding parallel applications:

Draft provision 9 (Enforcement of a settlement agreement and substantive claim before a court or an arbitral tribunal)

If an application relating to the settlement agreement has been made to a court, arbitral tribunal or any other competent authority [which may affect recognition or enforcement of the settlement agreement], the competent authority of the State where the enforcement of the settlement agreement is sought may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement [and may also, on the application of the party claiming enforcement of the settlement agreement, order the other party to give suitable security].

48. The draft provision reflects the proposal that the instrument could include a provision similar to article VI of the New York Convention (A/CN.9/867, paras. 168 and 169).

3. Parties' choice in the application of the instrument

49. The issue of whether the application of the instrument should depend on the consent of parties to the settlement agreement was left open for further consideration, as it would largely depend on the form of the instrument and the mechanism envisaged therein (A/CN.9/867, paras. 142, 180-182). The Working Group may wish to consider the following possible approaches: (i) an opt-in approach, requiring parties' express consent for the application of the instrument (which could be formulated as a requirement in the application process or as a defence by a party refusing enforcement); or (ii) an opt-out approach, providing that parties may exclude the application of the instrument, which is the approach taken, for instance, in article 6 of the United Nations Convention on Contracts for the International Sale of Goods

[9] In particular, article 10(3), which provides as follows: "The disclosure of the information referred to in paragraph 1 of this article shall not be ordered by an arbitral tribunal, court or other competent governmental authority and, if such information is offered as evidence in contravention of paragraph 1 of this article, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement."

(CISG), and article 1(7) of the Model Law on Conciliation. It should be noted that if an opt-in or opt-out approach were to be included in the instrument, the latter would be more usual. Indeed, parties can exclude the application of a legislative text which is not of an imperative nature; and it is rare that parties confirm the application of an existing legislative text. For instance, if the instrument were to be a model legislative text, the provisions could be drafted as default rules ("unless otherwise agreed by the parties, …").

50. During the discussion, those in support of the opt-in mechanism argued that it would provide parties with a choice, highlight the voluntary nature of the conciliation process and raise the parties' awareness on the enforceability envisaged in the instrument. Those not in favour stated that requiring an opt-in would substantively limit the scope of the instrument and that it would be very unlikely for parties to agree to the expedited enforcement envisaged in the instrument at the final stages of the conciliation process (A/CN.9/867, para. 142).

(1) Opt-in

51. The Working Group may wish to consider the following formulations for requiring an opt-in:

(i) Additional paragraph in draft provision 7 (Application for enforcement)

"(1) To obtain enforcement of the settlement agreement, …:

…

(d) [proof]/[evidence] that the parties to the settlement agreement consented to the application of the [instrument]."

(ii) Additional paragraph in draft provision 8 (Grounds for refusing recognition and enforcement)

"(1) Enforcement of a settlement agreement may be refused …:

(f) The parties to the settlement agreement did not consent to the application of the [instrument]."

(2) Opt-out

52. The Working Group may wish to consider the following formulations for an opt-out mechanism:

(i) Additional paragraph in draft provision 1 (Scope of application)

"The parties to the settlement agreement may exclude the application of this [instrument]. Subject to articles ---, the parties to the settlement agreement may derogate from or vary the effect of any provision in the [instrument]."

(ii) Additional paragraph in draft provision 8 (Grounds for refusing recognition and enforcement)

"(1) Enforcement of a settlement agreement may be refused …:

(f) The parties to the settlement agreement have agreed to exclude the application of the [instrument]."

53. Another approach, if the instrument were to take the form of a Convention, would be for the instrument to not provide any opt-in or opt-out mechanism but allow States that wish to incorporate such a mechanism to make a declaration to that effect. The Working Group may, however, wish to consider the possible complications that might arise from allowing such declaration. The Working Group may wish to consider the following formulations:

Option 1: *A Party may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.*

Option 2: *A Party may declare that it shall apply this Convention unless the parties to the settlement agreement have agreed to exclude the application of the Convention.*

F. Form of the instrument

54. The Working Group may wish to consider the final form of the instrument. At its sixty-third session, the Working Group considered possible forms of the instrument, which could be a convention, model legislative provisions (either as a stand-alone text or as a complement to article 14 of the Model Law on Conciliation) or a guidance text (for instance, expanding paragraphs 87 to 92 of the Guide to Enactment on article 14 of the Model Law). The prevailing view was that there were a number of issues that would require further consideration before a decision could be made on the form of the instrument. Nonetheless, a number of delegations expressed preference for preparing a convention, as a convention could more efficiently contribute to the promotion and harmonization of conciliation (A/CN.9/861, para. 108).

C. Report of the Working Group on Dispute Settlement on the work of its sixty-sixth session (New York, 6-10 February 2017)

(A/CN.9/901)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, the Commission mandated the Working Group to commence work 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 agreed that the mandate of the Working Group should be broad to take into account the various approaches and concerns.[1]

2. At its sixty-third (Vienna, 7-11 September 2015) and sixty-fourth (New York, 1-5 February 2016) sessions, the Working Group considered that topic on the basis of notes by the Secretariat (A/CN.9/WG.II/WP.190 and A/CN.9/WG.II/WP.195, respectively). At its sixty-fourth session, the Working Group requested the Secretariat to prepare a document outlining the issues considered at the session and setting out draft provisions without prejudice to the final form of the instrument, grouping provisions into broad categories.[2]

3. At its forty-ninth session, the Commission had before it the report of the Working Group on the work of its sixty-third and sixty-fourth sessions (A/CN.9/861 and A/CN.9/867, respectively). After discussion, the Commission commended the Working Group for its work on the preparation of an instrument dealing with enforcement of international commercial settlement agreements resulting from conciliation ("instrument"), and confirmed that the Working Group should continue its work on the topic.[3]

4. At that session, the Commission also held a preliminary discussion regarding possible future work in the area of international dispute settlement. The Commission

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-142.
[2] A/CN.9/867, para. 15.
[3] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162-165.

considered the topics of (i) concurrent proceedings; (ii) code of ethics/conduct for arbitrators; and (iii) possible reform of investor-State dispute settlement system.[4] After deliberation, the Commission decided to retain the three topics on its agenda for further consideration at its next session. It further requested that the Secretariat, within its existing resources, continue to update and conduct preparatory work on all the topics so that the Commission would be in a position to make an informed decision whether to mandate its Working Group II to undertake work in any of the topics, following the current work on the enforcement of settlement agreements resulting from conciliation. In that context, it was reaffirmed that priority should be given to the current work by Working Group II so that it could expeditiously complete its work.[5]

5. At its sixty-fifth session (Vienna, 12-23 September 2016), the Working Group continued its deliberations on the basis of a note by the Secretariat (A/CN.9/WG.II/WP.198), and agreed that work would proceed with the aim of preparing a uniform text on enforcement of international commercial settlement agreements resulting from conciliation. It requested the Secretariat to prepare draft provisions showing how they would be adjusted depending on whether the instrument would take the form of a convention or model legislative provisions. It was reaffirmed that such work should be without any prejudice to the final form of the instrument.[6]

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its sixty-sixth session in New York, from 6-10 February 2017. The session was attended by the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Bulgaria, Burundi, Cameroon, Canada, Chile, China, Colombia, Czech Republic, Denmark, France, Germany, Greece, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Kuwait, Lebanon, Malaysia, Mexico, Namibia, Nigeria, Pakistan, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

7. The session was attended by observers from the following States: Algeria, Belgium, Croatia, Cyprus, Democratic Republic of the Congo, Dominican Republic, Estonia, Ethiopia, Iraq, Finland, Luxembourg, Malta, Netherlands, Norway, South Africa, South Sudan, Sweden, Syrian Arab Republic and Viet Nam.

8. The session was also attended by observers from the Holy See and the European Union.

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

(a) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC) and International Institute for the Unification of Private Law (UNIDROIT);

(b) *Invited non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitrators' and Mediators' Institute of New Zealand (AMINZ), Beijing Arbitration Commission/Beijing International Arbitration Center (BAC/BIAC), Belgian Center for Arbitration and Mediation (CEPANI), Centro de Arbitraje Cámara de Comercio de Lima (CCL), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), China Society of Private International Law (CSPIL), Comité Français de l'Arbitrage (CFA), Construction

[4] Ibid., paras. 174-194.
[5] Ibid., para. 195.
[6] A/CN.9/896, para. 13.

Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), European Law Students' Association (ELSA), Florence International Mediation Chamber (FIMC), Forum for International Conciliation and Arbitration (FICA), G.C.C. Commercial Arbitration Centre (GCCAC), Hong Kong Mediation Centre (HKMC), Institute of International Commercial Law (IICL), Inter-American Bar Association (IABA), Inter-American Commercial Arbitration Commission (IACAC), International Academy of Mediators (IAM), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Law Association (ILA), International Mediation Institute (IMI), Jerusalem Arbitration Center (JAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Law Association for Asia and the Pacific (LAWASIA), Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), New York International Arbitration Center (NYIAC), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA), The World Association of Former United Nations Interns and Fellows (WAFUNIF), and Union Internationale des Huissiers de Justice (UIHJ).

10. The Working Group elected the following officers:

Chairperson: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

Rapporteur: Ms. Petra Peer (Austria)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.199); and (b) note by the Secretariat regarding the preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/WG.II/WP.200 and addendum).

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 an instrument on enforcement of international commercial settlement agreements resulting from conciliation.
5. Organization of future work.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group considered agenda item 4 on the basis of the note prepared by the Secretariat (A/CN.9/WG.II/WP.200 and addendum). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The Working Group requested the Secretariat to prepare draft model legislative provisions complementing the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law") and a draft convention, both addressing enforcement of international settlement agreements resulting from conciliation, based on the compromise proposal (see para. 52 below) and reflecting the deliberations and decisions of the Working Group.

IV. International commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

14. The Working Group continued its deliberations on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation ("instrument") on the basis of document A/CN.9/WG.II/WP.200 and its addendum. The Working Group agreed to consider the draft provisions contained therein without prejudice to the final form of the instrument to be prepared.

15. The Working Group began its preliminary deliberation on some of the outstanding issues as provided in paragraphs 4 to 14 of document A/CN.9/WG.II/WP.200.

A. Legal effect of settlement agreements

16. The Working Group recalled its deliberations on how the instrument would express that settlement agreements could or should be given legal effect, for instance, as a prerequisite for enforcement or in defence against a claim, without using the expression "recognition", which raised concerns in some jurisdictions.

17. It was questioned whether there was a need for the instrument to include provisions to that effect as the main objective of the instrument was to envisage an enforcement mechanism. Along the same lines, it was suggested that the instrument should not address the legal effect of a settlement agreement between the parties. It was also argued that there was no need for the instrument to address that point as the legal effect of a settlement agreement as binding on the parties was implicit in the notion of an agreement.

18. In response, it was said that it would be appropriate for the instrument to address situations where a party might not be necessarily seeking enforcement of a settlement agreement but instead would be seeking to rely on the settlement agreement as a defence or for other procedural purposes. In that context, the Working Group recalled the drafting suggestion made at its sixty-fifth session (A/CN.9/896, para. 155), which read: "A settlement agreement shall be enforced and shall be given effect in defence against any claim made by either party to the settlement agreement [as far as the defence is available in national law] to the same extent as in enforcement proceedings [in accordance with the rules of procedure of the State where enforcement is sought and subject to (the provisions on defences in the instrument)]."

19. With regard to the proposed wording in draft provisions 1(1), 3(1) and 4(1), a concern was raised about the meaning of the phrase "legal effect", as it was ambiguous, including whether it referred to the substantive or procedural legal effect.

20. To address that concern, the following alternative text was suggested: "In case of a dispute concerning a matter which a party claims to have already been settled by a settlement agreement, the interested party may invoke the existence of the settlement agreement in accordance with the law of the State where the settlement agreement is sought to be relied upon and under the conditions laid down in this instrument to prove that the dispute has been settled."

21. It was explained that the alternative text would make it clear that a settlement agreement could be used as a defence in court proceedings, if the conditions set out in draft provision 3 were met and there were no grounds for refusing enforcement under draft provision 4. It was explained that, as a settlement agreement might have different legal effects depending on the jurisdiction, the alternative text would not address the legal effect of a settlement agreement. Instead, the effect would be deferred to the law of the State where the settlement agreement was sought to be relied upon. As to the placement of the alternative text, it was suggested that it could be placed in draft provision 3 with corresponding revisions made to other parts of the instrument.

22. Some questions were raised regarding the alternative text. One question related to the consequences on enforcement when the law of the State where the settlement agreement was sought to be relied upon prohibited a party from invoking the settlement agreement. It was understood that the alternative text should not be read as allowing a State which implemented the instrument to prohibit a party from invoking the settlement agreement in accordance with this provision. It was also mentioned that reference to the law of the State where the settlement agreement was sought to be relied upon might be understood to refer also to the substantive law of that State and thus, would be broader than the "rules of procedure" provided in draft provision 3. It was further questioned whether the conditional phrase in the alternative text ("In case of a dispute concerning a matter which a party claims to have already been settled by a settlement agreement") was necessary.

23. To address some of those questions, it was suggested that the alternative text could be further revised to read: "In case of a dispute concerning a matter which a party claims to have already been settled by a settlement agreement, that party may invoke the existence of the settlement agreement in the State where the settlement agreement is sought to be relied upon in accordance with the law of that State and under the conditions laid down in this instrument to prove that the dispute has been settled."

24. After discussion, the Working Group agreed to further consider the above-mentioned drafting proposals (see paras. 18, 20 and 23) in addition to draft provisions 1(1) and 3(1).

B. Settlement agreements concluded in the course of judicial or arbitral proceedings

25. The Working Group recalled its understanding that: (i) settlement agreements reached during judicial or arbitral proceedings but not recorded as judicial decisions or arbitral awards should fall within the scope of the instrument; and (ii) the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument.

26. The Working Group further recalled its deliberations on the exclusion of settlement agreements concluded in the course of judicial or arbitral proceedings, in light of the objective to avoid possible gap or overlap with existing and future conventions, namely the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention"), and the 2016 preliminary draft convention on judgments, under preparation by the Hague Conference on Private International Law.

27. While some preference was expressed for option 1 in draft provision 1(3), it was suggested that settlement agreements recorded as judgments should be excluded from the scope of the instrument only to the extent that they would be enforceable in the same manner as judgments. It was further suggested to clarify that settlement agreements concluded before a court in the course of proceedings but not recorded as judgments would fall under the scope of the instrument to the extent that they were not enforceable in the same manner as a judgment. In that context, the Working Group considered the following drafting suggestion: "The instrument does not apply to settlement agreements approved by a court, or which have been concluded before a court in the course of proceedings, and which are enforceable in the same manner as a judgment, or recorded as an arbitral award."

28. With respect to that drafting suggestion, it was pointed out that additional burden would be put on the enforcing authority as it would need to determine enforceability under conventions or domestic law applicable to judgments. Therefore, it was suggested that it would be preferable not to include the additional criteria of enforceability in draft provision 1(3).

29. Concerns were raised that the drafting suggestion (see para. 27 above) might create a gap, if it did not provide that a settlement agreement recorded as an arbitral award but not enforceable as an arbitral award would fall under the scope of the instrument (for example, when the enforceability of a consent award is denied under the New York Convention due to the lack of an underlying dispute). It was further questioned whether the assessment of enforceability should be made in accordance with the law of the State where the settlement agreement was recorded as a judgment (the originating State) or in accordance with the law of State where enforcement was sought. In response, it was said that reference to the law of the originating State would be consistent with the approach adopted in the 2016 preliminary draft convention on judgments under preparation.

30. Concern was expressed that parties might be deprived of the opportunity to enforce a settlement agreement in instances where the settlement was recorded as a judgment or an arbitral award, but the law of the State where enforcement was sought did not permit enforcement under those regimes. It was therefore suggested that option 2 in draft provision 1(3) would be preferable as it would permit application of the instrument to settlement agreements recorded as judgments or arbitral awards, to the extent that they cannot be relied upon for enforcement as judgments or arbitral awards.

31. It was noted that, in certain jurisdictions, it was typical for parties to request a court to record a settlement agreement as a judgment. It was highlighted that in such circumstances, a large number of settlement agreements would be excluded from the scope of the instrument under option 1 of draft provision 1(3). In order to avoid such negative consequences, it was suggested that the instrument could provide for some flexibility to the enacting or implementing State to expand the scope of the instrument (possibly through declarations if the instrument were to be a convention). Support was expressed for that suggestion. It was noted that an alternative approach might be for the instrument to provide States with the flexibility to limit the scope of application, rather than to expand it, through declarations.

32. However, it was pointed out that uncertainties might result from such declarations, and therefore, doubts were expressed on the need to adopt an open and flexible approach to the matter. It was suggested that if the parties to a settlement agreement decided to record their settlement agreements in the form of a judgment or an arbitral award, there would be little need for allowing enforcement under the instrument.

33. The Working Group then considered whether settlement agreements not concluded in the course of judicial or arbitral proceedings but afterwards recorded as judgments or arbitral awards should fall within the scope of the instrument. It was widely felt that such situations could be addressed along the same lines as settlement agreements concluded in the course of judicial or arbitral proceedings and recorded as judgements or arbitral awards.

34. After discussion, the Working Group agreed to consider the matter further at a later stage of its deliberations.

C. Opt-out or opt-in for the parties to the settlement agreement; declaration by States regarding the effect of an opt-in by the parties

35. The Working Group considered whether the application of the instrument would depend on the consent of the parties to the settlement agreement. The wide range of views that had been expressed at the previous sessions of the Working Group were reiterated.

36. One view was that the parties' choice should not have any impact on the application of the instrument and, therefore, the instrument should apply generally and automatically provided that the requirements therein were met and no grounds for resisting enforcement existed. It was said that such an approach would provide an

enforcement regime comparable to that of the New York Convention for arbitral awards. That approach would avoid potential conflicts between the parties regarding the application of the enforcement regime envisaged in the instrument. It was further mentioned that requiring an opt-in would run contrary to the underlying objective of the instrument, which was to make it easier for businesses to enforce settlement agreements. Requiring an opt-in would also be contrary to the expectations of the parties as they would generally expect the other party to comply with the settlement agreement and thus its possible enforcement.

37. A different view was that parties should decide whether the instrument would be applicable in light of the importance of party autonomy, and that this could be achieved by providing for an opt-in or opt-out mechanism in the instrument. It was argued that parties needed to be fully aware of the consequences of the instrument becoming applicable and the opt-in or opt-out mechanism would provide a gradual introduction to the new enforcement regime.

38. The Working Group considered draft provision 4(1)(f) which dealt with the question of opt-out or opt-in by the parties to the settlement agreement as a ground for refusing enforcement. It was suggested that such a provision, if kept in the instrument, would be better placed under draft provision 4(2). Another suggestion was to require opt-in or opt-out by the parties in the provision on the scope or on application requirements.

39. Considering the divergence in views, the Working Group heard the suggestion also made at its sixty-fifth session that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement could be left to States when adopting or implementing the instrument. For example, if the instrument were to be a convention, a State could be given the flexibility to declare that that it would apply the convention only to the extent that the parties to the settlement agreement agreed to its application (as provided in option 1 in paragraph 52 of document A/CN.9/WG.II/WP.200). If the instrument were to take the form of model legislative provisions, an opt-in mechanism could be included as an option for States to consider when enacting such legislative provisions. In that context, reference was made to articles 1(6) and 1(7) of the Model Law on Conciliation.

40. The suggestion in paragraph 39 above was considered as one possible means to address the divergence of approaches on the question of opt-in or opt-out mechanisms. However, it was pointed out that providing flexibility to States to formulate declarations to that effect might give rise to uncertainty as to whether a settlement agreement would be enforceable, and could result in imbalance between parties in different jurisdictions as a settlement agreement might be enforceable in one but not in another.

D. Impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure

41. The Working Group recalled its discussion at its previous sessions on the impact of the conciliation process, and the conduct of conciliators, on the enforcement procedure. In that context, diverging views were expressed regarding the inclusion of defences for resisting enforcement of settlement agreements as formulated in draft provision 4(1)(d), which addressed manifest failure of the conciliator to maintain fair treatment of the parties, and draft provision 4(1)(e), which addressed non-disclosure by the conciliator of circumstances likely to give rise to justifiable doubts as to its impartiality or independence.

42. One view was that draft provisions 4(1)(d) and 4(1)(e) struck an appropriate balance providing an efficient mechanism for enforcement of settlement agreements and assuring legal certainty. It was explained that draft provisions 4(1)(d) and 4(1)(e) would contribute to ensuring that the process leading to a settlement agreement was conducted in an appropriate manner and provide a review mechanism by a court or an enforcing authority through which the parties could be protected. It was also noted

that the inclusion of draft provisions 4(1)(d) and 4(1)(e) would highlight the importance of ethics and conduct of conciliators.

43. In support of that view, it was mentioned that draft provision 4(1)(d) introduced objective standards. With regard to the term "manifest", it was said that the inclusion of that term raised the threshold, adding to the objectiveness of the standard and suggesting that only serious irregularities or failure by the conciliator would be grounds for refusing enforcement. On the other hand, views were also expressed that the "manifest" threshold was too high a standard and one which would be difficult to prove. A proposal was made to replace the notion of "manifest failure to maintain fair treatment" with "impropriety".

44. With regard to the notion of "fair treatment", it was mentioned that the notion was included in article 6(3) of the Model Law on Conciliation, which justified the inclusion in the instrument. It was mentioned that paragraph 55 of the Guide to Enactment and Use of the Model Law further provided guidance on the meaning of that term. In response, it was said that paragraph 55 was not meant to provide guidance on the issue under consideration, and that paragraph 55 further stated that the reference in the Model Law to maintaining fair treatment of the parties was intended to govern the conduct of the conciliation process and not the contents of the settlement agreement.

45. With regard to draft provision 4(1)(e), a suggestion was made to insert the words "in the eyes of the parties", but there was little support as that phrase would be introducing a subjective criteria. A further suggestion was made to introduce in draft provision 4(1)(e) language similar to that in draft provision 4(1)(d) which would require that non-disclosure by a conciliator had a material impact or undue influence on the parties entering into the settlement agreement.

46. Another view was that draft provisions 4(1)(d) and 4(1)(e) would run contrary to the objective of the instrument and were not necessary. It was stated that those matters were covered under other grounds for resisting enforcement in draft provision 4, such as paragraph 1(c), which referred to the settlement agreement being null and void, and paragraph 2(a), which addressed violation of public policy. It was suggested that any material accompanying the instrument could clarify that paragraphs 1(c) and 2(a) were intended to include circumstances dealt with in paragraphs 1(d) and 1(e). In response, the view was expressed that there was merit in retaining paragraphs 1(d) and 1(e) as explicit defences.

47. It was further said that draft provisions 4(1)(d) and 4(1)(e) might be problematic, as they would require the enforcing authority to take into consideration relevant domestic standards on conduct of the conciliator and the conciliation process. It was also mentioned that as the instrument was being prepared to allow for cross-border enforcement, the enforcing authority might have to inquire about a misconduct or a process which did not necessarily take place in that jurisdiction, which also posed problems.

48. In addition, it was underlined that manifest failure by a conciliator to maintain fair treatment would, in most cases, be very difficult to establish due to the confidential or informal nature of the process and the confidentiality obligation of the conciliator. Proving such failure might result in the parties violating the terms of confidentiality, which was a core characteristic of conciliation. In response, it was said that article 9 of the Model Law on Conciliation provided exceptions to confidentiality obligation, where disclosure would be required under the law or for the purposes of implementation or enforcement of a settlement agreement.

49. With respect to draft provision 4(1)(e), it was pointed out that in the preparation of the Model Law on Conciliation, a suggestion had been made to address the consequences that might result from non-disclosure by the conciliator. Reference was made to paragraph 52 of the Guide to Enactment and Use of the Model Law on Conciliation which read: "… the prevailing view was that the consequences of failure to disclose such information should be left to the provisions of law in the enacting State … In particular, a failure to disclose facts that might give rise to justifiable doubts … does not, in and of itself, create a ground for setting aside a settlement

agreement that would be additional to the grounds already available under applicable contract law." It was said that including non-disclosure by a conciliator as a defence to resist enforcement would run contrary to the approach adopted in the Model Law on Conciliation. In that context, a suggestion was made that draft provision 4(1)(e) could be merged with draft provision 4(1)(d) (see para. 76 below).

50. It was further pointed out that from practitioners' standpoint, inclusion of draft provisions 4(1)(d) and 4(1)(e) would deter the utility of the instrument, as it could create ancillary disputes. It was also mentioned that the standards in draft provision 4(1)(d) were subjective and could be interpreted differently. It was highlighted that conciliators were bound by ethical duties and professional standards and those provisions would be superfluous. In that context, a suggestion was made that work to prepare ethical standards for conciliators could be undertaken.

E. Proposal

51. With a view to make progress on the preparation of the instrument, a possible compromise proposal (hereinafter referred to as "compromise proposal") was made in relation to the following issues: legal effect of settlement agreements (issue 1); settlement agreements concluded in the course of judicial or arbitral proceedings (issue 2); declaration on opt-in by the parties (issue 3); impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure (issue 4); and the form of the instrument (issue 5).

52. The compromise proposal read as follows:

"*Issue 1*

"Draft provision 3: In case of a dispute concerning a matter that a party claims to have already been settled by a settlement agreement, the party may invoke the existence of the settlement agreement in the State where the settlement agreement is sought to be relied upon in accordance with the rules of procedure of the State and under the conditions laid down in this instrument to prove that the dispute has been settled.

"Draft provision 1(1): This instrument applies to international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement').

"Draft provision 4 (chapeau): The competent authority of the State where the application under article 3 is made may refuse to grant relief under article 3 at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that: …

"*Issue 2*

"Draft provision 1(3): This instrument does not apply to settlement agreements: (a) approved by a court; or (b) that have been concluded before a court in the proceedings, either of which are enforceable in the same manner as a judgment; or (c) recorded and enforceable as an arbitral award.

"Issue 3

*"*A Party may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.

"*Issue 4*

"Draft provision 4(1)(d): Gross misconduct by the conciliator that violated applicable standards and that had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.

"Draft provision 4(1)(e): The conciliator did not disclose circumstances unknown to the parties that were likely to give rise to justifiable doubts as to its

impartiality or independence and such lack of disclosure had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement.

"Report to give examples of applicable standards of conduct, such as paragraph 55 of the Guide to Enactment and Use of the Model Law on Conciliation, and codes of conduct.

"*Issue 5*

"Model Law and Convention prepared simultaneously. Some have suggested use of the formula from the Transparency Convention."

53. The Working Group undertook the consideration of the compromise proposal, which was supported as providing a sound basis for further deliberations. It was generally felt that the drafting could be improved.

Issue 1, draft provision 3

54. It was explained that draft provision 3 aimed at addressing situations where a settlement agreement might be raised in defence against a claim. It was clarified that draft provision 3 would not replace draft provision 3(1) in document A/CN.9/WG.II/WP.200 but rather would be an additional paragraph. Further, it was underlined that that provision would permit a party to rely on a settlement agreement in different procedural contexts.

55. It was questioned whether the phrase "to prove that the dispute has been settled" was necessary as a defence would not always be limited to that aspect. It was further questioned whether requiring proof at the stage of application that a matter had been settled was appropriate. In addition, it was pointed out that the notion of a dispute having been settled was unclear. Therefore, it was suggested to either delete that phrase or revise it along the following lines: "to prove that the dispute has been conclusively settled, subject only to review under draft provision 4". It was further suggested that draft provision 3 should refer to the specific provisions in the instrument containing conditions (for example, draft provisions 3 and 4). A suggestion was made that draft provision 3 should clarify which State was being referred to in the phrase "rules of procedure of the State". It was suggested that draft provision 3 would be open to flexible application in the light of the different judicial systems.

Issue 1, draft provision 1

56. A comment was made that draft provision 1 no longer referred to "enforcement" and therefore did not define the objective or scope of the instrument. It was suggested that draft provision 1 should at least include a reference to "enforcement", indicating the key purpose of the instrument and following the approach in the New York Convention. In response, it was explained that it might be difficult to refer to the concept embodied in draft provision 3 and that including only "enforcement" might unintentionally limit the scope of the instrument. On that point, it was suggested that draft provision 3 was ancillary to the main purpose of the instrument and need not be referred to in draft provision 1. It was therefore suggested that reference to "enforcement" should be retained in draft provision 1.

Issue 1, draft provision 4

57. A comment was made that the phrase "grant relief" in draft provision 4 might convey a wider meaning than "enforcement", possibly referring to substantive relief. In response, it was clarified that the phrase "granting relief" intended to encompass both the right of a party to seek enforcement and to invoke a settlement agreement under draft provision 3.

Issue 2, draft provision 1(3)

58. In relation to draft provision 1(3), questions were raised regarding: (i) which authority would determine the enforceability in the same manner as a judgment and on what basis, whether it would be the law of the State where enforcement was sought

or that of the State where the settlement agreement was approved or court proceedings took place; (ii) the implications of the reference to the "enforceable as an arbitral award"; and (iii) the difference between the notions of a settlement agreement being "approved" by a court in paragraph (a), and being "concluded" before a court in paragraph (b).

59. In relation to question (i) in paragraph 58 above, it was explained that it would be the enforcing authority that would determine enforceability. With regard to a settlement agreement approved by a court or concluded before a court, that determination would be based on the standard (or law) of the State where the settlement agreement was approved or court proceedings took place, for the sake of consistency with the 2016 preliminary draft convention on judgments under preparation. With respect to a settlement agreement recorded as an arbitral award, that determination would be based on the law of the State where enforcement was sought in light of existing enforcement frameworks including the New York Convention. It was explained that draft provision 1(3) was silent on the matter as the basis for determination might vary depending on whether settlement agreements were approved by a court or concluded before a court, or recorded as arbitral awards. In response, it was said that the applicable standard for the determination of enforceability should be clarified, in particular as the law of different jurisdictions might be applicable, for example, the law of the place where the conciliation took place, where the settlement agreement was concluded and where the court approved the settlement agreement.

60. In relation to question (ii) in paragraph 58 above, it was explained that the addition of the phrase "enforceable as an arbitral award" in paragraph (c) was intended to address the gap that might arise from non-enforceability of a consent award in certain jurisdictions. Questions were raised on practical implications of that provision, in particular whether it might create an overlap with existing enforcement frameworks for arbitral awards.

61. In relation to question (iii) in paragraph 58 above, it was explained that paragraphs (a) and (b) were intended to cover a wide range of different circumstances, as in some jurisdictions, a settlement agreement that was approved by a court was not necessarily enforceable as a judgment. It was further clarified that they were meant to refer to situations, such as where parties would proceed with out-of-court conciliation and then seize a court to have the settlement approved and where parties would start court proceedings and settle out of court.

62. It was clarified that the phrase "of which are enforceable in the same manner as a judgment" would apply to both paragraphs (a) and (b). As a matter of drafting, it was suggested that paragraphs (a) and (b) could be combined.

63. The Working Group heard a number of additional comments and questions on draft provision 1(3). On a practical note, it was cautioned that the enforcing authority would need to inquire about the enforceability at the State where the settlement agreement was approved or court proceedings took place. Such a process was said to be costly and potentially lead to complications and delays. It was highlighted that that procedure would be an additional burden on the enforcing authority.

64. It was questioned whether a party denied enforcement of a settlement agreement, which was approved by a court or concluded before a court, could then apply for enforcement of the settlement agreement itself. It was explained that the purpose of draft provision 1(3) was to avoid overlap and therefore a party would not be able to enforce a settlement agreement in such circumstances. In response, it was said that overlaps among various enforcement regimes would be unavoidable and could be beneficial to parties. Therefore, reservations were expressed on draft provision 1(3), in particular in light of the complications that might result therefrom. Along the same lines, a further suggestion was made to leave it entirely to the enforcing authority to decide the applicable enforcement regime.

65. It was suggested that a State could provide a more favourable regime than that provided in draft provision 1(3) by applying the more-favourable-right provision (see para. 48 of document A/CN.9/WG.II/WP.200 and article 7 under paragraph 2 of

document A/CN.9/WG.II/WP.200/Add.1). It was suggested that draft provision 1(3) should be considered in conjunction with that more-favourable-right provision.

66. However, it was pointed out that the more-favourable-right provision would not solve issues arising from multiple enforcement regimes. It was said that where a settlement agreement survived the transformation into a judgment or an arbitral award, a solution could be sought to allow their co-existence. In that context, it was suggested to replace draft provision 1(3) by the following text: "This instrument does not apply to a settlement agreement which, in the State where enforcement is sought, can be enforced as a judgment or an award."

67. A different suggestion was to address the matter as a defence to resist enforcement, leaving the determination to the enforcing authority. It was suggested that an additional ground for refusing enforcement could read along the following lines: "The settlement agreement has been approved by a court, concluded before a court or recorded as an arbitral award, and the enforcing authority finds that its enforcement can be satisfactorily pursued outside the instrument."

68. With a view to provide more flexibility in the application of the provision, a drafting suggestion was made to replace the words "either of which are enforceable in the same manner as a judgment" by the words "to the extent that the judgment is enforceable".

69. It was pointed out that the involvement of a judge might vary from merely recording parties' settlement agreement to taking an active role in the settlement. It was questioned whether the different types of court decisions that would result therefrom would have an impact on the operation of draft provision 1(3).

70. It was suggested that draft provision 1(3) should indicate that the party against whom the application was being invoked should bear the proof that the settlement agreement in question did not fall within the scope of the instrument.

71. After discussion, it was understood that draft provision 1(3) could operate in the following manner: (i) the competent authority where enforcement was sought would determine the application of the instrument; (ii) whether a settlement agreement was enforceable in the same manner as a judgment under paragraphs (a) and (b) would be determined in accordance with the law of the State where the settlement agreement was approved or court proceedings took place; (iii) the determination on that enforceability would be made by the competent authority where enforcement was sought; (iv) the more-favourable-right provision would allow States to apply the instrument, for example, to a settlement agreement approved by a court and enforceable in the same manner as a judgement; and (v) with regard to paragraph (c), the competent authority would determine the enforceability in accordance with the law where enforcement was sought and if the arbitral award fell outside the scope of the relevant enforcement regime, such as the New York Convention, the settlement agreement would survive and be considered for enforcement under the instrument.

Issue 4, draft provisions 4(1)(d) and 4(1)(e)

72. With regard to issue 4, it was explained that the proposed draft provisions 4(1)(d) and 4(1)(e) sought to reflect a compromise among the divergence in views expressed.

73. A question was raised whether there was a need for draft provision 4(1)(e) when the substance of that provision could sufficiently be covered by draft provision 4(1)(d). In response, it was said that draft provisions 4(1)(d) and 4(1)(e) addressed different issues, the former concerning the conduct of the conciliator based on applicable standards and the latter concerning non-disclosure by the conciliator.

74. With regard to draft provision 4(1)(d), it was mentioned that terms such as "gross misconduct", "violate", "material impact" and "undue influence" were ambiguous, unknown in certain legal traditions and might introduce uncertainties. In that context, a few drafting suggestions were made, for example, deleting reference to "gross misconduct" and referring to the violation of applicable standards by the conciliator or reinstating the terms "manifest failure" or "fair treatment."

75. In response, it was explained that the introduction of those terms in the compromise proposal was an attempt to incorporate more objective standards with a higher threshold, balancing the different views expressed in the Working Group on the need for such a provision in the instrument. It was stated that while those terms might be novel, the enforcing authorities would not have much difficulty in interpreting them.

76. With regard to draft provision 4(1)(e), a number of concerns were expressed. It was mentioned that it would be difficult for a party to prove the failure of a conciliator to disclose circumstances likely to give rise to justifiable doubts. It was further mentioned that draft provision 4(1)(e) still retained subjective standards and did not have much practical implication. It was reiterated that grounds for refusing enforcement should focus on the conduct of the parties and not on the conduct of the conciliators. It was emphasized that failure of disclosure by a conciliator should not constitute a ground for refusing enforcement. It was also said that draft provision 4(1)(e) should be merged with draft provision 4(1)(d) (see also para. 49 above).

77. In addition, it was also questioned why the disclosure obligation would apply only to circumstances unknown to the parties. In response, it was explained that there might be situations where a conciliator did not disclose circumstances giving rise to justifiable doubts as the parties were already aware of such circumstances. It was stated that in such instances, non-disclosure by a conciliator should not be construed as a ground for resisting enforcement, thus explaining why draft provision 4(1)(e) was limited to those circumstances "unknown" to the parties.

78. In support of retaining draft provision 4(1)(e), it was said that disclosure requirements were common in relevant applicable standards including in domestic legislation. It was also said that by qualifying the situation to where the non-disclosure by a conciliator had a material impact or undue influence on the parties, it achieved a balance between an oversight mechanism and the interest of the parties.

79. To address some of the concerns, it was suggested that draft provisions 4(1)(d) and 4(1)(e) could be combined to read: "a material breach of applicable standards by the conciliator but for which a reasonable party would not have entered into a settlement agreement". It was explained that the word "material" would ensure that only serious (non-trivial) breach constitute grounds for refusal, the word "reasonable" would provide for objective standards, the words "applicable standards" would encompass the various standards on conduct (including fair treatment) as well as disclosure, and the "but for" phrase would ensure that the ground could be invoked only when the consent of the parties to enter into a settlement agreement had been vitiated. There was support for this drafting proposal as providing a more objective standard compared to that of draft provisions 4(1)(d) and 4(1)(e).

80. It was questioned which standards would be applicable in draft provision 4(1)(d), whether standards applicable at the place where the conciliation took place or at the place where enforcement was sought. As to the comment in the compromise proposal that the report should give examples of applicable standards of conduct, delegations were invited to provide such examples. However, a note of caution was expressed that it was likely that such applicable standards might change over time and that providing examples might not be appropriate.

81. The Working Group continued its deliberation on the following drafting proposal:

> Draft provision 4(1)(d): There was a serious breach by the conciliator of standards applicable to the conciliator or the conciliation, without which breach that party would not have entered into the settlement agreement.
>
> Draft provision 4(1)(e): The conciliator failed to disclose circumstances to the parties that raise justifiable doubts as to the conciliator's impartiality or independence and such failure to disclose had a material impact or undue influence on that party, without which failure that party would not have entered into the settlement agreement.

82. It was said that draft provisions 4(1)(d) and 4(1)(e) should be understood as an extension of draft provision 4(1)(c), where a conduct by the conciliator had an impact on the parties entering into the agreement, which could lead to the settlement agreement being null and void. It was explained that there was merit in retaining draft provisions 4(1)(d) and 4(1)(e). It was further explained that draft provisions 4(1)(d) and 4(1)(e) would not impact the confidential nature of conciliation and that the enforcing authority would generally not be expected to inquire into the details of the process.

83. With respect to that proposal, a number of questions were raised including: (i) the meaning of "serious" breach and on what basis a breach would be considered "serious"; (ii) the need for the qualification that a breach had to be "serious" considering that the breach was further qualified as having a certain impact on a party; (iii) whether the non-inclusion of a reference to a "reasonable" party in draft provision 4(1)(d) (which reference was originally in draft provision 4(1)(d) of the compromise proposal, see above para. 52) made the ground subjective; (iv) whether the non-inclusion of the word "unknown" in draft provision 4(1)(e) (which word was originally in draft provision 4(1)(e) of the compromise proposal, see above para. 52) might lower the threshold; (v) the need and purpose of including the words "undue influence" in addition to "material impact" in draft provision 4(1)(e); and (vi) whether the phrase "and such failure to disclose had a material impact or undue influence on the party" in draft provision 4(1)(e) was necessary.

84. It was explained that the drafting proposal in paragraph 81 aimed at providing for an objective criteria. It was further explained that by limiting the grounds to when a breach or a failure to disclose had an impact on the parties entering into the agreement, the draft provisions provided for an objective threshold. It was mentioned that the term "serious breach" was used instead of the terms "gross misconduct", which was less known in civil law jurisdictions, and "manifest failure", which was considered ambiguous. It was also explained that the word "unknown" from the compromise proposal was deleted, not because a party would be able to rely on circumstances known to that party to resist enforcement, but rather because such knowledge would not have had a material impact on that party and thus would not construe ground for refusing enforcement under draft provision 4(1)(e). As to the word "reasonable" from the compromise proposal, it was explained that that word introduced subjective elements, which should be avoided, and that it was therefore not retained in the drafting proposal.

85. On the question about the need to retain draft provision 4(1)(e) in addition to draft provision 4(1)(d), it was said that draft provision 4(1)(e) would allow an enforcing authority to refuse enforcement even when the applicable standard did not necessarily include a disclosure obligation, yet subject to the conditions mentioned in that draft provision.

86. Concerns were raised that the inclusion of draft provisions 4(1)(d) could open doors for the enforcing authority to refuse enforcement based on diverse grounds, which would run contrary to the flexible nature of conciliation. It was pointed out that the responsibilities and obligations of an arbitrator and those of a conciliator differed, and that this should be taken account of when applying the relevant standards.

87. It was mentioned that there was a need to clarify the scope and the meaning of the "standards applicable" in draft provision 4(1)(d). In response, it was explained that the standards applicable were not only those applicable to the conciliator but those applicable to the process. It was mentioned that such standards took different forms such as the law governing conciliation and codes of conduct, including those developed by professional associations. Therefore, it was suggested that the *travaux preparatoires* or any explanatory material accompanying the instrument could provide examples of standards applicable. It was further suggested that reference should be made not only to the different types of standards but also to elements contained in those standards, such as independence, impartiality, fair treatment referred to in article 6(3) of the Model Law on Conciliation and in paragraph 55 of its Guide to Enactment and Use, and confidentiality. A different suggestion was to

retain those notions in the text of the instrument. Another proposal was for the Commission to consider preparing a separate code of conduct for conciliators.

88. After discussion, the Working Group agreed to continue its discussion based on the drafting proposal contained in paragraph 81 above at a later stage of its deliberations. It was generally felt that the Secretariat should be given flexibility in improving the draft taking into account suggestions made. It was also agreed that any explanatory material accompanying the instrument could include a reference to different types of, and elements in, standards applicable to conciliators and conciliation.

Issue 5

89. The Working Group considered issue 5 of the compromise proposal, which stated that a model legislative text and a convention should be prepared simultaneously and that a "formula" similar to that in the General Assembly resolution 69/116 of 10 December 2014 accompanying the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration should be used.

90. It was clarified that the "formula" was intended to refer to the preamble of that resolution which read: "Recalling … that the Commission decided to prepare a convention that was intended to give those States that wished to make the Rules on Transparency applicable to their existing investment treaties concluded before 1 April 2014 an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the Convention."

91. It was recalled that that wording was adopted in light of the application in time of the UNCITRAL Rules on Transparency in Treaty-based Investor-Sate Arbitration. It was suggested that any similar formula would need to be adapted to the specific characteristic of the work on conciliation. In that context, it was suggested that, as the Commission would be developing a model legislative text and a convention in parallel, it should be clarified that States would not be expected to adopt both instruments.

92. During the discussion, views were expressed in preference for preparing only model legislative provisions. It was noted that the preparation of a convention on the topic would allow States that adopt the model legislative provisions in their domestic laws to become a party to the convention at a later stage.

93. After discussion, in a spirit of compromise and to accommodate the different levels of experience with conciliation in different jurisdictions, it was agreed that the Working Group would continue to prepare both a model legislative text complementing the Model Law on Conciliation, and a convention, on enforcement of international commercial settlement agreements resulting from conciliation. It was further agreed that a possible approach to address the specific circumstance of preparing both types of instrument could be to suggest that the General Assembly resolution accompanying those instruments would express no preference on the type of instrument to be adopted by States.

D. Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

(A/CN.9/WG.II/WP.200 and Add.1)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission considered a proposal to undertake work on the preparation of a convention on the enforceability of settlement agreements reached through international commercial conciliation (A/CN.9/822).[1] It requested the Working Group to consider the feasibility and possible form of work in that area.[2] At its forty-eighth session, in 2015, the Commission took note of the consideration of the topic by the Working Group at its sixty-second session (A/CN.9/832, paras. 13-59)[3] and agreed that the Working Group should commence work at its sixty-third session to identify relevant issues and develop possible solutions, including the 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.[4] At its forty-ninth session, in 2016, the Commission confirmed that the Working Group should continue its work on the topic.[5]

2. Accordingly, at its sixty-third to sixty-fifth sessions, the Working Group undertook work on the preparation of an instrument on enforcement of international settlement agreements resulting from conciliation.[6]

3. This note, which consists of document A/CN.9/WG.II/WP.200 and its addendum, reflects the deliberations of the Working Group at its sixty-fifth session. Document A/CN.9/WG.II/WP.200 outlines the issues considered so far by the Working Group and sets out draft provisions to be included in a possible instrument on enforcement of international settlement agreements resulting from conciliation (referred to in this note as the "instrument"). The draft provisions have been prepared without prejudice to the final form of the instrument (A/CN.9/896, paras. 12 and 213). Document A/CN.9/WG.II/WP.200/Add.1 illustrates how the draft provisions could be adjusted if the instrument were to take the form of a convention or of model legislative provisions supplementing the UNCITRAL Model Law on International Commercial Conciliation ("Model Law on Conciliation" or "Model Law").

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[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123-125.

[2] Ibid., para. 129.

[3] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 135-141.

[4] Ibid., para. 142.

[5] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 162-165.

[6] The reports of the Working Group on the work of its sixty-third, sixty-fourth and sixty-fifth sessions are contained in documents A/CN.9/861, A/CN.9/867 and A/CN.9/896, respectively.

II. Draft instrument on enforcement of international commercial settlement agreements resulting from conciliation

A. General remarks

1. Legal effect of settlement agreements

4. The Working Group considered how the instrument would express that settlement agreements could or should be given legal effect, for instance, as a prerequisite for enforcement or in defence against a claim, without using the expression "recognition" which, in certain jurisdictions, might be understood to confer *res judicata* or preclusive effect (A/CN.9/896, paras. 77-81, 147-155 and 200-203).

In further considering this matter, the Working Group may wish to take into account that: (i) parties may rely on a settlement agreement in different procedural contexts; (ii) the legal effect given to a settlement agreement varies depending on the national procedural framework; and (iii) any provision on that matter should not result in precluding a competent authority's consideration of the grounds for refusing enforcement (A/CN.9/896, para. 202).

5. Draft provisions 1 (1) and 3 (1) below address that issue by referring to the "legal effect between the parties" of a settlement agreement, and to a party "seeking to rely upon a settlement agreement" (see paras. 15, 29 and 30 below; see also A/CN.9/896, paras. 155 and 203).

2. Settlement agreements concluded in the course of judicial or arbitral proceedings

6. The Working Group confirmed its understanding that: (i) settlement agreements reached during judicial or arbitral proceedings but not recorded as judicial decisions or arbitral awards should fall within the scope of the instrument (A/CN.9/867, para. 125 and A/CN.9/896, para. 48); and (ii) the mere involvement of a judge or an arbitrator in the conciliation process should not result in the settlement agreement being excluded from the scope of the instrument (A/CN.9/867, para. 131 and A/CN.9/896, para. 54).

7. The Working Group may wish to further consider whether settlement agreements concluded in the course of judicial or arbitral proceedings, and recorded as judicial decisions or arbitral awards should fall within the scope of the instrument (A/CN.9/896, paras. 49-52, 169-176, 205-210). The objective of any provision on the matter would be to avoid any overlap and gap between possible applicable regimes (A/CN.9/896, paras. 49 and 210). The Working Group, at its sixty-fifth session, considered two possible formulations to address this matter (A/CN.9/896, paras. 176 and 205-209). While both formulations exclude from the scope of the instrument settlement agreements recorded as judicial decisions or arbitral awards, one difference is the treatment of settlement agreements when the conversion (as court decisions or arbitral awards) does not have effect or is not acceptable in the State where enforcement is sought (A/CN.9/896, para. 209). Draft provision 1 (3) contains those two formulations as options 1 and 2 (see paras. 15 and 20 below).

8. A further matter that the Working Group may wish to consider is whether settlement agreements not concluded in the course of judicial or arbitral proceedings but afterwards recorded as judicial decisions or arbitral awards should fall within the scope of the instrument (A/CN.9/896, paras. 53 and 169).

3. Opt-out or opt-in for the parties to the settlement agreement; declaration by States regarding the effect of an opt-in by the parties

9. The Working Group may wish to further consider whether the application of the instrument would depend on the consent of the parties to the settlement agreement (A/CN.9/896, paras. 126-134 and 195-199). At its sixty-fifth session, a wide range of views were expressed. One view was that the parties' choice should not have any

impact on the application of the instrument and, therefore, the instrument should apply provided that the requirements therein were met and no grounds for resisting enforcement existed (A/CN.9/896, para. 127). A different view was that parties should be given the choice to decide whether the instrument would apply, and that this could be achieved by providing for an opt-out or opt-in mechanism in the instrument (A/CN.9/896, para. 128).

10. During these discussions, it was suggested that the question whether the application of the instrument would depend on the consent of the parties to the settlement agreement need not necessarily be dealt with in the instrument, but could be left to States when adopting or implementing the instrument. For example, if the instrument were to be a convention, a State could be given the flexibility to declare that it would require the parties' agreement to the application of the convention (A/CN.9/896, paras. 130 and 196). If the instrument were to take the form of model legislative provisions, an opt-in mechanism could be included as an option for States to consider when enacting such legislative provisions (A/CN.9/896, para. 196). On this last point, it may be noted that article 1 (6) of the Model Law on Conciliation provides that the parties may "agree to the applicability of this Law", as a means to widen the scope of application of the Model Law; article 1 (7) of the Model Law provides that "the parties are free to agree to exclude the applicability of this law".

11. In relation to the suggestion referred to in paragraph 10 above, it was pointed out that: (i) it would be preferable to set out the opt-in or opt-out rule in the instrument and subsequently allow States to deviate or to make a declaration; and (ii) the application of such a mechanism could become complex, might give rise to uncertainty as to whether a settlement agreement would be enforceable, and could result in imbalance between jurisdictions as a settlement agreement might be enforceable in one but not in another. With respect to the last point, it was suggested that a solution could be to provide for a reciprocal application (A/CN.9/896, para. 197).

12. With a view to reflect the various views expressed, draft provision 4 (1)(f) deals with the question of opt-out or opt-in by the parties to the settlement agreement as a ground for refusing enforcement (see paras. 37, 43 and 44 below). The suggestion of a possible declaration by States if the instrument were to take the form of a convention (see para. 10 above) is addressed at paras. 50 to 52 below.

4. Impact of the conciliation process, and of the conduct of conciliators, on the enforcement procedure

13. The Working Group may wish to further consider whether to include, as separate grounds for refusing enforcement, failure to maintain fair treatment of the parties as well as failure to disclose circumstances likely to give rise to justifiable doubts as to the impartiality and independence of the conciliator (A/CN.9/896, paras. 103-109 and 191-194). Draft provision 4 (1)(d) and (e) deals with that matter (see paras. 37, 41 and 42 below).

5. Form of the instrument

14. The Working Group had a preliminary discussion about the form of the instrument (A/CN.9/896, paras. 135-143 and 211-213). While support was expressed for preparing either a convention or model legislative provisions, there was little support for preparing a guidance text (A/CN.9/896, para. 135). It was generally felt that it would be premature for the Working Group to make a decision on the final form of the instrument, as well as whether work should commence first on a convention or on model legislative provisions. To accommodate the divergence in views, it was agreed that work would proceed with the aim of preparing a uniform text on the topic of enforcement of international commercial settlement agreements resulting from conciliation (A/CN.9/896, para. 213). Document A/CN.9/WG.II/WP.200/Add.1 shows how the draft provisions in section B below would appear if the instrument were to take the form of a convention or of model legislative provisions supplementing the Model Law.

B. Annotated draft provisions

1. Scope of the instrument

15. The Working Group may wish to consider the following formulation regarding the scope of the instrument:

Draft provision 1 (Scope of application)

"1. This [instrument] applies to the legal effect between the parties, and to the enforcement, of international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement(s)').

"2. This [instrument] does not apply to settlement agreements:

"(a) Concluded for personal, family or household purposes by one of the parties (a consumer); or

"(b) Relating to family, inheritance or employment law.

"3. Option 1: [*This [instrument] does not apply to settlement agreements which have been:*

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards.]

Option 2: [*This [instrument] applies to settlement agreements:*

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements, to the extent that they cannot be relied upon, including for enforcement, as judgments or judicial settlements under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*]*; or*

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards, to the extent that they cannot be relied upon, including for enforcement, as arbitral awards under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*].]

Option 3: [*This [instrument] does not apply to settlement agreements which have been:*

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements if they can be relied upon, including for enforcement, as judgments or judicial settlements under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*]*; or*

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards if they can be relied upon, including for enforcement, as arbitral awards under the law of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*]*."*]

Comments on draft provision 1

16. Draft provision 1 sets forth the scope of the instrument. Paragraph 1 reflects the discussion of the Working Group that the purpose of the instrument would need to be clearly spelled out, preferably in draft provision 1 (A/CN.9/896, paras. 151-155 and 200-203). It also provides a definition of the term "settlement agreement" (see A/CN.9/896, paras. 32, 64, 117, 145, 146 and 152). The different elements of

such agreement are further elaborated in draft provision 2. The formal requirement that the settlement agreement shall be in writing is contained in draft provision 1 (1), with draft provision 2 (2) defining how that requirement is met, in particular in relation to electronic communications (see A/CN.9/896, paras. 64 and 66).

17. The Working Group may wish to note that the definition of settlement agreements in paragraph 1 no longer refers to the resolution of "all or part of" a dispute. As one of the grounds for refusing enforcement is the non-finality of the settlement agreement, a settlement agreement resolving part of a dispute would not be enforceable (for the reason that it is not a final resolution of the dispute). Moreover, it would be difficult for a competent authority to assess whether the dispute resolved by the settlement agreement is part of a wider range of disputes. Therefore, it is suggested to refer to "a dispute" or to the notion of "a dispute covered by the settlement agreement" (see also draft provisions 4 (1)(b) in para. 37 below).

18. Paragraphs 2 and 3 deal with exclusions from the scope of the instrument.

19. Paragraph 2 contains draft formulation on exclusion of settlement agreements dealing with consumer, family and employment law matters, in accordance with the discussion of the Working Group (see A/CN.9/896, paras. 55-60).

20. Paragraph 3 deals with the exclusion from the scope of the instrument of agreements concluded in the course of judicial or arbitral proceedings (A/CN.9/896, paras. 48-54, 169-176, 205-210; see also above, paras. 6-8). Options 1 and 2 reflect draft suggestions made at the sixty-fifth session of the Working Group (A/CN.9/896, paras. 176 and 208). According to option 1, the effectiveness of settlement agreements would be extinguished once they are converted, whereas their effectiveness would be preserved under certain circumstances in option 2. The Working Group generally felt that option 1 would be preferable, although elements of option 2 might deserve further consideration (A/CN.9/896, para. 210). Option 3 seeks to take elements from both options. The term "judicial settlement" is used in these options together with the word "judgment" in order to align the language with that of article 12 of the Convention on Choice of Court Agreements (2005) (the "Choice of Court Convention") (see A/CN.9/896, para. 52). Options 2 and 3 mention "the law of the State" so as to refer to enforcement of foreign judgments and arbitral awards on the basis of both conventions to which the State concerned is party and applicable domestic law (A/CN.9/896, para. 208).

Additional matter — Settlement agreements involving States and other public entities

21. Regarding settlement agreements involving States and other public entities, the Working Group reaffirmed its decision that such agreements should not be automatically excluded from the scope of the instrument (see A/CN.9/896, paras. 61 and 62), and could be addressed through a declaration if the instrument were to take the form of a convention (see para. 48 below). If the instrument were to take the form of model legislative provisions, it would be for each State enacting legislation to decide the extent to which such agreements would fall under the enacting legislation.

2. Definitions

22. The Working Group may wish to consider the following formulation regarding the definitions:

Draft provision 2 (Definitions)

"1. A settlement agreement is 'international' if:

"(a) At least two parties to the settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

"(b) The State in which the parties to the settlement agreement have their places of business is different from either:

"(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

"(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"(c) For the purposes of this article:

"(i) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

"(ii) If a party does not have a place of business, reference is to be made to the party's habitual residence;

"2. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"3. 'Conciliation' means a process, regardless of the expression used and irrespective of the basis upon which the conciliation is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the conciliator') lacking the authority to impose a solution upon the parties to the dispute."

Comments on draft provision 2

23. Paragraph 1 contains a definition of "international" settlement agreement. Upon considering whether the international nature of a settlement agreement should be derived from the international nature of the conciliation (as defined in article 1 (4) of the Model Law on Conciliation), the Working Group agreed that the instrument should instead refer to the internationality of "settlement agreements" (A/CN.9/896, paras. 19 and 158-163). The Working Group may wish to consider whether to maintain the definition of "international" in relation to both the conciliation as provided in the Model Law and the settlement agreement as provided in draft provision 2 (1) if the instrument were to take the form of legislative provisions supplementing the Model Law (see document A/CN.9/WG.II/WP.200/Add.1, para. 4). The Working Group may wish to consider whether the international character of the conciliation could be derived from the internationality of the settlement agreement.

24. Paragraph 1 is modelled on article 1 (4) of the Model Law on Conciliation (A/CN.9/896, paras. 17-31 and 161). Subparagraph (b) has been closely aligned with article 1 (4)(b) of the Model Law (A/CN.9/896, para. 22).

25. Paragraph 1 does not include a provision similar to that found in article 1 (6) of the Model Law on Conciliation that "*This Law also applies to a commercial conciliation when the parties agree that the conciliation is international or agree to the applicability of this Law*". The Working Group agreed that the instrument should not contain a similar provision if it were to take the form of a convention, but that the matter might need to be considered further if the instrument were to take the form of model legislative provisions supplementing the Model Law (A/CN.9/896, para. 26). This matter might need to be considered also in light of the question of opt-out or opt-in mechanism for the parties (see para. 10 above).

26. Paragraph 2 addresses the requirement found in draft provision 1 (1) that settlement agreements should be in writing (A/CN.9/896, paras. 33-38 and 64-66). As the purpose of the instrument is to facilitate enforcement of settlement agreements, it was stated during the fifty-fifth session of the Working Group that it would be essential for the competent authority to be presented with a settlement agreement in writing in order to proceed with the enforcement process (A/CN.9/896, para. 36). It may be recalled that the definition of the written requirement incorporates the

principle of functional equivalence embodied in UNCITRAL texts on electronic commerce.

27. Paragraph 3 contains a definition of "conciliation", based on article 1, paragraphs (3) and (8) of the Model Law (A/CN.9/896, paras. 39-47 and 164-168). If the instrument were to take the form of model legislative provisions supplementing the Model Law, that definition would not be necessary (see A/CN.9/WG.II/WP.200/Add.1, para. 3).

Additional matter — Commercial

28. The Working Group confirmed the understanding that the instrument should apply to "commercial" settlement agreements without providing for any limitation as to the nature of the remedies or contractual obligations (see A/CN.9/896, para. 16). As to the formulation, the Working Group considered that the instrument should apply to settlement agreements concluded by parties to a "commercial" dispute (see A/CN.9/896, paras. 146 and 152). It may be noted that the Model Law on Conciliation already includes, in footnote 2, an illustrative list of the interpretation to be given to the term "commercial" (see A/CN.9/WG.II/WP.200/Add.1, para. 3).

3. Application requirements

29. The Working Group may wish to consider the following formulation regarding the application to the competent authority:

Draft provision 3 (Application)

"1. A settlement agreement shall be given legal effect between the parties and enforced in accordance with the rules of procedure of [option 1, legislative provision: *this State*][option 2, convention: *the State where the settlement agreement is sought to be relied upon*], *and under the conditions laid down in this [instrument].*

"2. A party relying on a settlement agreement, including for its enforcement, under this [instrument] shall supply:

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to its involvement in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"3. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate that parties' or conciliator'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 article 2 (2) above, by itself or together with further evidence.

"4. If the settlement agreement is not in an official language of [option 1, legislative provision: *this* State][option 2, convention: *the State where the application is made], the competent authority may request the party making the application to supply a translation thereof into such language.*

"5. When considering the application, the competent authority shall act expeditiously."

Comments on draft provision 3

30. Paragraph 1 reflects the principle that the instrument should provide a mechanism whereby a party to a settlement agreement would be able to seek enforcement directly in the State of enforcement without a review or control mechanism in the State where the settlement agreement originated from as a pre-condition (see A/CN.9/896, para. 83). The Working Group may wish to consider whether paragraph 1 sufficiently clarifies that settlement agreements could be relied upon by a party in any procedure, whether akin to, for example, homologation before enforcement or in defence proceedings, and would produce effect between the parties (A/CN.9/896, paras. 155 and 203; see also paras. 4 and 5 above).

31. Paragraphs 2 and 3 deal with the requirements for an application under the instrument. Paragraph 2 (a) provides that a settlement agreement shall be signed by the parties (A/CN.9/896, para. 64), and paragraph 3 determines how that requirement could be met in relation to a settlement agreement concluded through electronic communication, in line with UNCITRAL texts on electronic commerce.

32. Paragraph 2 (b) corresponds to the understanding of the Working Group that the instrument would need to provide, in some fashion, that the settlement agreement should indicate that a conciliator was involved in the process and that the settlement agreement resulted from conciliation (A/CN.9/896, paras. 70-75 and 186-190). It was generally felt by the Working Group that that indication would distinguish a settlement agreement from other contracts and provide for legal certainty, facilitate the enforcement procedure and prevent possible abuse. However, it was also emphasized that the additional requirement should not be burdensome, should be kept simple to the extent possible (see A/CN.9/896, paras. 40 and 70) and that the means of proving that a conciliator was involved should not be construed as an exhaustive list (A/CN.9/896, para. 188).

33. Paragraphs 2 (c) and 5 correspond to suggestions that the competent authority should have the ability to require additional documents that would be necessary and should act expeditiously (A/CN.9/896, paras. 82 and 183). By way of background, the Working Group considered whether the instrument should provide that the settlement agreement should be in one single document, or in a complete set of documents. After discussion, there was general support for not including such a requirement in the instrument, but instead providing that the competent authority should have, at the stage of the application, the ability to require from the parties documents that would be strictly necessary (A/CN.9/896, paras. 67-69 and 177-185).

34. The Working Group may wish to note that the consequences of non-compliance with the application requirements are to be assessed in relation to the acceptability of the application for enforcement (A/CN.9/896, para. 190).

Additional matter — Informal processes

35. The Working Group may wish to consider whether the form requirements of settlement agreements in draft provisions 1 (1) and 2, as well as the application process in draft provision 3, sufficiently ensures that settlement agreements resulting from informal processes are excluded (A/CN.9/867, paras. 117 and 121; A/CN.9/896, paras. 42-44 and 164-167).

36. The Working Group may wish to consider further the suggestion that flexibility should be provided to States to broaden the scope of the instrument to include agreements between the parties not necessarily reached through conciliation. For example, a reservation (if the instrument were to take the form of a convention), or a footnote (if it were to take the form of model legislative provisions) could indicate that the application of the instrument extends to agreements settling a dispute reached without the assistance of a third person (A/CN.9/896, paras. 40 and 41; see also para. 49 below).

4. Defences

37. The Working Group may wish to consider the following formulation regarding the defences:

Draft provision 4 (Grounds for refusing to give legal effect to, or to enforce, a settlement agreement)

"*1. The competent authority of [*option 1, legislative provision: *this State][*option 2, convention*: the State where the application under draft provision 3 is made] may refuse to give legal effect to, or to enforce, a settlement agreement at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:*

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked, and therefore, have not yet given rise to the obligations of that party; or

*"(c) The settlement agreement is null and void, inoperative or incapable of being enforced under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the State where the application under draft provision 3 was made]; or*

"(d) A manifest failure by the conciliator to maintain a fair treatment of the parties had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement; or

"(e) The conciliator did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence; or

"[(f) [Option 1 - opt-out*: The parties to the settlement agreement have agreed to exclude the application of the [instrument] in accordance with article* -] [Option 2 - opt-in*: The parties to the settlement agreement did not consent to the application of the [instrument] as provided for in article* -].]

*"2. The competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the State where the application under draft provision 3 was made] may also refuse to give legal effect to, or to enforce, a settlement agreement if it finds that:*

"(a) Giving legal effect to, or enforcing, the settlement agreement would be contrary to the public policy of that State; or

"(b) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of that State."

Comments on draft provision 4

- *Paragraph 1, subparagraph (a)*

38. Subparagraph (a) reflects the agreement in substance by the Working Group (A/CN.9/896, para. 85).

- *Paragraph 1, subparagraph (b)*

39. Subparagraph (b) contains various grounds for resisting enforcement that relate to the settlement agreement. Regarding the ground that the settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement, the Working Group agreed to retain that ground, in particular to avoid situations where parties would submit a draft agreement, or a text that would not be a

final resolution between the parties of the dispute (A/CN.9/896, paras. 88 and 89). Regarding the ground that the settlement agreement had been subsequently modified by the parties, the Working Group generally agreed that that ground should be retained, and could possibly be merged with the ground that the obligations in the settlement agreement have been performed (A/CN.9/896, paras. 90 and 98). Regarding the ground that the settlement agreement contained conditional or reciprocal obligations, it is clarified that the ground would apply only if the conditions stipulated in the agreement were not met or if the obligations had not been performed or complied with by the applicant (A/CN.9/896, paras. 91 and 98).

- *Paragraph 1, subparagraph (c)*

40. Subparagraph (c) is based on article II (3) and article V (1)(a) of Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"). It seeks to reflect the understanding of the Working Group that the instrument should not give the competent authority the ability to interpret the validity defence to impose requirements in domestic law, and that consideration of the validity of settlement agreements by the competent authority should not extend to form requirements (A/CN.9/896, paras. 99-102).

- *Paragraph 1, subparagraph (d)*

41. Subparagraph (d) addresses the impact of serious misconduct by the conciliator at the enforcement stage (A/CN.9/896, paras. 103-109 and 191-194), in line with the decision of the Working Group that the scope of that subparagraph should be limited to instances where the conciliator's misconduct had a direct impact on the settlement agreement (A/CN.9/896, paras. 107 and 194). The Working Group agreed to further consider the matter in light of the fact that maintaining fair treatment of the parties relates to the conduct of the conciliation process (which is not addressed in the instrument) and does not apply to the content of the settlement agreement (see above, para. 13).

- *Paragraph 1, subparagraph (e)*

42. Subparagraph (e) addresses failure by the conciliator to disclose information on circumstances likely to give rise to justifiable doubts regarding impartiality or independence (A/CN.9/896, paras. 104, 105, 108 and 194).

- *Paragraph 1, subparagraph (f)*

43. Subparagraph (f) is dealing with possible opt-in or opt-out by the parties (see paras. 9-12 above). Preliminary suggestions were made that the provision on defences would be the right place for dealing with that question (A/CN.9/896, para. 198). Subparagraph (f) also aims at clarifying a ground in the previous version of the draft which stated that "*the enforcement of the settlement agreement would be contrary to its terms and conditions*" (see A/CN.9/WG.II/WP.198, para. 34) with more clear and specific wording (A/CN.9/896, paras. 92-98; 126-134; and 195-199).

44. If paragraph 1 (f) is retained, the Working Group may wish to consider whether to include a provision addressing the possibility of opt-out or opt-in by the parties to the settlement agreement. In that respect, the Working Group may wish to consider article 1, paragraphs (6) and (7) of the Model Law, as well as the following possible formulations: (i) for an opt-out by the parties: *"The parties to the settlement agreement may exclude, by agreement in writing, the application of this [instrument]. Subject to articles ---, the parties to the settlement agreement may derogate from or vary the effect of any provision in the [instrument]."*; (ii) for an opt-in by the parties: "*This [instrument] shall apply only if the parties to the settlement agreement have consented in writing to its application*.". The Working Group may wish to consider how to ensure that such provisions would not be interpreted as a waiver or exclusion by parties of recourse regarding the settlement agreement.

- *Paragraph 2*

45. Paragraph 2 covers situations where the competent authority would consider the defences on its own initiative, and reflects the agreement in substance by the Working Group (A/CN.9/896, paras. 110-112).

5. Relationship of the enforcement process to judicial or arbitral proceedings

46. The Working Group may wish to consider the following formulation regarding parallel applications:

Draft provision 5 (Parallel applications or claims)

> *"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of [*option 1, legislative provision*: this State][*option 2, convention*: the State where the enforcement of the settlement agreement is sought] may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."*

Comments on draft provision 5

47. Draft provision 5 addresses how a competent authority would treat a situation where an application (or claim), which might impact the enforcement, has been made to a court, an arbitral tribunal or any other competent authority. The Working Group generally agreed that it would be appropriate for the competent authority to be given the discretion to adjourn the enforcement process, if an application (or claim) relating to the settlement agreement had been made to a court, arbitral tribunal or any other competent authority, which might affect the enforcement process (A/CN.9/896, paras. 122-125). It may be noted that draft provision 5 does not deal with applications that would affect procedures for giving legal effect to the settlement agreement.

6. Other matters

(a) "More-favourable-right" provision

48. The proposal for a provision mirroring article VII(1) of the New York Convention, which would permit application of more favourable national legislation or treaties to enforcement, was considered by the Working Group. There was general support for including such a provision in the instrument, as a separate provision, even though reservation was expressed (A/CN.9/896, paras. 154, 156, and 204). The Working Group may wish to consider the following draft formulation: *"This [instrument] shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the State where such settlement agreement is sought to be relied upon."*

(b) States and other public entities

49. The Working Group may wish to consider the following formulation for a declaration on the application of the instrument to settlement agreements concluded by States and other public entities if the instrument were to take the form of a convention (see para. 21 above; see also A/CN.9/862, para. 62): *"A Party may declare that [*option 1: *it shall apply][*option 2: *it shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration."*

(c) Conciliation process; involvement of a third person

50. The possibility of providing some flexibility to States who may wish to apply the instrument to agreements settling a dispute, regardless whether they resulted from conciliation, was considered by the Working Group (A/CN.9/896, paras. 40 and 41; see also para. 36 above). It was suggested that if the instrument were to take the form of a convention, it could provide for a reservation whereby a State party could declare that it would extend its application to settlement agreements reached without the assistance of a third person. Such a reservation could read as follows: "*A Party may declare that it shall apply this Convention to agreements settling a dispute regardless*

of whether [a conciliator assisted the parties in resolving their dispute][the agreements resulted from conciliation].” If the instrument were to take the form of model legislative provisions, that possibility could be indicated, for instance, in a footnote (A/CN.9/896, para. 41).

(d) Declaration by States regarding the effect of an opt-in by the parties

51. The Working Group may wish to consider further the suggestion to include in the instrument a declaration to the effect that each State would treat settlement agreements as binding and enforce them to the extent that the party applying for enforcement indicated the parties’ agreement to enforcement under the instrument (A/CN.9/896, paras. 130, 196 and 197; see also para. 10 above).

52. If the instrument were to take the form of a convention, it may be envisaged that States that wish to incorporate such a mechanism could make a declaration to that effect. The Working Group may wish to consider the following formulations:

Option 1: “*A Party may declare that it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.”*

Option 2: “*A Party may declare that it shall apply this Convention unless the parties to the settlement agreement have agreed to exclude the application of the Convention.”*

53. The Working Group may wish to consider the impact of such reservation (see para. 11 above).

(A/CN.9/WG.II/WP.200/Add.1) (Original: English)

Note by the Secretariat on settlement of commercial disputes: international commercial conciliation: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation

ADDENDUM

Contents

II. Draft instrument on enforcement of international commercial settlement agreements resulting from conciliation

C. Form of the draft instrument

1. As requested by the Working Group at its sixty-fifth session, this section illustrates how the draft uniform provisions presented in document A/CN.9/WG.II/WP.200 would be adjusted depending on whether the instrument would take the form of a convention or of model legislative provisions supplementing the Model Law on Conciliation (A/CN.9/896, paras. 12 and 213). The purpose is to merely facilitate consideration by the Working Group of the form of the instrument (A/CN.9/896, paras. 135-143 and 211-213; see also A/CN.9/WG.II/WP.200, paras. 3 and 14). An annex to this note contains a table of concordance between the provisions of the two possible forms of instrument.

1. Convention

2. Should the Working Group decide that a convention should be prepared, possible provisions might read as follows.

"**Article 1 — Scope of application**

"1. This Convention applies to the legal effect between the parties, and to the enforcement, of international agreements resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement(s)').

"2. This Convention does not apply to settlement agreements:

"(a) Concluded for personal, family or household purposes by one of the parties (a consumer); or

"(b) Relating to family, inheritance or employment law.

"3. Option 1: [This Convention does not apply to settlement agreements which have been:

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral award.]

Option 2: [This Convention applies to settlement agreements:

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements, to the extent that they cannot be relied upon, including for enforcement, as judgments or judicial settlements under the law of the State where the settlement agreement is sought to be relied upon; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards, to the extent that they cannot be relied upon, including for enforcement, as arbitral awards under the law of the State where the settlement agreement is sought to be relied upon.]

Option 3: [This Convention does not apply to settlement agreements which have been:

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements if they can be relied upon, including for enforcement, as judgments or judicial settlements under the law of the State where the settlement agreement is sought to be relied upon; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards if they can be relied upon, including for enforcement, as arbitral awards under the law of the State where the settlement agreement is sought to be relied upon."]

"**Article 2 — Definitions**

"1. A settlement agreement is 'international' if:

"(a) At least two parties to the settlement agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

"(b) The State in which the parties to the settlement agreement have their places of business is different from either:

"(i) The State in which a substantial part of the obligations under the settlement agreement is to be performed; or

"(ii) The State with which the subject matter of the settlement agreement is most closely connected.

"(c) For the purposes of this article:

"(i) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

"(ii) If a party does not have a place of business, reference is to be made to the party's habitual residence.

"2. A settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"3. 'Conciliation' means a process, regardless of the expression used and irrespective of the basis upon which the conciliation is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ('the conciliator') lacking the authority to impose a solution upon the parties to the dispute.

"**Article 3 — Application**

"1. A settlement agreement shall be given legal effect between the parties and enforced in accordance with the rules of procedure of the State where the settlement agreement is sought to be relied upon, and under the conditions laid down in this Convention.

"2. A party relying on a settlement agreement, including for its enforcement, under this Convention shall supply:

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to its involvement in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"3. The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator, is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate that parties' or conciliator'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 article 2(2) above, by itself or together with further evidence.

"4. If the settlement agreement is not in the official language(s) of the State where the application is made, the competent authority may request the party making the application to supply a translation thereof into such language.

"5. When considering the application, the competent authority shall act expeditiously.

"**Article 4 — Grounds for refusing to give legal effect to, or to enforce, a settlement agreement**

"1. The competent authority of the State where the application under draft provision 3 is made may refuse to give legal effect to, or to enforce, a settlement agreement at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked, and therefore, have not yet given rise to the obligations of that party; or

"(c) The settlement agreement is null and void, inoperative or incapable of being enforced under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the State where the application under draft provision 3 was made; or

"(d) A manifest failure by the conciliator to maintain a fair treatment of the parties had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement; or

"(e) The conciliator did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence; or

"[(f) [*Option 1 — opt-out*: The parties to the settlement agreement have agreed to exclude the application of this Convention in accordance with article -] [*Option 2 — opt-in*: The parties to the settlement agreement did not consent to the application of this Convention as provided for in article -].]

"2. The competent authority of the State where the application under draft provision 3 was made may also refuse to give legal effect to, or to enforce, a settlement agreement if it finds that:

"(a) Giving legal effect to, or enforcing, the settlement agreement would be contrary to the public policy of that State; or

"(b) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of that State.

"**Article 5 — Parallel applications or claims**

"If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of the State where the enforcement of the settlement agreement is sought may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security.

"**Article 6 — Parties' choice regarding the application of the Convention**

[*Option 1, Opt-out*: "The parties to the settlement agreement may exclude, by agreement in writing, the application of this Convention. Subject to articles ---, the parties to the settlement agreement may derogate from or vary the effect of any provision in the Convention.]

[*Option 2, Opt-in*: "This Convention shall apply only if the parties to the settlement agreement have consented in writing to its application.]

"**Article 7 — Other laws or treaties**

"This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the State where such settlement agreement is sought to be relied upon.

"**Article 8 — Reservations**

"1. A Party may declare that:

"(a) [Option 1: It shall apply][Option 2: It shall not apply] this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, only to the extent specified in the declaration;

"(b) It shall apply this Convention to agreements settling a dispute regardless of whether [a conciliator assisted the parties in resolving their dispute][the agreements resulted from conciliation];

"(c) [Option 1: It shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.] [Option 2: It shall apply this Convention unless the parties to the settlement agreement have agreed to exclude the application of the Convention.]

"2. No reservations are permitted except those expressly authorized in this article.

"3. Reservations may be made by a Party at any time. Reservations made at the time of signature shall be subject to confirmation upon ratification, acceptance or approval. Such reservations shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned. Reservations made at the time of ratification, acceptance or approval of this Convention or accession thereto shall take effect simultaneously with the entry into force of this Convention in respect of the Party concerned.

"4. Reservations and their confirmations shall be deposited with the depositary.

"5. Any Party that makes a reservation under this Convention may withdraw it at any time. Such withdrawals are to be deposited with the depositary, and shall take effect upon deposit."

[**Final provisions**: Depositary — Signature, ratification, acceptance, approval accession — Entry into force — Amendments — Denunciation]

2. Legislative provisions supplementing the Model Law on Conciliation

3. If the Model Law on Conciliation were to be complemented by provisions on enforcement of settlement agreements, the Working Group may wish to consider whether the provisions of the Model Law could possibly be presented in three sections, as follows: Section 1 on General Provisions would contain articles 1 to 3 of the Model Law, as completed by new definitions;[1] Section 2 on Conciliation Procedure would contain articles 4 to 13 of the Model Law; and Section 3 on Legal Effect and Enforcement
of Settlement Agreements would contain the new provisions on enforcement of settlement agreements, replacing article 14. The Working Group may wish to note that additional adjustments to the Model Law might be required based on further consideration of issues that remain to be decided, and that the presentation below is not exhaustive regarding the amendments that might need to be made to the Model Law.

4. Section 1, article 1, paragraphs (4) and (5) of the Model Law could be amended as follows:

"1.4 A conciliation or a settlement agreement is international if:

(a) At least two parties to the conciliation have, at the time of the conclusion of the settlement agreement, their places of business in different States; or

(b) The State in which the parties have their places of business is different from either:

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or

(ii) The State with which the subject matter of the dispute is most closely connected.

"1.5 For the purposes of this article:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement;

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[1] Article 1(1) of the Model Law includes a footnote on the term "commercial" (A/CN.9/896, para. 16 and A/CN.9/WG.II/WP.200, para. 28); the word "conciliation" is defined in article 1(3) (A/CN.9/896, paras. 39-47, 164-168, and A/CN.9/WG.II/WP.200, para. 27); and article 1, paragraphs (6) and (7) provide for a opt-in and opt-out for the parties (A/CN.9/WG.II/WP.200, paras. 10 and 44).

"(b) If a party does not have a place of business, reference is to be made to the party's habitual residence."

5. Section 1, article 1(9) of the Model Law could be supplemented as follows:

"1.9 This Law does not apply to:

"(a) [Cases where a judge or an arbitrator, in the course of judicial or arbitral proceedings, attempts to facilitate a settlement];[2]

"(b) Settlement agreements concluded for personal, family or household purposes by one of the parties (a consumer);

"(c) Settlement agreement relating to family, inheritance or employment law; and

"[(d) Settlement agreements concluded by a State or any governmental agencies or any person acting on behalf of a governmental agency]."

6. An alternative to listing the exclusions would be to provide more generally that: "This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to conciliation or may be submitted to conciliation only according to provisions other than those of this Law". A similar provision can be found in article 1(5) of the UNCITRAL Model Law on International Commercial Arbitration.

7. Section 1, article 1, of the Model Law could be complemented with a definition of "settlement agreements", as follows:

"1.10 A 'settlement agreement' is an international agreement resulting from conciliation and concluded in writing by parties to resolve a commercial dispute ('settlement agreement(s)').

"1.11 For the purposes of this article, a settlement agreement is 'in writing' if its content is recorded in any form. The requirement that a settlement agreement be 'in writing' is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."

8. Article 14 of the Model Law would be replaced by section 3, which could read as follows:

"**Article 14 — General principles**

"14.1 A settlement agreement shall be given legal effect between the parties and enforced in accordance with the rules of procedure of this State, and under the conditions laid down in this Section.

"14.2 Option 1: [The procedure in this section does not apply to settlement agreements which have been:

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards.]

Option 2: [The procedure in this section applies to settlement agreements:

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements, to the extent that

[2] Article 1(9)(a) might need to be adjusted to take account of the decision of the Working Group on the matter of settlement agreements concluded in the course of judicial or arbitral proceedings (see A/CN.9/WG.II/WP.200, paras. 6-8, 15 and 20).

they cannot be relied upon, including for enforcement, as judgments or judicial settlements under the law of this State; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards, to the extent that they cannot be relied upon, including for enforcement, as arbitral awards under the law of this State.]

Option 3: [The procedure in this section does not apply to settlement agreements which have been:

"(a) Approved as court orders, concluded before a court in the course of proceedings, or recorded as judgments or judicial settlements if they can be relied upon, including for enforcement, as judgments or judicial settlements under the law of this State]; or

"(b) Concluded before an arbitral tribunal in the course of proceedings, and recorded as arbitral awards if they can be relied upon, including for enforcement, as arbitral awards under the law of this State."]

"14.3 The functions referred to in this Section shall be performed by … (referred to as the "competent authority") [Each State enacting the Model Law specifies the court, courts or other competent authorities to perform the functions].

[Footnote to the title of section 3 or to article 14:

"*A State may consider applying this Section to agreements settling a dispute, irrespective of whether they resulted from conciliation.]

"**Article 15 — Application**

"15.1 A party relying on a settlement agreement, including for its enforcement, under this Section shall supply:

"(a) The settlement agreement signed by the parties;

"(b) [Evidence][Indication] that the settlement agreement resulted from conciliation, such as by including the conciliator's signature on the settlement agreement, by providing a separate statement by the conciliator attesting to its involvement in the conciliation process or by providing an attestation by an institution that administered the conciliation process; and

"(c) Such other necessary document as the competent authority may require.

"15.2 The requirement that a settlement agreement shall be signed by the parties or, where applicable, the conciliator is met in relation to an electronic communication if:

"(a) A method is used to identify the parties or the conciliator and to indicate that parties' or conciliator'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 article 1(11) above, by itself or together with further evidence.

"15.3 If the settlement agreement is not in the official language(s) of this State, the competent authority may request the party making the application to supply a translation thereof into such language.

"15.4 When considering the application, the competent authority shall act expeditiously.

"**Article 16 — Defences**

"16.1 The competent authority of this State may refuse to give legal effect to, or to enforce, a settlement agreement at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:

"(a) A party to the settlement agreement was under some incapacity; or

"(b) The settlement agreement is not binding or is not a final resolution of the dispute covered by the settlement agreement; or the obligations in the settlement agreement have been subsequently modified by the parties or have been performed; or the conditions set forth in the settlement agreement have not been met for a reason other than a failure by the party against whom the settlement agreement is invoked, and therefore, have not yet given rise to the obligations of that party; or

"(c) The settlement agreement is null and void, inoperative or incapable of being enforced under the law to which the parties have subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of this State; or

"(d) A manifest failure by the conciliator to maintain a fair treatment of the parties had, in light of the circumstances of the case, a material impact or undue influence on a party, without which the party would not have entered into the settlement agreement; or

"(e) The conciliator did not disclose circumstances likely to give rise to justifiable doubts as to its impartiality or independence as provided for in article 8; or

["(f) [*Option 1 — opt out*: The parties to the settlement agreement have agreed to exclude the application of this Law in accordance with article 1(7)] [*Option 2 — opt in*: The parties to the settlement agreement did not consent to the application of this Law as provided for in article 1(6)].[3]

"16.2 The competent authority of this State may also refuse to give legal effect to, or to enforce, a settlement agreement if it finds that:

"(a) Giving legal effect to, or enforcing, the settlement agreement would be contrary to the public policy of this State; or

"(b) The subject matter of the settlement agreement is not capable of settlement by conciliation under the law of this State.

"16.3 If an application or a claim relating to a settlement agreement has been made to a court, an arbitral tribunal or any other competent authority which may affect enforcement of that settlement agreement, the competent authority of this State may, if it considers it proper, adjourn the decision on the enforcement of the settlement agreement and may also, on the request of a party, order the other party to give suitable security."

[3] It may be noted that article 1(6) of the Model Law aims at permitting application of the Model Law where other criteria for its application are not met, so its purpose and effect are different compared to the opt-in provision under the convention.

Annex

Table of concordance

Draft provisions	*Convention*	*Legislative provisions*
Scope and definition of "settlement agreement"	Article 1(1)	Article 14.1 on scope/purpose (Amendment to article 14 of the Model Law) Article 1.10 for the definition of "settlement agreement" (Amendment to article 1 of the Model Law)
Exclusion of family, employment and consumer law matters	Article 1(2)	Article 1.9 (Amendment to article 1 of the Model Law)
Exclusion of settlement agreements recorded as judicial settlements and arbitral awards	Article 1(3)	Article 14.2 (Amendment to article 14 of the Model Law)
Determination of the competent authority	N/A	Article 14.3 (Amendment to article 14 of the Model Law)
Definitions	Article 2	Article 1
Definition of "international"	Article 2(1)	Article 1(4) (Amendment to article 1 of the Model Law)
Definition of the "written requirement"	Article 2(2)	Article 1(11) (Amendment to article 1 of the Model Law)
Definition of "conciliation"	Article 2(3)	Current article 1(3) of the Model Law
Application	Article 3	Article 15
Grounds for refusing to give legal effect to, or to enforce, a settlement agreement	Article 4	Article 16(1) and (2)
Parallel applications or claims	Article 5	Article 16(3)
Opt-out/opt-in for the parties	Articles 6 (and 8)	Current article 1(6) and (7) of the Model Law
Other laws or treaties	Article 7	N/A
Reservations	Article 8	Article 1.9 on settlement agreements concluded by States/other public entities (Amendment to article 1 of the Model Law) Footnote to article 14 on conciliation process (Amendment to article 14 of the Model Law)

III. ELECTRONIC COMMERCE

A. Report of the Working Group on Electronic Commerce on the work of its fifty-fourth session (Vienna, 31 October-4 November 2016)

(A/CN.9/897)

[Original: English]

Contents

I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated Working Group IV to undertake work in the field of electronic transferable records.[1]

2. 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).

3. At its forty-fifth session, in 2012, 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.[2]

4. 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). 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).

5. At its forty-sixth session, in 2013, 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.[3]

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.
[2] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90.
[3] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 230 and 313.

6. 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). At its forty-ninth session (New York, 28 April-2 May 2014), the Working Group continued its work on the preparation of draft provisions on the basis of document A/CN.9/WG.IV/WP.128 and Add.1.

7. At its forty-seventh session, in 2014, the Commission reaffirmed the mandate of the Working Group to develop a legislative text on electronic transferable records that would greatly assist in facilitating electronic commerce in international trade.[4]

8. At its fiftieth session (Vienna, 10-14 November 2014), the Working Group continued its work on the preparation of draft provisions on the basis of 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). At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of draft provisions on the basis of document A/CN.9/WG.IV/WP.132 and Add.1.

9. At its forty-eighth session, in 2015, the Commission encouraged the Working Group to finalize the current work in order to submit its results at the Commission's forty-ninth session bearing in mind that an UNCITRAL model law on electronic transferable records would be accompanied by explanatory materials.[5]

10. At its fifty-second session (Vienna, 9-13 November 2015), the Working Group continued its work on the preparation of draft provisions on the basis of document A/CN.9/WG.IV/WP.135 and Add.1. The Working Group proceeded with its deliberations of the notions of electronic transferable records and of control as functional equivalent of possession as well as of a general reliability standard.

11. At its fifty-third session (New York, 9-13 May 2016), the Working Group continued its work on the preparation of draft provisions on the basis of document A/CN.9/WG.IV/WP.137 and Add.1.

12. At its forty-ninth session, in 2016, the Commission agreed that priority should be given to completing the preparation of the draft Model Law on Electronic Transferable Records and the accompanying explanatory note, so that they could be finalized and adopted by the Commission at its next session. It was generally felt that the topics of identity management and trust services as well as of cloud computing should be retained on the work agenda and that it would be premature to prioritize between the two topics. The Commission confirmed its decision that the Working Group could take up work on those topics upon completion of the work on the draft Model Law on Electronic Transferable Records. In that context, the Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic. It was also mentioned that priority should be based on practical needs rather than on how interesting the topic was or the feasibility of work.[6]

II. Organization of the session

13. The Working Group, composed of all States members of the Commission, held its fifty-fourth session in Vienna from 31 October to 4 November 2016. The session was attended by representatives of the following States members of the Working

[4] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149.
[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231.
[6] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 235 and 353.

Group: Argentina, Austria, Brazil, Canada, China, Colombia, Czechia, El Salvador, France, Germany, Honduras, India, Indonesia, Italy, Japan, Kenya, Kuwait, Mexico, Pakistan, Panama, Philippines, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

14. The session was also attended by observers from the following States: Algeria, Belgium, Bolivia (Plurinational State of), Costa Rica, Cyprus, Dominican Republic, Paraguay, Republic of Moldova, Slovakia, Sweden, and Tunisia.

15. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: Caribbean Court of Justice (CCJ);

(c) *International non-governmental organizations*: Centre for Commercial Law Studies (Queen Mary University of London), European Law Students' Association (ELSA), GSM Association (GSMA), Institute of Law and Technology (Masaryk University), International Bar Association (IBA), International Federation of Freight Forwarders Associations (FIATA), Law Association for Asia and the Pacific (LAWASIA) and The European Ecommerce & Omni-Channel Trade Association (EMOTA).

17. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Ms. Nadiah Faisal AL-DABBOUS (Kuwait)

18. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.IV/WP.138); and (b) a note by the Secretariat entitled "Draft Model Law on Electronic Transferable Records" (A/CN.9/WG.IV/WP.139 and its addenda).

19. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Draft Model Law on Electronic Transferable Records.
5. Legal issues related to identity management and trust services.
6. Contractual aspects of cloud computing.
7. Technical assistance and coordination.
8. Other business.
9. Adoption of the report.

III. Deliberations and decisions

20. The Working Group engaged in discussions on the draft Model Law on Electronic Transferable Records contained in document A/CN.9/WG.IV/WP.139 and its addenda (the "draft Model Law"). The deliberations and decisions of the Working Group thereon are reflected in chapter IV below. The Secretariat was requested to revise the draft Model Law and the explanatory materials to reflect those deliberations and decisions and transmit the revised text to the Commission for consideration at its fiftieth session. The Working Group recalled that UNCITRAL practice was to circulate the text as recommended by an UNCITRAL working group to all

Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft Model Law, so that the comments would be received before the Commission at its fiftieth session.

21. In addition, the Working Group engaged in discussions on legal issues related to identity management and trust services as well as on contractual aspects of cloud computing. The deliberations and decisions of the Working Group thereon are reflected in chapters V and VI respectively below.

IV. Draft Model Law on Electronic Transferable Records

A. General (Draft articles 1-5)

Draft article 1. Scope of application

Footnote

22. It was suggested to delete the footnote to paragraph 3, since paragraph 23 of A/CN.9/WG.IV/WP.139 was viewed as sufficiently explaining the exclusions possible under paragraph 3. In response, it was indicated that the footnote provided enacting States with the desired guidance on the possible scope of draft article 1 and was in line with the drafting style used for other UNCITRAL model laws.

23. After discussion, it was agreed to retain the footnote to paragraph 3 unchanged.

24. It was noted that, while States could create new types of transferable documents or instruments, including in electronic form, by enacting laws, parties to contractual obligations related to electronic transferable records could not do so by agreement.

25. Accordingly, the Working Group agreed that paragraph 18 of A/CN.9/WG.IV/WP.139 should be redrafted so that (a) the words "is not intended to" replaced the words "may not" in the first sentence; and (b) the second sentence should read "Allowing such creation by freedom of contract would circumvent the principle of numerus clausus of transferable documents or instruments, where that principle is applicable."

26. The Working Group agreed that the chapeau of paragraph 19 of A/CN.9/WG.IV/WP.139 should include the words "the requirements and legal effects of", in order to better clarify its meaning.

27. The Working Group further agreed to delete the words "if so believed" at the end of paragraph 23, subparagraph (b) of A/CN.9/WG.IV/WP.139 as not appropriate.

28. In addition, the Working Group also agreed that paragraph 23, subparagraph (b) of A/CN.9/WG.IV/WP.139 should indicate that jurisdictions could exclude documents or instruments falling under the scope of 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"), regardless of whether the Geneva Conventions were in force in those jurisdictions.

29. With regard to paragraph 27 of A/CN.9/WG.IV/WP.139, the Working Group agreed that the words "functional equivalents of" should be replaced with the word "legally", since electronic transferable records existing only in an electronic environment might fulfil the same functions as documents or instruments falling under the scope of the Geneva Conventions.

Draft article 2. Definitions

"electronic transferable record"

30. It was observed that the definition of "electronic transferable record" consisted solely of a reference to draft article 9. In that light, it was suggested to redraft that definition following the approach adopted in the definition of "transferable document or instrument". In response, it was recalled that such proposal had already been

discussed by the Working Group (see A/CN.9/869, paras. 24 and 25; see also A/CN.9/WG.IV/WP.137, paras. 20-26).

31. In view of the content of the definition of "electronic transferable record", the Working Group agreed that the comments contained in paragraphs 32 to 34 of A/CN.9/WG.IV/WP.139 should be presented as comments to draft article 9.

32. The Working Group also agreed that the words "of straight bills of lading" at the end of the second sentence of paragraph 34 of A/CN.9/WG.IV/WP.139 should be replaced with the words "of straight or nominative instruments, such as promissory notes, bills of lading, and bills of exchange" in order to provide for a broader range of nominative or straight documents or instruments.

"transferable document or instrument"

"issued on paper"

33. A proposal was made to delete the words "issued on paper" from the definition of "transferable document or instrument" as they were viewed as excluding tangible media other than paper. In response, it was indicated that the deletion of the words "issued on paper" would render the definition of "transferable document or instrument" medium-neutral. It was added that such revised definition could have unintended consequences on the fundamental structure of the Model Law, which aimed at establishing functional equivalence between paper-based transferable documents or instruments and electronic transferable records. It was also said that draft article 7, on writing, could refer to tangible media other than paper.

34. After discussion, the Working Group agreed to retain the definition of "transferable document or instrument" unchanged.

35. The Working Group also agreed that the second sentence in paragraphs 32 and 36 of A/CN.9/WG.IV/WP.139 should read "It does not aim at affecting the fact that substantive law shall determine the rights of the person in control." because the substantive law determined who was necessarily entitled to the rights referred to in the electronic transferable record.

36. The Working Group further agreed to delete the word "cargo" from paragraph 37 of A/CN.9/WG.IV/WP.139.

"electronic record"

37. The Working Group agreed to retain the definition of "electronic record" unchanged.

Draft article 3. Interpretation

General principles

38. With respect to the reference to "general principles on which this Law is based" contained in paragraph 2, it was indicated that identification of those principles would be useful, in particular, to provide guidance to readers not yet fully familiar with the Model Law. In that line, it was confirmed that the three fundamental principles underlying the Model Law were the principles of non-discrimination against electronic communications, functional equivalence and technological neutrality.

39. It was indicated that additional principles applicable to the Model Law, including some common to other uniform law texts, could be identified. It was added that the principle of good faith could be one of those principles, subject to the qualifications already expressed by the Working Group (A/CN.9/WG.IV/WP.139, para. 44).

40. It was further said that, while those general principles were already present in the Model Law, their exact content and operation could be identified progressively in light of the increasing level of use, application and interpretation of the Model Law. It was explained that such approach would provide needed flexibility in the interpretation of the Model Law. It was suggested that the explanatory materials

should be amended accordingly. In response, it was stated that the Model Law could not be based on general principles that did not yet exist.

41. After discussion, the Working Group agreed to (a) retain draft article 3 unchanged; (b) highlight in the explanatory materials that the principles of non-discrimination against electronic communications, functional equivalence and technological neutrality were the three fundamental principles underlying the Model Law; and (c) indicate in paragraph 46 of A/CN.9/WG.IV/WP.139 that: "The clarification of the exact content and operation of those general principles may take place progressively in light of the increasing level of use, application and interpretation of the Model Law."

Draft article 4. Party autonomy [and privity of contract]

42. It was recalled that the purpose of the Model Law was to promote international trade by enabling the use of electronic transferable records. It was added that the principle of party autonomy pursued the same purpose and that explanatory materials to the Model Law should reflect that.

43. It was explained that paragraph 1 referred to parties to contractual obligations related to the electronic transferable records. It was added that those parties needed to take full advantage of party autonomy, in particular, to support the rapid development of business practices.

44. In response, it was said that party autonomy was a notion adequate for contractual relations, but that substantive law applicable to transferable documents or instruments was often of mandatory application. It was added that functional equivalence rules aimed at enabling the use of electronic equivalents of transferable documents or instruments should likewise not be derogable.

45. It was indicated that the creation of dual or multiple functional equivalence regimes, based on different contractual agreements, was to be avoided, as it was with respect to transferable documents or instruments.

46. It was also indicated that the open list of provisions that could be derogated from contained in paragraph 1 did not provide sufficient guidance and that variance in its enactment could significantly disrupt uniformity. It was added that the Model Law should provide additional guidance on which provisions could be derogated from. As an example, it was indicated that draft articles 1 to 10, 12, 16, 17 and 20 of the Model Law could be identified as not derogable.

47. After discussion, the Working Group agreed to (a) retain draft article 4 unchanged; (b) retain the words "and privity of contract" outside square brackets in the title of draft article 4; (c) indicate in paragraph 50 of A/CN.9/WG.IV/WP.139 that: "Limiting party autonomy could hinder international trade as well as technological innovation and the development of new business practices."; (d) delete the word "broad" in paragraph 54 of A/CN.9/WG.IV/WP.139; and (e) reflect in the explanatory materials to the Model Law that enacting jurisdictions should carefully consider the possibility of allowing derogation of general principles underlying the Model Law and, in particular, functional equivalence rules, and the consequences thereof.

Draft article 5. Information requirements

48. The Working Group agreed to retain draft article 5 unchanged.

49. The Working Group agreed that draft article 15 should be placed after draft article 5, as both articles related to information requirements.

B. Provisions on electronic transactions (Draft articles 6-8)

Draft article 6. Legal recognition of an electronic transferable record

50. The Working Group agreed that draft article 6 should be placed in the first section of the Model Law, while functional equivalence related provisions should be

placed in the second section of the Model Law, and asked the Secretariat to make editorial changes accordingly.

51. A question was raised whether the word "consent" in paragraph 69 of A/CN.9/WG.IV/WP.139 referred to an agreement on the use of an electronic transferable record between the parties to contractual obligations related to electronic transferable records, or to an agreement on the use of system rules between the user of an electronic transferable records management system and the centralized operator of that system.

52. In that respect, it was explained that in certain types of systems based on the distributed ledger model there was no centralized operator and that therefore, while consent to the use of an electronic transferable record could be expressed, including implicitly, that may not be possible for system rules. In view of that observation as well as of the rapidly-evolving practice in the use of distributed ledgers, it was proposed to replace the words "do not require prior acceptance" in paragraph 69 of A/CN.9/WG.IV/WP.139 with the words "may not require prior acceptance".

53. After discussion, the Working Group agreed to (a) retain draft article 6 unchanged; (b) replace the words "enacting jurisdictions may decide to mandate" in paragraph 66 of A/CN.9/WG.IV/WP.139 with the words "this does not preclude enacting jurisdictions from mandating" as more appropriate for explanatory materials; and (c) revise paragraph 69 of A/CN.9/WG.IV/WP.139 to clarify the concept of consent referred to therein.

Techniques of enactment of draft articles 7 and 8

54. The Working Group agreed that provisions indicating the requirements for functional equivalence of the notions of "writing" and "signature" in an electronic environment were of fundamental importance for the application of UNCITRAL texts on electronic commerce. It was added that, while the enactment of the Model Law on Electronic Transferable Records required the adoption of those functional equivalence standards, such adoption could take place with different techniques.

55. In that respect, it was noted that a general law on electronic transactions was likely to contain such functional equivalence provisions, which could be based on UNCITRAL uniform texts. However, it was added, the case could also be that those functional equivalence provisions did not exist in a jurisdiction wishing to enact the Model Law on Electronic Transferable Records. In that case, the adoption of draft articles 7 and 8 would address the legislative need.

56. It was further explained that if those functional equivalence provisions already existed in a jurisdiction enacting the Model Law, a policy decision would have to be made on whether existing functional equivalence provisions contained in the general law on electronic commerce would apply also with regard to electronic transferable records, or, alternatively, draft articles 7 and 8 would apply. In that latter case, it was indicated that, while each enacting jurisdiction would be best placed to choose the most appropriate legislative approach, particular attention should be paid to avoid establishing a dual regime that sets forth different functional equivalence requirements for electronic records and electronic transferable records.

57. The Working Group agreed that the above considerations (see paras. 54-56 above) should be reflected in explanatory materials so as to provide guidance to enacting jurisdictions.

Relationship with other UNCITRAL texts on electronic commerce

58. A question was raised on the relationship between the Model Law on Electronic Transferable Records and the UNCITRAL Model Law on Electronic Commerce (1996).[7] In particular, it was suggested that paragraphs 3 and 4 of article 17 of the

[7] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication Sales No. E.99.V.4.

UNCITRAL Model Law on Electronic Commerce and certain provisions of the Model Law on Electronic Transferable Records could be incompatible.

59. A suggestion was made that additional guidance could be provided on the interaction of the different UNCITRAL texts on electronic commerce. It was recalled that those texts reflected evolving electronic commerce practice and that therefore certain provisions had been complemented, amended or updated by subsequent texts. It was added that such guidance would be particularly useful in technical cooperation activities.

60. After discussion, the Working Group agreed to (a) give further consideration to the relationship between the UNCITRAL Model Law on Electronic Commerce and the Model Law on Electronic Transferable Records; and (b) defer any consideration on the possibility of providing additional guidance on the interaction of the different UNCITRAL texts on electronic commerce to a future session.

Draft article 7. Writing

61. The Working Group agreed to retain draft article 7 unchanged.

Draft article 8. Signature

62. It was indicated that draft article 8 was meant to apply only to electronic transferable records and not to electronic records (see A/CN.9/WG.IV/WP.139, para. 75). After discussion, the Working Group agreed that reference be made to "electronic transferable record" instead of "electronic record".

63. It was said that a signature could relate to a voluntary decision rather than the need to meet a legal requirement. In order to reflect that possibility, the Working Group agreed that the words "or permits" should be included after the word "requires" and that the explanatory materials on that issue should reflect the content of paragraphs 4 and 29 of A/CN.9/WG.IV/WP.139/Add.2.

64. It was indicated that paragraph 79 of A/CN.9/WG.IV/WP.139 was not accurate since it could be read as not taking into account that the link between pseudonyms and real names could be based on factual elements to be found outside distributed ledger systems. In that light, the Working Group agreed that paragraph 79 of A/CN.9/WG.IV/WP.139 should be redrafted, taking also into account paragraph 39 of A/CN.9/WG.IV/WP.139/Add.1.

C. Use of electronic transferable records (Draft articles 9-19)

Draft article 9. Transferable document or instrument

65. Different views were heard with respect to the title. After discussion, the Working Group agreed on the title "Requirements for the use of an electronic transferable record" as best illustrating the content of draft article 9.

66. It was indicated that the comments to draft article 9 in A/CN.9/WG.IV/WP.139/Add.1 could be misinterpreted as the notion of "singularity" was to be understood as referring to singularity of claims and not to singularity of documents. It was explained that, while singularity of an electronic transferable record was possible, it was not necessary under the Model Law and might not be possible to achieve in registry-based systems, whose use the Model Law should also enable. It was suggested to review the explanatory materials to the Model Law accordingly.

67. In response, it was said that the matter had been discussed extensively and that the commentary reflected accurately the Working Group's discussions and deliberations. In particular, it was said that singularity of documents and singularity of claims were two distinct notions that both found adequate illustration in the explanatory materials. It was added that the suggested revision would require amending the text of draft article 9, since the article "the" in the English language

version of draft article 9, paragraph 1 (b)(i) and its corresponding translations were meant to reflect singularity of documents.

68. After discussion, the Working Group agreed to leave the explanatory materials to draft article 9 unchanged with respect to the references to singularity.

69. The Working Group agreed that the words "(or singularity)" should be deleted from paragraph 7 of A/CN.9/WG.IV/WP.139/Add.1 to avoid any confusion between the notions of "uniqueness" and "singularity".

70. It was suggested that paragraph 11 of A/CN.9/WG.IV/WP.139/Add.1 could be misread as authorizing replication of electronic transferable records and should be deleted. In response, it was said that, while replication of electronic transferable records could be technically possible, the electronic transferable records management system should prevent such replication, as indicated in paragraph 11 of A/CN.9/WG.IV/WP.139/Add.1. It was added that the possibility of producing non-transferable copies of electronic transferable records was not excluded under the Model Law.

71. It was indicated that the text of paragraph 13 of A/CN.9/WG.IV/WP.139/Add.1 could be misunderstood as implying a formal requirement of identification of the electronic transferable record as functional equivalent of a transferable document or instrument. In that light, the Working Group agreed to revise paragraph 13 of A/CN.9/WG.IV/WP.139/Add.1 as follows: "The information that would be required to be contained in a transferable document or instrument allows determining the substantive law applicable to the electronic transferable record (e.g., the law applicable to a bill of lading, rather than the law applicable to a promissory note). Nevertheless, one electronic transferable record may contain information that would be required to be contained in more than one type of transferable document or instrument."

72. It was indicated that the text of paragraph 21 of A/CN.9/WG.IV/WP.139/Add.1 could be misleading. It was further indicated that draft article 9 required that the electronic transferable record was capable of being controlled rather than being actually controlled. The Working Group agreed that paragraph 21 of A/CN.9/WG.IV/WP.139/Add.1 should be deleted.

73. It was said that the first sentence of paragraph 25 of A/CN.9/WG.IV/WP.139/Add.1 could be interpreted as indicating that only system designers could authorize changes, while those changes would be actually agreed upon by the parties to contractual obligations related to electronic transferable records. In light of that observation, the Working Group agreed to draft the first sentence of paragraph 25 of A/CN.9/WG.IV/WP.139/Add.1 as follows: "'Authorized' changes are those changes agreed upon by the parties to contractual obligations related to electronic transferable records throughout the life cycle of an electronic transferable record and permitted by the electronic transferable records management system."

74. It was suggested that the explanatory materials should provide guidance on the words "apart from any change which arises in the normal course of communication, storage and display" in draft article 9, paragraph 2. In that respect, it was recalled that the same words were used in article 8, paragraph 3 (a) of the UNCITRAL Model Law on Electronic Commerce, and that useful guidance could be found in the Guide to Enactment to that Model Law, subject to any adjustment needed in relation to the use of electronic transferable records.

75. The Working Group agreed that the explanatory materials should provide guidance on the words "apart from any change which arises in the normal course of communication, storage and display" in draft article 9, paragraph 2.

Draft article 10. Control

76. It was indicated that the notions of logical and physical control contained in paragraph 28 of A/CN.9/WG.IV/WP.139/Add.1 were not particularly relevant for the operation of the Model Law and could be easily misinterpreted. It was further said that the reference to the notion of "control" as implementing the requirement

contained in draft article 9, paragraph 1(b)(ii) was obscure. The Working Group agreed to retain the following draft of paragraph 28 of A/CN.9/WG.IV/WP.139/Add.1: "The notion of "control" is closely related to article 9, paragraph 1(b)(ii) (A/CN.9/869, para. 103)."

77. It was said that, although possession was a factual situation, and control was the functional equivalent of possession, the first sentence of paragraph 30 of A/CN.9/WG.IV/WP.139/Add.1 was not appropriate. The Working Group agreed to substitute the first sentence of paragraph 30 of A/CN.9/WG.IV/WP.139/Add.1 with the following: "The Model Law is concerned with identifying a functional equivalent to the fact of possession."

78. The Working Group agreed that the words "an electronic transferable record" in paragraph 37 of A/CN.9/WG.IV/WP.139/Add.1 should be replaced with the words "a transferable document or instrument". However, a view was expressed that the entities able to control an electronic transferable record may not necessarily be the same entities able to possess a transferable document or instrument, and that further consideration should be given to the possibility that physical and digital objects could, under certain circumstances, control electronic transferable records.

Draft article 11. General reliability standard

79. Broad support was expressed for the view that the concept of "reliability" in draft article 11 referred to the reliability of the method, and that reference to a method would include any system used to implement that method. It was suggested that draft article 11 should be revised accordingly. In that light, the Working Group agreed that subparagraph (a)(i) should read "Any operational rules relevant to the assessment of reliability"; and subparagraph (a)(iv) should read "The security of hardware and software".

80. The Working Group agreed that the words "illustrative and as such" should be included in paragraph 47 of A/CN.9/WG.IV/WP.139/Add.1 before the words "not exhaustive" to align the content of that paragraph with that of paragraph 50 of A/CN.9/WG.IV/WP.139/Add.1.

81. The Working Group also agreed that the words "parties, including" should be included before the words "third parties" in the first sentence of paragraph 54 of A/CN.9/WG.IV/WP.139/Add.1 to reflect that "authorized access and use of the system" was a notion relevant to all parties.

Draft article 12. Indication of time and place in electronic transferable records

82. It was indicated that the third sentence of paragraph 2 of A/CN.9/WG.IV/WP.139/Add.2 placed unnecessary importance on the indication of time and place in electronic transferable records. It was suggested that the sentence could be revised as follows: "Article 12 allows for that indication in electronic transferable records."

83. It was indicated that paragraph 7 of A/CN.9/WG.IV/WP.139/Add.2 could create the impression of the existence of an evidentiary rule in the Model Law. In response, it was explained that paragraph 7 aimed to clarify that, when substantive law allowed for agreement on the determination of time, that possibility should not be hindered by the technical features of the electronic transferable records management system.

84. After discussion, the Working Group agreed to (a) retain draft article 12 unchanged; (b) revise the third sentence of paragraph 2 of A/CN.9/WG.IV/WP.139/Add.2 as suggested; and (c) delete paragraph 7 of A/CN.9/WG.IV/WP.139/Add.2.

Draft article 13. Determination of place of business

85. After discussion, the Working Group agreed to retain draft article 13 unchanged.

86. It was indicated that, while the elements listed in draft article 13 did not, per se, determine the location of a place of business, those elements could be used together

with other elements to determine the location of a place of business. It was recalled that such interpretation was consistent with that of article 6, paragraphs 4 and 5 of the the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) ("Electronic Communications Convention").[8] The Working Group agreed that explanatory materials should reflect that interpretation.

87. The Working Group also agreed to delete the reference to "of business" in the last sentence of paragraph 11 of A/CN.9/WG.IV/WP.139/Add.2 since the notion of "place of business" was not relevant for draft article 12.

Draft article 14. Issuance of multiple originals

88. It was suggested to delete draft article 14, since draft article 1, paragraph 2 of the Model Law already enabled the issuance of multiple originals when permitted under applicable substantive law. It was added that the use of a single electronic transferable record could satisfy the functions pursued with the use of multiple original transferable documents or instruments.

89. In response, it was said that draft article 14 should be retained, as it provided guidance on a practice that existed in the paper environment. It was indicated that enacting jurisdictions would be in the best position to decide on the enactment of the provision taking into consideration whether substantive law permitted issuance of multiple originals for transferable documents or instruments.

Issuance of multiple originals on different media

90. The Working Group considered whether a provision dealing with the coexistence of multiple originals issued simultaneously on different media should be included in the Model Law (A/CN.9/WG.IV/WP.139/Add.2, paras. 14-16). It was said that the inclusion of such provision would provide additional clarity. In reply, it was said that such matter, although specifically covered by that provision, could be addressed in substantive law. It was also said that in practice issuing multiple originals on different media was not a common feature given the potential for competing claims for performance.

91. After discussion, the Working Group agreed to (a) retain draft article 14 unchanged; and (b) indicate in the explanatory materials that the Model Law did not prevent the possibility of issuing multiple originals on different media, when permitted by applicable substantive law.

Draft article 15. Additional information in electronic transferable records

92. The Working Group recalled its agreement to place draft article 15 in the general section of the Model Law (see para. 49 above).

Draft article 16. Endorsement

93. The Working Group agreed to retain draft article 16 unchanged.

Draft article 17. Amendment

94. It was suggested that draft article 17 introduced requirements that were not present in draft articles 7, 8 and 16, namely with respect to the use of a reliable method and to identification of the amendment. It was added that such different treatment of similar articles was inconsistent and could lead to interpretative challenges. In response, it was said that the scope of draft article 17 was different from those of draft articles 7, 8 or 16 and that, in particular, draft article 17 aimed at ensuring that amendments of an electronic transferable record, which needed not to be evident in the electronic environment, could be identified as such.

[8] United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), United Nations Publication Sales No. E.07.V.2.

95. It was indicated that draft article 17 referred to amendments of a legal nature (A/CN.9/804, para. 86). It was also said that the notion of "change which arises in the normal course of communication, storage and display" contained in draft article 9, paragraph 2 could be relevant to illustrate the difference between amendments of a legal and of a technical nature.

96. After discussion, the Working Group agreed to retain draft article 17 unchanged.

Draft article 18. Replacement of a transferable document or instrument with an electronic transferable record; Draft article 19. Replacement of an electronic transferable record with a transferable document or instrument

97. The Working Group confirmed that, in case a transferable document or instrument or an electronic transferable record were invalidated on the wrong assumption of the validity of the replacing record, document or instrument, substantive law would apply to the reissuance of the invalidated document, instrument or record, or to the issuance of the replacing record, document or instrument.

98. It was noted that an electronic transferable record could contain information that could not be included in a transferable document or instrument, e.g. metadata. In that case, it was added, the requirement contained in draft article 19, paragraph 2 (a), indicating that the replacing transferable document or instrument shall include all the information contained in the replaced electronic transferable record, might not be satisfied. It was therefore suggested to delete draft article 19, paragraph 2 (a), and, for consistency, draft article 18, paragraph 2 (a). It was added that substantive law would identify the information requirements to be satisfied by the replacing record, document or instrument.

99. It was further indicated that the purpose of draft articles 18 and 19 was to ensure that the change of medium would not affect the rights and obligations of the concerned parties. Accordingly, it was explained that the replacing record, document or instrument should contain all the information necessary in order not to affect those rights and obligations, regardless of the nature of that information. To clarify that point, it was suggested to replace the words "does not" with the words "shall not" in paragraph 4 of draft articles 18 and 19.

100. After discussion, the Working Group agreed to (a) delete paragraph 2 (a) of draft articles 18 and 19; (b) replace "does not" with "shall not" in paragraph 4 of draft articles 18 and 19; and (c) reflect the discussion in the explanatory materials.

D. Cross-border recognition of electronic transferable records (Draft article 20)

Draft article 20. Non-discrimination of foreign electronic transferable records

101. The Working Group agreed to retain draft article 20 unchanged.

102. The Working Group agreed that a reference should be added in the explanatory materials to clarify that the words "issued or used" in paragraph 1 included endorsement and amendment of an electronic transferable record.

103. It was indicated that, while the adoption of the Model Law would provide an adequate legal framework and therefore promote the use of electronic transferable records, other techniques could be available to pursue that goal.

104. In particular, it was noted that, if the rules of private international law as enacted in national law, pointed to a law applicable to electronic transferable records, it could be an effective manner to enable the use of those records, including in States that did not adopt dedicated legislation enabling that use. It was suggested that the following paragraphs could be added to the explanatory materials to draft article 20:

> "71bis. Recourse to private international law rules can be used to uphold the validity of an electronic transferable record. This is the case, for example, where the applicable conflict of law rules point to the law of the jurisdiction where the

electronic transferable record was issued as the law applicable to that record. Similarly, if an electronic transferable record contains a clause on governing law which is recognized under domestic law, including by private international law rules, the validity of that record may be determined by application of the law selected by the parties, and not of the substantive domestic law otherwise applicable to that record. The law of the electronic transferable record is not necessarily the law applicable to transfers or endorsements as transfers or endorsements are often governed by other laws, such as the law where those transactions take place. Mandatory rules under domestic law may also require that a transferable document or instrument be issued or presented on paper. Where this is the case, reference to foreign law by application of private international law rules might not allow a court of the jurisdiction where those mandatory rules exist to recognize the legal validity of an electronic transferable record in the absence of the Model Law.

"71ter. Paragraph 2 preserves the ability for a party to seek recognition of the validity of an electronic transferable record through the application of rules of private international law, which can be used as a separate and independent ground for upholding the validity of the electronic transferable record. An electronic transferable record issued in accordance with the law of a State that permits or requires the use of electronic transferable records may be recognized in another State by application of that other State's private international law rules or by application of the Model Law. The content and effect of existing domestic private international law rules are relevant considerations for deciding whether to implement the Model Law."

105. It was indicated that the suggested paragraphs should be used as explanatory materials to provide additional guidance and therefore included between paragraphs 71 and 72 of A/CN.9/WG.IV/WP.139/Add.2.

106. It was recalled that the Working Group had agreed that the Model Law should not displace existing private international law rules, including by avoiding the creation of a dual regime applying a special set of private international law rules for electronic transferable records (A/CN.9/869, paras. 125 and 128). It was also said that private international law was a complex matter and caution should be exercised when providing guidance on its interpretation and application. The importance of not contradicting draft article 20 was stressed. It was indicated that encouraging the enactment of the Model Law should be the main vehicle for its promotion.

V. Legal issues related to identity management and trust services

107. Broad consensus was expressed on the fundamental importance of identity management ("IdM") and trust services for all types of electronic transactions. In that respect, it was indicated that the overall goal of the proposed work on IdM should be to promote trade, especially across borders, by removing legal obstacles to mutual recognition of IdM systems and trust services (A/CN.9/854, para. 17). A reference was made to the impact of IdM on regional economic integration.

108. The Working Group heard a brief description of several national and regional IdM experiences. In conclusion, it was noted that current IdM practice was fragmented and that different legislative approaches were emerging. It was added that the preparation and adoption of the eIDAS Regulation[9] was an encouraging precedent with respect to establishing an enabling environment for IdM and trust services that operated in States with different legal backgrounds and IdM approaches.

[9] Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

Scope of work

109. With respect to the scope of the future work, it was suggested that, while IdM services could be used for both commercial and non-commercial services, in light of the mandate of UNCITRAL future work should focus on IdM systems used for commercial purposes, regardless of the private or public nature of the IdM services provider. It was also suggested that future work should take into account that cooperation between private and public entities in the delivery of IdM services was common and could take place in different forms.

110. It was recalled that the mandate received from the Commission referred to both IdM and trust services. It was suggested that work should be conducted simultaneously on both topics as they were closely related. In response, it was noted that work on IdM could assist in identifying and defining notions and issues that were relevant also for the work on trust services, and that therefore work on IdM should take place first.

111. The importance of taking into account the existence of technical standards was stressed. It was explained that the availability of a harmonized enabling legal framework for IdM and, in particular, the preparation of widely-accepted definitions of the different reliability levels would in turn facilitate the work on technical standards carried out by other organizations.

112. A reference was made to the distinction between two-party IdM systems, where the IdM services provider coincided with the relying party (e.g., the employer providing credentials to the employee for access to a network and then relying on the authentication of the employee with those credentials) and multi-party identity systems (often referred to as "federated identity systems"), where the relying party relied on credentials issued by a third-party services provider. It was suggested that, while use of two-party IdM systems was common and therefore those systems should not be excluded from future work, focus should be placed on multi-party identity systems.

113. The Working Group considered whether its future work on IdM should be limited to natural and legal persons or also include physical and digital objects. It was indicated that there was increasing interest for legislative aspects of the authentication of objects. In response, it was said that only natural and legal persons could have legal capacity, and that for that reason reference to natural or legal persons controlling the objects would suffice. In turn, it was explained that authentication of objects and liability for objects were two separate issues requiring different legal treatment.

Principles applicable to future work on IdM

114. It was indicated that the fundamental principles underpinning UNCITRAL texts on electronic commerce, namely the principles of technology neutrality, non-discrimination against the use of electronic means, functional equivalence and party autonomy, should be relevant also for future work on IdM and trust services.

115. It was added that additional principles could be identified, such as the principle of proportionality in the choice of IdM systems and trust services, which was already present in UNCITRAL texts on electronic commerce. The question was asked whether a principle of identity system neutrality could be identified independently of that of technology neutrality.

116. It was indicated that it could be desirable to identify additional general principles guiding future work. In that respect, reference was made to the possible inclusion of the principle of "transparency".

117. It was stressed that definitions of terms and concepts relevant for IdM and trust services should be provided in order to have a common understanding and basis for discussion.

118. After discussion, the Working Group agreed that its future work on IdM and trust services should be limited to the use of IdM systems for commercial purposes

and that it should not take into account the private or public nature of the IdM services provider.

119. The Working Group also agreed that work on IdM could take place on a priority basis. It further agreed that focus should be placed on multi-party identity systems and on natural and legal persons, without excluding consideration of two-party identity systems and of physical and digital objects when appropriate.

120. In addition, it was agreed that the Working Group should continue its work by further clarifying the goals of the project, specifying its scope, identifying applicable general principles and drafting necessary definitions.

121. Several views were expressed with respect to the use of legislative and contractual provisions in the assessment of reliability of IdM and trust services. It was indicated that, in certain conditions, a need could arise to identify in the legislation some elements relevant for that assessment, which therefore would not be left entirely to the agreement of the parties. However, it was also indicated that only party autonomy provided the flexibility necessary to best accommodate different business needs. It was suggested that such discussion, which was of significant relevance for future work, would greatly benefit from prior agreement on key terms and their definition.

122. In that respect, the Working Group agreed that, while priority could be given to work on IdM, the identification and definition of terms relevant for IdM and trust services should take place simultaneously given the close relationship between the two.

123. In response to a question, it was said that, at the current stage, it was not advisable to make a decision on whether future work should include IdM and trust services provided by private entities when used for non-commercial purposes.

VI. Contractual aspects of cloud computing

124. The Working Group heard that preparatory work on contractual aspects of cloud computing was being conducted at the expert level with a view to providing a draft document for the consideration of the Working Group. It was added that, in light of its content, that document was being drafted in the tentative form of a legal guide, subject to future decisions of the Commission on the final form of that document.

125. It was recalled that the proposal to conduct work on contractual aspects of cloud computing had been formulated based on a number of considerations, including that the provision of cloud computing services, which were of fundamental importance for economic development, had often a cross-border component (A/CN.9/823). Reference was made to the relevance of an adequate, predictable and enforceable contractual framework to support the development of cloud computing services.

126. It was noted that the preparation of a descriptive document listing issues relevant when reviewing contracts for cloud computing services could be particularly useful in assisting small and medium-sized enterprises. It was added that such document should reflect contractual practices and, where available, legislation, and should refer to relevant technical standards, but should not have a legislative nature, without prejudice to future deliberations and decisions of the Commission.

VII. Technical assistance and coordination

127. With respect to technical assistance and coordination, it was indicated that the United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) had adopted the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (the “Framework Agreement”) on 19 May 2016 and that the Framework Agreement had opened for signature by UN/ESCAP member States on 1 October 2016.

128. It was explained that the Framework Agreement aimed at facilitating technical interoperability and enabling mutual legal recognition of trade-related electronic transactions, as well as at establishing a technical cooperation mechanism. It was noted that the Framework Agreement relied on the adoption of uniform international legal standards, in particular UNCITRAL texts, for the establishment of a legal framework enabling electronic commerce across borders and that in that respect it was consistent with other recent regional agreements (see A/CN.9/863, para. 107).

B. Note by the Secretariat on a Draft Model Law on Electronic Transferable Records

(A/CN.9/WG.IV/WP.139 and Add.1-2)

[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 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).

7. At its fifty-first session (New York, 18-22 May 2015), the Working Group continued its work on the preparation of the draft Model Law as presented in document A/CN.9/WG.IV/WP.132 and Add.1. The Working Group focused its discussion on the definitions of electronic transferable record, possession and control.

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

8. At its fifty-second session (Vienna, 9-13 November 2015), the Working Group continued its work on the preparation of draft provisions as presented in document A/CN.9/WG.IV/WP.135 and Add.1. In particular, the Working Group discussed the relation between draft articles referring to a "reliable method" and a general reliability standard, as well as the elements relevant for assessing reliability.

9. At its fifty-third session, (New York, 9-13 May 2016), the Working Group continued its work on the preparation of the draft Model Law as presented in document A/CN.9/WG.IV/WP.137 and Add.1.

10. Part II of this note contains the draft provisions of the Model Law reflecting the deliberations and decisions of the Working Group during its fifty-third session (A/CN.9/869, paras. 19-131) as well as comments to be used for an Explanatory Note to the Model Law on Electronic Transferable Records.

II. Draft Model Law 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 transferable document or instrument including any rule of law applicable to consumer protection.

"3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to […].[2]"

Remarks

11. At its fifty-third session, the Working Group confirmed its understanding that paragraph 3 included an open-ended exclusion list that permitted application of the draft Model Law according to the needs of each enacting jurisdiction so as to provide both flexibility and clarity on the scope of application of the Model Law (A/CN.9/869, paras. 19-23). At that session, the Working Group identified three possible types of exclusions (A/CN.9/869, para. 23), referred to in the footnote inserted at the end of paragraph 3.

Comments

12. As indicated in the definition of "transferable document or instrument", the words "transferable document or instrument" refer to a transferable document or instrument issued on paper (as opposed to an electronic transferable record) in the Arabic, Chinese, English and Russian language versions of the Model Law (A/CN.9/863, para. 93 and A/CN.9/WG.IV/WP.137, para. 28). The words "paper-based" are used for linguistic clarity before the words "transferable document or instrument" in the French and Spanish language versions of the Model Law.

[2] The enacting State may consider including a reference to: (i) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (ii) documents and instruments falling under the scope of 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); and (iii) electronic transferable records existing only in electronic form.

Paragraph 1

13. The Model Law provides for generic rules that may apply to various types of electronic transferable records based on the principle of technology neutrality and a functional equivalence approach. The principle of technology neutrality entails adopting a system-neutral approach, enabling the use of models based on registry, token, distributed ledger and other technology.

14. 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") provided a starting point for defining the scope of application of the Model Law. That provision excludes from the scope of application of the Electronic Communications Convention "bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money". That exclusion is due to the fact that at the time of the adoption of the Convention "finding a solution for this problem [of the legal treatment of electronic transferable records] required a combination of legal, technological and business solutions, which had not yet been fully developed and tested".[3]

15. The Model Law focuses on the transferability of the record and not on its negotiability on the understanding that negotiability relates to the underlying rights of the holder of the instrument, which fall under substantive law (A/CN.9/761, para. 21).

16. Certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, do not fall under the definition of "transferable document or instrument" contained in the Model Law (see below, para. 34). The Model Law would therefore not apply to those documents or instruments (A/CN.9/797, paras. 27 and 28). However, that conclusion should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system since such prohibition is likely to result in unnecessary multiplication of systems and increase of costs (A/CN.9/869, para. 24).

Paragraph 2

17. Paragraph 2 sets forth the general principle that the Model Law does not affect substantive law, including rules of private international law, applicable to transferable documents or instruments. Hence, the same substantive law applies to a transferable document or instrument and to the electronic transferable record containing the same information as that transferable document or instrument. The principle applies to each step of the life cycle of an electronic transferable record.

18. One consequence of the rule contained in paragraph 2 is that the Model Law may not be used to create electronic transferable records that do not have an equivalent transferable document or instrument. Allowing such creation would circumvent the principle of numerus clausus of transferable documents or instruments, where that principle is applicable.

19. During the preparation of the Model Law, UNCITRAL agreed that certain issues related to electronic transferable records did not require a dedicated provision, since those issues were matters of substantive law. Such matters include:

(a) The definition of "performance of an obligation" (A/CN.9/863, para. 90);

(b) The issuance of an electronic transferable record to bearer (A/CN.9/797, para. 65);

[3] United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), Explanatory Note, United Nations Publication Sales No. E.07.V.2, para. 81.

(c) The change of the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to the order of a named person and the reverse case ("blank endorsement") (A/CN.9/828, paras. 81-84);

(d) The reissuance of an electronic transferable record (A/CN.9/869, para. 115);

(e) Division and consolidation of electronic transferable records (A/CN.9/869, para. 123); and

(f) The use of an electronic transferable record, including as collateral for security rights purposes (see below, para. 21).

20. The explicit reference to consumer protection law aims at clarifying the interaction between that law and the Model Law (A/CN.9/863, paras. 20 and 22) and represents an application of the general principle that the Model Law does not affect the substantive law applicable to transferable documents or instruments.

Paragraph 3

21. Paragraph 3 clarifies that the Model Law does not apply to securities and other investment instruments. 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). The term "securities" does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes (A/CN.9/834, para. 73).

22. The purpose of paragraph 3 is to permit the exclusion of certain documents or instruments from the scope of the Model Law. To that end, paragraph 3 includes an open-ended exclusion list that permits application of the Model Law according to the needs of each enacting jurisdiction, thus providing both flexibility and clarity on the scope of application of the Model Law.

23. The footnote to paragraph 3 highlights three possible types of exclusions and does not prevent States from adding other types of exclusions according to their needs:

(a) Certain instruments or documents, such as letters of credit, which may be considered transferable documents or instruments in some jurisdictions but not in others. In that respect, it should be noted that national legislation does not define transferable documents and instruments in a uniform manner (A/CN.9/869, para. 19);

(b) State parties 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") may consider excluding documents or instruments falling under the scope of those Conventions in order to avoid possible conflicts between the Geneva Conventions and the Model Law, if so believed (see below, paras. 24-28);

(c) Electronic transferable records that exist only in an electronic environment. Such exclusion could be useful in jurisdictions allowing for the use of both electronic transferable records that are functional equivalent of transferable documents or instruments and of electronic transferable records that exist only in an electronic environment. In that respect, it should be noted that a provision allowing for the application of the Model Law to purely electronic transferable records on a residual basis, so that in case of conflict the Model Law would not prevail over the law applicable to such electronic transferable records, was not inserted in the Model Law due to concerns on the interaction between the general principles contained in the Model Law and the general principles contained in laws of a different nature (A/CN.9/869, para. 22).

The Geneva Conventions

24. During the preparation of the Model Law, different views have been expressed on the interaction between the Model Law and the Geneva Conventions (see, for example, A/CN.9/768, paras. 20-22; A/CN.9/WG.IV/WP.125; A/CN.9/797, paras. 109-112).

25. One view expressed was that formalism was a fundamental principle underpinning the Geneva Conventions that prevented the use of electronic means and therefore the instruments falling under the scope of those Conventions should always be excluded from the scope of the Model Law (A/CN.9/797, para. 110).

26. In order to accommodate that view, the Model Law allows for exclusion of the documents and instruments falling under the scope of the Geneva Conventions (see above, para. 23(b)).

27. Jurisdictions adhering to that view and wishing to enable the use of electronic versions of the documents and instruments falling under the scope of the Geneva Conventions may consider introducing electronic transferable records existing only in an electronic environment, which will not be functional equivalents of the documents and instruments falling under the scope of the Geneva Conventions and will not fall under the scope of the Model Law.[4]

28. Another view expressed was that the scope of the Model Law should include instruments falling under the scope of the Geneva Conventions on the understanding that the Model Law generally aimed at overcoming obstacles to the use of electronic means arising from form requirements relating to the use of paper-based transferable documents or instruments (A/CN.9/768, para. 21).

References to preparatory work

A/CN.9/WG.IV/WP.118, paras. 2-25; A/CN.9/761, paras. 18-25, 28-30;
A/CN.9/WG.IV/WP.122, paras. 4-7; A/CN.9/768, paras. 17-24;
A/CN.9/WG.IV/WP.124, paras. 5-11; A/CN.9/797, paras. 16-20, 27-28, 65, 109-112;
A/CN.9/WG.IV/WP.125, paras. 1-36;
A/CN.9/WG.IV/WP.128, paras. 5-10;
A/CN.9/WG.IV/WP.130, paras. 6-12; A/CN.9/828, paras. 24 -30 and 81-84;
A/CN.9/WG.IV/WP.132, paras. 7-14; A/CN.9/834, paras. 72-73;
A/CN.9/WG.IV/WP.135, paras. 8-19; A/CN.9/863, paras. 17-22;
A/CN.9/WG.IV/WP.137, paras. 10-18; A/CN.9/869, paras. 19-23

> "**Draft article 2. Definitions**
>
> '*electronic transferable record*' is an electronic record that complies with the requirements of article 9."

Remarks

29. The definition of "electronic transferable record" reflects the modifications agreed upon in light of the information requirements contained in draft article 9 pursuant to the Working Group's decision at its fifty-third session (A/CN.9/869, para. 25).

30. It has been suggested that the definition of "electronic transferable record" should be reviewed upon completion of the consideration of all articles of the Model Law to evaluate its appropriateness for each instance where the defined term is used (A/CN.9/869, para. 25).

31. The definition of "electronic transferable record" does not cover electronic transferable records that exist only in an electronic environment (A/CN.9/863, para. 91; see also A/CN.9/797, para. 23).

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[4] For an example, see the Electronically Recorded Monetary Claims Act (Act No. 102 of 2007) of Japan.

Comments

32. The definition of "electronic transferable record" reflects the functional equivalent approach (A/CN.9/863, paras. 91 and 92) and refers to electronic transferable records that are equivalent to transferable documents or instruments. It does 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. Likewise, it 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 Model Law.

33. In line with the general approach and the scope of the Model Law, the definition of "electronic transferable record" is meant to apply to electronic transferable records that are functionally equivalent to transferable documents or instruments. Yet, the Model Law does not preclude the development and use of electronic transferable records that do not have a paper equivalent as those records are not governed by the Model Law (A/CN.9/863, para. 91).

34. The definition of "electronic transferable record" does not cover certain documents or instruments, which are generally transferable, but whose transferability may be limited due to other agreements. This could be the case, in certain jurisdictions, of straight bills of lading. Substantive law shall determine which documents or instruments are transferable. Moreover, this limitation of the definition of "electronic transferable record" should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system (see also above, para. 16).

> "*transferable document or instrument*" means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

Remarks

35. The definition of "transferable document or instrument" reflects the editorial changes agreed to by the Working Group at its fifty-third session (A/CN.9/869, para. 27).

Comments

36. The definition of "transferable document or instrument" focuses on the key functions of transferability and of providing a title or right to performance. It does not affect 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.

37. Applicable substantive law shall determine which documents or instruments are transferable in the various jurisdictions (A/CN.9/863, para. 94). An indicative list of transferable documents or instruments, inspired by article 2, paragraph 2, of the United Nations Convention on the Electronic Communications Convention includes: bills of exchange; cheques; promissory notes; consignment notes; bills of lading, warehouse receipts, cargo insurance certificates and air waybills.

> "*electronic record*" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.

Comments

38. The definition of "electronic record" is based on the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996)[5] and in the Electronic Communications Convention and aims to clarify that electronic records may, but do not need to, include a set of composite information (A/CN.9/797, paras. 43-45). It highlights the fact that information may be associated with the electronic transferable record at the time of issuance or at any time thereafter (e.g., information related to endorsement). For example, the generation of metadata does not necessarily take place after the generation of a record, but could also precede it. The composite nature of an electronic transferable record is particularly relevant for the notion of "integrity" contained in article 9, paragraph 2 of the Model Law (A/CN.9/863, para. 96).

39. Moreover, the definition of "electronic record" provides also for the possibility that in certain electronic transferable records management systems data elements may, taken together, provide the information constituting the electronic transferable record, but with no discrete record constituting in itself the electronic transferable record (A/CN.9/804, para. 71). The word "logically" refers to computer software and not to human logic (A/CN.9/863, para. 97).

References to preparatory work

A/CN.9/WG.IV/WP.122, para. 8; A/CN.9/768, paras. 25-34;
A/CN.9/WG.IV/WP.124, paras. 12-23; A/CN.9/797, paras. 21-28, 43-45;
A/CN.9/WG.IV/WP.128, paras. 11-30;
A/CN.9/WG.IV/WP.130, paras. 13-34; A/CN.9/828, para. 31;
A/CN.9/WG.IV/WP.132, paras. 15-36; A/CN.9/834, paras. 25-26, 95-98 and 100;
A/CN.9/WG.IV/WP.135, paras. 20-44; A/CN.9/863, paras. 88-102;
A/CN.9/WG.IV/WP.137, paras. 19-30; A/CN.9/869, paras. 24-27

"**Draft article 3. Interpretation**

"1. This Law is derived from a model law 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.

"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

40. The words "and the observance of good faith" have been deleted from paragraph 1 pursuant to the Working Group's decision at its fifty-third session on the understanding that the principle of good faith, as a general principle of international law, could be included in the general principles on which the draft Model Law is based under paragraph 2 (A/CN.9/869, para. 30).

41. With regard to paragraph 2 the Working Group may wish to discuss which are the general principles underlying the Model Law (see below, paras. 45-46).

Comments

International origin and promotion of uniform interpretation

42. Article 3 is intended to draw the attention of courts and other authorities to the fact that domestic enactments of the Model Law should be interpreted with reference to their international origin and the need to promote their uniform interpretation in light of that origin. The uniform interpretation of UNCITRAL texts is a key element

[5] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication Sales No. E.99.V.4.

to ensure predictability of the law applicable to commercial transactions across borders.

43. Similar wording appears in several UNCITRAL texts, including in article 3 of the UNCITRAL Model Law on Electronic Commerce and article 4 of the UNCITRAL Model Law on Electronic Signature, and was first introduced in article 7 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).[6] The words "This Law is derived from a model law of international origin" emphasize that the law constitutes an enactment of a model law with international origin (A/CN.9/768, para. 35) and are not contained in other UNCITRAL texts.

44. Article 3, unlike other provisions contained in UNCITRAL texts and dealing with their international origin and uniform interpretation, does not refer to the notion of "good faith". That exclusion is due to the fact that the principle of "good faith" has a specific meaning with respect to transferable documents or instruments, which is distinct from the general principle of good faith in international trade law (A/CN.9/869, para. 29). The principle of "good faith" as a general principle of international law could be included in the general principles on which the Model Law is based (A/CN.9/869, para. 30).

General principles

45. The notion of "general principles" 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")[7] is the provision containing that notion that has been most interpreted by case law.[8]

46. The notion of "general principles" contained in paragraph 2 refers to the general principles of the law governing electronic communications (A/CN.9/797, para. 29), including those already identified and stated in UNCITRAL texts such as the principles of non-discrimination against electronic communications, technological neutrality and functional equivalence. The identification of those general principles and of their exact content and operation may take place progressively in light of the increasing level of use, application and interpretation of the Model Law. Such progressive determination provides flexibility in the interpretation of the Model Law useful to ensure its ability to accommodate evolving commercial practices and business needs.

References to preparatory work

A/CN.9/WG.IV/WP.122, para. 9; A/CN.9/768, para. 35;
A/CN.9/WG.IV/WP.124, paras. 24-25; A/CN.9/797, para. 29;
A/CN.9/WG.IV/WP.128, paras. 31-35;
A/CN.9/WG.IV/WP.130, paras. 35-40;
A/CN.9/WG.IV/WP.132, paras. 37-42;
A/CN.9/WG.IV/WP.135, paras. 45-50;
A/CN.9/WG.IV/WP.137, paras. 31-35; A/CN.9/869, paras. 28-31

"**Draft article 4. Party autonomy [and privity of contract]**

"1. The parties may derogate from or vary by agreement [provisions of this Law].

"2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

[6] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3.
[7] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.
[8] See also the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, comment under article 7.

Remarks

47. Paragraph 1 has been modified pursuant to the decision of the Working Group at its fifty-third session, so as to enable enacting States to identify which provisions could be derogated from, since each enacting jurisdiction may allow derogation of different provisions (A/CN.9/869, paras. 37, 42 and 43).

48. The Working Group may wish to consider paragraph 2, whose consideration was deferred to a future session at the Working Group's fifty-third session (A/CN.9/869, para. 44).

49. In light of its deliberations on paragraph 2, the Working Group may wish to consider the title of draft article 4. The words in square brackets, "privity of contract", were included to emphasise that draft article 4 dealt not only with party autonomy but also with privity of contract (A/CN.9/797, para. 30).

Comments

50. Party autonomy is a fundamental principle underpinning commercial law and UNCITRAL texts. Limiting party autonomy could hinder technological innovation and the development of new business practices. Moreover, party autonomy may provide desired flexibility in the implementation of the Model Law.

51. However, the implementation of the principle of party autonomy has found some limits in UNCITRAL texts on electronic commerce in order to avoid conflicts with rules of mandatory application, such as those on public policy.

52. In particular, article 4 of the UNCITRAL Model Law on Electronic Commerce allows variation by agreement of the provisions on electronic communications, but sets limits to variation by agreement of functional equivalence rules, also to avoid circumventing form requirements of mandatory application. Moreover, party autonomy may not affect rights and obligations of third parties.[9]

53. Moreover, article 5 of the UNCITRAL Model Law on Electronic Signatures indicates that parties may derogate from all provisions of that Model Law, unless derogation would not be valid or effective under applicable law, i.e. it would affect rules of mandatory application such as those relating to public policy.[10] A similar approach is adopted in article 3 of the Electronic Communications Convention.[11]

54. Similarly, the Model Law provides broad party autonomy within the limits of mandatory law and without affecting rights and obligations of third parties. In particular, it should be noted that certain jurisdictions, in particular those belonging to the civil law tradition, recognize the principle of numerus clausus of transferable documents or instruments (A/CN.9/768, para. 36). The Model Law does not aim at offering manners to circumvent by agreement that principle, in line with the general principle that the Model Law does not affect substantive law provisions. At the same time, and based on the same general principle, the Model Law does not limit in any manner the ability of the parties to derogate from or vary substantive law.

55. Therefore, a careful analysis is necessary to ascertain which provisions of the Model Law could be derogated from or varied. The Model Law leaves this assessment to the enacting State, in order to accommodate differences in legal systems. To that end, paragraph 1 contains square brackets, in which the enacting State could identify the provisions which could be derogated from or varied (A/CN.9/869, paras. 37, 42 and 43).

References to preparatory work

A/CN.9/WG.IV/WP.122, para. 10; A/CN.9/768, paras. 36-37;

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[9] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, paras. 44-45.

[10] UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication Sales No. E.02.V.8, paras. 111-112.

[11] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 85.

A/CN.9/WG.IV/WP.124, para. 26; A/CN.9/797, paras. 30-32 and 113;
A/CN.9/WG.IV/WP.128, para. 36;
A/CN.9/WG.IV/WP.130, para. 41;
A/CN.9/WG.IV/WP.132, para. 43;
A/CN.9/WG.IV/WP.135, paras. 51-53;
A/CN.9/WG.IV/WP.137, paras. 36-39; A/CN.9/869, paras. 32-44

"**Draft article 5. 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."

Comments

56. Article 5, inspired by article 7 of the Electronic Communications Convention, highlights the need to comply with possible disclosure obligations that might exist under other law. Examples of those information requirements include information to be provided under consumer protection law and to prevent money-laundering and other criminal activities.

57. The obligation to comply with those information requirements arises from the principle that the Model Law does not affect substantive law contained in article 1, paragraph 2 of the Model Law. The reference to other law containing the information requirements provides desirable flexibility since those requirements are likely to change over time (A/CN.9/869, paras. 45-47). Article 5 does not deal with the legal consequences attached to violating information requirements, which are contained, like the information requirement itself, in other law.

58. Article 5 does not prohibit the issuance of an electronic transferable record to bearer when permitted under substantive law (A/CN.9/768, para. 38). In that respect, it should be noted that an electronic transferable records management system may allow to identify the person in control of an electronic transferable record for regulatory purposes (e.g., anti-money-laundering) but not for commercial law purposes (e.g., for an action in recourse).

References to preparatory work

A/CN.9/WG.IV/WP.122, para. 11; A/CN.9/768, para. 38;
A/CN.9/WG.IV/WP.124, para. 27; A/CN.9/797, para. 33;
A/CN.9/WG.IV/WP.128, para. 37;
A/CN.9/WG.IV/WP.130. para. 42;
A/CN.9/WG.IV/WP.132, para. 44;
A/CN.9/WG.IV/WP.135, para. 54;
A/CN.9/WG.IV/WP.137, paras. 40-41; A/CN.9/869, paras. 45-47

B. Provisions on electronic transactions

Remarks

59. Subject to further decisions of the Working Group, the Model Law is divided in four sections ("General", articles 1-5; "Provisions on electronic transactions", articles 6-8; "Use of electronic transferable records", articles 9-19; and "Cross-border recognition of electronic transferable records", article 20).

60. The Working Group at its forty-eighth session decided to retain draft articles 6-8 as a separate section (A/CN.9/797, para. 34; see also A/CN.9/768, para. 40). The Working Group may wish to review its decision in light of the progress made in the preparation of the Model Law and of the fact that articles 6-8 relate to the use of electronic transferable records and not to electronic transactions. In that respect, the Working Group may also wish to consider whether article 6 should be included in the "General" section of the Model Law in light of its content.

References to preparatory work

A/CN.9/768, paras. 40 and 44;
A/CN.9/WG.IV/WP.124, paras. 28 and 29; A/CN.9/797, para. 34;
A/CN.9/WG.IV/WP.130, para. 43;
A/CN.9/WG.IV/WP.132, para. 45;
A/CN.9/WG.IV/WP.135, para. 55;
A/CN.9/WG.IV/WP.137, para. 42

Comments

61. Any reference to a legal requirement contained in the provisions of the Model Law setting forth functional equivalence rules implies a reference to the consequences arising when a legal requirement is not met, making it not necessary to explicitly refer to those consequences (A/CN.9/834, paras. 43 and 46). Accordingly, the Model Law does not contain the words "or provides consequences" after the words "when the law requires".

"**Draft article 6. Legal recognition of an electronic transferable record**

"1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

"2. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

"3. The consent of a person to use an electronic transferable record may be inferred from the person's conduct."

Remarks

62. Draft article 6 reflects the decisions made by the Working Group at its fifty-third session (A/CN.9/869, paras. 93 and 94), namely, to include the provisions on consent, priorly contained in a separate article, in this article.

Comments

Paragraph 1

63. Paragraph 1 restates the general principle of non-discrimination against the use of electronic means that is contained in article 5 of the UNCITRAL Model Law on Electronic Commerce and in article 8, paragraph 1, of the Electronic Communications Convention.

64. By stating that information "shall not be denied validity or enforceability on the sole ground that it is in electronic form", paragraph 1 merely indicates that the form in which an electronic transferable record is presented or retained cannot be used as the only reason for which that transferable record would be denied legal effectiveness, validity or enforceability. However, the provision should not be misinterpreted as establishing the legal validity of an electronic transferable record or any information therein.[12]

Paragraphs 2 and 3

65. Paragraphs 2 and 3 are inspired by article 8, paragraph 2 of the Electronic Communications Convention.

66. Paragraph 2 clarifies that legal recognition of electronic transferable records does not imply a requirement to use or accept them. However, enacting jurisdictions may decide to mandate the use of electronic transferable records, at least with respect

[12] See also United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 129.

to some categories of users and some types of transferable documents and instruments, in light of the policy goals pursued.[13]

67. The requirement of "consent" is a general one and applies to all instances where an electronic transferable record is used under the Model Law and to all parties involved in the life cycle of the electronic transferable record (A/CN.9/768, para. 57). Therefore, other provisions of the Model Law do not contain an explicit reference to consent (A/CN.9/768, para. 57, see also A/CN.9/WG.IV/WP.124, para. 41).

68. The consent to use an electronic transferable record does not need to be expressly indicated or given in any particular form. While absolute certainty can be accomplished by obtaining an explicit consent before using an electronic transferable record, such an explicit consent should not be mandated as it would create an unreasonable barrier to the use of electronic means.

69. The consent to using electronic transferable records may be inferred from all circumstances, including parties' conduct. While certain systems used for electronic transferable records management, such as registry-based systems, may require acceptance of system rules, which include or imply consent to the use of electronic transferable records, other systems, such as token-based and distributed ledger-based systems, do not require prior acceptance of contractual rules, and therefore consent may be inferred by circumstances such as exercise of control on the electronic transferable record or performance of the obligation contained in the electronic transferable record.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 11 and 20; A/CN.9/768, paras. 39, 57-58;
A/CN.9/WG.IV/WP.124, para. 30, paras. 40-44; A/CN.9/797, paras. 34-35, 62-63;
A/CN.9/WG.IV/WP.128, para. 37; A/CN.9/WG.IV/WP.128/Add.1, para. 5;
A/CN.9/804, para. 17;
A/CN.9/WG.IV/WP.130, para. 44; WP.130/Add.1, para. 7;
A/CN.9/WG.IV/WP.132, para. 46; WP.132/Add.1, para. 11;
A/CN.9/WG.IV/WP.135, para. 56; WP.135/Add.1, para. 7;
A/CN.9/WG.IV/WP.137, para. 43; WP.137/Add.1, para. 9; A/CN.9/869, paras. 93 and 94

"**Draft article 7. Writing**

"Where the law requires that information should be in 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

70. In its future deliberations on a law applicable to electronic transferable records existing only in electronic form, the Working Group may wish to confirm that the law governing those records should set forth the same requirements contained in draft article 7, i.e. that information should be accessible so as to be usable for subsequent reference (A/CN.9/768, para. 42).

71. At the Working Group's forty-ninth session, it was suggested that draft article 7 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 2. 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). In light of that discussion, the Working Group may wish to clarify the relationship between draft article 7 and

[13] See, for instance, article 6-2 of the Act on Issuance and Negotiation of Electronic Bills of Exchanges and Promissory Notes (Law 7197 of 22 March 2004, as amended) of the Republic of Korea.

draft article 9, setting forth information and integrity requirements for the functional equivalence of transferable documents or instruments.

Comments

72. Article 7 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). It is inspired by article 6, paragraph 1 of the UNCITRAL Model Law on Electronic Commerce.[14] However, article 7 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (A/CN.9/797, para. 37), depending on the system chosen for electronic transferable records management.

73. Article 7 sets forth a functional equivalence rule for the notion of "writing" with respect to electronic transferable records only. The use of writing is instrumental in performing several actions that may occur during the life cycle of an electronic transferable record, such as endorsement (A/CN.9/768, para. 46).

74. The general rule on functional equivalence between electronic and written form contained in the law on electronic transactions (A/CN.9/797, para. 38) applies to all electronic records that are not transferable. If the Model Law on Electronic Transferable Records is enacted by consolidation with an enactment of the UNCITRAL Model Law on Electronic Commerce or similar text, the enacting jurisdiction may consider adopting a single provision for the functional equivalence of written and electronic form, which will apply to both transferable and non-transferable electronic records.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 12-13; A/CN.9/768, paras. 40-44;
A/CN.9/WG.IV/WP.124, paras. 31-33; A/CN.9/797, paras. 36-39;
A/CN.9/WG.IV/WP.128, paras. 38-39; A/CN.9/804, paras. 18-19;
A/CN.9/WG.IV/WP.130, paras. 45-47;
A/CN.9/WG.IV/WP.132, paras. 47-49;
A/CN.9/WG.IV/WP.135, paras. 57-60;
A/CN.9/WG.IV/WP.137, paras. 44-47;

"**Draft article 8. Signature**

"Where the law requires a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic record."

Remarks

75. At its fifty-third session, the Working Group agreed that draft article 8 is meant to apply only to electronic transferable record and not to electronic records that are not transferable, though used in connection with electronic transferable records (A/CN.9/869, paras. 48-49). In light of that conclusion, the Working Group may wish to further consider its decision that draft article 8 should refer to the information contained in the "electronic record" and not to the "electronic transferable record" as that article deals with a general signature requirement in the substantive law (A/CN.9/804, para. 20).

Comments

76. Article 8 establishes the requirements for the functional equivalence of "signature" (A/CN.9/804, para. 20) when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature

[14] For comments on that provision, see UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, paras. 47-50.

(implicit signature requirement) (A/CN.9/797, para. 46; see also A/CN.9/834, para. 43).

77. Article 8 is inspired by article 7, subparagraph 1(b) of the UNCITRAL Model Law on Electronic Commerce. Moreover, following the text of article 9, paragraph 3 of the Electronic Communications Convention, it refers to the "intention" of the party so as to better capture the different functions that may be pursued with the use of an electronic signature. The reliability of the method referred to in article 8 shall be assessed according to the general reliability standard contained in article 11.

78. The reference to the signature requirement being fulfilled "by" an electronic transferable record is meant to clarify that article 8 applies to electronic transferable records only and not to other electronic records that are not transferable but are somehow related to an electronic transferable record (A/CN.9/869, paras. 48-49). Hence, article 8 sets forth a functional equivalence rule for the notion of "signature" with respect to electronic transferable records only.

79. Certain electronic transferable records management systems, such as those based on distributed ledger, may use pseudonyms rather than real names. In that case, the requirement to identify the signatory may be satisfied by linking pseudonym and real name as needed.

80. The general rule on functional equivalence of electronic and handwritten signatures contained in the law on electronic signatures applies to signatures used in relation to all electronic records that are not transferable. If the Model Law on Electronic Transferable Records is enacted by consolidation with an enactment of the UNCITRAL Model Law on Electronic Signatures or similar text, the enacting jurisdiction may consider adopting a single provision for the functional equivalence of electronic and handwritten signatures, which will apply to both transferable and non-transferable electronic records.

Notion of "Original"

Comments

81. Unlike other UNCITRAL texts on electronic commerce, the Model Law does not contain a functional equivalence rule for the paper-based notion of "original" (A/CN.9/804, para. 40). In that respect, it should be noted that article 8 of the UNCITRAL Model Law on Electronic Commerce refers to a static notion of "original" while electronic transferable records are meant, by their own nature, to circulate. Therefore, the notion of "original" in the context of electronic transferable records is different from that adopted in previously-adopted UNCITRAL texts (A/CN.9/797, para. 47). Accordingly, the Model Law refers to integrity of the electronic transferable record as one of the requirements that need to be fulfilled in order to achieve functional equivalence with a transferable document or instrument (art. 9, subpara. 1(b)(iii)) (see A/CN.9/WG.IV/WP.139/Add.1, para. 24).

82. Hence, while the notion of "original" of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying both the person entitled to performance and the object of control.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 12-13; A/CN.9/768, paras. 41 and 43;
A/CN.9/WG.IV/WP.124, paras. 31-34; A/CN.9/797, paras. 40-47;
A/CN.9/WG.IV/WP.128, paras. 40-41; A/CN.9/804, para. 20;
A/CN.9/WG.IV/WP.130, paras. 48-53;
A/CN.9/WG.IV/WP.132, paras. 50-55;
A/CN.9/WG.IV/WP.135, paras. 61-67;
A/CN.9/WG.IV/WP.137, paras. 48-51; A/CN.9/869, paras. 48-49.

(A/CN.9/WG.IV/WP.139/Add.1) (Original: English)

Note by the Secretariat on a Draft Model Law on Electronic Transferable Records

ADDENDUM

Contents

II. Draft Model Law on Electronic Transferable Records

C. Use of electronic transferable records

"Draft article 9. Transferable document or instrument

"1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and

(b) A reliable method is used:

(i) To identify that electronic record as the electronic transferable record;

(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) To retain the integrity of the electronic transferable record.

"2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises 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."

Remarks

1. Draft article 9 reflects the deliberations of the Working Group at its fifty-third session (A/CN.9/869, paras. 50-68). At that session the Working Group agreed that (i) the title of draft article 9 should refer to "transferable document or instrument" to be in line with the drafting style used for other articles providing for a functional equivalent in the draft Model Law; and (ii) subparagraph 1(a) should refer to a transferable document or instrument without any qualifier such as "equivalent" to avoid uncertainty on the understanding that an electronic transferable record should contain the same information as the transferable document or instrument of the same type.

2. With regard to subparagraph 1(b)(i), the Working Group confirmed that paragraph 1 was based on both the "singularity" and the "control" approaches. The Working Group also agreed that the use of the word "the" to identify the electronic transferable record was adequate in the English, French and Spanish languages (A/CN.9/869, paras. 54 and 58).

3. The Working Group may wish to note that, upon consultation with the relevant translation units, adequate translation for subparagraph 1(b)(i) have been sought in the Arabic, Chinese and Russian languages.

4. With regard to paragraph 1(b)(ii), the Working Group agreed that the reference to a reliable method therein was appropriate and that it referred to the reliability of

the system used to render the electronic record capable of being subject to control (A/CN.9/869, para. 64).

5. With regard to paragraph 2, the Working Group agreed that it related to system integrity and that therefore reference should be made to "authorized" changes (A/CN.9/869, paras. 61-62). The Working Group also agreed to delete the second sentence of paragraph 2 referring to the assessment of the standard of reliability as redundant, since it repeated in part draft article 11, subparagraph (1)(a) on the assessment of the reliability standard, which is applicable also to draft article 9 (A/CN.9/869, paras. 65-66).

Comments

6. Article 9 provides a functional equivalence rule for the use of transferable documents or instruments by setting forth the requirements to be met by an electronic record. It aims at preventing the possibility of multiple requests to perform the same obligation by combining two approaches, i.e. "singularity" and "control" (A/CN.9/834, para. 86). The reliability of the method referred to in article 9 shall be assessed according to the general reliability standard contained in article 11 (A/CN.9/863, paras. 66 and 73).

7. Article 9 represents the outcome of discussions originating from the notion of "uniqueness". Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance (A/CN.9/WG.IV/WP.118, para. 39) and thus to avoid multiple claims (A/CN.9/761, para. 33; A/CN.9/768, para. 51). Providing a guarantee of uniqueness (or singularity) in an electronic environment equivalent to possession of a document of title or negotiable instrument has long been considered a peculiar challenge (A/CN.9/WG.IV/WP.90, para. 95; A/CN.9/WG.IV/WP.115, paras. 12-18).

8. Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible. In fact, the notion of uniqueness poses challenges also with respect to transferable documents or instruments, since paper does not provide an absolute guarantee of non-replicability. However, centuries of use of paper in business transactions have provided sufficient information to commercial operators for an assessment of the risks associated with the use of that medium while practices on the use of electronic transferable records are not yet equally well-established.

9. With respect to electronic transferable records, resorting to the notions of "singularity" and "control" suffices to provide reliable assurance that the debtor will not be exposed to multiple requests for performance (A/CN.9/804, paras. 38, 71 and 74; see also A/CN.9/797, paras. 48 and 50 and A/CN.9/869, para. 55).

10. The "singularity" approach requires reliable identification of the electronic transferable record that entitles its holder to request performance of the obligation indicated in it, so that multiple claims of the same obligation would be avoided, while the "control" approach focuses on the use of a reliable method to identify the person in control of the electronic transferable record (A/CN.9/834, para. 86; A/CN.9/869, para. 56).

11. One effect of the adoption of the notions of "singularity" and "control" in the Model Law is the prevention of unauthorized replication of an electronic transferable record by the system (see also A/CN.9/834, paras. 105-107).

Subparagraph 1(a)

12. Subparagraph 1(a) states that the electronic record should contain the information required to be in a transferable document or instrument. Since that information is contained in writing in a transferable document or instrument, its inclusion in an electronic transferable record must comply with article 7 of the Model Law. The definition of "electronic record" contained in article 2 of the Model Law clarifies that the electronic record may, but does not need to have a composite nature (see A/CN.9/WG.IV/WP.139, paras. 38-39).

13. The electronic transferable record must contain the information identifying it as the functional equivalent of a transferable document or instrument. That identification is necessary also to determine the substantive law applicable to the electronic transferable records (e.g., the law applicable to a bill of lading, rather than the law applicable to promissory note).

14. A law that does not contain a provision akin to subparagraph 1(a) of article 9, but sets forth directly the information requirements to be contained in an electronic transferable record, is likely to provide for electronic transferable records that are not functionally equivalent to transferable documents or instruments, but exist only in an electronic environment.

15. Accordingly, an electronic transferable record existing only in electronic form would not satisfy the requirements of article 9 and would, thus, not fall under the definition of electronic transferable record contained in article 2. Namely, while an electronic transferable record existing only in electronic form could satisfy other requirements set forth in the Model Law, that record would define autonomously the information requirements and therefore would not satisfy the requirements of article 9, paragraph 1(a) (A.CN.9/869, para. 67).

16. Subparagraph 1(a) does not contain any qualifier as "equivalent", "corresponding" or "as having the same purpose" given that under that provision an electronic transferable record must indicate the same information required for a transferable document or instrument of the same type. Insertion of a further qualifier might create uncertainty (A/CN.9/869, paras. 50-51).

Subparagraph 1(b)(i)

17. Subparagraph 1(b)(i) sets forth the requirement to identify an electronic record as the record containing the information necessary to establish that record as the electronic transferable record. That requirement implements the "singularity" approach (A/CN.9/834, para. 86; A/CN.9/869, para. 52).

18. The purpose of the provision is to identify the electronic transferable record as opposed to other electronic records that are not transferable. Identification alone suffices to express the singularity approach (A/CN.9/869, paras. 52, 55 and 59; A/CN.9/828, para. 32; see also A/CN.9/WG.IV/WP.137, para. 57). The article "the" in the English, French and Spanish languages suffices to point at the singularity approach, thus avoiding the use of any qualifier and related challenges (A/CN.9/869, para. 58). Other language versions are intended to convey the same notion.

19. Unlike certain domestic legislation,[1] subparagraph 1(b)(i) does not refer to a qualifier such as "authoritative", "operative" or "definite" to identify the electronic record as the electronic transferable record (A/CN.9/869, paras. 52, 57-60; A/CN.9/834, paras. 101-104; A/CN.9/828, paras. 32). The reason for that omission is that a qualifier could create interpretative challenges, especially in certain languages, could be interpreted as referring to the notion of "uniqueness" that had been abandoned, and could ultimately foster litigation.

Subparagraph 1(b)(ii)

20. Subparagraph 1(b)(ii) sets forth the requirement that the electronic transferable record should be capable of being controlled from its creation until it ceases to have any effect or validity, particularly in order to allow for its transfer. That requirement implements the "control" approach (A/CN.9/834, para. 86; A/CN.9/869, para. 64).

21. The provision takes into account the possibility that an electronic transferable record might not necessarily be actually subject to control (A/CN.9/804, para. 61). This could happen, for instance, when a token-based electronic transferable record is lost.

[1] Section 7-106 of the Uniform Commercial Code (UCC).

22. The reference to a reliable method with respect to subparagraph 1(b)(ii) refers to the reliability of the system used to render the electronic record capable of being subject to control (A/CN.9/869, para. 64).

Subparagraph 1(b)(iii)

23. The notion of integrity is an absolute one (A/CN.9/863, para. 42). It refers to a fact, and as such, is objective, i.e. either an electronic transferable record retains integrity or not. The reference to the reliable method used to retain integrity is relative or subjective and the assessment of that method is subject to the general reliability standard contained in article 11 (A/CN.9/869, para. 63).

Paragraph 2

24. Paragraph 2 sets forth a provision on the assessment of the notion of integrity (A/CN.9/828, paras. 48 and 49). It indicates that an electronic transferable record retains integrity when any set of information related to authorized changes (as opposed to changes of purely technical nature) remains complete and unaltered from the time of the creation of the electronic transferable record until it ceases to have any effect or validity (A/CN.9/804, para. 29). It is inspired by article 8, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/828, para. 45). However, it should be noted that article 8, paragraph 3(a) of the Model Law on Electronic Commerce refers to a notion of integrity with respect to the use of the notion of "original" that may be more appropriate for electronic contracting. On the other hand, the notion of integrity contained in article 9, paragraph 2 of the Model Law necessarily takes into account the fact that the life cycle of electronic transferable records implies a number of events that need to be accurately reflected in those records.

25. "Authorized" changes are those changes permitted by the system designers throughout the life cycle of an electronic transferable record (A/CN.9/828, para. 44; A/CN.9/834, paras. 27-28). The term "authorized" does not refer to whether the changes are legitimate, which would introduce a standard presupposing a legal assessment under substantive law (A/CN.9/804, para. 32). For instance, unauthorized changes would be those performed by a hacker who must compromise the integrity of the electronic transferable record in order to have access to it (A.CN.9/869, paras. 61-62).

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 15-19; A/CN.9/768, paras. 48-56, 75, 76 and 85;

A/CN.9/WG.IV/WP.124, paras. 35-39; A/CN.9/797, paras. 47-60;

A/CN.9/WG.IV/WP.128, paras. 42-55; A/CN.9/804, paras. 21-40; paras. 70-75;

A/CN.9/WG.IV/WP.130, paras. 54-65;

A/CN.9/828, paras. 31-40, paras. 42-49;

A/CN.9/WG.IV/WP.132, paras. 56-64; A/CN.9/834, 21-30 and 85-90 and 92; 99-108;

A/CN.9/WG.IV/WP.135, paras. 68-80;

A/CN.9/WG.IV/WP.137, paras. 52-65; A/CN.9/869, paras. 50-68.

"Draft article 10. Control

"1. Where the law requires the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

(b) To identify that person as the person in control.

"2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record."

Remarks

26. Draft article 10 reflects the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 103-110) to (i) place the draft article consecutively after draft article 9 in view of their logical relation; (ii) use as title the word "control" since it refers to a particularly relevant notion in the draft Model Law and best highlights its content; and (iii) use the word "identify" in subparagraph 1(b) in light of its clear meaning.

Comments

27. Article 10 provides a functional equivalence rule for the possession of a transferable document or instrument. Functional equivalence of possession is achieved when a reliable method is employed to establish control of that record by a person and to identify the person in control.

28. The notion of "control" is closely related to article 9 subparagraph (b)(ii) (A/CN.9/869, para. 103) and actually implements the requirement contained in that subparagraph. "Control" could refer to control of the information relating to the electronic transferable record ("logical control") or to control of the physical object containing that information ("physical control"), depending on the system used to manage the electronic transferable record (A/CN.9/768, para. 78).

29. The notion of "control" is not defined in the Model Law since it is the functional equivalent of the notion of "possession", which, in turn, may vary in each jurisdiction (A/CN.9/834, para. 83).

30. Both control and possession are factual. In line with the general principle that the Model Law does not affect substantive law, the notion of control does not affect or limit the legal consequences arising from possession. Consequently, parties may agree on the modalities for the exercise of possession, but may not modify the notion of possession itself (A/CN.9/863, para. 101).

31. The title of article 10 refers to "control" and not to "possession", thus departing from the naming style of other articles of the Model Law, since the notion of "control" is particularly relevant in the Model Law. While a notion of "control" may exist in national legislation,[2] the notion of "control" contained in article 10 needs to be interpreted autonomously in light of the international character of the Model Law.

Paragraph 1

32. The reliability of the method referred to in article 10 shall be assessed according to the general reliability standard contained in article 11 (A/CN.9/863, paras. 66 and 73).

Subparagraph 1(a)

33. Subparagraph 1(a) refers to "exclusive" control for reasons of clarity (A/CN.9/834, para. 93), since the notion of "control", similarly to that of "possession", implies exclusivity in its exercise (A/CN.9/797, para. 74). Yet, control, like possession, could be exercised concurrently by more than one person in control. The concept of "control" does not refer to "legitimate" control, since this is a matter of substantive law (A/CN.9/797, para. 76).

34. Although both the notion of "control" and the notion of "singularity" aim at preventing multiple requests of performance of the same obligation, the two notions operate independently and should be distinguished. For instance, it is possible to conceive exclusive control over a multiple record, i.e. a record that does not meet the

[2] E.g., Section 7-106 of the Uniform Commercial Code.

requirements of singularity. Conversely, it is also possible to conceive non-exclusive control over a single record (A/CN.9/804, para. 69; see also A/CN.9/797, paras. 48-50; and paragraphs 9-10 above).

Subparagraph 1(b)

35. Subparagraph 1(b) requires to reliably identify the person in control as the holder of the electronic transferable record (A/CN.9/768, paras. 77 and 85). The person in control of an electronic transferable record is in the same legal position as the holder of an equivalent transferable document or instrument.

36. The reference to the "person in control" of the electronic transferable record in subparagraph 1(b) does not imply that the person is also the rightful person in control of that record as this is for substantive law to determine (A/CN.9/828, para. 61). Further, the reference to the person in control does not exclude the possibility of having more than one person exercising control (A/CN.9/828, para. 63) or of attributing selectively control on one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (e.g., title to property of goods, security interests, etc.).

37. The person in control may be a natural or a legal person (A/CN.9/869, paras. 109-110) or other entity able to possess an electronic transferable record under substantive law. The use of the services of a third party to exercise exclusive control does not affect exclusivity of control or imply that the third party service provider or any other intermediary is a person in control (A/CN.9/804, para. 59).

38. The requirement to identify the person in control does not imply that an electronic transferable record in itself shall contain the identification of the person in control. Rather, that requirement demands that the method or system employed to establish control as a whole shall perform the identification function (A/CN.869, paras. 106-108; A/CN.9/828, para. 63). Moreover, identification should not be understood as implying an obligation to name the person in control, as the Model Law allows for the issuance of electronic transferable records to bearer, which implies anonymity (A/CN.9/828, para. 51).

39. Certain electronic transferable records management systems, such as those based on distributed ledgers, may identify the person in control by referring to pseudonyms rather than to real names. That identification, and the possibility to link pseudonym and real name, if need be, would satisfy the requirement to identify the person in control. In any case, anonymity for commercial law purposes may not preclude the possibility of identifying the person in control for other purposes, such as law enforcement.

40. Article 10 will also assist in carrying out those necessary steps occurring in the life cycle of the electronic transferable record that require demonstration of control of that record. For instance, the notion of "presentation" in the paper environment relies on demonstration of possession of a transferable document or instrument as its core element. That demonstration may be given by identifying the person in control. In practice, the electronic transferable records management system may rely on the requirement to identify the person in control contained in article 10 when dealing with presentation of a record. Accordingly, the Model Law does not contain a separate provision on presentation (A/CN.9/863, paras. 27-36).

Paragraph 2

41. Transferable documents or instruments, and therefore also electronic transferable records, may circulate by delivery and by endorsement. Paragraph 2 sets forth that transfer of control over an electronic transferable record is the functional equivalent of delivery, i.e. transfer of possession, of a transferable document or instrument (A/CN.9/834, paras. 31-33; see also the comments on article 16 on endorsement).

42. Paragraph 2 includes the words “or permits” in order to clarify its application to cases in which the law merely permits, but does not require transfer of possession of a transferable document or instrument.

43. The delivery of a transferable document or instrument may be a necessary step in the life cycle of that document or instrument. For instance, the request for delivery of goods typically requires surrendering a bill of lading. The Model Law does not contain specific provisions on surrender as paragraph 2, on transfer of control as functional equivalent of delivery, would apply also to those cases.

References to preparatory work

A/CN.9/761, paras. 24-25, 38-41 and 50-58;

A/CN.9/WG.IV/WP.122, para. 14; paras. 26-28; A/CN.9/768, paras. 45-47 and 75-85;

A/CN.9/WG.IV/WP.124/Add.1, paras. 1-2 and 3-9; A/CN.9/797, paras. 66 and 74-90;

A/CN.9/WG.IV/WP.128/Add.1, paras. 11-20; A/CN.9/804, paras. 51-70;

A/CN.9/WG.IV/WP.130/Add.1, paras. 20-28; A/CN.9/828, paras. 50-67;

A/CN.9/WG.IV/WP.132/Add.1, paras. 24-34; A/CN.9/834, paras. 31-33 and 83-94;

A/CN.9/WG.IV/WP.135/Add.1, paras. 19-28; A/CN.9/863, paras. 27-36 and paras. 99-102;

A/CN.9/WG.IV/WP.137/Add.1, paras. 23-30; A/CN.9/869, paras. 103-110.

“Draft article 11. General reliability standard

“For the purposes of articles [8, 9, 10, 11, 17, 18, 19] the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

(i) The operational rules relevant to the assessment of reliability governing the system;

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The security of hardware and software systems;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(vii) Any applicable industry standards; or

(b) Proven in fact to have fulfilled the function by itself or together with further evidence.

Remarks

44. Draft article 11 reflects the deliberations of the Working Group at its fifty-third session (A/CN.9/869, paras. 69-78) to (i) replace the word “quality” in subparagraph (a)(iv) with the word “security” since quality did not lend itself easily to an objective assessment and the notion of security is more directly relevant for assessing the reliability of the method; (ii) delete the words “agreed to” in subparagraph (b) since the provision does not relate only to functions that had been agreed upon contractually; and (iii) delete the second paragraph referring to party agreement with regard to the purposes of assessing reliability between the parties on the understanding that the draft Model Law does not prevent parties from contractually allocating some liability.

45. The Working Group may wish to consider whether subparagraph (a)(vi) should refer to the reliability of the system, of the methods used in the system, or of both. In that respect, the Working Group may wish to confirm that the term "system" is used in the Model Law to refer to the electronic transferable records management system, upon the understanding that reference to that system does not imply the existence of a system administrator or other form of centralized control. In that line, the Working Group may also wish to consider whether subparagraph (a)(iv) should refer to "hardware and software used in the system".

Comments

46. Article 11 provides a consistent and technology neutral general standard on the assessment of reliability that applies whenever a provision of the Model Law requires the use of a "reliable method" for the fulfilment of its functions (A/CN.9/863, para. 44).

47. Article 11 aims to increase legal certainty by indicating elements that may be relevant in assessing reliability (A/CN.9/804, para. 47). The list of circumstances contained in article 11 is not exhaustive and does not prevent the parties from allocating liability contractually (see also paras. 62-63 below). The general reliability standard is applicable to all electronic transferable records management system providers and not only to third-party service providers (A/CN.9/804, para. 48).

48. Though the provision aims at providing guidance on the assessment of the reliability of the electronic transferable records management system in case of dispute ("ex post" reliability assessment), its content will necessarily also influence the design of the system ("ex ante" reliability assessment) (A/CN.9/863, para. 44) since system designers pursue offering reliable systems.

49. Each provision of the Model Law referring to the use of a reliable method aims at fulfilling a different function (A/CN.9/863, para. 54). Accordingly, the reference to "the purposes of articles" contained in the chapeau of article 11 aims to clarify that the assessment of the reliability of each relevant method should be carried out separately in light of the function specifically pursued with the use of that method (A/CN.9/863, para. 39). That approach provides needed flexibility when assessing the application of the reliability standard in practice (A/CN.9/828, para. 47) as it allows customizing the reliability assessment to each function fulfilled by the system.

Subparagraph (a)

50. Subparagraph (a) contains a list of circumstances to assist in determining reliability. The words "which may include" clarify that the list is not exhaustive and has an illustrative nature only (A/CN.9/863, paras. 46 and 66). The words "all relevant circumstances" include the purpose for which the information contained in the electronic transferable record was generated (A/CN.9/863, para. 67).

51. The list of circumstances aims at achieving a balance between providing guidance on the assessment of reliability and imposing requirements that may result in excessive costs on business, ultimately hampering electronic commerce and leading to increased litigation on complex technical matters (A/CN.9/863, para. 46). Additional possibly relevant circumstances include: 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).

"operational rules"

52. Subparagraph (a)(i) refers to "operational rules" that are usually contained in an operating manual whose application could be monitored by an oversight body and that, as such, may not have a purely contractual nature. The words "relevant to the assessment of" clarify that only operational rules regarding the reliability of the system, and not operational rules in general, should be considered (A/CN.9/863, paras. 57 and 68).

"assurance of data integrity"

53. Subparagraph (a)(ii) refers to the "assurance of data integrity" as an absolute notion, since data integrity cannot be expressed by reference to a level (A/CN.9/863, para. 42). Though the notion of "integrity" of the electronic transferable record is already contained in article 9, it is included also as an element in the assessment of the general reliability standard. More precisely, the reference to integrity contained in article 10 is relevant also to articles that do not mention integrity when integrity is in fact relevant to assess the reliability of the method used and, ultimately, the achievement of functional equivalence (A/CN.9/863, paras. 69 and 70).

"prevent unauthorized access to and use of the system"

54. The circumstance refers to the ability to prevent access to and use of the system by third parties not authorized to do so. In that respect, it should be noted that the notion of integrity in the Model Law refers to "authorized" changes. A reliable method shall therefore prevent unauthorized changes. Moreover, the notion of control is based on exclusivity which presupposes the ability to exclude third parties without authorized access to the system.

"security of hardware and software systems"

55. Reference to "security of hardware and software systems" is included in the list of criteria for the assessment of the general reliability standard for electronic transferable records, since security of hardware and software systems has a direct impact on the reliability of the method used. That reference is found also in article 10, subparagraph (b) of the UNCITRAL Model Law on Electronic Signatures, which refers to the "quality of hardware and software systems" as one of the factors to be regarded for the determination of trustworthiness of any systems, procedures and human resources utilized by a certification service provider. The term "security" is used in subparagraph (a)(iv) instead of "quality" since the notion of security lends itself more easily to an objective assessment of the method used (A/CN.9/869, para. 69).

"regularity and extent of audit by an independent body"

56. The existence of regular accurate audits carried out by an independent body may be seen as evidence of validation of the reliability of the system by a third party. Similarly, article 10, subparagraph (e) of the UNCITRAL Model Law on Electronic Signatures refers to the "regularity and extent of audit by an independent body" as one of the factors to be considered for the determination of trustworthiness of any systems, procedures and human resources utilized by a certification service provider.

"declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method"

57. The criteria of "regularity and extent of audit by an independent body" is inspired by article 10, subparagraph (f) of the UNCITRAL Model Law on Electronic Signatures, which refers to the "declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing" as one of the factors to be regarded for the determination of trustworthiness of any systems, procedures and human resources utilized by a certification service provider. A declaration by such body may guarantee a certain level of objectivity in the assessment of the reliability of the method.

"Any applicable industry standard"

58. The reference to "any applicable industry standard" stems from a suggestion to refer to internationally accepted standards and practices to avoid increased litigation based on complex technical matters (A/CN.9/804, para. 46) and to allow flexibility in technology choice while providing guidance, in light also of the fact that electronic

transferable records management systems are likely to be designed and maintained by highly-specialized professionals (A/CN.9/863, para. 56).

59. During the discussions on article 11, the term "any applicable industry standard" was preferred to "industry best practices" since the former can be more easily ascertained (A/CN.9/863, para. 71). Applicable industry standards should preferably be internationally recognized (A/CN.9/863, para. 56). In fact, the use of international standards may promote the emergence of a common notion of reliability across jurisdictions. Reference to industry standards shall not be interpreted so as to violate the principle of technology neutrality (A/CN.9/863, para. 71).

Subparagraph (b)

60. Subparagraph (b) provides a "safety clause" with the purpose of preventing frivolous litigation by validating methods that have in fact achieved their function regardless of any assessment of their reliability (A/CN.9/863, para. 43). It refers to the fulfilment of the function in the specific case under dispute and does not aim at predicting future reliability based on past performance of the method (A/CN.9/863, para. 51). The provision may operate with respect to any of the functions pursued with the use of electronic transferable records (A/CN.9/869, para. 71). A similar mechanism is contained in article 9, subparagraph (3)(b)(ii), of the Electronic Communications Convention, relating to the functional equivalence of electronic signatures.

61. In practice, the fact that the method used has in fact achieved the function pursued with its use will prevent any discussion on the assessment of its reliability according to subparagraph (b).

Party autonomy

62. The Model Law does not contain an explicit reference to the relevance of an agreement of the parties when assessing reliability in article 11. That omission is due to the desire to set forth an objective reliability standard and therefore not to make it dependent on party autonomy. In particular, the inclusion of a reference to party autonomy could have been read as: (a) introducing different standards for the assessment of reliability whose application would depend on the parties involved; (b) leading to inconsistent findings in respect of the validity of the electronic transferable record, and (c) circumventing substantive law, especially provisions of mandatory application, and ultimately affect third parties. Hence, party autonomy with respect to the assessment of reliability is limited to allocation of liability under the limits set forth in applicable law (A/CN.9/869, para. 75; see also A/CN.9/863, paras. 40 and 59).

63. The relevance of party agreements may be particularly significant in the context of closed systems or when referring to industry standards, since those agreements often contain useful guidance on technical details and may promote technological innovation within the limits of mandatory substantive law (A/CN.9/869, para. 77; see also A/CN.9/863, paras. 58 and 74).

References to preparatory work

A/CN.9/WG.IV/WP.128, paras. 56-58; A/CN.9/WG.IV/WP.128/Add.1, paras. 19-20;

A/CN.9/804, paras. 41-49 and 63;

A/CN.9/WG.IV/WP.130, paras. 66-78; A/CN.9/828, paras. 47-49

A/CN.9/WG.IV/WP.132, paras. 65-77;

A/CN.9/WG.IV/WP.135, paras. 81-95; A/CN.9/863, paras. 37-76;

A/CN.9/WG.IV/WP.137, paras. 66-77; A/CN.9/869, paras. 69-78.

(A/CN.9/WG.IV/WP.139/Add.2) (Original: English)

Note by the Secretariat on a Draft Model Law on Electronic Transferable Records

ADDENDUM

Contents

II. Draft Model Law on Electronic Transferable Records (*continued*)

C. Use of electronic transferable records (Articles 12-19)

> "**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 transferable document or instrument, a reliable method shall be used to indicate that time or place with respect to an electronic transferable record."

Remarks

1. Draft article 12 reflects the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 79-82).

Comments

2. Significant legal consequences are attached to the indication of time and place in transferable documents and instruments. For instance, recording the time of an endorsement is necessary to establish the sequence of the obligors in the action of recourse. Article 12 points at the importance of indicating that information in electronic transferable records. In the case of endorsements, this is particularly important given that the dematerialized nature of electronic transferable records does not make their temporal sequence apparent as in transferable documents or instruments (A/CN.9/834, para. 38).

3. Provisions relating to the indication of time and place, if any, are to be found in substantive law, which may indicate to what extent and which parties may agree on it. If the indication of time and place is mandatory under substantive law, that requirement must be complied with in accordance with article 9 of the Model Law, mandating that the electronic transferable record shall contain the information "required to be contained in a transferable document or instrument".

4. The words "or permits" clarify that article 12 shall apply also to cases when the law permits, but does not require the indication of time or place with respect to a transferable document or instrument (A/CN.9/834, para. 42). In line with the general rule that the Model Law does not impose any additional information requirement, article 12 does not require the indication of time and place when that information is not mandatory under applicable law.

5. Methods available to indicate time and place in electronic transferable records may vary with the system used. Therefore, article 12 is based on a technology-neutral approach compatible with systems based on registry, token, distributed ledger or other technology (A/CN.9/863, para. 24). The reference to the use of a reliable method in indicating time points at the possibility of using trust services such as trusted time stamping (A/CN.9/869, para. 81).

6. The nature of the electronic transferable record may enable automation of certain steps in the life cycle of the record related to time. For instance, promissory notes may be presented for payment automatically on due date.

7. In registry systems, the system is likely to time-stamp automatically the events occurring in the life cycle of the electronic transferable records. However, automatic time-stamping should not prevent parties from determining otherwise the time of their actions, when possible under substantive law.

8. The provisions on time and place of dispatch and receipt of data messages (article 15 of the UNCITRAL Model Law on Electronic Commerce) and of electronic communications (article 10 of the Electronic Communications Convention) are relevant for contract formation and management but may not be appropriate with respect to the use of electronic transferable records (A/CN.9/834, para. 36).

References to preparatory work

A/CN.9/797, para. 61;
A/CN.9/WG.IV/WP.128/Add.1, paras. 1-4;
A/CN.9/WG.IV/WP.130/Add.1, paras. 1-6;
A/CN.9/WG.IV/WP.132/Add.1, paras. 1-10; A/CN.9/834, paras. 36-46;
A/CN.9/WG.IV/WP.135/Add.1, paras. 1-4; A/CN.9/863; paras. 23-24, 26;
A/CN.9/WG.IV/WP.137/Add.1, paras. 1-4; A/CN.9/869, paras. 79-82.

"**Draft article 13. Determination of place of business**

"1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

"2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country."

Remarks

9. Draft article 13 reflects the deliberations of the Working Group at its fifty-third session to retain the article with the title "Determination of place of business" (A/CN.9/869, paras. 83-92).

Comments

10. The law may attach a number of consequences to the place of business. In particular, the place of business may be relevant for the cross-border use of electronic transferable records (A/CN.9/869, para. 83). Substantive law shall indicate how to identify the relevant place of business, which, in principle, does not need to be different only because of the use of electronic or paper medium. The scope of article 13 is limited to clarifying that the location of an information system, or parts thereof, is not an indicator of a place of business as such (A/CN.9/863, para. 25). That clarification may be particularly useful in light of the likelihood that third parties providing services relating to the management of electronic transferable records will use equipment and technology located in various jurisdictions, or whose location may change regularly, such as in the case of use of cloud computing.

11. Article 13, whose text is inspired by article 6, paragraphs 4 and 5 of the Electronic Communications Convention,[1] aims at providing guidance on the determination of a place of business when electronic means are used by indicating

[1] See also United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), Explanatory Note, United Nations Publication Sales No. E.07.V.2, paras. 116-121.

that certain elements do not per se identify a place of business (A/CN.9/869, para. 90). Its scope is therefore different from that of article 12, which relates to the indication of the place of business in the electronic transferable record, and not to its determination.

12. Substantive law may allow parties to identify the place of business by agreement. In that case, article 13 may provide a set of suppletive rules on the determination of the place of business that could usefully complement parties' agreements (A/CN.9/869, para. 84). Reference to "place of business" shall be interpreted as reference to the various notions related to geographic location (e.g., residence, domicile, etc.) that may be relevant during the life cycle of the electronic transferable record.

References to preparatory work

A/CN.9/WG.IV/WP.135/Add.1, paras. 5-6; A/CN.9/863, paras. 25-26; A/CN.9/WG.IV/WP.137/Add.1, paras. 5-8; A/CN.9/869, paras. 83-92.

"**Draft article 14. Issuance of multiple originals**

"Where the law permits the issuance of more than one original of a transferable document or instrument, this may be achieved with respect to electronic transferable records by the issuance of multiple electronic transferable records."

Remarks

13. Draft article 14 reflects the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 95-99). Accordingly, paragraph 2 on the indication of the total number of originals issued has been deleted from draft article 14 as redundant, since draft article 9, subparagraph 1(a) already requires that the electronic transferable record should contain an indication of the issuance of multiple originals whenever substantive law set forth that requirement.

14. The Working Group may wish to consider whether a provision dealing with the coexistence of multiple originals issued simultaneously on different media should be inserted in the draft Model Law. This provision may be useful in promoting the use of electronic transferable records while addressing special needs of some parties who may not be in the position of handling those records.

15. In particular, in case the Working Group wishes to insert a provision indicating that multiple originals may be issued simultaneously on different media, such provision could be drafted along the following lines:

"1. Where the law permits the issuance of more than one original of a transferable document or instrument, this may be achieved with the simultaneous issuance of one or more electronic transferable records and of one or more transferable documents or instruments.

"2. [When one or more electronic transferable records and one or more transferable documents or instruments relating to the same obligation are simultaneously issued] [In case of issuance of one or more electronic transferable records and one or more transferable documents or instruments according to paragraph 1], the electronic transferable records and the transferable documents or instruments shall indicate so."

16. If, on the contrary, the Working Group wishes to insert a provision indicating that multiple originals may not be issued simultaneously on different media, such provision could be drafted along the following lines:

"Where the law permits the issuance of more than one original of a transferable document or instrument, this may not be achieved with the simultaneous issuance of one or more electronic transferable records and of one or more transferable documents or instruments."

Comments

17. The possibility of issuing multiple originals of a transferable document or instrument exists in several fields of trade (A/CN.9/WG.IV/WP.124, para. 49). Examples of legal provisions recognizing that practice may be found in article 47, paragraph 1(c) of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the "Rotterdam Rules")[2] and in article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP"). It has been reported that the practice of issuing multiple originals exists also in the electronic environment.

18. Article 14 aims to enable the continuation of that practice with respect to the use of electronic transferable records (A/CN.9/797, para. 68) when that practice is permitted under applicable law. In that respect, it should be noted that the Model Law does not contain a functional equivalent of the paper-based notion of "original". Instead, the functions fulfilled by the original of a transferable document or instrument with respect to requesting performance are satisfied in an electronic environment by the notions of "singularity" and "control" (see A/CN.9/WG.IV/WP.139, paras. 81-82). Hence, the transposition of the practice of issuing multiple original transferable documents or instruments in an electronic environment requires the issuance of multiple electronic transferable records relating to the performance of the same obligation.

19. However, caution should be exercised when issuing multiple electronic transferable records. In fact, that practice may expose to the possibility of multiple claims for the same performance based on the presentation of each original (A/CN.9/WG.IV/WP.130/Add.1, para. 9). Moreover, the same functions pursued with the issuance of multiple original transferable documents or instruments may be achieved in an electronic environment by attributing selectively control on one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (e.g., title to property of goods, security interests, etc.). In practice, for instance, a registry could record multiple claims having different objects and relating to the same electronic transferable record.

20. Article 14 does not contain an obligation to indicate whether multiple originals have been issued. If substantive law contains that obligation, the electronic transferable record must comply with it in accordance with the information requirements contained in article 9, subparagraph 1(a) of the Model Law (A/CN.9/869, paras. 97 and 99).

21. Similarly, article 14 does not specify whether one or all originals must be presented to request the performance of the obligation contained in the electronic transferable record as this matter is determined by applicable law or, where possible, contractual agreement (for additional information on substantive law, see A/CN.9/WG.IV/WP.132/Add.1, paras. 14-16).

References to preparatory work

A/CN.9/WG.IV/WP.122, para. 25; A/CN.9/768, paras. 71-74;
A/CN.9/WG.IV/WP.124, paras. 49-50; A/CN.9/797, paras. 47, 68-69;
A/CN.9/WG.IV/WP.128/Add.1, paras. 6-7; A/CN.9/804, para. 50;
A/CN.9/WG.IV/WP.130/Add.1, paras. 8-16;
A/CN.9/WG.IV/WP.132/Add.1, paras. 12-20; A/CN.9/834, paras. 47-52;
A/CN.9/WG.IV/WP.135/Add.1, paras. 8-13;
A/CN.9/WG.IV/WP.137/Add.1, paras. 10-16; A/CN.9/869, paras. 95-99.

"**Draft article 15. 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 transferable document or instrument."

[2] General Assembly resolution 63/122, annex.

Comments

22. As a general rule, the electronic transferable record shall contain all the information contained in the transferable document or instrument (article 9, subparagraph 1(a) of the Model Law). The Model Law does not require the insertion of information additional to that contained in a transferable document or instruments for the issuance and use of an electronic transferable record. Requiring that additional information would create a legal requirement that does not exist with respect to the issuance and use of transferable documents or instruments and therefore could constitute discrimination against the use of electronic means.

23. Adding to that general rule, article 15 clarifies that the electronic transferable record may, but does not need to contain information additional to that contained in the transferable document or instrument. In other words, while the Model Law does not impose any additional information requirement for electronic transferable records, it also does not prevent the inclusion in those records of additional information that may not be contained in a transferable document or instrument due to the different nature of the two media (A/CN.9/869, paras. 101 and 102).

24. Examples of such additional information include information necessary due to technical reasons, such as metadata or a unique identifier (A/CN.9/761, para. 32). Moreover, such additional information could consist of dynamic information, i.e. information that may change periodically or continuously based on an external source, which may be included in an electronic transferable record due to its nature but not in a transferable document or instrument. The price of a publicly-traded commodity and the position of a vessel are examples of dynamic information (A/CN.9/768, para. 66 and A/CN.9/797, para. 73).

References to preparatory work

A/CN.9/WG.IV/WP.118, paras. 36-37; A/CN.9/761, para. 32;
A/CN.9/WG.IV/WP.122, para. 22; A/CN.9/768, para. 66;
A/CN.9/WG.IV/WP.124, paras. 51-54; A/CN.9/797, paras. 70-73;
A/CN.9/WG.IV/WP.128/Add.1, para. 10;
A/CN.9/WG.IV/WP.130/Add.1, para. 19;
A/CN.9/WG.IV/WP.132/Add.1, para. 23;
A/CN.9/WG.IV/WP.135/Add.1, para. 18;
A/CN.9/WG.IV/WP.137/Add.1, paras. 21-22; A/CN.9/869, paras. 101-102.

> "**Draft article 16. Endorsement**
>
> "Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 7 and 8."

Remarks

25. Draft article 16 has been recast pursuant to the Working Group's deliberations at its fifty-third session (A/CN.9/869, paras. 111-114) on the understanding that the words "included in" encompass instances when the information was logically associated with or otherwise linked to the electronic transferable record.

Comments

26. Transferable documents or instruments may be transferred by delivery and by endorsement (for comments on delivery, see A/CN.9/WG.IV/WP.139/Add.1, paras. 41-43). Substantive law sets forth the conditions for the circulation of transferable documents or instruments, which apply to functionally equivalent electronic transferable records. Article 16 identifies the requirements that need to be complied with in order to achieve functional equivalence of endorsement in addition

to the requirements for functional equivalence of written form and signature (A/CN.9/768, para. 46; A/CN.9/WG.IV/WP.128/Add.1, para. 23).

27. While national laws may contain a wide range of formal prescriptions for endorsement in a paper-based environment, article 16 aims to achieve functional equivalence of the notion of endorsement regardless of those requirements and in line with the approach taken for other functional equivalence rules in the Model Law. Hence, article 16 adds to the functional equivalence rules for writing, signature and transfer already contained in the Model Law by providing also for specific forms of endorsement required under substantive law, such as endorsements on the back of a transferable document or instrument or by affixing an *allonge* (A/CN.9/828, para. 76).

28. Inserting in article 16 specific references to certain form requirements, but not to others, might be interpreted as excluding those other requirements from the scope of the article, thus ultimately frustrating its purpose (A/CN.9/804, para. 80). Hence, article 16 does not refer to any specific form of requirement, but includes all of them.

29. The words "or permits" are included in article 16 to provide for instances when substantive law allows for, but does not require endorsement (A/CN.9/828, para. 77).

30. The words "included in" have been chosen as reflecting more accurately current practice (A/CN.9/828, para. 78) and to encompass instances when the information is logically associated with or otherwise linked to the electronic transferable record (A/CN.9/869, para. 114), thus enabling the use of different models for electronic transferable records management systems in line with the principle of technology neutrality.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 14, 47-49; A/CN.9/768, paras. 46, 102;
A/CN.9/WG.IV/WP.124/Add.1, paras. 13-15; A/CN.9/797, paras. 95-97;
A/CN.9/WG.IV/WP.128/Add.1, paras. 22-27; A/CN.9/804, paras. 80-81;
A/CN.9/WG.IV/WP.130/Add.1, paras. 34-37; A/CN.9/828, paras. 76-80;
A/CN.9/WG.IV/WP.132/Add.1, paras. 36-38;
A/CN.9/WG.IV/WP.135/Add.1, paras. 35-37;
A/CN.9/WG.IV/WP.137/Add.1, paras. 31-33; A/CN.9/869, paras. 111-114.

"**Draft article 17. Amendment**

"Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such."

Comments

31. Substantive law or contractual agreements may allow for the amendment of a transferable document or instrument and specify who has the authority to amend the electronic transferable record, under what circumstances and whether a duty to notify third parties of the amendment exists (A/CN.9/761, para. 49 and A/CN.9/768, para. 95). Article 17 provides a functional equivalence rule for instances in which an electronic transferable record may be amended. The amendments referred to in article 17 are of legal and not technical nature.

32. Article 17 sets forth an objective standard, as indicated by the use of the word "identified" (A/CN.9/828, paras. 86 and 87), for the identification of amended information in an electronic environment. The rationale for requesting the identification of the amended information lies in the fact that, while amendments may be easily identifiable in a paper-based environment due to the nature of that medium, that may not be the case in an electronic environment. Qualifiers to identification, such as "accurately" or "readily", do not provide an objective standard while introducing an additional burden and imposing cost on system operators (A/CN.9/828, para. 88 and A/CN.9/863, para. 84).

33. Thus, article 17 aims to provide evidence of and trace all (A/CN.9/828, para. 88) amended information (A/CN.9/828, para. 85). The article is in line with the general obligation to preserve the integrity of the electronic transferable record contained in article 9 of the Model Law (A/CN.9/WG.IV/WP.139/Add.1, para. 23). It does, however, go beyond that general obligation, as the amended information shall not only be recorded but also identified as such and therefore recognizable.

34. Article 17 requires that a reliable method shall be used to identify the amended information, but does not set out the method to be employed to identify the amendment or the amended information, as that could impose an additional burden on the management of the electronic transferable record (A/CN.9/828, paras. 89 and 90). The reliability of the method shall be assessed according to the general reliability standard contained in article 11 (A/CN.9/863, paras. 66 and 73).

35. The words "or permits" aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record but does not require it (A/CN.9/WG.IV/WP.130/Add.1, para. 42).

References to preparatory work

A/CN.9/761, paras. 45-49; A/CN.9/WG.IV/WP.118/Add.1, paras. 1-5;
A/CN.9/WG.IV/WP.122, paras. 36-39; A/CN.9/768, paras. 93-97;
A/CN.9/WG.IV/WP.124/Add.1, paras. 21-26; A/CN.9/797, para. 101;
A/CN.9/WG.IV/WP.128/Add.1, paras. 33-38; A/CN.9/804, para. 86;
A/CN.9/WG.IV/WP.130/Add.1, paras. 41-45; A/CN.9/828, paras. 85-90;
A/CN.9/WG.IV/WP.132/Add.1, paras. 39-43;
A/CN.9/WG.IV/WP.135/Add.1, paras. 38-40; A/CN.9/863, paras. 83-87;
A/CN.9/WG.IV/WP.137/Add.1, paras. 34-35.

"**Draft article 18. Replacement of a transferable document or instrument with an electronic transferable record**

"1. An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used.

"2. For the change of medium to take effect, the following requirements shall be met:

(a) The electronic transferable record shall include all the information contained in the transferable document or instrument; and

(b) A statement indicating a change of medium shall be inserted in the electronic transferable record.

"3. Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity.

"4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

36. Draft article 18 has been recast to reflect the deliberations of the Working Group at its fifty-third session (A/CN.9/869, paras. 116-120). Accordingly, paragraph 1 is drafted in the active voice. Paragraph 3 now contains a reference to paragraph 1 in addition to paragraph 2 to clarify that the electronic transferable record has to be issued in accordance with both paragraphs.

37. The Working Group may wish to note that a transferable document or instrument may be invalidated on the wrong assumption of the validity of the electronic transferable record replacing it. In that case, the Working Group may wish to confirm that substantive law would apply to the reissuance of the transferable document or instrument, or, alternatively and if possible, that the electronic transferable record shall be issued in compliance with draft article 18.

38. The Working Group may wish to consider whether the comments to draft articles 18 and 19 should be combined, since the structure of the two articles is similar.

Comments

39. If the law recognizes the use of both transferable documents or instruments and electronic transferable records, the need for a change of medium may arise during the life cycle of those documents, instruments or records. Enabling change of medium is critical for the wider acceptance and use of electronic transferable records, especially when used across borders, given the different levels of acceptance of electronic means and readiness for their use in different States and business communities (A/CN.9/761, para. 72).

40. While modern legal texts based on medium neutrality may recognize the possibility of change of medium,[3] laws dealing exclusively with transferable documents or instruments are unlikely to foresee it. Articles 18 and 19 of the Model Law aim to fill that gap.

41. Articles 18 and 19 have a substantive nature and aim at satisfying two main goals: enabling change of medium without loss of information; and ensuring that the replaced transferable document or instrument will not further circulate (A/CN.9/828, para. 95) so as to prevent the coexistence of two claims to performance of the same obligation and, more generally, not to affect in any manner the rights and obligations of any party (A/CN.9/834, para. 54).

42. Article 18 omits the reference to substantive legal notions such as “issuer”, “obligor”, “holder” and “person in control” in order to accommodate the variety of schemes used in the various transferable documents or instruments, thus providing the flexibility needed to accommodate business practice (A/CN.9/834, paras. 57 and 64 and A/CN.9/WG.IV/WP.135/Add.1, para. 44).

43. Substantive law, including parties’ agreement, identifies those parties whose consent is relevant for the change of medium (A/CN.9/834, para. 62) and which parties, if any, need to be notified of the change.

44. Paragraph 1 requires that a reliable method shall be used for the change of medium. The reliability of the method shall be assessed according to the general reliability standard contained in article 11 (A/CN.9/863, paras. 66 and 73).

45. The word “replace” in paragraph 1 does not refer to the notion of reissuance, since reissuance and change of medium are distinct concepts and article 18 is clearly meant to refer to the latter (A/CN.9/869, para. 116).

46. The requirements set forth in paragraph 2 (a) and (b) are concurrent but not sequential. The electronic transferable records management system will in practice determine the steps in which they are implemented. The legal consequence for non-compliance with any of them is the invalidity of the change of medium and, consequently, of the electronic transferable record (A/CN.9/834, para. 58).

47. Paragraph 3 sets forth that, when the change of medium has taken place, the transferable document or instrument ceases to have any effect or validity. This is necessary to avoid multiple claims for performance. The word “upon” indicates that there should be no interval between the issuance of the replacement and the termination of the replaced document or record (A/CN.9/828, paras. 97 and 102).

48. The words “shall be made inoperative and” before the word “ceases” reflect that the transferable document or instrument could not be further transferred after change of medium. They leave sufficient flexibility on the choice of the method to render the transferable document or instrument inoperative (A/CN.9/869, para. 118).

49. A transferable document or instrument could fulfil other functions besides transferability, such as providing evidence of a contract for the carriage of goods and of receipt of the goods, or, with respect to transferable documents or instruments,

[3] See article 17 of An Act to Establish a Legal Framework for Information Technology, CQLR c C-1.1 (Québec); see also article 10 of the Rotterdam Rules.

providing evidence of the chain of endorsements for an action in recourse. The ability to fulfil those additional functions may continue after the document or instrument has been made inoperative (A/CN.9/869, para. 118).

50. Paragraph 3 refers to the issuance of the electronic transferable record in accordance with paragraphs 1 and 2, to clarify that the electronic transferable record has to be issued in accordance with both paragraphs (A/CN.9/869, para. 119).

51. Paragraph 4 is intended to clarify as a statement of law that the rights and obligations of the parties are not affected by the change of medium (A/CN.9/834, para. 61). Though a general principle already contained in the Model Law, the paragraph was retained in view of its declaratory function (A/CN.9/828, paras. 101 and 102).

References to preparatory work

A/CN.9/761, paras. 72-77;
A/CN.9/WG.IV/WP.122, paras. 44-46; A/CN.9/768, para. 101;
A/CN.9/WG.IV/WP.124/Add.1, paras. 27-31; A/CN.9/797, paras. 102-103;
A/CN.9/WG.IV/WP.128/Add.1, paras. 40-47;
A/CN.9/WG.IV/WP.130/Add.1, paras. 47-54; A/CN.9/828, paras. 94-102;
A/CN.9/WG.IV/WP.132/Add.1, paras. 46-56; A/CN.9/834, paras. 53-64;
A/CN.9/WG.IV/WP.135/Add.1, paras. 43-48;
A/CN.9/WG.IV/WP.137/Add.1, paras. 38-43; A/CN.9/869, paras. 116-120.

> "**Draft article 19. Replacement of an electronic transferable record with a transferable document or instrument**
>
> "1. A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used.
>
> " 2. For the change of medium to take effect, the following requirements shall be met:
>
> (a) The transferable document or instrument shall include all the information contained in the electronic transferable record; and
>
> (b) A statement indicating a change of medium shall be inserted in the transferable document or instrument.
>
> "3. Upon issuance of the transferable document or instrument in accordance with paragraphs 1 and 2, the electronic transferable record shall be made inoperative and ceases to have any effect or validity.
>
> "4. A change of medium in accordance with paragraphs 1 and 2 does not affect the rights and obligations of the parties."

Remarks

52. Pursuant to the Working Group's decision at its fifty-third session (A/CN.9/869, paras. 121, 116-120), draft article 19 reflects the changes agreed upon for draft article 18 since the two draft articles share the same structure.

53. Accordingly, paragraph 1 is drafted in the active voice on the basis of the alternative draft contained in A/CN.9/WG.IV/WP.137/Add.1, paragraph 47. Paragraph 3 now contains a reference to paragraph 1 in addition to paragraph 2 to clarify that the transferable document or instrument had to be issued in accordance with both paragraphs.

54. Further, paragraph 3 includes the words "shall be made inoperative and" before the word "ceases" to reflect that the electronic transferable record could not be further transferred after change of medium leaving sufficient flexibility to industry on the choice of the method to render the electronic transferable record inoperative.

Comments

55. Article 19 provides for the replacement of an electronic transferable record with a transferable document or instrument. A survey of business practice indicates that such replacement is more frequent than the reverse case due to the fact that a party whose involvement was not envisaged at the time of the creation of the electronic transferable record does not wish or is not in a position to use electronic means (A/CN.9/WP.137/Add.1, para. 44).

56. Under certain national laws, a paper-based print-out of an electronic record may be considered as equivalent to an electronic record.[4] Under article 19 a print-out of an electronic transferable record needs to meet the requirements of that article in order to have effect as a transferable document or instrument replacing the corresponding electronic transferable record.

57. The content of article 19 mirrors that of article 18 on the replacement of a transferable document or instrument with an electronic transferable record (A/CN.9/834, para. 64). Therefore, the comments in paragraphs 39-51 above also apply, mutatis mutandis, to article 19.

References to preparatory work

A/CN.9/WG.IV/WP.122, paras. 44-46; A/CN.9/768, para. 101;
A/CN.9/WG.IV/WP.124/Add.1, paras. 27-31; A/CN.9/797, paras. 102-103;
A/CN.9/WG.IV/WP.128/Add.1, paras. 40-47;
A/CN.9/WG.IV/WP.130/Add.1, paras. 47-54; A/CN.9/828, paras. 94-102;
A/CN.9/WG.IV/WP.132/Add.1, paras. 46-56; A/CN.9/834, paras. 53-64;
A/CN.9/WG.IV/WP.135/Add.1, paras. 49-51;
A/CN.9/WG.IV/WP.137/Add.1, paras. 44-47; A/CN.9/869, paras. 121-122.

Third-party service providers

58. Depending on the model chosen, electronic transferable records management systems may require the use of services provided by third parties. The Model Law is technology neutral and therefore compatible with all models. Reference in the Model Law to electronic transferable record management systems does not imply the existence of a system administrator or other form of centralized control.

59. UNCITRAL texts on electronic commerce have sometimes dealt with the conduct of third-party service providers. In particular, articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures provide guidance on the assessment of the conduct of a third-party service provider and of the trustworthiness of its services.

60. However, the enabling scope of the Model Law is not compatible with regulatory concerns, which should be addressed in other legislation. Moreover, expected developments in technology and business practice recommend a flexible approach when assessing the conduct of third-party service providers. Hence, the Model Law leaves freedom of choice of third-party service providers as well as of the type of services requested and of their technology (A/CN.9/834, para. 78).

61. In that respect, it should be noted that the general reliability standard set forth in article 11 of the Model Law, and specific standards such as the criterion to assess integrity contained in article 9, paragraph 2 of the Model Law provide parameters to assess the reliability of an electronic transferable record and of its management system. Designers of those management systems need to comply with those standards in order to set up commercially viable enterprises.

[4] See, e.g., Electronic Transactions Act, 2007 of Saint Vincent and the Grenadines, Section 11(2): "Where a rule of law requires or permits a person to provide a certified copy of a document and the document exists in electronic form, the requirement is met if the person provides a print-out certified to be a true reproduction of the document or information."

D. Cross-border recognition of electronic transferable records (Article 20)

"**Draft article 20. 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 abroad.

"2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument."

Remarks

62. Draft article 20 reflects the deliberations of the Working Group at its fifty-third session (A/CN.9/869, paras 124-131). Accordingly, paragraph 1 aims to provide only for non-discrimination of foreign electronic transferable records (A/CN.9/869, para. 128).

Comments

63. Article 20 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the fact that it was issued or used abroad and without affecting private international law rules (A/CN.9/869, paras. 125 and 129).

64. The need for an international regime to facilitate the cross-border use of electronic transferable records was already recognized at the outset of the work and reiterated throughout the deliberations on the Model Law (A/CN.9/761, paras. 87-89; A/CN.9/863, para. 77). That need was also emphasized by the Commission at its forty-fifth session (A/67/17, para. 83).

65. However, different views were expressed on how to achieve that goal. On the one hand, there was the desire not to displace existing private international law rules and to avoid the creation of a dual regime applying a special set of conflict of laws provisions for electronic transferable records. On the other hand, there was awareness of the importance of dealing adequately with aspects relating to the international use of the Model Law for its success and expression of the desire to favour its cross-border application regardless of the number of enactments (A/CN.9/863, paras. 77-82).

Paragraph 1

66. Paragraph 1 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the place of origin or of use of the electronic transferable record. In other words, paragraph 1 aims to prevent that the place of origin or of use of the electronic transferable record could be considered in themselves reasons to deny legal validity or effect to an electronic transferable record. A provision similar in scope may be found in article 12, paragraph 1 of the UNCITRAL Model Law on Electronic Signatures.

67. The words "issued or used" aim at covering all events occurring during the life cycle of an electronic transferable record. In determining the location of the place of business, article 13 of the Model Law may also be relevant.

68. Paragraph 1 does not affect substantive law, including private international law (A/CN.9/869, para. 125). Thus, for instance, paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that does not recognize the legal validity of electronic transferable records (A/CN.9/869, para. 125). However, paragraph 1 also does not prevent that an electronic transferable record issued or used in a jurisdiction that does not allow the issuance and use of electronic transferable records, and that otherwise complies with the requirements of

applicable substantive law, could be recognized in a jurisdiction enacting the Model Law (see also A/CN.9/863, para. 79).

69. The word “abroad” is used to refer to a jurisdiction other than the enacting one, including a different territorial unit in States comprising more than one.

70. Paragraph 2 reflects the understanding that the Model Law should not displace existing private international law applicable to transferable documents or instruments (A/CN.9/768, para. 111). The introduction of dedicated provisions would lead to a dual private international law regime, which is not desirable (A/CN.9/869, para. 78).

71. Paragraph 2 implements the general principle already contained in article 1, paragraph 2 of the Model Law (A/CN.9/WG.IV/WP.139, para. 17). It clarifies that private international law rules are considered substantive law for the purposes of that article (A/CN.9/869, para. 129).

72. Since paragraph 1 refers only to non-discrimination while paragraph 2 relates to private international law, the two paragraphs operate on different levels and do not interfere.

References to preparatory work

A/67/17, para. 83;
A/CN.9/WG.IV/WP.122, paras. 60-62; A/CN.9/768, para. 111;
A/CN.9/WG.IV/WP.124/Add.1, paras. 45-47; A/CN.9/797, para. 108;
A/CN.9/WG.IV/WP.128/Add.1, paras. 62-66;
A/CN.9/WG.IV/WP.130/Add.1, paras. 71-75;
A/CN.9/WG.IV/WP.132/Add.1, paras. 79-83;
A/CN.9/WG.IV/WP.135/Add.1, paras. 58-63; A/CN.9/863, paras. 77-82;
A/CN.9/WG.IV/WP.137/Add.1, paras. 52-63; A/CN.9/869, paras. 124-131.

C. Report of the Working Group on Electronic Commerce on the work of its fifty-fifth session (New York, 24-28 April 2017)

(A/CN.9/902)

[Original: English]

Contents

I. Introduction

1. At its forty-ninth session, in 2016, the Commission confirmed its decision that the Working Group could take up work on the topics of identity management and trust services as well as of cloud computing upon completion of the work on the draft Model Law on Electronic Transferable Records. The Commission was of the view that it would be premature to prioritize between the two topics. It was mentioned that priority should be based on practical needs rather than on how interesting the topic was or the feasibility of work. The Secretariat, within its existing resources, and the Working Group were asked to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic.[1]

2. At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group held a preliminary exchange of views on a possible future work on cloud computing, without reaching any decision (A/CN.9/897, para. 126). On identity management and trust services, it was agreed that the Working Group should continue clarifying the goals of the project, specifying its scope, identifying applicable general principles and drafting necessary definitions (A/CN.9/897, paras. 118-120 and 122). (For further background information, see A/CN.9/WG.IV/WP.140, paras. 6-10.)

[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 235 and 353.

II. Organization of the session

3. The Working Group, composed of all States members of the Commission, held its fifty-fifth session in New York from 24 to 28 April 2017. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Canada, China, Colombia, Czech Republic, El Salvador, France, Germany, Honduras, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Namibia, Pakistan, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The session was also attended by observers from the following States: Belgium, Cambodia, Congo, Dominican Republic, Iraq, Paraguay, Saudi Arabia, Sweden, Syrian Arab Republic, Ukraine and Zimbabwe.

5. The session was also attended by observers from the Holy See and the European Union.

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

(a) *United Nations system*: World Bank;

(b) *Intergovernmental organizations*: International Institute for the Unification of Private Law (Unidroit);

(c) *International non-governmental organizations*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Center for International Legal Education (CILE), China Society of Private International Law (CSPIL), CISG Advisory Council, European Law Students' Association (ELSA), European Multi-Channel and Online Trade Association (EMOTA), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), GSM Association (GSMA), International Bar Association (IBA), International Federation of Freight Forwarders Associations (FIATA), Jerusalem Arbitration Center (JAC), Law Association for Asia and the Pacific (LAWASIA) and World Association of Former United Nations Interns and Fellows (WAFUNIF).

7. The Working Group elected the following officers:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Mr. Kyoungjin CHOI (Republic of Korea)

8. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.IV/WP.140 and Add.1); (b) a proposal by the Russian Federation on improving the identity management system through the use of a transboundary trust environment and a common trust infrastructure for cross-border electronic transactions (A/CN.9/WG.IV/WP.141); (c) a note by the Secretariat on contractual aspects of cloud computing (A/CN.9/WG.IV/WP.142); (d) a note by the Secretariat containing terms and concepts relevant to identity management and trust services (A/CN.9/WG.IV/WP.143); (e) a proposal by Austria, Belgium, France, Italy, the United Kingdom, and the European Union on legal issues relating to electronic identity management and trust services (A/CN.9/WG.IV/WP.144); (f) a paper by the United States on legal issues relating to identity management and trust services (A/CN.9/WG.IV/WP.145); and (g) a proposal by the United Kingdom on outcome based standards and international interoperability (A/CN.9/WG.IV/WP.146).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.

4. Contractual aspects of cloud computing.
5. Legal issues related to identity management and trust services.
6. Technical assistance and coordination.
7. Other business.
8. Adoption of the report.

III. Deliberations and decisions

10. The Working Group engaged in the discussion of contractual aspects of cloud computing on the basis of a note by the Secretariat (A/CN.9/WG.IV/WP.142) and legal issues related to identity management and trust services on the basis of a note by the Secretariat (A/CN.9/WG.IV/WP.143) and proposals by States (A/CN.9/WG.IV/WP.141, A/CN.9/WG.IV/WP.144, A/CN.9/WG.IV/WP.145 and A/CN.9/WG.IV/WP.146). The deliberations and decisions of the Working Group on contractual aspects of cloud computing are reflected in chapter IV of this report, and the deliberations and decisions of the Working Group on legal issues related to identity management and trust services are reflected in chapter V of this report.

IV. Contractual aspects of cloud computing

11. The Working Group discussed contractual aspects of cloud computing on the basis of document A/CN.9/WG.IV/WP.142. The value of an UNCITRAL guidance text on cloud computing, especially for micro, small and medium-sized enterprises, was recognized. In light of the evolving range of cloud computing services, of the variety in types of cloud services contracts and of rapid developments in technology and business practices, it was suggested that general and flexible guidance should be offered.

12. With respect to the drafting approach, there was agreement that the guidance document should aim at explaining the main features of cloud services contracts without attempting to address exhaustively all potential issues arising from all types of such contracts. The desirability of focusing on unique cloud-specific aspects was noted. It was added that existing work by other international organizations, including on technical standards, should be taken into account.

13. As regards the form of the guidance text, there was agreement that at this stage the preparation of a legislative guide or other legislative text or of a detailed legal guide was not desirable. The prevailing view was that a work product should take a form of a checklist of issues to be taken into account when drafting a cloud services contract (the “checklist”). The checklist should describe contractual issues without favouring any particular party and should uphold the principle of party autonomy.

14. The other view was that model contractual clauses or a guide should be prepared on particularly relevant aspects such as data portability and data security. Another view was that the Working Group should start with defining terms relevant to cloud services and prepare a legal guide once definition of those terms had been clarified.

15. After discussion, the Working Group decided to recommend to the Commission the preparation of a checklist of major issues that contracting parties might wish to address in cloud services contracts. In light of its nature, the checklist should not offer best practice guidance or recommendations. The need for preparation of guidance materials or model contractual clauses could be considered at a later stage.

16. As regards the scope of the work, the Working Group was of the view that only issues arising from business-to-business cloud services contracts should be addressed, while government-to-business and business-to-consumer contexts should be excluded. Issues arising from business-to-government relations would be addressed only incidentally. It was added that the guidance document should not address the use of cloud computing in specific sectors, such as education, health-care and financial

services, since those sectors posed peculiar challenges addressed by dedicated regulation.

17. It was understood that all clusters of issues listed in paragraph 24 of document A/CN.9/WG.IV/WP.142 should be retained. However, it was added, a detailed discussion should be offered only for those issues specific to cloud computing. Highlighted issues included data portability, data security, subcontracting and risk allocation. Certain matters, such as regulatory ones, including privacy and data protection, and intellectual property rights, should be only mentioned in order to alert contracting parties.

18. It was indicated that providing guidance on choice of law and forum in cloud services contracts would be useful, particularly in developing countries. It was recalled that the various jurisdictions provided different levels of recognition of party autonomy in choice of law and forum, which could have particularly relevant impact on the enforceability of cloud services contracts.

19. It was further indicated that general contract law could address a number of issues arising from cloud services contracts. It was added that providing a reference to general contract law could have a significant impact on familiarizing less sophisticated concerned parties, including in developing countries, with cloud services contracts. Moreover, it could be useful to distinguish between matters addressed in general contract law and matters addressed in service contracts law. After discussion, it was agreed that the checklist should list relevant issues, including those that could be addressed in general contract law or in other law.

20. It was explained that, since the content of cloud services contracts could vary significantly, it was for applicable law to qualify those contracts in light of their actual content. That qualification would then allow the parties to deal appropriately with issues such as: formation and form of the contract; price and payment; duration, renewal and termination; amendments of contractual terms; and dispute resolution. Hence, it was suggested, it would be particularly useful to provide a detailed description of possible services offered.

21. It was agreed that pre-contractual aspects within contract law could be discussed but that the existence of pre-contractual obligations should not be implied. It was suggested that it could be useful to address separately issues arising from standard contracts for the provisions of off-the-shelf cloud services, which were usually concluded by adhesion, and custom-tailored contracts. In response, it was stated that, as with other types of contracts, cloud computing contracts might involve parties with different levels of sophistication.

22. It was indicated that risk allocation and liability were particularly relevant when considering entering into cloud services contracts and therefore should be included in the checklist. It was added that for the time being that discussion should be limited to liability of contractual parties and should not extend to third-party liability.

23. After discussion, the Working Group suggested that the Commission could ask the Secretariat to prepare, with the help of experts, a draft checklist reflecting the above preliminary considerations, and to submit it to the consideration of the Working Group.

24. As regards the timing of work, one view was that the work could be undertaken in parallel with work on another topic assigned by the Commission to the Working Group. In response, concern was expressed that parallel work on more than one topic could affect the quality of the outcome of that work. Priority should be allocated to work on contractual aspects of cloud computing in light of timeliness and importance of that work. The Working Group deferred a recommendation to the Commission on that aspect until after consideration of other topics on its agenda. (For further discussion, see chapter VI below).

25. The Working Group considered whether the checklist should define the concept of cloud computing, for example with reference to its main features, benefits and risks listed in paragraphs 1 and 2 and 17 to 23 of the annex in document A/CN.9/WG.IV/WP.142. It was observed that, while the annex might assist in the

drafting of the checklist, the draft would not necessarily utilize the text or approach contained in the annex. The understanding was that the checklist should describe but not define cloud computing and related concepts. Paragraph 2 of the annex would need to be amended to reflect that point and to explain that cloud services contracts could be qualified as variants of contracts for provision of services and of other types of contracts depending on the actual content of the contract. It was agreed that an explanation of the contracts covered by the checklist would need to be provided from the outset.

26. With reference to paragraph 8 of the annex, it was recalled that the Working Group had decided not to discuss in the checklist the involvement of cloud service partners, such as cloud auditors and cloud service brokers. The checklist could alert contracting parties about issues related to third parties, other than cloud auditors and cloud service brokers, only to the extent that those issues might need to be addressed in a cloud services contract.

27. With reference to paragraph 10, it was explained that the provision of cloud services might raise cross-border issues even in domestic cloud services contracts. Accordingly, it was confirmed that cross-border issues should be duly reflected in the checklist in addition to private international law matters. With reference to paragraph 13 of the annex, it was understood that it would need to be redrafted to reflect the deliberations of the Working Group not to include specific clauses in the checklist. It was agreed that, although the checklist should be as broad and complete as possible, it should not convey to a reader that it dealt exhaustively with all possible pre-contractual and contractual issues related to cloud computing. With reference to paragraph 15 of the annex, the understanding was that, in light of the nature of the checklist, the text would use such expressions as “the parties may wish to consider” or “the parties might wish to provide”.

28. With those preliminary suggestions for a redraft of the annex in document A/CN.9/WG.IV/WP.142, the Working Group completed its consideration of agenda item 4 (for the recommendation of the Working Group to the Commission on the timing of work on cloud computing, see chapter VI below).

V. Legal issues related to identity management and trust services

A. General comments

29. A question was asked on whether the work on identity management (“IdM”) and trust services should consider also their use in relation to government services. In response, it was explained that, while non-commercial matters were outside the mandate of UNCITRAL, commercial applications often relied on identity schemes or credentials originating in the public sector. It was recalled that the Working Group had agreed that its future work on IdM and trust services should be limited to the use of IdM systems for commercial purposes and that it should not take into account the private or public nature of the IdM services provider (A/CN.9/897, para. 118). The Working Group reaffirmed that decision.

30. It was recalled that the mandate received from the Commission referred to both IdM and trust services (A/71/17, para. 235).

31. The value of UNCITRAL’s work in identifying and addressing legal obstacles to the commercial use of IdM and trust services, including in the broader framework of the work conducted by the United Nations and other international organizations on legal identity, was emphasized. Such work would signal to the international community that legally enabling electronic identification at the global level was possible.

B. Objectives of the project

32. It was suggested that the main goal of work on IdM and trust services should be to enable their cross-border recognition. It was noted that the achievement of that goal would require defining elements of mutual legal recognition such as the recognizing entity, the object of the recognition, the purpose of the recognition and under which circumstances recognition might occur.

33. In order to achieve cross-border recognition, it was suggested that the Working Group could prepare a legal toolbox that would: identify the various solutions relating to IdM and trust services; define their levels of reliability; and specify the legal consequences attached to each reliability level, including liability for failure to provide the specified level of reliability. The benefits of that toolbox would include providing parties with different options for managing risks on an informed basis and ensuring interoperability.

34. Another view was that the main goal of the proposed work was to address fundamental issues related to the legal recognition of identity in electronic form. It was suggested that work could commence with identifying cases when identification was required by law. Subsequently, the conditions under which identity information in electronic form could satisfy identification requirements would be defined. Similarly, the circumstances under which a commercial operator could rely on identity information in electronic form would be specified.

35. Support was expressed for the formulation of a functional equivalence rule for identification. It was indicated that when doing so the distinction between foundational identity and transactional identity would need to be taken into account.

36. Another proposal was to compile existing models for IdM, ranging from self-assertion schemes to dedicated legislation, identify those models that were more appropriate for commercial purposes and prepare related sets of rules.

37. It was suggested that any work should take into consideration ongoing efforts to promote technical and legal interoperability and not override, but enable existing schemes. Efforts to create new identities and IdM systems instead of using existing ones were questioned.

38. A question was asked on the relationship between IdM and trust services. Support was expressed for the view that the two notions were closely interlinked, and that work on IdM entailed work on trust services since IdM was a means to an end, and not an end in itself. Hence, it was suggested that work on IdM alone would not suffice. It was added that IdM was a precondition of trust services and that therefore work should begin on IdM aspects.

39. The view that work should start on trust services was also expressed. In particular, a suggestion was to identify specific trust services intended to be covered by an UNCITRAL instrument and describe the features of those trust services. In response, it was indicated that trust services should be addressed only in the context of IdM and not in a broader context or discretely.

40. Support was also expressed for the view that, while IdM was necessary for certain trust services as well as for other purposes, it was a fundamental notion with autonomous relevance and should therefore be dealt with separately and on a priority basis. It was added that, on the basis of the work carried out on IdM it could be possible to identify at a later stage which trust services were relevant for IdM and conduct further work limited to those trust services.

41. It was suggested to consider identifying common fundamental issues relevant to both IdM and trust services in light of general guiding principles. The Working Group was invited to consider to that end paragraphs 15 and 16 of document A/CN.9/WG.IV/WP.144.

42. In response to a query on the relationship between IdM and trust services, several jurisdictions reported that the two were separate and distinct notions although closely interrelated. It was explained that IdM was an enabler of trust services. Examples of

the interaction between IdM and trust services in various contexts and at various levels, including with respect to anti-money laundering and know-your-customer regulations, were provided. Different views were expressed on the desirability of carrying out work on IdM and trust services simultaneously or sequentially.

43. A query was raised on whether attribution of identity information would pertain to the domain of trust services, in particular electronic signatures as addressed in UNCITRAL instruments, rather than to that of IdM. Reference was made to the distinction between identification required by law and identification in a business environment for enforcement purposes.

44. To make a more informed decision on the objectives of UNCITRAL work in the area of IdM, a proposal was made to identify gaps and practical needs that UNCITRAL could address through its work in the area of IdM.

45. In light of the general mandate of UNCITRAL to reduce or remove legal barriers to international trade, the Working Group agreed that it would be appropriate to identify the legal recognition and mutual recognition of IdM and trust services as the goals of the work of UNCITRAL in that area.

46. It was indicated that reference to the notion of mutual recognition could be more appropriate in a legal context than reference to interoperability, which might have technical implications falling outside the mandate of UNCITRAL.

47. It was suggested that the notion of mutual recognition in a commercial context should not necessarily refer to cross-border recognition. Rather, it should refer to recognition of identity credentials created for commercial purposes across IdM systems regardless of their national or international nature. It was added that mutual recognition should be voluntary rather than mandatory. It was also indicated that legal recognition and mutual recognition could have similar or different meaning depending on the context but would always refer to the concept of identification.

C. Introduction of proposals submitted by States with respect to the scope of work and general principles

48. The delegation of the Russian Federation introduced a paper contained in document A/CN.9/WG.IV/WP.141. It was highlighted that, despite the importance and breadth of IdM, an appropriate legal framework was still missing, and that therefore UNCITRAL should focus on defining the legal regime for IdM, addressing in particular the legal significance of identification. It was added that the scope of the suggested work should focus on clarifying issues specific to electronic IdM and should not touch upon IdM regimes well-established in a paper-based environment. The importance of not excluding any particular system model, especially decentralized ones, was stressed. It was suggested that, in light of the relevance and diversity of the issues to be addressed, work should initially focus on IdM, and that trust services should be addressed thereafter. That work should be based on existing UNCITRAL e-commerce texts and their well-recognized underlying general principles. The desirability of developing adequate terminology, taking into account International Telecommunications Union standards, was mentioned.

49. The delegation of the United Kingdom introduced a paper contained in document A/CN.9/WG.IV/WP.146. It was indicated that the use of cross-border IdM was an enabler of the digital economy and that that use required interoperability among national schemes, which could be established by defining outcome-based standards. Bearing in mind that IdM schemes could vary significantly both nationally and internationally, the goal of the suggested work would be to establish a common understanding of levels of assurance. Reference was made to the relevance of the principle of technological neutrality and of other general principles applicable in the area of e-commerce.

50. The observer delegation of Belgium introduced a paper contained in document A/CN.9/WG.IV/WP.144. The objective of the suggested work was to increase legal certainty of electronic transactions through IdM and trust services, tools enabling

international trade actors to conduct risk management. Goals to pursue included: achieving clarification and harmonization of legal terms; establishing legal interoperability as a precursor of technical interoperability; increasing awareness of relevant legal issues; and operationalizing and concretising existing UNCITRAL texts. That work would be based on existing UNCITRAL texts, including general principles, in the area of e-commerce. Additional principles specific to IdM and trust services and listed in paragraph 16 of the paper would be applicable, such as: different levels of assurance and security defined on the basis of objective criteria; distinct legal effects, including burden of proof, according to the level of assurance; and liability according to the level of assurance.

51. The delegation of the United States introduced a paper contained in document A/CN.9/WG.IV/WP.145, outlining governing principles and substantive topics for discussion by the Working Group. It was clarified that the paper was not a proposal and did not express United States' position on issues listed in the paper. It was indicated that the paper focused on IdM-related issues on the understanding that work on trust services would take place after work on IdM. In addition to referring to the already established e-commerce general principles that inspire UNCITRAL's work, the paper identified issues specific to IdM such as: system model neutrality; the relationship between IdM law and privacy law and between IdM law and data security law; and contract-based system rules. It was indicated that the obligation to identify would be found in other law or in contractual agreement. Therefore, IdM law should not aim at imposing any new identification obligation.

D. General principles applicable to the work on IdM and trust services

52. The Working Group agreed that the following four fundamental principles would guide its work in the area of IdM: party autonomy, technological neutrality, functional equivalence and non-discrimination. The understanding was that those principles would be equally applicable to both IdM and trust services but the way in which they apply might differ.

53. It was explained that the principle of proportionality considered by the Working Group at its fifty-fourth session (A/CN.9/897, para. 115) referred to freedom of the parties in the choice of the IdM solution, in particular with respect to the desirable level of assurance. It was indicated that proportionality should not be treated as a separate guiding principle but rather as an aspect of the application of the principle of party autonomy.

54. With respect to technological neutrality, it was indicated that that notion should include reference to economic model neutrality (referred to in document A/CN.9/WG.IV/WP.144) and system model neutrality (as described in document A/CN.9/WG.IV/WP.145), so as not to preclude the use of or discriminate against any existing or future system model.

55. In response to a question on whether the centralized, decentralized or distributed architecture of a mutual recognition mechanism would be relevant for future discussions, it was explained that issues related to model architecture should be addressed according to the principle of technological neutrality and, in particular, its application to neutrality of system models.

56. With reference to the concept of functional equivalence, the Working Group considered it premature to identify functions that IdM would purport to fulfil. The terms related to identification defined in document A/CN.9/WG.I/WP.143 were found unhelpful for such purpose.

57. It was noted that IdM services could go beyond services available in a paper-based environment. The concern was raised that adopting a functional equivalence approach might have the unintended consequence of limiting IdM services to only those existing in a paper-based environment.

58. It was recalled that the goal of the work on IdM was to identify legal obstacles to the use of electronic identity credentials and to formulate provisions to overcome them. In that respect, it was also recalled that identification was a process involving interaction of at least two persons and the presentation of an identity document. Moreover, it was stated that the identification process required the following steps: (a) verification of the validity and accuracy of the identity document; (b) verification of whether the person presenting the document was the person identified in that document; and (c) correctness of the steps undertaken and judgment used in identifying the person. It was added that the use of IdM would not alone satisfy identification requirements. In particular, it was observed that IdM would not purport and be able to verify questions of fact such as forgery, hacking and good faith of a relying party.

59. Those concerns were shared by other delegations. Reference in that context was made to the notion of attribution of identity information described in document A/CN.9/WG.IV/WP.145.

60. It was noted that under a functional equivalence approach the legal effects of identification would arise from substantive law. However, it was also noted that the law could set forth identification requirements without making reference to a paper-based document, and that in that case a functional equivalence approach would not be applicable.

61. Another point was that a wide variety of identification methods existed and that therefore it would be impossible to achieve functional equivalence for all of them. On the other hand, it was observed that harmonizing substantive rules could interfere with existing law.

62. Other delegations questioned the prudence of focusing on functional equivalence requirements for identification as opposed to IdM as a process. It was noted that IdM may or may not involve the use of paper-based identification documents. It was also explained that, while identification could be a function of certain trust services such as electronic signatures and seals, it would be difficult to identify a function of identification.

63. After discussion, the Working Group agreed that the principle of functional equivalence would be relevant for the work of UNCITRAL on IdM but cases could arise where it would not be applicable. The Working Group deferred consideration of possible approaches to those cases, in particular whether any substantive rules would need to be formulated for such situations.

64. As regards the principle of non-discrimination, the Working Group's attention was drawn to various formulations of that principle found in documents A/CN.9/WG.IV/WP.144 and A/CN.9/WG.IV/WP.145. Support was expressed for the formulation found in document A/CN.9/WG.IV/WP.145 since it closely followed the formulation found in UNCITRAL texts in the area of e-commerce. The alternative view was that that formulation did not refer to trust services, and that therefore the formulation found in paragraph 15 of document A/CN.9/WG.IV/WP.144 was preferable.

65. The Working Group agreed that certain fundamental issues identified for discussion in document A/CN.9/WG.IV/WP.145, in particular the relationship between IdM law and privacy law, between IdM law and data security law, and between contract-based system rules and other law, should also be considered by the Working Group. It was indicated that those issues could be either considered in substance or by deferral to other applicable law.

E. Subjects to be addressed in the work on IdM and trust services

66. The Working Group continued consideration of topics and issues that need to be addressed in discussing IdM and trust services based on paragraph 16 of document A/CN.9/WG.IV/WP.144 and the chapter entitled "Substantive topics" of document A/CN.9/WG.IV/WP.145. The convergence between the two documents, in particular

on issues of legal recognition, levels of assurance and risk allocation, was highlighted. However, it was reiterated that the considerations found in document A/CN.9/WG.IV/WP.145 were applicable only to IdM.

67. The Working Group was invited to identify principles, issues and topics equally applicable to IdM and trust services.

1. Legal recognition

68. It was indicated that legal recognition might be understood as referring to the use of IdM to satisfy legal requirements for identification. It was specified that those requirements might be set forth in the law or agreed upon. Moreover, that notion could refer to a presumption of identity attributed to the use of credentials in certain circumstances. Other meanings were also possible. A number of issues, such as who provides recognition and for which purpose, would need to be clarified.

69. It was explained that the notion would also be relevant when parties used IdM and trust services for risk management in the absence of a formal legal obligation but for purely contractual reasons. It was indicated that instances when the law provided for consequences in the absence of proper identification should also be captured.

70. The view was reiterated that work should aim at enabling legal recognition instead of creating binding requirements. It was clarified that that would mean that no additional standard should be established; instead, interoperability between existing standards should be assured.

2. Mutual recognition

71. The Working Group was invited to consider the notion of mutual recognition addressing such questions as who would perform recognition, what would be recognized, how, and the legal effects. It was explained that the notion referred to the acceptance of identity credentials created in one IdM system by another IdM system regardless of the use of different technology, rules or business model.

72. It was indicated that eIDAS was an example of federated IdM system based on standards of the International Organization for Standardization (ISO) that should be considered by UNCITRAL given that it had already been accepted by 28 States with different IdM systems in place and it was referred to in negotiations with more States. In response, the view was expressed that solutions designed for enabling access to online public services would not necessarily be appropriate in a commercial context. The alternative view was that commercial parties were already able to use those solutions on a voluntary basis as long as they met their identification needs. It was said that examples existed of commercial entities such as banks and other financial institutions using public trust frameworks for their commercial needs.

73. Reference was made to the Intra-ASEAN Secure Transactions Framework, applicable to both public and private sectors and also based on the ISO 29115 standard. It was explained that the goal of that non-regulatory scheme was to promote legal recognition of identification and authentication across ASEAN countries. There were however many challenges encountered in that respect, and UNCITRAL was well placed to address them by developing a global mechanism.

74. The view was reiterated that the scope of the work of UNCITRAL on IdM and trust services was not to impose particular solutions on commercial parties but rather to provide a set of options to satisfy their risk management needs. It was added that commercial parties should be free to attribute various effects to different levels of assurance. However, it was noted that the value of ensuring a common understanding of the assertion of identity by an IdM scheme against a set of uniform assurance levels should not be questioned. It was observed that the availability of a shared reference framework to which IdM systems could be mapped was considered essential for international trade.

3. Attribution of identity information to a subject

75. It was explained that the notion of attribution referred to two aspects: the determination that the person using the identity credential was the person purported to be; and how a relying party could carry out that determination.

76. It was indicated that attribution could be addressed with the use of credentials bound to identity and with reference to levels of assurance. It was added that attribution was also related to risk management. It was explained that a discussion of the mechanics of attribution processes would require in-depth reference to technical details.

77. In response, it was noted that the ability to attribute identity was not necessarily related to the level of assurance. It was also noted that a discussion on the legal effects of attribution, such as presumptions associated with levels of assurance and the possibility to rebut them, did not necessarily imply reference to technical details. The use of pseudonyms and anonymization were considered relevant issues for future consideration.

4. Reliance/attribution of action, data message or signature to a subject

78. It was explained that reliance was a notion related to, but distinct from attribution, since reliance on identity credentials might be inappropriate even in case of successful attribution of those credentials. It was added that reliance had relevance also for the allocation of liability and for broader issues such as fraud and good faith.

5. Liability/Risk allocation

79. It was indicated that liability and risk allocation had a fundamental role in the work on IdM and trust services. It was stressed that commercial operators would greatly benefit from clarity on liability and risk allocation as currently applicable laws had often been drafted without taking into account IdM and trust services. Examples were provided of how liability for IdM and trust services had been addressed in legislative texts. It was added that liability matters could also be addressed contractually.

80. A question was put on whether addressing liability and risk allocation would imply work on a legislative text. The prevailing view was that, irrespective of the form of the work on IdM and trust services, liability and risk allocation would need to be addressed.

6. Transparency

81. It was explained that the notion of transparency had two distinct aspects. The first aspect was to what extent users should be informed about methods and processes used to deliver IdM and trust services. The second aspect related to duties to inform concerned parties in case of security breaches. The relevance of that information in the choice of IdM and trust services was highlighted.

82. Examples of transparency mechanisms, including through certification and peer review, were provided. Sanctions, disclosure obligations under applicable law and respect for confidentiality, commercially sensitive information and secrecy were mentioned among the issues to be considered in the context of transparency.

7. Other issues

83. While deferring its consideration of the nature of the text to be prepared, the Working Group recognized that that aspect might dictate certain approaches. A view was expressed that, for the Working Group to be productive in its work on IdM, the Commission would need to clarify the nature of the text to be prepared. If a non-legislative text was envisaged, certain issues would not need to be discussed in such depth as for a legislative text. The application of the four fundamental principles identified by the Working Group (see para. 52 above) might also vary.

84. On a preliminary basis, some delegations expressed their reservations on the formulation of substantive rules on IdM. On the other hand, other delegations indicated that the intended goal of the project required a higher level of legal harmonization, which could only be achieved with the preparation of a legislative text.

8. Conclusions

85. The Working Group agreed that the notions of legal recognition, mutual recognition, attribution, reliance, liability and risk allocation, and transparency were relevant for its work on IdM and trust services and suggested that those notions should be further considered, taking into account the above considerations, at a future session.

F. Possible definitions of main terms and concepts

86. It was suggested that the Working Group could further clarify the scope of the suggested work on the basis of the non-exhaustive list of concepts and definitions provided in paragraph 20 of document A/CN.9/WG.IV/WP.144. It was indicated that such additional clarification could greatly assist the Commission in its consideration of the matter.

87. In response, it was said that a discussion of concepts and definitions could be premature, since they would need to be considered in a specific context and they were likely to be modified in light of the progress of work. It was therefore suggested that that list should be retained for future reference. It was added that reference to the information contained in the documents submitted to the current session of the Working Group would suffice to inform the Commission.

88. The prevailing view was that the list of concepts should be considered, if not in detail, at least in general terms.

89. In introducing concepts and definitions contained in paragraph 20 of A/CN.9/WG.IV/WP.144, it was explained that those concepts and definitions were a reduced set of the definitions contained in the eIDAS Regulation[2] selected on the basis of their relevance to UNCITRAL work on IdM and trust services. It was explained that those concepts and definitions could be applied to a large number of different schemes.

90. The suggestion was made that those definitions and concepts listed in paragraph 20 of document A/CN.9/WG.IV/WP.144 and not yet appearing in document A/CN.9/WG.IV/WP.143 should be added to a revised set of defined terms. Subject to confirmation of the mandate, such revised tentative and non-binding list would provide a basis for future deliberations by the Working Group without any implication on the future direction of those deliberations. It was added that at the current stage of deliberations, in the absence of the specific context, any agreement on definitions would not be possible.

91. In response, a concern was reiterated that the current list of defined terms in document A/CN.9/WG.IV/WP.143 was unnecessarily technical and therefore difficult to understand. In that line, it was suggested that the list of defined terms should contain legal definitions found in national, regional and international legal texts and should be as broad as possible to offer an adequate basis to future deliberations. The view was also expressed that the definitions contained in paragraph 20 of document A/CN.9/WG.IV/WP.144 should actually provide a basis to determine the future direction of work.

92. Subject to the deliberations of the Commission with respect to future mandate, the Working Group asked the Secretariat to revise document A/CN.9/WG.IV/WP.143 by including definitions and concepts listed in paragraph 20 of document

[2] Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

A/CN.9/WG.IV/WP.144, without prejudice to the future direction of possible work by UNCITRAL on IdM and trust services.

VI. Recommendations on priority of work

93. It was recalled that the Commission had asked the Working Group to continue to update and conduct preparatory work on the topics of cloud computing and IdM and trust services so that it could make an informed decision at a future session, including on the priority to be given to each topic.

94. There was general agreement on the view that the suggested work on the two topics was different in scope and content. It was suggested that work on the two topics could continue in parallel, taking into account that differences between the two projects could lead to different paces in their development. However, the view was reiterated (see para. 24 above) that parallel work on both topics could pose excessive demands on the Working Group, in particular at a more advanced stage, to the detriment of the quality of the final products.

95. It was indicated that work on cloud computing had made more progress towards a specific direction and that therefore it could be finalised sooner than work on IdM and trust services. Therefore, the preference was expressed for commencing work on cloud computing on a priority basis. It was added that the outcome of that work could provide useful guidance, in particular, to users in developing countries and to small and medium-sized enterprises.

96. On the other hand, it was indicated that significant progress had been made in better defining the scope and general principles underlying future work on IdM and trust services. The foundational importance of that work for enabling electronic commerce was stressed. It was indicated that, in light of that importance, including vis-à-vis the more limited scope of work on cloud computing, priority should be given to work on IdM and trust services, in particular, in case the resources of the Secretariat would not allow to conduct work in parallel on the two topics.

97. The Working Group submitted the above considerations to the Commission for its determination.

VII. Technical assistance and coordination

98. The Working Group heard an oral report on technical assistance and coordination activities undertaken by the Secretariat related to the promotion of UNCITRAL texts in the area of electronic commerce.

99. Reference was made to the work being carried out inter-sessionally on legal issues relating to electronic single window facilities and paperless trade facilitation. It was recalled that UNCITRAL had provided input in the preparation of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific (Bangkok, 19 May 2016).[3] It was indicated that that work had highlighted the importance of fully appreciating the interaction between UNCITRAL texts and e-commerce chapters of global and regional trade agreements. Reference was made to the fact that those chapters often contained provisions on mutual recognition of authentication methods on a technologically neutral basis.

100. Reference was also made to work on enactment of UNCITRAL texts on electronic commerce. It was mentioned that new enactments of those texts were taking place in Southern Africa, thanks to their transposition in a regional model law. It was added that some States had concluded the domestic procedures for the adoption of the United Nations Convention on the Use of Electronic Communications in International

[3] Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-20&chapter=10&clang=_en.

Contracts (New York, 2005),[4] and that therefore additional treaty actions relating to that Convention could be expected in the near future.

101. It was indicated that, pending adoption of the Model Law on Electronic Transferable Records by the Commission, some States had already started considering actively the adoption of that text, in particular, in light of its possible impact on enabling technological innovation, including through the use of distributed ledgers, in the banking and financial sector.

VIII. Other business

102. The Working Group took note that its fifty-sixth session is tentatively scheduled to be held in Vienna from 20 to 24 November 2017, those dates being subject to confirmation by the Commission at its fiftieth session, scheduled to be held in Vienna from 3 to 21 July 2017.

[4] General Assembly resolution 60/21, annex.

D. Note by the Secretariat on legal issues related to identity management and trust services

(A/CN.9/WG.IV/WP.141)

[Original: Russian]

The Russian Federation submitted to the Secretariat a paper for consideration at the fifty-fifth session of the Working Group. The text received by the Secretariat is reproduced as an annex to this note.

Annex

Proposal by the Russian Federation

Improving the identity management system through use of a transboundary trust environment and a common trust infrastructure for cross-border electronic transactions

Introduction

The Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific was adopted on 24 May 2016 at the seventy-second session of the Economic and Social Commission for Asia and the Pacific (ESCAP).

The objective of the Framework Agreement is "to promote cross-border paperless trade by enabling the exchange and mutual recognition of trade-related data and documents in electronic form and facilitating interoperability among national and subregional single windows and/or other paperless trade systems, for the purpose of making international trade transactions more efficient and transparent while improving regulatory compliance."

Article 5 of the Framework Agreement establishes "improving transboundary trust environment" (paragraph 1 (g)) as one of the general principles guiding the Agreement.

This document is aimed at continuing the work of improving the transboundary trust environment in electronic commerce (e-commerce), an important agenda item for ESCAP and for the United Nations Commission on International Trade Law (UNCITRAL).

An earlier version of the proposal, contained in document A/CN.9/WG.III/WP.136, was submitted to UNCITRAL Working Group III (Online Dispute Resolution) for consideration at its thirty-second session in Vienna (30 November-4 December 2015). On the recommendation of Working Group participants, the document was transmitted to Working Group IV (Electronic Commerce) for consideration owing to its relevance to that Working Group's agenda. The main areas of focus are the technical, organizational and legal mechanisms for strengthening the transboundary trust environment for e-commerce in the Asia and the Pacific region. At the fifty-third session of Working Group IV, the delegation of the Russian Federation expressed its intention to submit a proposal on identity management for the consideration of the Working Group at its next session, subject to confirmation by the Commission that identity management would be included on the agenda of the Working Group at that session. Delegations were invited to submit information on identity management with a view to facilitating consideration of the topic.

Ensuring the security of the cross-border exchange of electronic documents is a highly relevant issue that has been highlighted in global and regional declarations, specifically:

- "Promote research and cooperation enabling effective use of data and software, in particular electronic documents and transactions, including electronic means of authentication, and improve security methods. (World Summit on the Information Society document "WSIS+10 Vision for WSIS Beyond 2015. C5. Building confidence and security in the use of ICTs", subparagraph (f));

- "[…] promoting confidence and trust in electronic environments globally by encouraging secure cross-border flows of information, including electronic documents[, and promoting] efforts to expand and strengthen the Asia-Pacific Information Infrastructure and to build confidence and security in the use of ICT" (Vladivostok Declaration (Asia-Pacific Economic Cooperation (APEC) leaders' declaration, 2012): "Integrate to Grow, Innovate to Prosper").

Worldwide, there are currently several examples of good practice in addressing the issue:

- In the European Commission: on the basis of Regulation (EU) No. 910/2014 of the European Parliament and the Council of the European Union on electronic identification and trust services for electronic transactions in the internal market (eIDAS Regulation);[1]

- In the Eurasian Economic Union: on the basis of the Treaty on the Eurasian Economic Union and the Framework for the use of services and legally significant electronic documents in inter-State informational interaction;[2]

- In the Asia and the Pacific region: on the basis of the Pan-Asian e-commerce Alliance (PAA).[3]

The development of the global economy requires, particularly in times of crisis, enhanced integration processes in various economic and social areas, including through the innovative use of current information and communications technologies (ICT).

One of the main issues that arises with respect to cross-border trade is the security and confidentiality of information transmitted via the Internet. An identity management (IdM) system is used to address that issue. IdM is a set of functions and capabilities (e.g., administration, management and maintenance, discovery, communication exchanges, correlation and binding, policy enforcement, authentication and assertions) used for:

- Assurance of identity information (e.g., identifiers, credentials, attributes);
- Assurance of the identity of an entity (for example: users/subscribers, groups, user devices, organizations, network and service providers, network elements and objects, and virtual objects); and
- Supporting business and security applications.[4]

The objectives of IdM are:

- Access control (hardware should be accessed only by authorized users and for the purposes that the owners intend);
- Confidentiality of access;
- IdM system integrity.

In order to achieve those objectives, an IdM system should:

- Ensure the necessary system performance with established resilience indicators;
- Ensure the function of identification data management (creation, alteration, freezing, archiving or deletion of identification information);

[1] http://ec.europa.eu/dgs/connect/en/content/electronic-identification-and-trust-services-eidas-regulatory-environment-and-beyond.
[2] www.eurasiancommission.org/docs/Download.aspx?IsDlg=0&print=1&ID=5713.
[3] www.paa.net/.
[4] https://www.itu.int/rec/T-REC-X.1252-201004-I/en.

- Ensure the protection of identification data;
- Ensure the use of secure identification and authentication mechanisms (such as an electronic signature, two-step password protection and biometric authentication);
- Ensure the interoperability of the security solutions used;
- Ensure the integrity of the IdM system and of identification information.

There are two types of IdM system: application-centric and user-centric.[5]

In large-scale IdM systems, the application-centric IdM system means that identity services and policies are designed to satisfy requirements for identity providers and optimized for the requirements of applications, e.g. provisioning a user's account information. There is an identity provider and a relying party in the application-centric IdM system. When an identity service is provided for the user, the identity exchange usually takes place between these two entities. “Identity” should be understood as the representation of an entity in the form of one or more information elements which allow the entity or entities to be sufficiently distinguished within context. For IdM purposes the term “identity” is understood as contextual identity (subset of attributes) i.e., the variety of attributes is limited by a framework with defined boundary conditions (the context) in which the entity exists and interacts. Historically, the identity and access management technologies have focused mainly on the authentication of end users for federated access to applications and services (in the federated access model there are multiple identity providers that can be trusted by a user and that can manage the partial identity information of users if required. Identity information of the user in each identity provider can be shared). Therefore, the security requirement is limited to the perimeter of its application domains.

The user-centric IdM is mainly focused on end users and optimized for the requirement of those end users. It means that the main objective of an IdM system is to provide convenient and comprehensive identity services for users. The main feature is to give the user full control over his identity. When a user's identity information is disseminated, it must pass through the user to give the user a chance to enforce some personal policy if necessary; for example, a choice of personal preferences in relation to confidentiality or personal authorization. In the user-centric IdM system, a client program that interacts with the IdM server to retrieve identity information has to be installed in the user's computing environment, Therefore, easy and comprehensive security guidelines are required to guide the user to securely install and deploy any relevant software. The software must manage some of the user's security-related information. User-centricity distinguishes itself from other models of IdM by emphasizing that the user and not an authority maintains control over how a user's identity attributes are created, disseminated, updated and terminated. It means that the user has full authority for the life cycle of their identity. The level of control can be determined by the user's privacy requirements.

IdM issues were first considered within the framework of the International Telecommunication Union (ITU) and its Telecommunication Standardization Sector (ITU-T) in 2006, when the Focus Group on Identity Management was established by ITU-T Study Group 17, which works on telecommunication and ICT security issues. The objective of the Focus Group was to consider IdM questions and common principles in telecommunications and ICT. The Focus Group’s activities evolved into an ITU global IdM initiative which was implemented in 2008. Study groups 2, 9, 11, 13, 16 and 17 of ITU-T collaborated on this initiative. The Joint Coordination Activity for Identity Management (JCA-IdM) has been led by Study Group 17 since 2009. Through the Activity, a road map of IdM standards has been developed, which includes relevant input by the following organizations: the Alliance for Telecommunications Industry Solutions (ATIS), the European Telecommunications Standards Institute (ETSI),the Internet Engineering Task Force (IETF), the International Organization for Standardization (ISO)/International Electrotechnical Commission (IEC), ITU, the National Institute of Standards and Technology (NIST),

[5] https://www.itu.int/rec/T-REC-X.1253-201109-I/en.

the Organization for the Advancement of Structured Information Standards (OASIS), the Kantara Initiative and the Third Generation Partnership Project (3GPP) (a description of the IdM activities and standards issued by the ITU and these organizations can be found on the ITU website: http://www.itu.int/en/ITU-T/studygroups/2013-2016/17/ict/Pages/ict-part06.aspx).

The establishment of a transboundary trust environment (TTE) in the area of e-commerce will contribute to the simplification of procedures and to the development of international trade, and will make it possible to simplify the identification process and IdM for participating countries. The term "trust" in the context of security can be understood to mean certainty with regard to the reliability and veracity of information or with regard to the ability and willingness of an entity to act appropriately in a given situation. Creating a trust environment between States will thus help to harmonize the use of security mechanisms (for example, all countries will use a common approach to the selection of such mechanisms as electronic signatures and two-step password protection) and will also make it possible to increase the level of trust (continuing, measurable confidence in the reputation, capabilities, validity or authenticity of someone or something) between participants in e-commerce.

A transboundary trust environment in e-commerce is proposed to mean a combination of legal, organizational and technical conditions recommended by the relevant United Nations specialized agencies and international organizations with the aim of ensuring trust in the international exchange of electronic documents and data between parties (entities) that interact electronically when conducting e-commerce. Its main purpose is to provide users with various levels of trust services (basic, medium, high) with the help of an IdM system during the course of their electronic interaction. This will make it possible for electronic interaction to be given legal significance at users' discretion, regardless of their geographical location and jurisdiction. One of the most important areas of research in this area will be the analysis of possible IdM mechanisms.

It is proposed that "electronically interacting parties (entities)" in e-commerce be understood to mean all public authorities and natural and legal persons interacting within the framework of a relationship resulting from the creation, sending, transmission, receiving, storage and use of electronic documents and data when conducting e-commerce.

These proposals are intended to identify approaches and issues to be discussed in the context of the elaboration of a set of recommendations on the establishment and functioning of a transboundary trust environment (e-commerce TTE recommendations) in relevant United Nations organizations. They are designed to facilitate the establishment of technological, institutional and legal infrastructure for the application of e-commerce TTE recommendations and, in particular, to simplify the IdM system for e-commerce transaction security.

Conceptual approaches

1. It is proposed that e-commerce TTE recommendations be focused on guaranteeing the rights and legal interests of citizens and organizations under the jurisdiction of United Nations Member States in relation to the performance of legally significant information transactions in electronic form using the Internet and other open mass-usage ICT systems.

2. These institutional guarantees would be provided within the framework of the commercial activities of specialized operators that:

- Provide users with a set of trusted ICT services for IdM implementation;
- Operate within the framework of established legal regimes that include, but are not limited to, restrictions concerning personal data processing.

3. It is proposed that a description be given of the various possible legal regimes:

- Those based on international agreements (conventions) and/or directly applicable international regulations;
- Those based on commercial agreements and/or common trade practice;
- Those without special international regulation.

Legal regimes can receive additional support from traditional institutions (government bodies, settlement through the courts, risk insurance, notaries public and others) through the mutual recognition of electronic documents authenticated by trusted ICT services.

Established legal regimes may also provide for the introduction of special requirements concerning material and financial support for the commercial activities of specialized operators in case of damage caused by them to users, including instances in which personal data are compromised.

It is proposed that institutional guarantee- and legal regime-related issues with respect to the establishment and operation of regional and global e-commerce TTE clusters and to the functional services provided within the framework of those clusters be addressed in a separate UNCITRAL recommendation.

4. It is suggested that a description be given of possible sets of trusted ICT infrastructure services according to the level of importance of the functional applications. One of the most important areas of research in that regard will be the analysis of possible IdM mechanisms. ICT services and the current level of trust in those services can be determined by functional operators of information systems (operators that organize and/or carry out identity data storage and processing in an information system and that define the objectives and actions (operations) implemented using the identity data in that information system) on the basis of threats, risks, legal regimes and user needs. In order to ensure the necessary level of trust, IdM operators could function in a neutral international environment as defined by specific legal regimes. It is proposed that a description be given of the organizational structures needed in order to establish and maintain such a neutral international environment.

Common provisions on the establishment and functioning of regional and global e-commerce TTE clusters, functional services provided within the framework of those clusters and sets of trusted ICT infrastructure services could be considered within the framework of the United Nations Centre for Trade Facilitation and Electronic Business (CEFACT) and Economic Commission for Europe (ECE) joint "Recommendation for ensuring legally significant trusted transboundary electronic interaction".

IdM implementation and the description of specific trusted ICT services could be the subject of technical standards and recommendations of ITU, the ISO/IEC Joint Technical Committee 1 (JTC 1), the European Telecommunications Standards Institute and other bodies.

5. Sets of attributes for IdM purposes should be defined by the legal regimes that regulate the commercial activities of operators specializing in performing identification tasks and of functional operators, and can be supported by the appropriate trusted ICT services. The activities of operators may be regulated by special organizational and technical requirements focused, inter alia, on the protection of personal data.

Sets of attributes for IdM purposes and the identification procedures themselves may serve as the basis for the definition of trust levels in identification systems. Such trust levels could be of the utmost importance in the regulation of interaction between different trust clusters (see section 9).

6. It is proposed that descriptions be provided of the interaction mechanisms of individual States and their international alliances with other international bodies within the framework of establishment of a common e-commerce TTE:

6.1. On the basis of accession to an existing legal regime that provides institutional guarantees to electronically interacting entities:

- The complete accession of a State to an existing legal regime on the basis of international treaties and/or directly applicable international regulations in which the establishment of a regional e-commerce TTE, including functional services provided in that e-commerce TTE, is either envisaged or provided for.
- The partial accession of a State to an existing legal regime on the basis of international treaties and/or directly applicable international regulations through the adoption of specific provisions relating to the establishment of a regional and/or functional e-commerce TTE;

6.2. On the basis of interaction between various international alliances:

- In the first phase, a group of States creates an isolated regional e-commerce TTE cluster, including functional e-commerce TTE services provided within the framework of that TTE, providing institutional guarantees for electronically interacting entities under the legal regime specified by those States and ensuring the security of e-commerce transactions;
- In the second phase, the protocols and mechanisms for trusted interaction with other international alliances are defined in relation to the mutual recognition of different legal regimes. Such mutual recognition should take into account the institutional guarantees and information security requirements relevant to each of those international bodies, possibly on the basis of information security gateways (ISG) operating under special legal regimes and responsible for IdM;

6.3. On the basis of interaction between a State and other States or international alliances:

- In the first phase, a State creates an isolated national e-commerce TTE cluster operating under a national legal regime determined by that State;
- In the second phase, the protocols for trusted interaction with other States and/or international alliances are defined in relation to the mutual recognition of different legal regimes. Such mutual recognition should take into account the institutional guarantees and information security requirements relevant to those States and international bodies, possibly on the basis of ISGs operating under special legal regimes and responsible for IdM.

7. It is proposed that a description be given of cluster-forming mechanisms, similar to those described in section 6, for legal regimes based on commercial agreements and/or common trade practice.

8. It is proposed that a description be given of the mechanisms for establishing a global e-commerce TTE on the basis of integration of the various clusters into a single matrix constructed according to the following parametric input information:

- Types of functional services and regional scope;
- Types of legal regimes and their variants.

9. It is proposed that a description be given of approaches to the establishment of several types of ISG as key elements of building a global matrix for an e-commerce TTE in order to ensure the security of e-commerce transactions.

Ensuring that the conditions for interaction between different global e-commerce TTE clusters are met and that that interaction is secure could be one of the objectives of establishing such ISGs. All the necessary technological, organizational and legal aspects could be considered when establishing the ISGs.

Approaches to establishing generic ISGs should take into account the various possible levels of interaction between different e-commerce TTE clusters. The establishment of ISGs that perform IdM, for example, can be achieved either at the legal and organizational levels alone or at a more complex level: legal, organizational and technological.

Approaches to establishing generic ISGs should take into account the use of transition profiles that describe and define the transition from one cluster to another. Such transition profiles could take into account the level of trust in the identification systems used within interacting clusters (see section 5).

A description of several types of ISG could be the subject of ITU and JTC-1 technical standards and recommendations.

Establishing an e-commerce TTE through a unified trust infrastructure

As stated above, the main objective in establishing an e-commerce TTE is to provide users with various levels (basic, medium and high) of trust services with the help of an IdM system during the course of their electronic interaction.

The e-commerce TTE is a fundamental, easily scalable platform that provides unified and secure access to electronic trust services by using IdM. Since existing electronic IdM systems and mechanisms are taken into account, it is expected that any requirements for the upgrading of those systems and mechanisms in order for them to be included in the e-commerce TTE would be minimal.

During the development of the e-commerce TTE system, a common trust infrastructure (CTI) architecture was proposed, the interconnections between its various components and their interaction with users were described and work was simultaneously carried out in three areas: technological, organizational and legal. An analysis of options for practical implementation and scenarios for CTI use made it possible to produce a list of the documentation required for a complete specification of the system. The CTI architecture was designed in such a way that it would be easy to adjust to scale. It can be expanded easily at any level through the addition of new components, such as new legal systems, new supranational participants or new operators of trust and identity data services.

Technical and technological aspects of the CTI

There may be many technological mechanisms for IdM and trust service delivery. The main requirement applicable to CTI elements is that they ensure interoperability. Regulation at this level would be facilitated by various standards and instructions, as would be provided for by the documentation of a coordination council of regulators of trusted electronic data interchange (CCRTEDI). The use of an IdM mechanism such as an electronic signature in transboundary electronic interaction is an example of the technological operation of trust services. For comparison, two CTI implementation options are given: a decentralized system with a notionally low level of trust between the participants in informational interaction (see figure 1) and a centralized system with a medium level of trust between those participants (see figure 2).

Table 1 sets out the features of the decentralized and centralized CTI systems. The procedure for using an electronic signature as an IdM system mechanism for the two CTI implementation schemes is described in table 2.

Table 1

Use of an IdM mechanism in a CTI for informational interaction, with low and medium trust levels

Low trust level (figure 3)	Medium trust level (figure 4)
1. Apostille services (AS) are provided by national operators of apostille services. These operators may also provide other IdM services. 2. International organizations (operators and regulators) are not involved. 3. National regulators interact directly, exchanging security certificates. 4. National regulators ensure the operation of national trust service operators in their jurisdiction with regard to their certificates and those of national regulators under other jurisdictions.	1. Apostille services (AS) are provided by international operators of apostille services. These operators may also provide other IdM services. 2. International organizations are involved: an international CTI regulator and international trust service operators. 3. National CTI regulators communicate only through the supranational CTI regulator. National trust service operators also communicate only through their respective international operators. 4. The international CTI regulator provides centralized certification of national trust service operators and national CTI regulators. 5. National regulators ensure the operation of national trust service operators in their jurisdiction with regard to their certificates and the international regulator's certificates.

Table 2

Procedure for the use of electronic signatures as an IdM system mechanism in schemes with low and medium trust levels

Low trust level (figure 3)	Medium trust level (figure 4)
1. Natural/legal person I sends documents with an electronic signature (ES) in jurisdiction J, selecting the required level of trust services provided by the CTI (basic, medium or high). 2. A request to verify the electronically signed documents in jurisdiction J is sent to the national apostille service operator under jurisdiction Q. 3. The verification request is forwarded to the national apostille service operator under jurisdiction J. 4. The mathematical verification of the electronic signature is carried out in jurisdiction J. 5/6. A request/response regarding the certificate status is sent to the national signature service (SS) operator under jurisdiction J. 7. The national apostille service operator under jurisdiction Q receives confirmation that the electronic signature is correct within jurisdiction J. 8. The national apostille service operator under jurisdiction Q certifies the request and forwards it to natural/legal person 2.	1. Natural/legal person I sends documents with an electronic signature (ES) in jurisdiction J, selecting the required level of trust services provided by the CTI (basic, medium or high). 2. A request to verify the electronically signed documents in jurisdiction J is sent to the international apostille service operator I-J-Q. 3. The mathematical verification of the electronic signature is carried out in jurisdiction J. 4/5. A request/response regarding the certificate status is sent to the national signature service (SS) operator under jurisdiction J. 6. The international apostille service operator I-J-Q certifies the request and forwards it to natural/legal person 2.

Fig. 1

Electronic signature verification within the framework of a TTE with a low trust level (decentralized option)

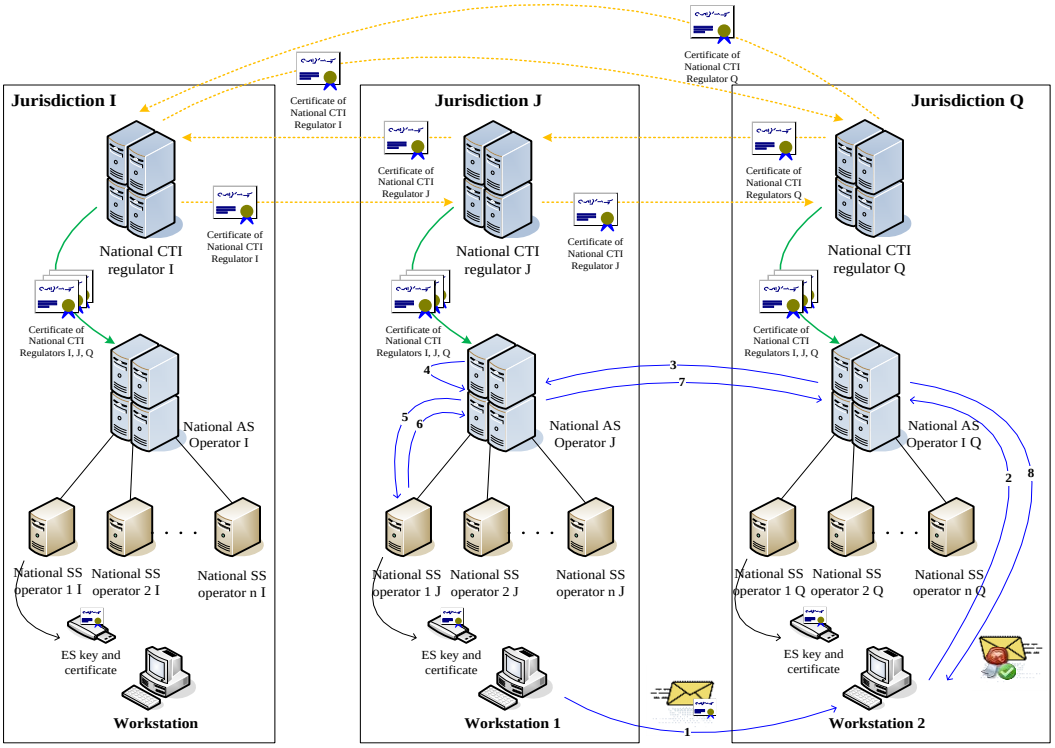
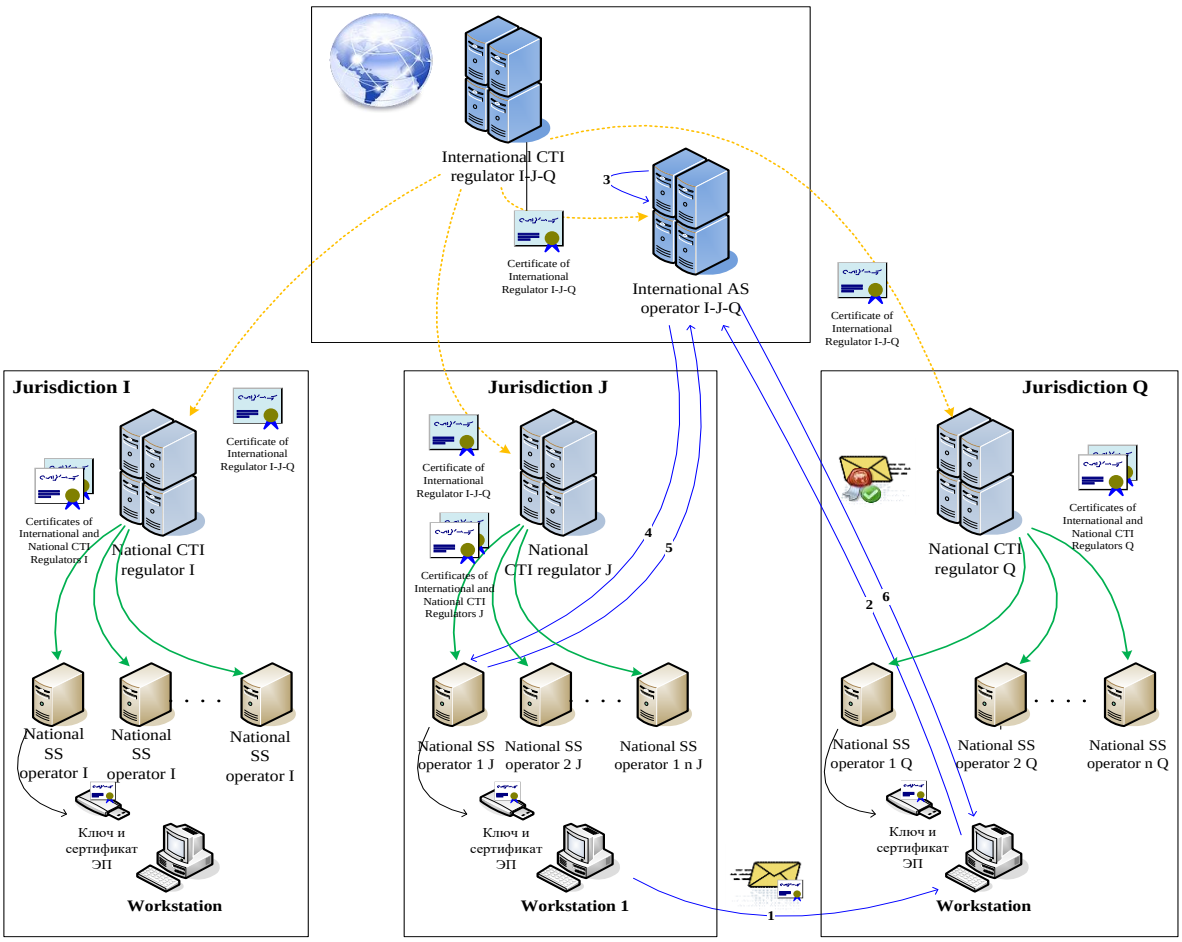


Fig. 2
Electronic signature verification within the framework of a TTE with a medium trust level (decentralized option)

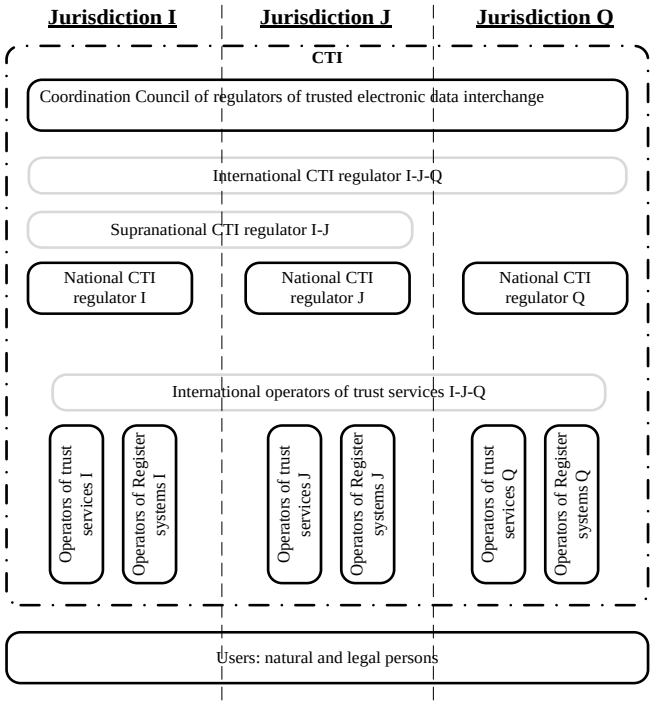


Organizational aspects

Mutual legal recognition of IdM and trust services provided under the jurisdictions of various States would be achieved through the establishment and operation of a coordination council of regulators of trusted electronic data interchange (CCRTEDI). The activities of such a coordination council would be regulated by its statutes, which would be recognized and signed by all its authorized members, that is, the bodies responsible for regulating electronic data interchange, represented in the first instance by national CTI regulators.

Organizational regulation is illustrated in the following diagram (see figure 3):

Fig. 3
Organizational regulation of the transboundary trust environment
(optional elements are indicated by the grey text boxes)



The coordination council would issue a set of documents, its power to do so being enshrined in its statutes:

- Requirements for coordination council members, compliance with which would be a prerequisite for full membership of the coordination council;
- Guidelines for conducting preliminary "shadow" supervision for admission to the coordination council and periodic mutual audits in order to maintain voluntary membership;
- Compliance criteria for CTI service operators and for IdM and trust service operators, and the methodology for applying those criteria;
- A system for assessing/verifying the compliance of CTI service operators and IdM and trust service operators with those criteria.

In an e-commerce TTE, each legal system is represented by a national CTI regulator (see figure 3, national CTI regulators I, J and Q), which regulates the activities of trust service and IdM operators within its jurisdiction.

It is likely that closely integrated groups of States (such as the Eurasian Economic Community or the European Union) would establish a supranational CTI regulator (see figure 3, "Supranational CTI regulator I-J"). A single supranational CTI regulator I-J would therefore replace the group of national CTI regulators I and J.

The procedure for admitting new members to the coordination council (new legal systems and supranational participants) and the system for verifying the compliance of CTI service and IdM operators with the criteria published by the coordination council (for new operators of IdM and trust services) give the CTI natural scalability.

If members of the coordination council (see below) have achieved a nominally "medium" level of trust, they can initiate the establishment of an international CTI regulator and international IdM and trust service operators (see figure 3, "International CTI regulator I-J-Q" and "International operators of trust services I-J-Q"). The international CTI regulator would coordinate interaction among international trust service operators, national CTI regulators (under the coordination council statutes) and/or supranational CTI regulators.

In order to become a national trust service operator or register system operator, a provider of those services would have to obtain accreditation through the national CTI regulator in the same State. International trust service operators would be required to obtain accreditation through the international CTI regulator. The accreditation requirements for trust service and register system operators and the requirements applicable to their activities would be regulated by compliance criteria published by the coordination council and possibly by national supplements issued by the appropriate regulator.

Both natural and legal persons may be users of electronic services within the framework of the e-commerce TTE. Users would select the required level of trust service at their discretion or by agreement.

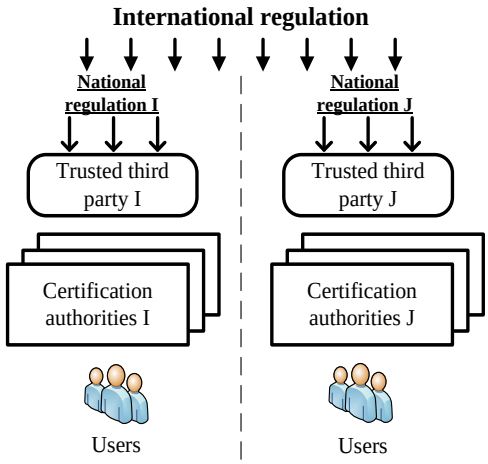
The services would be provided by the appropriate trust service providers/operators. In some cases, services may also be provided by register system operators. Trust service and register system operators would be united by a common trust infrastructure.

There may be various implementation options for trust services forming part of the e-commerce TTE, depending on the level of trust between participants in informational interaction. For example, at nominally high and medium levels of mutual trust between members of the coordination council, centralized international services provided in accordance with agreed standards may be used effectively. In the case of a nominally low trust level, the provision of trust services would be organized according to the principle of decentralization, that is, on the basis of national services in each State.

Legal aspects

An e-commerce TTE can be constructed on the basis of a single domain or multiple domains. A multi-domain basis is the more complex option from a legal and organizational point of view. A multi-domain system requires the use of the technical resources of a trusted third party. Figure 4 shows a general schematic representation of legal regulation.

Fig. 4
Legal regulation of the transboundary trust environment



The legal regulation of transboundary informational interaction can be divided into two parts: international and national. International legal regulation would be carried out on the basis of the following types of document:

- International treaties/agreements;
- Instruments of various international organizations;
- International standards and rules;
- Agreements between participants in transboundary informational interaction on specific issues;

• Model legislation.

National legal regulation would similarly be based on a set of regulatory instruments specific to each individual legal system.

Summary

The material presented above shows that the establishment of an e-commerce TTE offers the optimal means of enhancing the IdM system, for the following reasons:

- The establishment of national, regional and international trust clusters would ensure greater interoperability of IdM mechanisms such as electronic signatures;
- Mutual legal recognition of IdM and trust services provided under the jurisdiction of various States would make it possible to formulate a common approach to IdM system standardization;
- The adoption of international treaties and agreements and international standards and regulations on the use of a TTE would make it possible to enhance the trust level of participants in e-commerce, which in turn would make it possible to simplify IdM implementation;
- The activities of the coordination council (CCRTEDI) would make it possible to draw up unified compliance criteria to be met by IdM and trust service operators, and the methodology for applying those criteria.

IdM system improvement would in turn create secure conditions for transboundary international commercial activities. The establishment of an e-commerce TTE requires the implementation of a number of system-related measures, namely:

- The implementation of technical solutions to ensure the security and confidentiality of information;
- The implementation of organizational solutions through the establishment of a coordinating body;
- The implementation of legal and regulatory solutions through the drawing up of international treaties on the use of an e-commerce TTE.

The organization of an e-commerce TTE will also require coordination among organizations whose work involves issues relating to IdM and cross-border trade (including ISO, ITU, CEFACT, ECE, UNCITRAL and APEC) with a view to developing a common approach both to standardization of the use of an e-commerce TTE as an IdM mechanism and to the use of an e-commerce TTE for transboundary electronic interaction and commercial activities.

The next step in moving this process forward would be the discussion of experience and expertise with various partners (experts and organizations) interested in facilitating, simplifying and at the same time giving legal effect to transboundary electronic services.

Such interested partners might in the first instance be political or economic organizations.[6] Political bodies already partially involved in work in this area include both supranational organizations (such as the Commonwealth of Independent States (CIS), APEC, the European Union and the Shanghai Cooperation Organization) and bodies established within the framework of bilateral relations between certain States. Economic bodies interested in achieving that goal include, for example, the relevant United Nations bodies, such as CEFACT, ECE, UNCITRAL (Working Groups III and IV), ECE, the European Economic Area and the Eurasian Economic Community. It can be assumed that, owing to the specific natural characteristics (including the historical, cultural, political, economic and technical characteristics) of the various

[6] Other humanitarian organizations may also be interested in this product – for example, in the field of law, the Hague Conference on Private International Law – as well as organizations in the fields of medicine and education; however, in our view, such organizations are more likely to use an established TTE than to support the development of a new product.

regions of the world, various international or regional organizations of countries will establish their own coordination bodies (coordination councils of regulators of trusted electronic data interchange) and CTI architecture, depending on the level of trust within each format and the aforementioned characteristics.

We therefore believe that during the initial stages of implementation of this project there will not be a single global "trust domain" (for example, at the level of one of the United Nations organizations), but rather several trust domains at the regional level or even at the country level.[7] Nonetheless, even the establishment of separate trust domains would improve the IdM system, given the need to ensure interoperability within trust domains.

Once the CTI architecture has been determined (in the relevant trust domain), work can begin on the drafting of a further set of organizational, regulatory and technical documents negotiated within the framework of the coordination council. Interoperability would thus be ensured within the framework of the relevant trust domain.

The adoption of that set of documents by coordination council members (in the relevant trust domain) would facilitate transition to the final stage of practical implementation of the systems for legally significant transboundary electronic interaction.

Comments for the attention of the experts of UNCITRAL Working Group IV on Electronic Commerce

The problem of ensuring security and the identification of entities and objects in e-commerce can be addressed through the model proposed above (model for the establishment and functioning of an e-commerce TTE in the form of a matrix constructed on the basis of interconnected regional and global clusters that include the functional services provided within the framework of that e-commerce TTE) in the following way:

- A functional e-commerce TTE cluster specializing in the creation of a trust zone for IdM in relation to transboundary e-commerce transactions would be established;
- In geographical terms, all United Nations Member States could be included in that cluster;
- The operation of the cluster would be ensured through the commercial activities of a specialized operator or group of interlinked operators;
- The provision of packages of IdM trust services based on a set of identification schemes adopted within the framework of e-commerce platforms could be an area of the commercial activities of specialized operators;
- The legal regime for the specialized operators' commercial activities would be established under agreements with e-commerce platforms.

[7] An informational and legal environment in which the same CTI is used.

E. Note by the Secretariat on contractual aspects of cloud computing

(A/CN.9/WG.IV/WP.142)

[Original: English]

Contents

I. Introduction

1. At its forty-seventh session, in 2014, the Commission had before it a proposal by the Government of Canada entitled "Possible future work on electronic commerce — legal issues affecting cloud computing" (A/CN.9/823). The proposal explained the concept of cloud computing and why it would be useful for UNCITRAL to carry out work on the legal issues affecting parties to a cloud computing arrangement. The preparation of "a document outlining the cloud computing contractual relationships and legal issues that arise in that context" was suggested (A/CN.9/823, para. 5). The proposal illustrated a number of such possible legal issues, explicitly excluding intellectual property (IP) and privacy from the scope of the suggested work (A/CN.9/823, paras. 5-11). A checklist or a more detailed list of considerations for cloud users were mentioned as options for a possible form of the document, and a specific reference was made to UNCITRAL documents in other fields, such as the *Notes on Organizing Arbitral Proceedings* (1996),[1] *Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud* (2013)[2] and the *Legal Guide on International Countertrade Transactions* (1992)[3] (A/CN.9/823, para. 5). Possible steps by the Commission as regards the proposal were suggested, in particular a request from the Commission to the Secretariat to gather information relating to cloud computing and prepare a document outlining exising practices, which "could then be used by the Working Group to identify issues in need of practical legislative or other solutions and to discuss possible future work" (A/CN.9/823, para. 12).

2. At that session, there was wide support in the Commission for the proposal recognizing the implication of cloud computing, particularly for small and medium-sized enterprises. However, it was suggested that caution should be taken not to engage in issues such as data protection, privacy and IP, which might not easily lend themselves to harmonization and might raise questions as to whether they fell within the mandate of the Commission. It was also stressed that work already undertaken by other international organizations in that area should be taken into consideration so as

[1] Available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html.
[2] Available at www.uncitral.org/uncitral/en/uncitral_texts/payments.html.
[3] United Nations publication, Sales No. E. 93.V.7 (A/CN.9/SER.B/3), available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html.

to avoid any overlap and duplication of work. It was also suggested that 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. It was noted that the scope of any future work would, in any case, have to be determined by the Commission at a later stage. After discussion, the Commission requested the Secretariat to compile information on cloud computing, including by organizing, co-organizing or participating in colloquia, workshops and other meetings within available resources, and to report at a future session of the Commission.[4]

3. At its forty-eighth session, in 2015, the Commission had before it a proposal by Canada entitled "Contractual issues in the provision of cloud computing services" (A/CN.9/856). The information provided therein was "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" (A/CN.9/856, the last paragraph before the annex). The proposal expanded on the issues identified in document A/CN.9/823 (see para. 1 above), in particular on the concept of cloud computing and its various existing models, characteristics, benefits and risks (economic, security and legal) (A/CN.9/856, paras. 4-47). A number of legal issues additional to those listed in document A/CN.9/823 were identified (A/CN.9/856, paras. 48-75). An annex to the proposal provided information on international organizations that had covered issues relating to cloud computing in their work. As a possible step by the Commission, it was suggested that the Commission may mandate a Working Group to review legal issues arising from cloud computing 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. It was further suggested that 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 (A/CN.9/856, the last paragraph before the annex).

4. At that session, broad consensus was expressed in the Commission 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. After discussion, the Commission instructed the Secretariat to conduct preparatory work on cloud computing, including through the organization of colloquia and expert group meetings, for future discussion at the Working Group level. 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.[5]

5. At its forty-ninth session, in 2016, the Commission was informed that work on contractual aspects of cloud computing had started at the expert level on the basis of the proposal A/CN.9/856. The Commission was also informed about preparatory work on the other topic allocated by the Commission to the Working Group (identity management and trust services). It was suggested that work should commence on legal issues relating to cloud computing based on preparatory work already conducted. However, the view was also expressed that additional preparatory work was necessary, which should aim at compiling relevant information. Preference was expressed for work to commence instead on identity management and trust services. After discussion, it was generally felt that the topics of identity management and trust

[4] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 146, 147 and 150.

[5] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 354, 356 and 358.

services as well as of cloud computing should be retained on the work agenda and that it would be premature to prioritize between the topics. The Commission confirmed its decision that the Working Group could take up work on those topics upon completion of the work on the Model Law on Electronic Transferable Records. The Commission requested the Secretariat, within its existing resources, and the Working Group to continue to update and conduct preparatory work on the two topics including their feasibility in parallel and in a flexible manner and report back to the Commission so that it could make an informed decision at a future session, including the priority to be given to each topic. In that context, it was mentioned that priority should be based on practical needs rather than on how interesting the topic was or the feasibility of work.[6]

6. At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group held a preliminary exchange of views on a possible future work on cloud computing. While no decision was made, it was noted that the preparation of a descriptive document listing issues relevant when reviewing contracts for cloud computing services could be particularly useful in assisting small and medium-sized enterprises. It was added that such document should reflect contractual practices and, where available, legislation, and should refer to relevant technical standards, but should not have a legislative nature, without prejudice to future deliberations and decisions of the Commission (A/CN.9/897, para. 126).

7. As requested by the Commission (see para. 4 above), the Secretariat in this note shares with the Working Group results of the preparatory work accomplished so far in the area of cloud computing. The Secretariat is expected to report on those aspects to the Commission as well (see para. 5 above).

II. Results of preparatory work

A. Summary of steps taken by the Secretariat

8. The Secretariat used the proposals of Canada (A/CN.9/823 and A/CN.9/856; see paras. 1 and 3 above) as the basis for its preparatory work.

9. In addition to reviewing relevant reports, standards and publications, the Secretariat has undertaken informal consultations with experts. As broad participation in informal expert consultation as possible has been sought to ensure representation of views from all regions, principal economic and legal systems of the world and of developed and developing countries.

10. The Secretariat first sought comments from experts on the proposed outline of issues to be addressed in a text to be prepared by UNCITRAL or its secretariat in the area of cloud computing. The feedback received informed the structure and content of the text that was eventually circulated for comments by experts in the form of a draft legal guide on contractual aspects of cloud computing.

11. The draft legal guide elicited numerous comments, summarized in the sections below. There was consensus on many issues of technical nature and disagreement on some issues, mostly of policy nature, such as desirability and feasibility of preparing a detailed legal guide on contractual issues of cloud computing similar to existing UNCITRAL legal guides.[7] The policy issues summarized in section B below need to be resolved before any further preparatory work by the Secretariat in the area of cloud computing is undertaken. Sample chapters prepared by the Secretariat and annexed to this note are presented to the Working Group to facilitate the discussion of those issues.

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[6] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 229-235.

[7] See the *UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (1987), United Nations publication, Sales No. E.87.V.10 (A/CN.9/SER.B/2), available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1988Guide.html, and the *UNCITRAL Legal Guide on International Countertrade Transactions* (1992) referred to in paragraph 1 of this note.

B. Policy issues

1. Form of work

12. The consultations revealed preference for a non-legislative text that would analyse contractual issues relating to cloud computing and possible approaches to them. It was considered unfeasible and undesirable to prepare a legislative text (e.g. a model law or legislative guide) given sensitive policy issues, such as personal data protection and jurisdictional aspects, that cloud computing raised.

13. Divergent views were expressed on the form of a possible non-legislative text. It was questioned whether legal issues arising from cloud computing contractual relationships were so distinct from other types of contracts, for example IT outsourcing, renting, services and licensing contracts, as to justify the preparation of a detailed legal guide on cloud computing akin to the existing UNCITRAL legal guides.[8] In addition, concern was expressed that a detailed legal guide could become quickly outdated in light of the rapid evolution of cloud computing contract practices.

14. Furthermore, in some jurisdictions cloud computing might be made subject to the principles applicable to public utilities (e.g. provision of safe and adequate service to all who apply for services without undue discrimination and for just and reasonable prices), which would considerably constrain the cloud services providers' freedom of contract. The value of a contractual legal guide in such cases would be doubtful.

15. The preparation of a short guidance text, which would be easier to agree upon and more user-friendly, was suggested. However, it was also stated that the length of a guidance text should be a secondary consideration since a text would need to be sufficiently detailed to provide useful guidance to contracting parties.

16. It was suggested that the main beneficiaries of a guidance text would be users of cloud computing services with a weaker bargaining position. It was therefore recommended that a guidance text should be prepared keeping that group of contracting parties in mind.

2. Scope of work and drafting approaches

17. Based on the understanding that, to remain relevant, a guidance text should avoid time-bound terms and concepts, a question was raised on whether a guidance text should nevertheless refer to existing types of cloud computing services (such as infrastructure as a service (IaaS), platform as a service (PaaS), etc.) and their deployment models (public, private, etc.). The unanimous view was that different types of services and different deployment models raised different legal issues and might justify different contract drafting approaches. It would therefore be unavoidable to describe in a guidance text the main characteristics of the existing types of cloud computing services and their deployment models. It was proposed that a guidance text should differentiate legal issues common to any cloud computing contract, regardless of the types of services involved and their deployment model, from those specific to a particular contract type.

18. Another question was whether it would be reasonable to expect that a guidance text could exhaustively deal with all legal issues arising from all possible types of cloud computing services (existing or future), their different deployment models and diverse business circumstances in which cloud computing contracts could operate. If not, restrain would need to be exercised in the choice of issues to be covered and the breadth and depth of their analysis in a guidance text, to make the project manageable. The text could for example focus only on data portability, interoperability, data breach, risks of multi-tenancy and other issues of most concern to contracting parties in cloud computing relationships.

19. The need to discuss issues of the general contract law if they do not raise any cloud-specific considerations was particularly questioned. Risks of intervening into the existing contract law framework and constraining the freedom of parties to

[8] Ibid.

contract by doing so were highlighted. Concern was also expressed about risks of touching upon issues of potentially regulatory concern: although a guidance text would not intend to provide guidance to policymakers considering the adoption of regulatory or legislative provisions dealing directly or indirectly with cloud computing services, a UNCITRAL text could nevertheless be considered reflecting a minimum internationally accepted standard of practice in contract dealings related to cloud computing services and thus a reference for good practice.

20. Another view was to adopt a more comprehensive approach, following examples of the existing UNCITRAL legal guides dealing with contract drafting issues.[9] The value of a more comprehensive guidance text for users in a weaker bargaining position was particularly highlighted.

21. Advisability of focusing on cloud-specific issues only in the business-to-business (B2B) context and excluding the business-to-consumer (B2C), government-to-business (G2B) and business-to-government (B2G) contexts was questioned. It was not clear from consultations whether, if the B2G context was to be covered,[10] a guidance text should provide any recommendations on such pre-tendering issues as the selection of a method or tool and award criteria for procurement of cloud computing services. (See the annex to this note for a sample chapter of a possible guidance text addressing specific legal issues arising from public cloud services contracts).

22. Views also differed on whether a guidance text should deal only with contracts between cloud service providers and cloud service customers or also cover contracts involving intermediaries, such as cloud services brokers or integrators. The extent of coverage of subcontracting issues was not clear either. Divergent views were also expressed on whether a guidance text should deal with sector-specific (e.g. healthcare or financial services) cloud services contracts. Neither was a common view on the extent of discussion of legal issues arising from possible infringement of third parties' rights (i.e. issues of privacy and personal data protection, consumer protection law) or from behaviour of users of cloud computing services other than the cloud services customer (e.g. the customer's employees).[11]

23. The careful assessment of risks arising from the use of cloud computing services before entering into binding commitments was considered particularly important. That assessment should cover not only contract performance but also post-contractual issues. The views however differed on whether a detailed legal guidance from UNCITRAL on pre-contractual due diligence would be feasible or desirable in light of the diverse factors that influence pre-contractual considerations. It was considered that a guidance text could highlight essential pre-contractual aspects, such as pre-contractual risk assessment, audits, service performance trials and verification of (sub)licensing status. Post-contractual issues would need to be discussed in detail in conjunction with relevant contractual clauses, such as on portability and export of data, post-contractual services, IP rights and post-contractual audits.

C. Possible contents and structure of a future text

24. In addition to the issues raised above and in the annexed sample chapters, the following issues, listed in a possible order of treating them, might be addressed in a chapter of a possible guidance text dealing with contract drafting aspects:

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[9] Ibid.

[10] A related question is raised in document A/CN.9/823, para. 11: "Is the cloud computing and related legal issues different in the government context versus in the business context and should different standards apply?"

[11] Similar issues are raised in document A/CN.9/823, para. 8: "How are third parties and third parties-related information affected by cloud computing agreements?"

(a) *Freedom of contract and the applicable legal framework*: choice of law considerations specific to cloud computing, in particular how private international law would identify the governing law in the absence of parties' choice of law;[12]

(b) *Formation and form of the contract*: specifics of cloud services contract formation; and solutions for identification and authentication of the parties and users of cloud services (link to identity management and trust services);[13]

(c) *Description of services and performance parameters*: description of core, ancillary and optional services; explicit and implied warranties; consents and rights related to the performance of services; such service performance parameters as availability of services, response time, maintenance and upgrades; application of, and compliance with, technical standards; service performance monitoring and audits;[14]

(d) *Risk allocation*: description of risks in general and how to allocate them best in cloud services arrangements (e.g. data security, data protection and data breach risks). In that context, differing legal consequences may arise depending on the nature of the data placed on the cloud, the type of contract and other circumstances. Any minimum requirements for handling security and data breach would need to be discussed;[15]

(e) *Government access to data*: the extent to which a guidance text should address relationships of the contracting parties with government authorities in national or cross-border context would need to be clarified (e.g. reporting requirements to state agencies under data protection law, disclosure orders and preservation and production of evidence in criminal investigations and other contexts);[16]

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[12] Similar issues are raised in document A/CN.9/823, para. 10: "would a choice of applicable law and jurisdiction between the service provider and the service applicant pointing to State A validly oust jurisdiction of the national courts in State B where a user is located?"; and in document A/CN.9/856, para. 56: "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?"; and ibid., para. 57: "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?"

[13] Similar issues are raised in document A/CN.9/823, para. 7: "is any contractual framework acceptable or should best practices be established [for identity management to ensure secured access to cloud data]? … how does States' domestic legislation apply to accepted identity management protocols? What do courts accept as reasonable practices and what do they consider being negligent practices?"

[14] Similar issues are raised in document A/CN.9/856, para. 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?"

[15] Similar issues are raised in document A/CN.9/823, para. 6: "What duties does the service provider have towards preserving the integrity of the data? What remedies are available in cases where the integrity of the data has been compromised?" "…what duties does the service provider have in relation to business losses due to the unavailability of the service?"; and in document A/CN.9/856, para. 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?"; and ibid., para. 66: "Is it an implied term of the contract that the cloud provider is required to maintain control over data?"

[16] Similar issues are raised in document A/CN.9/823, paras. 10 and 11: "should the host be subject to disclosure requirements even though it has very limited connection to the jurisdiction ordering disclosure?" and "Should the service provider be required to disclose that access to the data can be granted to a given State authority in the conduct of special investigative powers?" and in document A/CN.9/856, para. 61: "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."; ibid., para. 62: "In civil and commercial matters, courts can issue an order

(f) *IP issues*: proprietary licenses vs. open standards issues; limits on reproduction of content and communication to public; rights to applications that customers developed or deployed on the cloud; IP issues arising from modifications of the customer data; ownership rights on cloud-processed data (e.g. metadata); rights to improvements arising from the customer's suggestions; other scenarios of sharing IP; and intersection between IP developments and duty of care.[17] The extent to which a guidance text should discuss any IP issues would need to be clarified. Some experts echoed the already expressed views that IP issues should be excluded (see paras. 1 and 2 above). Others suggested highlighting in a guidance text risks of exploiting IP rights through cloud computing arrangements;

(g) *Price and payment*: mechanisms for price calculation and price adjustments; methods for measuring services;

(h) *Liability*: possible exemptions from, or limitations of, liability; remedies; damages; and liability insurance;[18]

(i) *Duration, renewal and termination*: fixed or indefinite duration; mechanisms for renewal; causes for termination; partial or complete termination; and handling of customer data upon termination.[19] The extent to which a guidance text should address the impact of insolvency of the cloud service provider or the customer on the cloud services contract would need to be clarified;

(j) *Amendments of contractual terms*: what would constitute amendments and what would be the result of routine maintenance and upgrades would need to be clarified; and

(k) *Dispute resolution*: alternative dispute resolution mechanisms, commercial arbitration and choice of jurisdiction considerations specific to cloud computing environment.[20] The extent of discussion of preventive injunctions, online dispute resolution issues and class and collective actions would need to be clarified.

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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?"

[17] Similar issues are raised in document A/CN.9/823, para. 8: "Who owns the data under these agreements?" and in document A/CN.9/856, para. 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 IA's is being supplied?"; ibid., para. 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?"

[18] Similar issues are raised in document A/CN.9/823, para. 11: "what practical and effective measures to limit risks should be put in place by service providers? For example should service providers be encouraged to offer multi-tiered access with varying access privileges (i.e., not all personal information about an entity is accessible to all users)? Should they be required to inform potential clients of the availability or unavailability of such safeguards and multi-tiered access functions? Should they contract liability insurance and who should be responsible for insuring a particular risk? … Is the existence of legislation on the protection of personal information and compliance by the service provider with the legislation sufficient to exonerate the provider from liability?"; and in document A/CN.9/856, para. 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?"

[19] Similar issues are raised in document A/CN.9/823, para. 6: "Under what terms can a cloud agreement be terminated? What happens to the data when the contract is terminated?"

[20] Similar issues are raised in document A/CN.9/823, para. 10: "would a choice of applicable law and jurisdiction between the service provider and the service applicant pointing to State A validly oust jurisdiction of the national courts in State B where a user is located?"; and in document A/CN.9/856, para. 56: "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?"; ibid., para. 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?"; and ibid., para. 75: "In the absence of a clause on jurisdiction where can the parties to the contract bring an

25. The extent of relying on and reflecting in a guidance text cloud computing standards, such as those of the International Organization for Standardization (ISO), would need to be clarified.[21] For example, ISO standards in the area of cloud computing, elaborated in cooperation with other international organizations, do not only define cloud computing terms and provide technical standards in that area. They often contain guidance on what and how should be addressed in cloud services relationships.

III. Issues for consideration by the Working Group

26. The Working Group is expected to formulate recommendations for the consideration of the Commission on the feasibility and practical needs for the work on cloud computing, the exact scope of that work, possible methodology and priority to be allocated to that work (see paras. 4 and 5 above). In so doing, it may wish to address in particular:

(a) The form that a work product on cloud computing would take, i.e. whether a legal guide giving explanations concerning cloud services contract drafting, or another text would be prepared. In considering that aspect, the Working Group may wish to recall the diverse spectrum of texts that UNCITRAL has adopted, which could be broadly divided into: (i) legislative texts (conventions, model laws, legislative guides and recommendations, and model legislative provisions); [22] (ii) uniform contractual clauses and rules (such as the *UNCITRAL Arbitration Rules*[23]); and (iii) explanatory texts (such as legal guides, informational notes and recommendations);

(b) If a legal guide is to be prepared, whether it would be similar as regards the level of detail, arrangement and drafting approaches to the existing UNCITRAL legal guides,[24] or a different template would need to be followed;

(c) Scope of the work, in particular, whether a text to be prepared would purport to address all possible cloud computing contracts or only a particular group thereof or particular issues of cloud computing. Other important considerations related to the scope of the work and drafting approaches that the Working Group may wish to address are raised in paragraphs 17-23 above;

(d) The timing of the work in the area of cloud computing, i.e. whether the work should be undertaken before, after or in parallel with the work on the other topic

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action or seek provisional protection measures? What should be the basis for such exercise of jurisdiction?"

[21] Similar issues are raised in document A/CN.9/856, para. 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."; and ibid., para. 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?"

[22] Such UNCITRAL legislative texts as conventions and model laws are usually accompanied by explanatory materials (guides to enactment (and interpretation) or explanatory notes), prepared by UNCITRAL or its secretariat to assist with the use of the text. Explanatory materials are based on the records of the relevant legislative process in UNCITRAL. They may be adopted by the Commission (see e.g. the *Guide to Enactment of the Model Law on Public Procurement (Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 46. The text of the Guide is available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html) or issued as a work product of the Secretariat (see e.g. the *Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006* (United Nations publication, Sales No. E.08.V.4). Available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

[23] Available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html.

[24] See above, footnote 7.

assigned by the Commission to the Working Group (identity management and trust services); and

(e) A method of work, which is closely related to the preceding point. The Working Group may wish to make a recommendation to the Commission on whether the work should take place in the Working Group or in the Commission in plenary or handled by the Secretariat with the involvement of experts. In the latter case, the role of the Commission and the Working Group would need to be clarified. Different implications of the decision on a method of work on expert representation from States and on resources of the Secretariat necessary to provide substantive and conference management services should be taken into account.

27. In considering the most appropriate method of work, the Working Group may wish to recall that all legislative texts and most non-legislative texts were prepared by UNCITRAL either in a working group or at annual sessions of UNCITRAL. In their pre-adoption form, they were subject to comments by Governments and relevant international organizations. That was the case also with such non-legislative texts as the *UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works*,[25] which was prepared by the Working Group on the New International Economic Order working on it from 1981 to 1987, and the *UNCITRAL Legal Guide on International Countertrade Transactions*,[26] whose draft chapters were prepared by the Secretariat and discussed in the Commission and in a working group from 1990 to 1992. Some non-legislative texts, although prepared by the UNCITRAL secretariat, were nevertheless subject to review and approval by UNCITRAL that authorized their publications as a product of the work of the Secretariat.[27]

28. Non-legislative texts vary significantly not only by subject but also by purpose, structure and presentation style. They may deal with issues not addressed in any other UNCITRAL text[28] or be linked to other UNCITRAL texts.[29] Reference to non-legislative texts in this context excludes explanatory materials that may accompany a UNCITRAL legislative text.[30]

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[25] Ibid.

[26] See above, footnote 3.

[27] See e.g. the *UNCITRAL Legal Guide on Electronic Funds Transfers* (1987) (United Nations publication, Sales No. E.87.V.9 (A/CN.9/SER.B/1), available at www.uncitral.org/pdf/english/texts/payments/transfers/LG_E-fundstransfer-e.pdf), *Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods* (2007) (United Nations publication, Sales No. E.09.V.4, available at www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf), *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (2009) (United Nations publication, Sales No. E.10.V.6, available at www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html) and *Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud* (2013) (see above, footnote 2).

[28] E.g. the *UNCITRAL Legal Guide on International Countertrade Transactions* (see above, footnote 3) is the only text of UNCITRAL on that subject. The same can be said about *Recognizing and Preventing Commercial Fraud: Indicators of Commercial Fraud* (2013) (see above, footnote 2).

[29] See e.g. *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (2011) (available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html); or *Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules as revised in 2010* (2012) (*Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), annex I).

[30] See above, footnote 22.

Annex

Sample chapters of a possible guidance text on contractual aspects of cloud computing, prepared by the Secretariat[31]

Introduction

Origin and Purpose

1. The guidance text covers cloud services contracts in which one party (the cloud service provider) provides to the other party (the customer) cloud services in the form of one or more capabilities via cloud computing. Capabilities may vary from the provision and use of simple connectivity and basic computing services (such as storage, emails, office applications) to the provision and use of the whole range of physical and virtual resources needed to build own information technology (IT) platforms, or deploy, manage and run customer-created or customer-acquired applications or software.

2. Cloud computing can generally be defined as supply and use of computing services (e.g., data hosting or data processing) through open or closed network. Cloud services contracts are thus a variation of contracts for provision of services. Depending on data involved in cloud computing, they could be subject to various legal regimes, inluding those on privacy protection, banking law and anti-money-laundering regulations. An international or cross-border dimension in this type of contracts is prevalent but cloud computing could be confined by law or practice to a single jurisdiction as well.

3. The Commission decided to undertake work in the area of cloud computing in recognition of a significant potential of cloud computing solutions for economic growth, in particular for small and medium enterprises (SMEs). [*to be elaborated drawing on future UNCITRAL records*]

…

4. The guidance text does not intend to express the position of UNCITRAL on the desirability of concluding cloud services contracts. It is intended merely to assist potential parties to a cloud services contract in identifying issues that they should consider before entering into, and while negotiating and drafting, a cloud services contract. The various solutions to issues discussed in the guidance text will not govern the relationship between the parties unless they expressly agree upon such solutions, or unless the solutions result from provisions of the applicable law.

5. The guidance text has been designed to be of use to persons regardless of their legal background. It is emphasized however that the guidance text should not be regarded by the parties as a substitute for obtaining legal and technical advice and services from competent professional advisers. Nor is the guidance text intended to be used for interpreting cloud services contracts.

6. The guidance text does not interfere with mandatory domestic rules; nor does it intend to provide a model for, or encourage the adoption, of special legislation on cloud computing. Apart from relevant local, national and international legal rules and the provisions of the contract, local, national and international standards or codes of practice may exist, which this guidance text does not purport to replace.

Scope of the guidance text

7. The guidance text highlights main considerations usually involved in concluding cloud services contracts regardless of the type of services and their deployment model. At the same time, the guidance text recognizes that cloud services

[31] The sample chapters do not reflect views of UNCITRAL or its working group. They are the result of the Secretariat's research and consultations with experts and also draw on documents A/CN.9/823 and A/CN.9/856. They presented in a draft form for consideration by the Working Group.

contracts could take a variety of forms and display differing features depending upon the particular circumstances of the transaction. The guidance text highlights commonly encountered issues arising from particular types of cloud services and their deployment models [*to be confirmed*].

8. [The guidance text touches upon issues arising from the involvement of cloud service partners that may be engaged in support of, or auxiliary to, activities of either the cloud service provider or the customer or both. Examples of cloud service partners include cloud auditors and cloud service brokers. The guidance text addresses rights and remedies available to users of cloud services other than the customer (e.g. customers' clients, employees) only to a limited extent, in the context of possible clauses that could be considered for inclusion into a cloud service contract between the cloud service provider and the customer. [*The extent of coverage of third party aspects (subcontracting, brokers, auditors, rights of data subjects, consumers, other users of cloud services, etc.) in the guidance text is to be clarified.*]]

9. The guidance text may not be applicable to arrangements for the use of cloud services between cloud services providers and consumers to the extent that those arrangements would be subject to mandatory consumer protection law and regulations. [*Other exclusions from the scope, such as B2G, G2B, specific sectors, etc., are to be discussed.*]

10. Cloud computing and cloud services could involve cross-border operations or could be confined to a particular region or country. This guidance text could be used by the parties regardless of a cross-border factor. For most standardized simple cloud services, that factor would not matter; under some circumstances, cross-border aspects may add an additional layer of complexity discussed in this guidance text.

11. The guidance text is not dealing with issues of licensing and outsourcing arrangements although some aspects of cloud services may resemble those relationships.

Arrangement of the guidance text

12. The guidance text is arranged in several parts. The first part introduces a reader to contracts covered by the guidance text and benefits and risks of cloud computing. The second part deals with certain matters arising prior to the time when the contract is drawn up and describes possible contracting approaches to structuring a cloud services contract depending on the type and deployment model chosen by the contracting parties. The discussion of these subjects has two aims: to direct the attention of the parties to important matters which they should consider prior to commencing the negotiation and drawing up of a cloud services contract, and to provide a setting for the discussion of the legal issues involved in the contract.

13. The third part discusses possible types of contract clauses that parties may use. The discussion in the guidance text is restricted to those types of clauses that are specific to or of special importance for cloud computing services. Some of the clauses described in the guidance text are essential for concluding a cloud services contract. Other clauses discussed in the guidance text may be useful in the context of the particular commercial circumstances, in particular in the light of the type of services and their deployment model. Throughout the guidance text, whenever appropriate, the discussion points out that different solutions may apply under different contracting approaches. In view of the great variety of circumstances in which cloud services contracts are concluded, the guidance text does not contain a general suggestion as to the types of clauses that parties should agree upon. It is for the parties to each contract to judge the extent to which the issues considered in the guidance text are relevant to their contract.

14. [The last part deals with specific legal issues that cloud services contracts raise in the G2B and B2G contexts and in sectors subject to special regulation, such as healthcare and financial services.] [*to be confirmed*]

Approach to drafting

15. Given its purpose to help contracting parties to identify pitfalls, limitations and other difficulties in the negotiation or execution of cloud services contracts, recommendations are made in the guidance text aimed at suggesting ways in which certain issues in a cloud services contract might be settled. Three levels of suggestion are used. The highest level is indicated by a statement to the effect that the parties "should" take a particular course of action. It is used sparingly in the guidance text and only when a particular course of action is a logical or legal necessity. An intermediate level is used when it is "advisable" or "desirable", but not logically or legally required, that the parties adopt a particular course of action. The lowest level of suggestion is expressed by formulations such as "the parties may wish to consider" or "the parties might wish to provide" or the agreement by the parties "might" contain a particular solution. The wording used for a particular suggestion may be, for drafting reasons, varied somewhat from that just indicated; however, it should be clear from the wording what level of suggestion is intended.

16. Since a prevailing terminology has been developed by various international and regional institutions active in the area of cloud computing, including the International Organization for Standardization (ISO), the guidance text uses the established terminology for the purpose of ensuring consistency, harmonization and legal clarity.

Part One. Cloud services contracts

Distinct features of cloud services contracts[32]

17. Distinct features common for all cloud services contracts are derived from the following typical characteristics of cloud computing via which the cloud services are provided:

(a) **Broad network access** means that capabilities can be accessed over the network from any place where the network is available (e.g. through Internet), using a wide variety of devices, such as mobile phones, tablets and laptops;

(b) **Measured service** means metered delivery of cloud services like in public utilities sector (gas, electricity, etc.), allowing monitoring the usage of the resources and charging by usage (on a pay-as-you-go basis);

(c) **Multi-tenancy** means that physical and virtual resources are allocated to multiple users whose data is isolated and inaccessible to one another;

(d) **On-demand self-service** means that services are used by the customer as needed, automatically or with minimal interaction with the cloud service provider;

(e) **Rapid elasticity and scalability** means the capability for rapid scaling, up or down, of the access or services provided in accordance with customer's requirements;

(f) **Resource pooling** means that physical or virtual resources can be aggregated by the cloud service provider in order to serve one or more customers without their control or knowledge over the processes involved.

18. There are various ways in which cloud computing can be organized based on the control and sharing of physical or virtual resources (deployment models), including:

(a) **Community cloud** where cloud services exclusively support a specific group of related cloud service customers with shared requirements, and where resources are controlled by at least one member of that group;

(b) **Private cloud** where cloud services are used exclusively by a single cloud service customer and resources are controlled by that cloud service customer;

[32] ISO/IEC 17788: 2014 and document A/CN.9/856 were used for drafting this section.

(c) **Public cloud** where cloud services are potentially available to any cloud service customer and resources are controlled by the cloud service provider;

(d) **Hybrid cloud** using at least two different cloud deployment models.

19. The extent of management and control by the customer of resources provided under the cloud services contract would depend on the type of capabilities provided to the customer and the cloud deployment model. In some cases, the customer would not manage or control the underlying physical and virtual resources, but would have control over operating systems, storage, and deployed applications that use the physical and virtual resources. The cloud service customer may also have limited ability to control certain networking components (e.g., host firewalls). In other cases, the customer would not have any control over the resources other than devices connecting it to the network.

Benefits and risks[33]

20. The economic benefits of using cloud computing arise from economy of scale achieved by pooling computing resources within the control of one cloud service provider who then offers them at discounted prices to multiple customers. The economic benefits at the microeconomic level may produce the positive impact at a macroeconomic level on businesses and international trade.

21. Reduced need for the capital investment in IT infrastructure and savings of operational costs associated with IT governance are cited among attractive features of cloud computing especially for start-ups and SMEs. Another important consideration is access to enhanced IT security, specialized staff, increased data storage capacity, improved data preservation and other state-of-the-art computing services features. Cloud computing may also be more user friendly than traditional IT services and allow for more flexibility, productivity and innovation.

22. At the same time, cloud computing is not risk-free. It involves outsourcing and associated risks. Financial losses may result from incomplete or inaccurate assessment of business needs, cloud computing risks and potential cost savings. They may also result from business interruption or loss of revenues because of reputational damage.

23. Specific cloud computing risks stem in particular from:

(a) **Loss of control**. The customer's decision to migrate all or part of its activities and data to cloud computing leads to the loss of exclusive control over them. The extent of the loss of control depends on the type of cloud service. The customer's ability to deploy the necessary measures to guarantee data integrity and confidentiality or verify whether data processing and retention are being handled adequately may be particularly affected;

(b) **Inherent features of cloud computing**. Inadequate security practices of the cloud service provider will raise risks for the customer. They may relate to inadequate silo architecture, isolation of resources and data segregation, insufficient identity management procedures, and the absence of special precautions to prevent attacks on the cloud computing infrastructure. Such inherent features of cloud computing as multi-tenancy and virtualization may exacerbate security risks;

(c) **Remote access to services** that provides opportunities for cyber attacks such as interception of communications, including passwords, phishing, fraud and the exploitation of software vulnerabilities;

(d) **Cross-border data flows**. Protecting personal and other sensitive data as well as respecting the right to privacy is particularly difficult in infrastructures that are shared and potentially accessible to governments. The lack of information about the location of the data and the number of stakeholders involved in the provision of cloud computing services accentuates data breach risks;

[33] Document A/CN.9/856 was used for drafting this section.

(e) **The loss or compromise of credentials for access to cloud computing services**, which is one of the common causes of data loss or data disclosure to unauthorized persons;

(f) **Vagueness in sharing roles and responsibilities**. Various stakeholders are involved in a cloud solution model: the cloud service provider, the customer, third parties whose information is held by the customer, etc. Any ambiguity in defining the roles and responsibilities related to data ownership, access control, maintenance of infrastructure, etc. may result in security and other risks. The failure to clearly assign responsibilities will have a higher impact where a third party's IT resources are used.

[Part two. Pre-contractual aspects]

[*the extent of discussion, if any, of relevant issues in the guidance text is to be clarified*]

…

Part three. Contract drafting

…

[*for possible contents of this chapter, see paragraph 24 of the main part of this note*]

[Part four. Specific legal issues of cloud services contracts in … [*areas, if any, are to be identified*]

[*Below is a sample chapter prepared by the Secretariat to illustrate a possible approach to drafting chapters on specific legal issues that cloud services contracts raise in contexts other than the B2B context and in sectors subject to special regulation, such as healthcare and financial services. The B2G context is used for illustration.*

If B2G transactions are to be covered in a guidance text, the list of issues set out below is for consideration by the Working Group. In addition, it is to be decided whether any guidance should be provided on such pre-contractual issues as defining specifications or performance requirements and selection of the appropriate procurement method or tool.]

Public cloud services contracts

24. Public entities entering into a cloud service contract would face similar issues about service performance levels, data security, protection and privacy to those discussed in the context of business-to-business (B2B) contracts. Additional or distinct complexities would arise because of the public nature of customers of cloud services and the role of public entities in implementing a public procurement function and socio-economic policies of a State.

25. Usually public entities are subject to various layers of laws that are not applicable to private entities, such as on freedom of information, State records and State archives, public queries, investigation, etc. Those laws would become applicable to cloud service providers by virtue of their contractual relationships with a public entity. Public entities and their employees would nevertheless remain subject to criminal, civil and administrative liability for the failure to exercise properly public functions entrusted to them, including if public data placed on the cloud containing protected information (e.g. classified information, personally identifiable information, commercially sensitive information) is misused or erroneously disclosed. The reputation of the government and public trust will thus be closely tied to the quality of cloud services.

26. Statutory requirements applicable to public entities may in particular dictate:

(a) With whom a public contract for cloud services could be concluded (cloud service providers may need to be certified by State agencies or there could be limits to contract with foreign entities);

(b) Which data could be migrated to cloud platforms (the move of data of a sensitive nature to the cloud may be prohibited);

(c) Under which terms and according to which standards cloud services could be used (law may dictate higher standards for security, privacy, confidentiality, accessibility, authentication, continuity of service, interoperability and portability, data breach notification obligations, restrictions on the geographical location of data in motion and data at rest and data centres, servers and redundant servers);

(d) Special rules on subcontracting. The advance consent of the procuring entity may be required for any subcontracting that was not announced in tender documents. No blanket consent for subcontracting would be acceptable since this could interfere with the principles of good governance and competition (unchecked subcontracting may promote collusion). There could be therefore mandatory verification of subcontractors and the obligation to replace the existing ones if compulsory grounds for that exist. In addition, it is common for subcontractors to be subject to the same terms of procurement as those imposed on the main contractor. The cloud service provider would therefore be required to reflect those terms in any existing or future subcontracting arrangements;

(e) Warranties, adequate capital or insurance coverage to be provided by the cloud service provider;

(f) Mandatory training for the cloud service provider's personnel handling sensitive information;

(g) State records management rules, in particular features allowing e-discovery and evidence preservation, the obligation to retain public data and related metadata in a certain form, including after the contract, disposition of records according to the State approved record schedules, and transfer of permanent records to the State archive in a prescribed form;

(h) Other additional functionalities, such as for implementing social policies of a State, e.g. accessibility of public data to disabled, and for interacting with individuals and legal entities, e.g. adherence to statutory deadlines for actions.

27. Public entities may also face significant restrictions on their ability to indemnify cloud service providers, agree on some dispute resolution clauses (e.g. on arbitration or jurisdiction of a foreign State) and accept click-through arrangements. They may also be required to include non-disclosure provisions and modify such standard clauses usually found in standard cloud services contracts in the B2B and business-to-customer (B2C) environments as broad downtime or other rights of cloud service providers, the absence of liability of cloud service providers for service failures and no obligation to indemnify customers in such cases. They may also be required to ensure that contractual clauses prohibit the cloud service provider from using the data for any of the providers' own purposes (such as advertising or other commercial activities). They would also not be able to agree on the transfer of any intellectual property (IP) ownership to the provider in any data stored on behalf of the public entity.

28. Grounds for termination by the Government of the contract in the business-to-government (B2G) context could also be broader, including for convenience. Law may also require termination of the contract by a public entity for corruption, fraud and other reasons specified in law and impose unlimited liability of a cloud service provider in such cases.

29. Procuring entities must be aware of any statutory requirements applicable to a cloud service contract in question. Those requirements may vary depending on the type of services to be provided and deployment model. Specifics of procurement of on-demand services as opposed to fixed price purchases would also need to be

considered in light of State budgeting processes. All those issues would dictate approaches to formulating eligibility, qualification, examination and evaluation criteria and selecting the most appropriate method or tool for procurement of required cloud computing services. They would therefore need to be considered at the procurement planning stage.

30. Carefully considering all those issues already at the procurement planning stage is especially important for public procuring entities since, unlike private entities, they would not have much freedom to negotiate the terms of the contract at the stage of the conclusion of the contract and to renegotiate contractual terms in response to problems at the contract implementation stage. The public procurement contract would have to incorporate the terms and conditions of the procurement as specified in the solicitation documents at the outset of the procurement and as set out in the terms and conditions of the winning tender. Any material changes to those terms and conditions at the conclusion of the contract or during its implementation would violate the key principles of transparency, competition and objectivity in public procurement. Any changes that would affect the nature of the contract, the pool of potential participants in the procurement proceedings or the result of the selection would be considered material. The right of the cloud service provider to unilaterally change the terms of the contract, often included in standard cloud services contracts in the B2B and B2C environments, would therefore need to be substantially modified, if not excluded altogether.]

F. Note by the Secretariat on legal issues related to identity management and trust services: terms and concepts relevant to identity management and trust services

(A/CN.9/WG.IV/WP.143)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, the Commission 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. 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.[1]

2. At its forty-ninth session, in 2016, the Commission had before it a note by the Secretariat on legal issues related to identity management and trust services (A/CN.9/891) summarizing the discussions during the UNCITRAL Colloquium on Legal Issues Related to Identity Management and Trust Services held in Vienna on 21 and 22 April 2016 and complemented by other material. The Commission was also informed that work on contractual aspects of cloud computing had started at the expert level on the basis of a proposal (A/CN.9/856) submitted at the forty-eighth session of the Commission, in 2015.[2]

3. At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group agreed that its future work on identity management and trust services should be limited to the use of identity management systems for commercial purposes and that it should not take into account the private or public nature of the identity management services provider. The Working Group also agreed that, while work on identity management could be taken up before work on trust services, the identification and definition of terms relevant for identity management and trust services should take place simultaneously given the close relationship between the two. It was further agreed that focus should be placed on multi-party identity systems and on natural and legal persons, without excluding consideration of two-party identity systems and of physical and digital objects when appropriate. In addition, it was agreed that the Working Group should continue its work by further clarifying the goals of the project, specifying its scope, identifying applicable general principles and drafting necessary definitions (A/CN.9/897, paras. 118-120 and 122).

4. This note contains the definition of a number of terms relevant for identity management and trust services. The terms are presented with a view to enabling discussions based on a common understanding of fundamental notions; they are not presented in order to suggest a discussion on legally binding definitions of those notions. Similarly, the terms are not intended to provide an indication on the scope of the future work of UNCITRAL in the field of identity management and trust services.

5. The source of the defined terms, where available, is explicity indicated. Due to different sources, the same term may include more than one definition. If no source is

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 358.

[2] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 229.

indicated, the definition was suggested during expert consultations. Preference was given to terms defined internationally. Additional sources of defined terms are available, especially at the national level.

6. The defined terms are listed in different sections for ease of presentation only and without prejudice to the determinations of the Working Group on their relevance for discussions on the legal aspects of identity management or of trust services.

7. The defined terms have different origins and therefore should not be read as a coherent set of interconnected terms. Rather, each term should be read separately as a stand-alone definition and as such is presented as a possible reference for the discussions of the Working Group. When available, the source of the defined term is indicated so that additional information could be gathered from the original source document.

8. Synonyms are indicated for convenience only in light of usage. Not all synonyms are terms defined in this note.

9. The terms are listed in alphabetical order in the English language version of this note. The same order is maintained in other language versions to ensure correspondence of paragraphs and therefore facilitate reference during the Working Group discussions.

II. Terms and concepts relevant to identity management and trust services

A. Definitions relevant to identity management

10. “Assurance level” means a level of confidence in the binding between an entity and the presented identity information. Source: Rec. ITU-T X.1252. Synonyms: identity assurance, level of assurance.

11. “Attribute” means an item of information or data associated with a subject. Examples of attributes include information such as name, address, age, gender, title, salary, net worth, driver’s license number, social security number, e-mail address, mobile number, and data such as the subject’s network presence, the device used by the subject, the subject’s usual home location as known by a network, etc. (for a human being); corporate name, principal office address, registration name, jurisdiction of registration, etc. (for a legal entity); make and model, serial number, location, capacity, device type, etc. (for a device). Synonym: identity attribute.

12. “Attribute provider” means a business or government entity that acts as a source of one or more attributes of a subject’s identity. An attribute provider is often the entity responsible for assigning, collecting, or maintaining such attributes. Examples of attribute providers include a government agency that maintains a birth registry or title registry, a national credit bureau, a business that maintains a commercial marketing database or a corporate registry, and entities such as mobile operators, banks, utilities and healthcare providers that hold verified user data and that either verify or provide these attributes to third parties (possibly, subject to user consent).

13. “Authentication” means (a) a process used to achieve sufficient confidence in the binding between the entity and the presented identity. Source: Rec. ITU-T X.1252; (b) the process of associating the claimed identity of a subject with the actual subject by confirming the subject’s association with a credential either directly (active authentication) or through the environment in which the subject is interacting (“passive authentication” or “adaptive authentication”). For example, entering a secret password that is associated with a username is assumed to authenticate that the individual entering the secret password is the person to whom the username was issued. Likewise, comparing a person presenting a passport to the picture appearing on the passport is used to authenticate (i.e., confirm) that that person is the person described in the passport.

14. “Authentication assurance” means the degree of confidence reached in the authentication process that the communication partner is the entity that it claims to be or is expected to be. Note: the confidence is based on the degree of confidence in the binding between the communicating entity and the identity that is presented. Source: Rec. ITU-T

X.1252. Note: in some cases, the notions of "identity assurance" and "authentication assurance" are viewed as separate components of the overall concept of "level of assurance".

15. "Authentication factor" means a piece of information and process used to authenticate or verify the identity of an entity. Source: ISO/IEC 19790. Note: authentication factors are divided into four categories: (a) something an entity has (e.g., device signature, passport, hardware device containing a credential, private key); (b) something an entity knows (e.g., password, PIN); (c) something an entity is (e.g., biometric characteristic); or (d) something an entity typically does (e.g., behaviour pattern). Source: Rec. ITU-T X.1254.

16. "Authenticator" means something that is used to verify the relationship between a subject and a credential. An active authenticator is usually something the subject knows (such as a secret password), something the subject has (such as a smartcard), or something the subject is (such as a photo or other biometric information), and is used to tie the subject to an identity credential. For example, a password functions as an authenticator for a username, a picture functions as an authenticator for a passport or driver's license. A passive authenticator is usually something the environment knows, e.g. the mobile network knows that the user is connected to the network, is in the usual location, is using the usual mobile device, has not been barred from using the network, etc.

17. "Authoritative source" means a repository which is recognized as being an accurate and up-to-date source of information. Source: Rec. ITU-T X.1254.

18. "Authorization" means (a) a process of granting rights and privileges to an authenticated subject based on criteria usually determined by the relying party. For example, once a subject is authenticated, he or she might be granted access to a confidential database. Source: A/CN.9/WG.IV/WP.120, annex; (b) the granting of rights and, based on these rights, the granting of access. Source: Rec. ITU-T Y.2720 and Rec. ITU-T X.800.

19. "Credential" means: (a) a set of data presented as evidence of a claimed identity and/or entitlements. Source: Rec. ITU-T X.1252; (b) data in digital or tangible form presented as evidence of a claimed identity of a subject. Examples of paper-based credentials include passports, birth certificates, driver's licenses, and employee identity cards. Examples of digital credentials include usernames, smart cards, mobile identity and digital certificates. Source: A/CN.9/WG.IV/WP.120, annex. Synonyms: electronic identification means, identity credential.

20. "Credential provider" or "Credential service provider" means (a) an entity that issues credentials to subjects; (b) a trusted actor that issues and/or manages credentials. Note: the Credential Service Provider (CSP) may encompass Registration Authorities (RAs) and verifiers that it operates. A CSP may be an independent third party, or it may issue credentials for its own use. Source: Rec. ITU-T X.1254.

21. "Enrolment" means (a) the process of inauguration of an entity into a context. Note 1: enrolment may include verification of the entity's identity and establishment of a contextual identity. Note 2: also, enrolment is a pre-requisite to registration. In many cases, the latter is used to describe both processes. Source: Rec. ITU-T X.1252; (b) the process by which credential providers (or their agents) verify the identity claims of a subject before issuing a credential to such subject.

22. "Entity" means something that has separate and distinct existence and that can be identified in a context. Note: an entity can be a physical person, an animal, a juridical person, an organization, an active or passive thing, a device, a software application, a service, etc., or a group of these entities. In the context of telecommunications, examples of entities include access points, subscribers, users, network elements, networks, software applications, services and devices, interfaces, etc. Source: Rec. ITU-T X.1252. An entity may have multiple identifiers.

23. "Federation" means (a) an association of users, service providers, and identity service providers. Source: Rec. ITU-T X.1252; (b) a group of identity providers, relying parties, subjects and others that agree to operate under compatible policies, standards, and technologies specified in system rules (or a trust framework) in order that subject identity information provided by identity providers can be understood and trusted by relying parties. Synonyms: identity federation, multi-party identity system.

24. "Identification" means the process of collecting, verifying, and validating sufficient identity attributes about a specific subject to define and confirm its identity within a specific context. Synonyms: identity proofing, registration.

25. "Identifier" means (a) one or more attributes used to identify an entity within a context. Source: Rec. ITU-T X.1252; (b) one or more attributes that uniquely characterize an entity in a specific context. Source: Rec. ITU-T X.1254.

26. "Identity" means (a) a set of attributes related to an entity. Source: ISO/IEC 24760; (b) information about a specific subject in the form of one or more attributes that allow the subject to be sufficiently distinguished within a particular context; (c) a set of the attributes about a person that uniquely describes the person within a given context. Synonym: digital identity.

27. "Identity assertion" means an electronic record originating with an identity provider and sent to a relying party that contains the subject's identifier (e.g., name, account number, mobile number, location, etc.), authentication status, and applicable identity attributes. The attributes are typically personal and non-personal information about the subject that is relevant to the transaction required by the relying party.

28. "Identity assurance" means the degree of confidence in the process of identity validation and verification used to establish the identity of the entity to which the credential was issued, and the degree of confidence that the entity that uses the credential is that entity or the entity to which the credential was issued or assigned. Source: Rec. ITU-T X.1252. Synonyms: assurance level; level of assurance. Note: in some cases, the notions of "identity assurance" and "authentication assurance" are viewed as separate components of the overall concept of "level of assurance".

29. "Identity federation" means a group of identity providers, relying parties, subjects and others that agree to operate under compatible policies, standards, and technologies specified in system rules (or a trust framework) in order that subject identity information provided by identity providers can be understood and trusted by relying parties. See also: federation; multi-party identity system.

30. "Identity management" means (a) a set of processes to manage the identification, authentication, and authorization of individuals, legal entities, devices, or other subjects in an online context. Source: A/CN.9/854, paragraph 6; (b) a set of functions and capabilities (e.g., administration, management and maintenance, discovery, communication exchanges, correlation and binding, policy enforcement, authentication and assertions) used for: (i) assurance of identity information (e.g., identifiers, credentials, attributes); (ii) assurance of the identity of an entity; and (iii) enabling business and security applications. Source: Rec. ITU-T Y.2720.

31. "Identity proofing" means (a) the process of collecting, verifying, and validating sufficient identity attribute information about a specific subject (a person, legal entity, device, digital object, or other entity) to define and confirm its identity within a specific context. Identity proofing may be carried out through self-assertion or against existing records; (b) a process which validates and verifies sufficient information to confirm the claimed identity of the entity. Source: Rec. ITU-T X.1252; (c) a process by which a registration authority (RA) captures and verifies sufficient information to identify an entity to a specified or understood level of assurance. Source: Rec. ITU-T X.1254. Synonyms: identification; registration.

32. "Identity provider" means (a) an entity responsible for the identification of persons, legal entities, devices, and/or digital objects, the issuance of corresponding identity credentials, and the maintenance and management of such identity information for subjects. Source: A/CN.9/WG.IV/WP.120, annex; (b) an entity that creates, maintains and manages trusted identity information of other entities (e.g., users/subscribers, organizations and devices) and offers identity-based services based on trust, business and other types of relationship. Source: Rec. ITU-T Y.2720. Synonym: credential service provider; identity service provider.

33. "Identity system" means an online environment for identity management transactions governed by a set of system rules (also referred to as a trust framework) where individuals, organizations, services, and devices can trust each other because authoritative sources

establish and authenticate their identities. Source: A/CN.9/WG.IV/WP.120, annex. An identity system involves (a) a set of rules, methods, procedures and routines, technology, standards, policies, and processes, (b) applicable to a group of participating entities, (c) governing the collection, verification, storage, exchange, authentication, and reliance on identity attribute information about an individual person, a legal entity, device, or digital object, (d) for the purpose of facilitating identity transactions. Synonyms: identity management system ("IdM system"); identity federation; electronic identification scheme.

34. "Identity transaction" means any transaction involving two or more participants which involves establishing, verifying, issuing, asserting, revoking, communicating, or relying on identity information.

35. "Identity verification" means the process of confirming that a claimed identity is correct by comparing the offered claims of identity with previously proven information. Source: Rec. ITU-T X.1252.

36. "Level of assurance" means a designation of the degree of confidence in the identification and authentication processes — i.e., (a) the degree of confidence in the vetting process used to establish the identity of an entity to whom a credential was issued, and (b) the degree of confidence that the entity using the credential is the entity to whom the credential was issued. The assurance reflects the reliability of methods, processes and technologies used. Some level of assurance schemes define levels of assurance by number, i.e., Levels 1 to 4, where Level 1 is the lowest assurance level, and Level 4 is the highest. Other schemes designate assurance levels as "low," "substantial" and "high". Synonyms: assurance level; identity assurance; trust level.

37. "Multifactor authentication" means authentication with at least two independent authentication factors. Note: authentication factors are divided into four categories: (a) something an entity has (e.g., device signature, passport, hardware device containing a credential, private key); (b) something an entity knows (e.g., password, PIN); (c) something an entity is (e.g., biometric characteristic); or (d) something an entity typically does (e.g., behaviour pattern). Source: ISO/IEC 19790; Rec. ITU-T X.1254

38. "Multi-party identity system" means an identity system, also referred to as an identity federation, in which a subject can use an identity credential issued by any one of several identity providers to authenticate multiple unrelated relying parties; An identity system that allows the use of identity credentials issued, and identity information asserted, by one or more identity providers with multiple relying parties. Source: A/CN.9/WG.IV/WP.120, annex. Synonym: identity federation.

39. "Participant" means any person or legal entity that participates in an identity system or an identity transaction using such system. Participants include subjects, identity providers, attribute providers, credential providers, relying parties, identity system operators, and others. Like participants in a credit card system, participants in an identity system typically agree contractually to a set of system rules (often referred to as a trust framework) applicable to their role.

40. "Proofing" means the verification and validation of information when enrolling new entities into identity systems. Source: Rec. ITU-T X.1252. Synonyms: identity proofing, identification.

41. "Pseudonym" means an identifier whose binding to an entity is not known or is known to only a limited extent, within the context in which it is used. Note: a pseudonym can be used to avoid or reduce privacy risks associated with the use of identifier bindings which may reveal the identity of the entity. Source: Rec. ITU-T X.1252.

42. "Registration" means a process in which an entity requests and is assigned privileges to use a service or resource. Note: enrolment is a pre-requisite to registration. Enrolment and registration functions may be combined or separate. Source: Rec. ITU-T X.1252.

43. "Registration authority" means an entity that provides enrolment and/or identity proofing services in the context of a federated (i.e., multi-party) identity system, usually for an identity provider.

44. "Relying party" means (a) the person or legal entity that relies on an identity credential or identity assertion to make a decision as to what action to take in a given application

context, such as to process a transaction or grant access to information or a system. Source: A/CN.9/WG.IV/WP.120, annex; (b) an entity that relies on an identity representation or claim by a requesting/asserting entity within some request context. Source: Rec. ITU-T X.1252; (c) a natural or legal person that relies upon an electronic identification or a trust service. Source: Regulation (EU) No. 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC ("eIDAS"), article 3(6).

45. "Repository" means an interface that accepts deposits of digital entities, enables their retention, and provides secure access to the digital entities via their identifiers. Source: Rec. ITU-T X.1255.

46. "Role" means a type (or category) of participant in an identity system, such as a subject, identity provider, credential provider, relying party, etc. A participant may have multiple roles. For example, with respect to the identification of its employees, an employer may function as both an identity provider and a relying party.

47. "Self-asserted identity" means an identity that an entity declares to be its own. Source: Rec. ITU-T X.1252.

48. "Subject" means the person, legal entity, device, or digital object (i.e., the entity) that is identified in a particular identity credential and that can be authenticated and vouched for by an identity provider. Source: A/CN.9/WG.IV/WP.120, annex. Synonyms: user; data subject.

49. "System rules": see trust framework.

50. "Trust" means the firm belief in the reliability and truth of information or in the ability and disposition of an entity to act appropriately, within a specified context. Source: Rec. ITU-T X.1252.

51. "Trust framework" means (a) the system rules for an identity system consisting of the business, technical, and legal rules that govern the participation in and operation of a specific identity system. They are typically privately developed (e.g., by the identity system operator of a specific identity system), and made binding and enforceable on the participants via contract. Source: A/CN.9/WG.IV/WP.120, annex; (b) a set of requirements and enforcement mechanisms for parties exchanging identity information. Source: Rec. ITU-T X.1254; (c) an IdM system where a set of verifiable commitments made by each of the various parties in a transaction to their counter parties, and these commitments necessarily include: (i) controls to help ensure commitments are met and (ii) remedies for failure to meet such commitments. Source: Rec. ITU-T X.1255. Synonyms: system rules; operating rules; scheme rules.

52. "Trust framework provider" means the entity or organization that creates or adopts the system rules and associated contractual structure for a specific identity system. The trust framework provider may also certify the participants that are in compliance with those system rules. For example, credit and debit card issuers may fulfill a similar role in the credit and debit card world; they set forth the system rules and enforce compliance.

53. "Trusted third party" means (a) an authority or its agent, trusted by other actors with respect to other activities (e.g., security related activities). Source: Rec. ITU-T X.1254; (b) an entity accepted by all parties to a transaction as an impartial and trustworthy intermediary to facilitate interactions between and among the parties.

54. "User" means (a) a subject of a credential; a consumer of the services offered by a relying party; (b) any entity that makes use of a resource, e.g., system, equipment, terminal, process, application, or corporate network. Source: Rec. ITU-T X.1252.

55. "Validation" means the process of verifying and confirming that an identity credential is valid (e.g., that it has not expired or been revoked).

56. "Verification" means (a) the process of checking information by comparing the provided information with previously corroborated information. Source: Rec. ITU-T X.1254; (b) the process or instance of establishing the authenticity of something. Note: verification of (identity) information may encompass examination with respect to validity, correct source, original, (unaltered), correctness, binding to the entity, etc. Source: Rec. ITU-T X.1252.

B. Definitions relevant to trust services

57. The following definitions may be particularly relevant in discussions on the legal aspects of trust services. However, a number of the definitions listed as relevant to the discussions on legal aspects of identity management may also be relevant for the discussions on the legal aspects of trust services (see above, para. 6).

58. "Certification service provider" means a person that issues certificates and may provide other services related to electronic signatures; Source: UNCITRAL Model Law on Electronic Signatures, article 2(e).[3]

59. "Electronic registered delivery service" means a service that makes it possible to transmit data between third parties by electronic means and provides evidence relating to the handling of the transmitted data, including proof of sending and receiving the data, and that protects transmitted data against the risk of loss, theft, damage or any unauthorized alterations. Source: eIDAS, article 3(36).

60. "Electronic seal" means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity. Source: eIDAS, article 3(25).

61. "Electronic signature" means (a) data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign. Source: eIDAS, article 3(10); (b) data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message. Source: UNCITRAL Model Law on Electronic Signatures, article 2(a). Note: article 9(3)(a) of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)[4] refers to indication of the signatory's intention in respect of the information contained in the electronic communication.

62. "Electronic time stamp" means data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time. Source: eIDAS, article 3(33).

63. "Relying party" means a person that may act on the basis of a certificate or an electronic signature. Source: UNCITRAL Model Law on Electronic Signatures, article 2(f).

64. "Trust service" means an electronic service normally provided for remuneration which consists of: (a) the creation, verification, and validation of electronic signatures, electronic seals or electronic time stamps, electronic registered delivery services and certificates related to those services, or (b) the creation, verification and validation of certificates for website authentication; or (c) the preservation of electronic signatures, seals or certificates related to those services. Source: eIDAS, article 3(16).

65. "Trust service provider" means a natural or a legal person who provides one or more trust services [either as a qualified or as a non-qualified trust service provider]. Source: eIDAS, article 3(19).

66. "Time stamp" means a reliable time variant parameter which denotes a point in time with respect to a common reference. Source: Rec. ITU-T X.1254.

67. "Validation" means the process of verifying and confirming that an electronic signature or a seal is valid. Source: eIDAS, article 3(41).

[3] United Nations publication, Sales No. E.02.V.8.
[4] General Assembly resolution 60/21, annex.

G. Note by the Secretariat on work in the field of electronic commerce: legal issues relating to electronic identity management and trust services: proposal by Austria, Belgium, France, Italy, the United Kingdom and the European Union

(A/CN.9/WG.IV/WP.144)

[Original: English/French]

The governments of Belgium, France, Italy and the United Kingdom, from the Austrian delegation and the European Union submitted to the Secretariat a paper for consideration at the fifty-fifth session of the Working Group. The text received by the Secretariat is reproduced as an annex to this note.

Annex

Proposal by Austria, Belgium, France, Italy, the United Kingdom and the European Union

Date: 26 January 2017

Proposal from the Governments of Belgium, France, Italy and the United Kingdom of Great-Britain and Northern-Ireland, from the Austrian delegation and the European Union : work in the field of electronic commerce — legal issues relating to electronic identity management and trust services.

I. Introduction

1. Pursuant to the mandate of the 44th Session of the Commission in 2011, the Working Group IV on electronic commerce (hereinafter Working Group IV) undertook work in the field of electronic transferable records.[1] During the 49th session of the Commission, Working Group IV reported on its work undertaken during its 52nd and 53rd sessions. Work on the provisions of the draft Model Law on Electronic Transferable records is being finalised.

2. At its 44th session in 2011, the Commission also noted that some support was also expressed for dealing with legal issues relating to identity management (IdM) as a possible topic in the mandate of Working Group IV.[2] At its 48th session in 2015, the Commission instructed the Secretariat to conduct preparatory work on IdM 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.[3]

3. Further to this request, at its forty-ninth session, the Secretariat submitted to the Commission a note on the legal issues related to IdM and trust services, which

[1] Report of the United Nations Commission on International Trade Law, forty-fourth session (27 June-8 July 2011) - A/66/17, para. 238.
[2] Ibid., para. 236.
[3] Report of the United Nations Commission on International Trade Law on the work of its forty-eighth session (2015), UN document A /70/17, para. 358.

provided a summary of the discussions held at the colloquium and at other relevant meetings on this subject.[4]

4. The Commission, at its forty-ninth session in 2016, reaffirmed the mandate given to Working Group IV to complete the preparation of the draft Model Law on Electronic Transferable Records and the accompanying explanatory note, and to consider the topics of IdM and trust services as well as of cloud computing upon completion of work on the draft Model Law.[5]

5. In accordance with the reaffirmation of this mandate, during the 54th session of Working Group IV the draft model law on electronic transferable records was finalised and work on IdM and trust services started. Following fruitful discussions on the latter subject,[6] Working Group IV decided that the following session would be devoted in particular to clarifying the objectives of the project on IdM and trust services, to stressing its scope, identifying the applicable general principles, listing the concepts to be defined and making a first draft definition of these.[7]

6. In this context, this proposal aims to provide the Working Group IV with a contribution on the above mentioned elements with a view to supporting the discussions during the 55th session of this Group, while remaining open to additional proposals aimed at fuelling the discussions.

II. Context, scope and objectives of the project

7. The proposed work in the field of IdM and trust services is directly linked to the work carried out by Working Group IV (1) in the past (in particular with reference to the model law on electronic commerce, the model law on Electronic Signatures and the Convention on the Use of Electronic Communications in International Contracts), (2) currently (work on electronic transferable records), and (3) in the future, on other topics that have been discussed, such as cloud computing or mobile payments.

8. De facto, IdM is a fundamental requirement underpinning most of the work that has been (or is being) undertaken by Working Group IV. In addition, many requirements provided for in UNCITRAL texts which are applicable to e-commerce can be facilitated by the use of one or more trust services provided by trust service providers. A “trust service” may include electronic signatures, electronic seals to ensure the origin and integrity of a document, electronic time stamps to provide a document with a specific date, secure communication of a document between parties (electronic registered delivery service), or website authentication.

9. Reliable IdM and the use of reliable trustworthy services have become essential requirements for e-commerce activities because of the increasing importance and sensitivity of online transactions.

10. In many Internet transactions, verifying the identity of a website’s owner is needed to ensure that the website belongs and is effectively managed by the legal person who claims to be behind it. Similarly, it is often important that parties identify themselves when starting interacting online. In addition, the electronic signature of a final agreement may also require identifying the different signatories, to ensure that they have expressed their consent to a content that will maintain its integrity, and stamping the document to provide it with a specific date and time. Finally, in some cases it is important that documents are transmitted to the other party through a secure channel that ensures the date of sending and receiving the document.

11. Identity authentication and trust services contribute significantly to a paperless commerce environment, since the daily operations of public administrations and businesses can be performed faster, more efficiently and at a lower cost. In this

[4] Document A/CN.9/891.
[5] Report of the United Nations Commission on International Trade Law on the work of its forty-ninth session (2016), UN document A/71/17, para. 353.
[6] Report of the 54th session of the Working Group IV on electronic commerce (16 November 2016), A/CN.9/897, para. 107 to 123.
[7] Ibid., para. 120.

context, many entities, both public and private, develop (or would like to develop) economic models that provide, or make use of, IdM and trust services.

12. Today national and regional reflections and initiatives in the field of IdM and/or trust services are numerous and have now reached maturity. While sometimes adopting contradictory approaches, they allow identifying relevant issues and can guide the discussion on devising the appropriate legal frameworks at international level that could be transposed into the existing different legal systems.

13. Work in the field of IdM and trust services aims at:

- Facilitating the development of international trade law and addressing the need to provide economic players with the tools to ensure the legal certainty of their electronic transactions.
- Contributing to harmonising emerging legal aspects of the projects which are currently addressing in silos these questions at national or international level. The objective would be to provide for a general legal framework applicable to both IdM and trust services, including the appropriate provisions to foster international cross-border legal and technical interoperability.
- Raising public administrations' and businesses' awareness — who are not always aware of the legal issues at stake -, with a view to boosting trust in electronic commerce and transactions.
- Completing and providing practical solutions to existing documents produced by UNCITRAL. More specifically, work in this field would aim at drafting legal provisions with a view to making the "abstract" requirements drafted in the above mentioned UNCITRAL texts more "concrete and operational". Businesses would therefore take advantage of clear legal rules to better manage their risk in the context of the international electronic commerce and to ensure the legal certainty of their transactions in a simple and efficient manner.

14. Given the close relationship between the two topics, the work should be focusing from the outset on both IdM and trust services. The definition of the scope of the work and of the concepts should therefore include these two closely related topics. Such an approach does not prevent from working on these topics in a sequential manner at a later stage.

III. Identification of applicable general principles and possible orientations

15. The fundamental principles underpinning UNCITRAL texts should guide the work on IdM and trust services. These include:

- *The principle of party autonomy*. The use of the provided tools should remain optional and fully respect party autonomy. Parties should also remain free to decide the level of assurance/security to be used. Providers should remain free to offer one or more IdM and trust services, and among them to provide one or more levels of assurance/security. To sum up, the set legal rules should be considered as a "legal toolbox" to be put at the disposal of the market players.
- *The principle of neutrality both technological and of economic models*. Providing a legal framework should in no way hamper innovation and business opportunities by introducing strict rules that would favour a technical solution or an economic model over another.
- *The principle of non-discrimination*. The legal effect and admissibility as evidence in legal proceedings of an electronic identification (eID) or a trust service should not be denied solely on the grounds that such service is in an electronic form or that it does not meet the requirements of the assurance/security levels.
- *The principle of functional equivalence* aiming at ensuring comparable legal functions, whether we act in the physical or in the electronic environment.

16. The issues that should be addressed when drafting the legal provisions, both for IdM and for trust services, are the following:

(a) The definition of different levels of assurance/security on the basis of objective criteria: assurance/security of IdM and trust services is often a critical element. Defining and measuring assurance/security can be fundamental in some cases. What is the assurance/security of an identity service or management system or of a trust service? The absence of objective evidence to judge the actual quality and assurance of a service may be a significant problem for stakeholders, in particular as part of their risk management policy. A flexible model providing for different levels of requirements for IdM and/or trust services and identity and/or trust service providers would respect the diversity of the systems around the world.

(b) Distinct legal effects associated to the level of assurance: The legal effects of electronic identification and authentication as well as those of a number of trust services should be defined. The objective is to determine the legal effects stemming from electronic identification and trust services according to each defined level of assurance. Stakeholders could thus effectively manage their legal risks by opting for the most appropriate level of assurance and legal effect in line with their needs. In order to define these different legal effects, one could, in particular, take account — when appropriate — of the principle of non-discrimination, the principle of assimilation, the principle of mutual recognition, particular presumptions and/or mechanisms for reversing the burden of proof. The higher the level of assurance, the more favourable the legal effect would be to the user of the service.

(c) Liability regimes according to the level of assurance: Defining the liability regime of the providers of electronic identification systems and of trust services in order to foster the required clarity and predictability. This regime would vary depending on the provided level of assurance.

17. For the services of IdM in particular, the following guidelines should be followed:

- By applying the principle of the party autonomy, providers of an online service can decide whether to require an electronic identification and authentication to access their service and which level of assurance is required.
- Cross-border mutual recognition of electronic identification means which have an assurance level equal to or higher than the assurance level required for the online access. This principle would be based on the definition of the different assurance levels of electronic identification means. Each level would be characterised by harmonised objective criteria.
- In order to determine which systems for IdM should be taken into account in our work, the purpose/aim of the use of the electronic identification means should first be identified, i.e. whether this is intended to be used -fully or partially — for commercial transactions or not, and later to understand who has issued the electronic identification means (whether it is the public or private sector or both). Since the purpose of using eID means may be commercial, all eID means — even those fully or partially issued by the public sector — should be considered in our work.
- Our work should first focus on identification of natural and legal persons, initially leaving out the question of identifying material (e.g. servers, smartphones, terminals ...) or digital objects (software ...). Since we need to establish rules of law, priority should be given to identifying the subject of law (whether natural or legal person) who has **rights and obligations and takes liability** (e.g. a website, a **copyright or a server owner**). Material or digital objects will always be linked to a natural or legal person. The identification of objects is essentially a technical and security issue rather than a legal one.
- eID means of a higher level should at least be attached to person identification data issued/managed by an **authoritative source**.

- For the higher assurance levels, an obligation should be established for the providers of eID means to notify any security breach to their system and, where necessary, to suspend it. The provider should notify in accordance with the provisions laid down in national law and, given the cross-border context, make the information publicly available.

- A presumption could be established by which objective criteria defining the assurance levels as well as the legal requirements should be respected if the provider is in line with the technical standards defined by an international authority.

18. For IdM, three assurance levels could be set: (a) low ; (B) substantial; And (C) high.

- Assurance levels would be based on technical specifications, standards and procedures related thereto.

- A cooperation mechanism and an interoperability framework could be foreseen to define the criteria underpinning the assurance levels as well as to exchange the information related to eID means and their assurance levels.

- A principle of cross-border mutual recognition would be envisaged for those eID means having an equivalent (or higher) assurance level (from the substantial level).

19. For trust services, the following guidelines should be followed:

- with a view to defining and harmonising security levels of trust services, there should be at least two levels:

  1. non-qualified trust services;

  2. Qualified trust services.

- The legal effects differ according to the security level of the trust service:

  1. If the trust service is NOT qualified: the legal effect is limited to the non-discrimination clause.

  2. If the trust service is QUALIFIED: the legal effect would include assimilation, presumption, reversal of the burden of proof.

- A principle of cross-border mutual recognition for trust services having an equivalent security level would be established.

- A general requirement on security, which is commensurate to the degree of risk, would be set for all providers (qualified or not).

- Specific requirements for qualified trust service providers and for the qualified trust services they provide would be provided for to ensure a high level of reliability/security.

- Liability regime would depend on whether the trust service provider is qualified or not.

- A requirement could be established for all trust service providers (at least qualified) to notify any breach of security to their system and, where necessary, to suspend it. The provider should notify in accordance with the provisions laid down in national law and, given the cross-border context, make the information publicly available.

- A presumption could be established by which objective criteria defining the security levels as well as the legal requirements should be respected if the provider is in line with the technical standards defined by an international authority.

IV. Identification of concepts and proposed draft definitions

20. In view of the forthcoming discussions on IdM and trust services, the following (non-exhaustive) list of concepts and definitions is proposed:

- ***Electronic identification:*** means the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person;
- ***Electronic identification means:*** means a material and/or immaterial unit containing person identification data and which is used for authentication for an online service;
- ***Person identification data*** means a set of data enabling the identity of a natural or legal person, or a natural person representing a legal person to be established;
- ***Electronic identification scheme*** means a system for electronic identification under which electronic identification means are issued to natural or legal persons, or natural persons representing legal persons;
- ***Authentication*** means an electronic process that enables the electronic identification of a natural or legal person, or the origin and integrity of data in electronic form to be confirmed;
- ***Authoritative source*** means any source irrespective of its form that can be relied upon to provide accurate data, information and/or evidence that can be used to prove identity;
- ***Trust service*** means an electronic service (normally provided for remuneration) which consists of:
  1. the creation, verification, and validation of electronic signatures, electronic seals or electronic time stamps, electronic registered delivery services and certificates related to those services, or
  2. the creation, verification and validation of certificates for website authentication; or
  3. the preservation of electronic signatures, seals or certificates related to those services;
- ***Qualified trust service*** means a trust service that meets the applicable requirements laid down in this text [Convention, Model Law];
- ***Electronic signature*** means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign;
- ***Signatory*** means a natural person who creates an electronic signature;
- ***Electronic seal*** means data in electronic form, which is attached to or logically associated with other data in electronic form to ensure the latter's origin and integrity;
- ***Electronic time stamp*** means data in electronic form which binds other data in electronic form to a particular time establishing evidence that the latter data existed at that time;
- ***Electronic registered delivery service*** means a service that makes it possible to transmit data between third parties by electronic means and provides evidence relating to the handling of the transmitted data, including proof of sending and receiving the data, and that protects transmitted data against the risk of loss, theft, damage or any unauthorised alterations;
- ***Certificate for website authentication*** means an attestation that makes it possible to authenticate a website and links the website to the natural or legal person to whom the certificate is issued;

- ***Electronic document*** means any content stored in electronic form, in particular text or sound, visual or audiovisual recording;
- ***Validation*** means the process of verifying and confirming that an electronic signature or a seal is valid;
- ***Relying party*** means a natural or legal person that relies upon an electronic identification or a trust service.

V. Linkages with practice

In order to better understand the scope of the work, concepts and links with practice, concrete projects set up in different countries or regions may be presented during the session(s) of Working Group IV. A presentation of CEF eID DSI and of the eIDAS node could be provided in order to illustrate how this works and is being implemented by the EU Member States.

H. Note by the Secretariat on legal issues related to identity management and trust services: proposal by the United States of America

(A/CN.9/WG.IV/WP.145)

[Original: English]

The United States of America submitted to the Secretariat a paper for consideration at the fifty-fifth session of the Working Group. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

I. Introduction

At its 54th session, Working Group IV (Electronic Commerce) began its discussions on the topic of identity management (IdM) and trust services. The tentative initial conclusions of the Working Group were as follows:

> 118. After discussion, the Working Group agreed that its future work on IdM and trust services should be limited to the use of IdM systems for commercial purposes and that it should not take into account the private or public nature of the IdM services provider.
>
> 119. The Working Group also agreed that work on IdM could take place on a priority basis. It further agreed that focus should be placed on multi-party identity systems and on natural and legal persons, without excluding consideration of two-party identity systems and of physical and digital objects when appropriate.
>
> 120. In addition, it was agreed that the Working Group should continue its work by further clarifying the goals of the project, specifying its scope, identifying applicable general principles and drafting necessary definitions.

(A/CN.9/897 at paras. 118-120).

To help focus the discussion for the 55th session of the Working Group and thereafter, the delegation of the United States of America has prepared this paper in an attempt to provide an outline of issues for the Working Group to consider. While there are undoubtedly many other issues that the Working Group will need to consider, the following initial list can hopefully be used as a starting point to guide initial discussions and to help focus the efforts of the Working Group. It is our hope the discussion of these issues, and other issues that may be identified by the Working Group, may provide direction to the Secretariat for the preparation of a Working Paper on IdM.

We understand that experts have engaged in an informal discussion of relevant terminology during the intersessional period. Although we believe that it will ultimately be necessary to carefully consider the wording of the definitions of the terminology to be used in this project, at this initial stage we recommend that the Working Group consider using initial definitions simply as the basis for facilitating its discussion. We recognize, however, that agreement on more detailed legal and technical definitions may ultimately be required.

II. Project Goals and Objectives

As a starting point, the Working Group may want to give consideration to the overall goals and objectives for the project. In light of the initial decision to focus on the use

of IdM systems for commercial purposes, the Working Group may want to consider which of the following goals and objectives might be appropriate for this project:

- Promote the development of a private sector identity ecosystem;
- Identify and remove legal barriers to commercial identity transactions;
- Remove ambiguities regarding the applicability of existing law to commercial identity transactions;
- Encourage the commercial use of and reliance on third party digital identity credentials;
- Facilitate the trust needed for commercial online identity transactions;
- Assist private parties by providing a basis for deciding whether to trust digital identity information in commercial transactions;
- Identify and remove cross-border obstacles to e-authentication;
- Facilitate cross-border recognition of digital identity information; and
- Foster confidence in electronic commerce.

III. Nature of the Proposed WG IV Work Product

It might be useful to begin consideration of the type of product the Working Group would like to develop in the field of commercial identity management.

IV. Governing Principles

Regardless of the ultimate form of the work product to be produced by the Working Group, there are several general principles that the Working Group may want to consider, and where appropriate adopt, to guide its work with respect to IdM. As with the Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts, such general principles can be used to guide the Working Group in its deliberations. Moreover, governing principles can be useful to help clarify the scope of work. Possible governing principles the Working Group may want to consider include the following:

A. Source of Legal Duty to Identify

As a starting point, the Working Group may want to consider whether any IdM legislation should contain obligations to identify a party in a commercial transaction independent of those that apply as a result of other legislation. If IdM legislation does not contain any obligations to identify a party, legal requirements to identify a party in a commercial transaction would be left to other existing laws such as laws governing notarization, “know your customer” requirements, anti-money laundering laws, or laws governing access to personal data. This was the approach the Working Group took with respect to electronic signatures when it developed the Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts.

B. Party Autonomy

Because IdM systems will typically be governed by contract-based system rules agreed to by the participants in such systems, it may be important to consider whether, and the extent to which, any law governing IdM transactions should recognize and defer to such system rules.

Thus, the Working Group may want to consider whether the principle of party autonomy should apply to commercial identity systems to allow the parties to an

identity system to vary by agreement the provisions of any legal rule, or of certain legal rules.

C. Technology Neutrality

Many different types of identity systems may be developed and implemented for use in commercial transactions. Such systems may use a wide variety of technologies. These may include simple usernames and passwords, more complex systems based on the PKI x.509 standard or other standards such as SAML or OpenID Connect. Additionally, systems are currently being developed using new technologies, such as Blockchain.

Thus, the Working Group may want to consider whether any work product relating to IdM should make clear that any IdM rules should not require the use of any particular technology.

The Working Group may want to further consider how UNCITRAL might best address the existence and use of multiple commercial identity systems.

Legislation other than that specific to IdM may, of course, require that parties use identity systems that meet certain requirements. And parties themselves may insist that the persons and entities with which they do business use a particular identity system. For example, a commercial entity could restrict access to its services to users that use one or more specific identity systems of which it is a member.

D. System Model Neutrality

In addition to variations among technologies deployed, commercial identity systems are currently the subject of a great deal of experimentation with respect to organizational and business structures and approaches deployed. We can probably expect to see quite a wide variation among identity system models in the future, even if they use the same underlying technology. These include broker or hub type arrangements, single identity provider models, single relying party models, organizational models, and many other different approaches.

Accordingly, the Working Group may want to consider whether it should adopt as a principle the concept of system model neutrality -- that is, a recognition that any work product developed should not be written in a way that assumes or requires the use of any particular identity system business, organizational, or structural model, and that can readily accommodate future changes in identity system approach, structure, and business model.

E. Non-Discrimination

The Working Group may also want to consider the applicability of the principle of non-discrimination in the context of the use of identity systems for commercial purposes. Under such a principle, for example, the legal effect (e.g., satisfaction of a legal requirement for identification) and admissibility as evidence in legal proceedings of an electronic identification should not be denied solely on the grounds that such identification was made in electronic form.

F. Relationship between Identity Management Law and Privacy Law

Commercial identity transactions involving the issuance or use of an identity credential will frequently involve some personal data. In such cases, privacy of such personal data may be important.

Privacy laws usually address the protection of personal data in accord with relevant public policy. Accordingly, the Working Group may want to consider the relationship between these laws and IdM systems.

G. Relationship between Identity Management Law and Data Security Law

Data security is critical to the proper functioning and trustworthiness of identity transactions, both from the perspective of protecting the confidentiality of the personal data involved in such transactions and for ensuring the proper functioning and trustworthiness of the credentials communications comprising the transaction itself.

Data protection laws often address the security of personal data in accord with relevant public policy. Similarly, other data security laws may do the same with respect to protecting other aspects of identity transaction communications. Accordingly, the Working Group may want to consider the relationship between these laws and IdM systems.

H. Relationship between Contract-Based System Rules and Other Law

Because IdM systems will typically be governed by contract-based system rules (i.e., trust frameworks) agreed to by the participants in such systems, the Working Group may want to discuss the relationship b5,etween these rules and applicable laws that are not directly related to identity.

V. Substantive Topics

A. Legal Recognition

The Working Group may want to consider the topic of legal recognition of identity information authenticated in a commercial transaction. In this regard, the Working Group may want to address what legal recognition is, what it seeks to achieve, and the requirements to obtain it; who provides legal recognition; the purposes for which legal recognition is provided; the relationship between legal recognition and laws that require some form of identification, such as laws governing notarization, “Know Your Customer,” anti-money laundering, access to personal data; and how, if at all, legal recognition applies to the identity of legal entities, devices, or digital objects.

B. Cross-Border Mutual Recognition.

The concept of mutual recognition is important to facilitate the commercial use of identity credentials, and reliance on those credentials, both across identity systems and across jurisdictional boundaries.

There are numerous issues that the Working Group may want to consider with respect to the subject of mutual recognition. Some of the more obvious issues include addressing: (a) whether there should be a requirement to recognize credentials, (b) if there is requirement to recognize credentials, who should be required to recognize the credentials, (c) if there is a requirement to recognize credentials, which party’s credentials should be recognized, (d) what is the purpose of such mutual recognition, (e) what exactly does “mutual recognition” mean, (f) what characteristics (e.g., levels of assurance) should be present for mutual recognition, (g) should there be limits on when mutual recognition applies, and (h) should mutual recognition apply to identity of legal entities, devices, or digital objects?

C. Attribution of Identity Information to a Subject

Attribution of identity information to a subject (for inclusion in an identity credential) is often a critical element of identity management systems. A fundamental question

governing attribution is when and under what circumstances is identity data in a credential to be attributed to a specific subject.

The Working Group may want to consider this issue from two perspectives. First, how should an identity provider ensure that the information about a subject that it includes in an identity credential does in fact describe the subject named in the credential? Second, when an identity credential is used, how can a relying party ensure that the information in the credential relates to the subject presenting the credential?

D. Reliance / Attribution of Action, Data Message, or Signature to a Subject

A key question for all participants in an identity system is when, and under what circumstances, reliance on an identity credential by a party is appropriate and reasonable. The reasonableness of reliance by a party can affect a variety of issues, including when an erroneous identity credential is relied upon.

For example, in the context of electronic signatures, this issue was addressed in Article 13 of the Model Law on Electronic Commerce.

E. Liability / Risk Allocation

Issues of liability and risk allocation are frequently cited as major barriers to the implementation of commercial identity systems. Issues include (a) concerns by identity providers and other participants in identity systems that the liability risk allocated to them under existing law is inappropriate or simply too onerous to allow them to proceed, as well as (b) concerns by participants in identity systems that the law is too vague, ambiguous or uncertain to allow them to properly assess their risks of participating.

The Working Group may want to consider whether it should address the issue of liability, and if so, for which identity system roles, and how. Examples of laws which address liability in the context of IdM systems include the European Union eIDAS regulation and the Virginia Electronic Identity Management Act.

F. Transparency

The processes, procedures, and technology used by an identity provider to issue and validate identity credentials can have a significant impact on the trustworthiness of any identity transaction using those credentials. Accordingly, it may be important that other participants in an identity system understand how those processes, procedures, and technology are implemented, so that they can make their own assessment as to the reliability and trustworthiness of the resulting identity transactions. To that end, the Working Group may want to consider whether there is an appropriate level of transparency on the part of certain participants within an identity system. Likewise, in the event of a breach or compromise in any of the processes, procedures, technology, databases, or identity credentials maintained by a party in the context of an identity system, the Working Group may want to consider whether information regarding such compromise should be disclosed.

In some cases, transparency requirements have also been used as a substitute for regulation mandating certain processes, procedures, or technology. An approach based on transparency allows parties to make their own decisions regarding trustworthiness based on more complete information.

G. Trustworthiness/Levels of Assurance

Many identity systems define so-called “levels of assurance” to help the participants to address concerns regarding the trustworthiness of identity credentials and identity

transactions. Several levels of assurance schemes exist, and they often involve differing gradations of assurance. For example, the EU defines three levels of assurance in its eIDAS Regulation (designated as “low,” “high,” and “substantial”), whereas four levels of assurance are utilized in the United States and elsewhere.

The Working Group may want to consider how best to facilitate trust by the participants in an identity system. While the concept of levels of assurance is commonly used, the Working Group may also want to consider whether other mechanisms, such as mandated transparency, third-party certification, or other approaches can be used to help facilitate trust.

I. Note by the Secretariat on legal issues related to identity management and trust services: proposal by the United Kingdom of Great Britain and Northern Ireland

(A/CN.9/WG.IV/WP.146)

[Original: English]

The United Kingdom of Great Britain and Northern Ireland submitted to the Secretariat a paper for consideration at the fifty-fifth session of the Working Group. The paper is reproduced as an annex to this note in the form in which it was received by the Secretariat.

Annex

Outcome Based Standards and International Interoperability

Enabling International Interoperability

Over the past decade the necessity of electronic identity (eID) to underpin an expanding digital economy has become apparent. Many countries have brought their residents and businesses online through the use of trusted electronic ID, enabling them to transact with their government and with private sector organizations, promptly, efficiently and securely.

While this has been a successful catalyst within countries, eID can only support substantial and sustained economic growth for a digital economy when that eID can operate across borders and jurisdictions. For this to be a reality those countries and jurisdictions need to be able to understand and trust the issuance and security of the issuing country's eID.

It is unlikely that all countries will adopt similar or the same eID scheme. Therefore the only realistic solution is to accept another country's eID on the basis of mutual recognition of equivalent schemes.

Mutual Recognition

Mutual recognition of standards, eID schemes and trust frameworks makes it possible for a user to prove their identity anywhere in the world; users can securely assert their identity to digital services; and an international identity ecosystem can give users and services confidence.

However, for this to be effective there has to be well understood internationally recognized standards by which an eID scheme can be measured. Countries can then express the capabilities of their schemes against such standards, and consumers of the eID issued by that country have assurance about its quality and trust.

Existing Internationally Recognized eID Standards

Many countries already have functioning eID schemes and standards bodies and supra-national organizations have already created a number of standardization frameworks in order to enable mutual recognition. The most prominent frameworks in this area are:

- ISO/IEC 29115 Entity Authentication Assurance Framework
- EU regulation N°910/2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market
- Draft ISO/IEC 29003 Identity Proofing
- NIST SP 800-63-3 Digital Identity Guidelines

Countries can express their capabilities in terms of these frameworks, including through independent certification. To accelerate the growth of the digital economy the UNCITRAL Working Group should look at how to create a structure to determine equivalence between existing international standards, eID schemes and trust frameworks.

There is ongoing bilateral work in this area between the UK, USA and Canada, as well as between some EU Member States as a precursor to notification under EU regulation N°910/2014. Some learnings could be taken from these activities to help inform what further action could be taken at a UNCITRAL working group level.

An Outcome Based Standardization Approach

An outcome based standard clearly describes the outcome that is going to be measured without favouring any specific technology or product. By taking an outcome based approach it is possible to react to new threats, take advantage of new technologies and reduce costs without impacting quality. These changes can be applied in a timely fashion yet remain compliant because the outcome based standard would not require amendment.

An outcome based approach makes it easier to reach a common agreement on the assurance required and to be technology neutral. If the assurance level specifies exactly the solution to be implemented, this creates a "lock-in" to a certain process and/or technology which discourages innovation, prevents evolution and alienates other implementations that deliver the same levels of assurance.

Outcome based assurance can ensure that potential providers have scope to design and develop different methods to achieve the same objective and encourage those providers to compete on cost and capability. Providers are then incentivized to maintain their product, replacing and improving this over time in order to maintain the capabilities and reduce cost. Outcome based levels are not a new concept in European law. To give just one example, by requiring "*a 40% offset deformable barrier test conducted at 56km/h*", EU vehicle safety legislation allows manufacturers to innovate with new physical materials/alloys to change or redesign their vehicle as long as the resulting vehicle continues to meet the frontal impact outcome based standard.

Example of Mutual Recognition for an Outcome Based Assurance Standard for Electronic Identity — eIDAS

EU regulation N°910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS) created a uniform understanding of the assurance and trust frameworks that are to accepted at an intra member state level. The Regulation sets out several levels of assurance (low, substantial and high) for electronic identity that define the outcomes that a national eID scheme must be able to demonstrate in order to be considered equivalent.

The principal is that the outcome based approach sets out the objective to be achieved for reaching the different LoAs for each of the different elements of the electronic identification scheme. The more rigorous the objective, controls or process, the higher the level of confidence and therefore the higher the LoA. How the objective is achieved is determined by the scheme operator within the member state. It does not require that a member state alter or harmonize their existing national eID schemes, it is a way to measure the equivalence of a scheme against a set benchmark.

Furthermore, in addition to the substantial work on eIDAS, the U.K. is presently running initial standards mapping exercises with the US and Canada; and scoping similar themed work through its membership of the Digital 5 group of nations Estonia, Israel, New Zealand, South Korea and the U.K.

Summary

The U.K. sees international interoperability of eID as a key driver for the growth of digital economies around the world, which would support sustainable and secure

economic growth globally in the future. We support further work being carried out in this area by UNCITRAL, whilst emphasizing the need to ensure that international interoperability, mutual recognition and an outcome based approach are considered, and that any output is aligned to existing internationally recognized eID standards.

J. Note by the Secretariat on a draft Model Law on Electronic Transferable Records with explanatory notes

(A/CN.9/920)

[Original: English]

Contents

Draft Model Law on Electronic Transferable Records

CHAPTER I. GENERAL PROVISIONS

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 transferable document or instrument including any rule of law applicable to consumer protection.

3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to […].[1]

Article 2. Definitions

For the purposes of this Law:

"*Electronic record*" means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;

[1] The enacting jurisdiction may consider including a reference to: (a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of 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); and (c) electronic transferable records existing only in electronic form.

"*Electronic transferable record*" is an electronic record that complies with the requirements of article 10;

"*Transferable document or instrument*" means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

Article 3. Interpretation

1. This Law is derived from a model law 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.

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.

Article 4. Party autonomy and privity of contract

1. The parties may derogate from or vary by agreement the following provisions of this Law: […].[2]

2. Such an agreement does not affect the rights of any person that is not a party to that agreement.

Article 5. 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.

Article 6. 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 transferable document or instrument.

Article 7. Legal recognition of an electronic transferable record

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

2. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

3. The consent of a person to use an electronic transferable record may be inferred from the person's conduct.

CHAPTER II. PROVISIONS ON FUNCTIONAL EQUIVALENCE

Article 8. Writing

Where the law requires that information should be in 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.

Article 9. Signature

[2] The enacting jurisdiction may consider which provisions of the Model Law, if any, the parties may derogate from or vary by agreement.

Where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record.

Article 10. Requirements for the use of an electronic transferable record

1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in a transferable document or instrument; and

(b) A reliable method is used:

(i) To identify that electronic record as the electronic transferable record;

(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) To retain the integrity of the electronic transferable record.

2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises 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.

Article 11. Control

1. Where the law requires the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

(b) To identify that person as the person in control.

2. Where the law requires or permits transfer of possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.

CHAPTER III. USE OF ELECTRONIC TRANSFERABLE RECORDS

Article 12. General reliability standard

For the purposes of articles 9, 10, 11, 13, 17, 18, and 19, the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in light of all relevant circumstances, which may include:

(i) Any operational rules relevant to the assessment of reliability;

(ii) The assurance of data integrity;

(iii) The ability to prevent unauthorized access to and use of the system;

(iv) The security of hardware and software;

(v) The regularity and extent of audit by an independent body;

(vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;

(vii) Any applicable industry standard; or

(b) Proven in fact to have fulfilled the function by itself or together with further evidence.

Article 13. 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 transferable document or instrument, a reliable method shall be used to indicate that time or place with respect to an electronic transferable record.

Article 14. Determination of place of business

1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country.

Article 15. Issuance of multiple originals

Where the law permits the issuance of more than one original of a transferable document or instrument, this may be achieved with respect to electronic transferable records by the issuance of multiple electronic transferable records.

Article 16. Endorsement

Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.

Article 17. Amendment

Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such.

Article 18. Replacement of a transferable document or instrument with an electronic transferable record

1. An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

Article 19. Replacement of an electronic transferable record with a transferable document or instrument

1. A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the transferable document or instrument.

3. Upon issuance of the transferable document or instrument in accordance with paragraphs 1 and 2, the electronic transferable record shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

CHAPTER IV. CROSS-BORDER RECOGNITION OF ELECTRONIC TRANSFERABLE RECORDS

Article 20. 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 abroad.

2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument.

Explanatory Notes to the Model Law on Electronic Transferable Records

I. Introduction [*to be inserted*]

II. Article-by-article commentary

Chapter I. General provisions

Article 1. Scope of application

Paragraph 1

1. The Model Law provides for generic rules that may apply to various types of electronic transferable records based on the principle of technological neutrality and a functional equivalence approach. The principle of technological neutrality entails adopting a system-neutral approach, enabling the use of models based on registry, token, distributed ledger and other technology.

2. Article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) [1] (the "Electronic Communications Convention") provided a starting point for defining the scope of application of the Model Law. That provision excludes from the scope of application of the Electronic Communications Convention "bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money". That exclusion is due to the fact that at the time of the adoption of the Convention "finding a solution for this problem [of the legal treatment of electronic transferable records] required a combination of legal, technological and business solutions, which had not yet been fully developed and tested".[2]

3. The Model Law focuses on the transferability of the record and not on its negotiability on the understanding that negotiability relates to the underlying rights of the holder of the instrument, which fall under substantive law.

4. Certain documents or instruments, which are generally transferable, but whose transferability is limited due to other agreements, do not fall under the definition of "transferable document or instrument" contained in the Model Law (see below, para. 19). The Model Law would therefore not apply to those documents or instruments. However, that conclusion should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system since such prohibition is likely to result in unnecessary multiplication of systems and increase of costs.

Paragraph 2

5. Paragraph 2 sets forth the general principle that the Model Law does not affect substantive law, including rules of private international law, applicable to transferable documents or instruments. Hence, the same substantive law applies to a transferable document or instrument and to the electronic transferable record containing the same information as that transferable document or instrument. The principle applies to each step of the life cycle of an electronic transferable record.

6. One consequence of the rule contained in paragraph 2 is that the Model Law is not intended to be used to create electronic transferable records that do not have an equivalent transferable document or instrument. Allowing such creation by party

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[1] General Assembly resolution 60/21, annex.

[2] United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), Explanatory Note, United Nations Publication Sales No. E.07.V.2, para. 81.

autonomy would circumvent the principle of *numerus clausus* of transferable documents or instruments, where that principle is applicable (see para. 33 below).

7. During the preparation of the Model Law, UNCITRAL agreed that certain issues related to electronic transferable records did not require a dedicated provision, since those issues were matters of substantive law. Such matters include the requirements and legal effects of:

(a) The definition of "performance of an obligation";

(b) The issuance of an electronic transferable record to bearer;

(c) The change of the modalities for circulation of an electronic transferable record issued to bearer in an electronic transferable record to the order of a named person and the reverse case ("blank endorsement");

(d) The reissuance of an electronic transferable record (see also below, paras. 155 and 159);

(e) Division and consolidation of electronic transferable records; and

(f) The use of an electronic transferable record, including as collateral for security rights purposes (see below, para. 9).

8. The explicit reference to consumer protection law aims at highlighting the interaction between that law and the Model Law and represents an application of the general principle that the Model Law does not affect the substantive law applicable to transferable documents or instruments.

Paragraph 3

9. Paragraph 3 clarifies that the Model Law does not apply to securities and other investment instruments. The term "investment instrument" is understood to include derivative instruments, money market instruments and any other financial product available for investment. The term "securities" does not refer to the use of electronic transferable records as collateral and therefore the Model Law does not prevent the use of electronic transferable records for security rights purposes.

10. The purpose of paragraph 3 is to permit the exclusion of certain documents or instruments from the scope of the Model Law. To that end, paragraph 3 includes an open-ended exclusion list that permits application of the Model Law according to the needs of each enacting jurisdiction, thus providing both flexibility and clarity on the scope of application of the Model Law.

11. The footnote to paragraph 3 highlights three possible types of exclusions and does not prevent enacting jurisdictions from adding other types of exclusions according to their needs:

(a) Certain instruments or documents, such as letters of credit, which may be considered transferable documents or instruments in some jurisdictions but not in others. In that respect, it should be noted that national legislation does not define transferable documents and instruments in a uniform manner;

(b) Documents or instruments falling under the scope of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and of the Convention Providing a Uniform Law for Cheques (Geneva, 1931) (the "Geneva Conventions") in order to avoid possible conflicts between the Geneva Conventions and the Model Law, regardless of whether the Geneva Conventions are in force or not in the jurisdiction enacting the Model Law (see below, paras. 12-15);

(c) Electronic transferable records that exist only in an electronic environment. Such exclusion could be useful in jurisdictions allowing for the use of both electronic transferable records that are functional equivalent of transferable documents or instruments and of electronic transferable records that exist only in an electronic environment. In that respect, it should be noted that a provision allowing for the application of the Model Law to purely electronic transferable records on a residual basis, so that in case of conflict the Model Law would not prevail over the

law applicable to such electronic transferable records, was not inserted in the Model Law due to concerns on the relationship between the general principles contained in the Model Law and the general principles contained in laws of a different nature.

The Geneva Conventions

12. During the preparation of the Model Law, different views have been expressed on the interaction between the Model Law and the Geneva Conventions.

13. One view expressed was that formalism was a fundamental principle underpinning the Geneva Conventions that prevented the use of electronic means and therefore the instruments falling under the scope of those Conventions should always be excluded from the scope of the Model Law. In order to accommodate that view, the Model Law allows for exclusion of the documents and instruments falling under the scope of the Geneva Conventions (see above, subpara. 11(b)).

14. Jurisdictions adhering to that view and wishing to enable the use of electronic versions of the documents and instruments falling under the scope of the Geneva Conventions may consider introducing electronic transferable records existing only in an electronic environment, which will neither be legally the documents and instruments falling under the scope of the Geneva Conventions nor fall under the scope of the Model Law.

15. Another view expressed was that the scope of application of the Model Law should include instruments falling under the scope of the Geneva Conventions on the understanding that the Model Law generally aims at overcoming obstacles to the use of electronic means arising from form requirements relating to the use of paper-based transferable documents or instruments.

References

A/CN.9/761, paragraphs 18-25, 28-30; A/CN.9/768, paragraphs 17-24; A/CN.9/797, paragraphs 16-20, 27-28, 65, 109-112; A/CN.9/828, paragraphs 24-30, 81-84; A/CN.9/834, paragraphs 72-73; A/CN.9/863, paragraphs 17-22; A/CN.9/869, paragraphs 19-23.

Article 2. Definitions

16. The definition of "electronic record" builds upon the definition of "data message" contained in the UNCITRAL Model Law on Electronic Commerce (1996)[3] and in the Electronic Communications Convention and aims to clarify that electronic records may, but do not need to, include a set of composite information. It highlights the fact that information may be associated with the electronic transferable record at the time of issuance or at any time before or after (e.g., information related to endorsement). In particular, the generation of metadata does not necessarily take place after the generation of a record, but could also precede it. The composite nature of an electronic transferable record is particularly relevant for the notion of "integrity" contained in article 10, paragraph 2, of the Model Law.

17. Moreover, the definition of "electronic record" allows for the possibility that in certain electronic transferable records management systems data elements may, taken together, provide the information constituting the electronic transferable record, but with no discrete record constituting in itself the electronic transferable record. The word "logically" refers to computer software and not to human logic.

18. The Model Law contains a definition of "electronic transferable record". For comments on the definition of "electronic transferable record" (see below, paras. 68-70).

19. The definition of "transferable document or instrument" focuses on the key functions of transferability and of providing a title to performance. It does not aim at

[3] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication Sales No. E.99.V.4.

affecting the fact that substantive law shall determine the rights of the person in control.

20. Applicable substantive law shall determine which documents or instruments are transferable in the various jurisdictions. An indicative list of transferable documents or instruments, inspired by article 2, paragraph 2, of the Electronic Communications Convention, includes: bills of exchange; cheques; promissory notes; consignment notes; bills of lading; warehouse receipts; insurance certificates; and air waybills.

21. As indicated in the definition of "transferable document or instrument", the words "transferable document or instrument" refer to a transferable document or instrument issued on paper (as opposed to an electronic transferable record) in the Arabic, Chinese, English and Russian language versions of the Model Law. The words "paper-based" are used for linguistic clarity before the words "transferable document or instrument" in the French and Spanish language versions of the Model Law (A/CN.9/863, para. 93).

References

A/CN.9/768, paragraphs 25-34; A/CN.9/797, paragraphs 21-28, 43-45; A/CN.9/828, paragraph 31; A/CN.9/834, paragraphs 25-26, 95-98 and 100; A/CN.9/863, paragraphs 88-102; A/CN.9/869, paragraphs 24-27.

Article 3. Interpretation

International origin and promotion of uniform interpretation

22. Article 3 is intended to draw the attention of courts and other authorities to the fact that domestic enactments of the Model Law should be interpreted with reference to their international origin and the need to promote their uniform interpretation in light of that origin. The uniform interpretation of UNCITRAL texts is a key element to ensure predictability of the law applicable to commercial transactions across borders.

23. Similar wording appears in several UNCITRAL texts, including in article 3 of the UNCITRAL Model Law on Electronic Commerce and article 4 of the UNCITRAL Model Law on Electronic Signatures,[4] and was first introduced in article 7 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).[5] The words "This Law is derived from a model law of international origin" emphasize that the law constitutes an enactment of a model law with international origin and are not contained in other UNCITRAL texts.

24. Article 3, unlike other provisions contained in UNCITRAL texts and dealing with their international origin and uniform interpretation, does not refer to the notion of good faith. That exclusion is due to the fact that the principle of good faith has a specific meaning with respect to transferable documents or instruments, which is distinct from the general principle of good faith in international trade law. The principle of good faith as a general principle of international law could be included in the general principles on which the Model Law is based.

General principles

25. The notion of "general principles" has been used in several UNCITRAL texts. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)[6] is the provision containing that notion that has been most interpreted by case law.

26. The general principles of the law governing electronic communications, namely the principles of non-discrimination against electronic communications, technological neutrality and functional equivalence that have already been identified

[4] UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication Sales No. E.02.V.8.
[5] United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3.
[6] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

and formulated in other UNCITRAL texts, are the fundamental principles underlying the Model Law.

27. The clarification of the exact content and operation of the notion of general principles referred to in paragraph 2 may take place progressively in light of the increasing level of use, application and interpretation of the Model Law (for the principle of good faith, see above, para. 24). Such progressive clarification provides flexibility in the interpretation of the Model Law useful to ensure its ability to accommodate evolving commercial practices and business needs.

References

A/CN.9/768, paragraph 35; A/CN.9/797, paragraph 29; A/CN.9/869, paragraphs 28-31.

Article 4. Party autonomy and privity of contract

28. Party autonomy is a fundamental principle underpinning commercial law and UNCITRAL texts that aims to promote international trade as well as technological innovation and the development of new business practices. Moreover, party autonomy may provide desired flexibility in the implementation of the Model Law.

29. However, the implementation of the principle of party autonomy has found some limits in UNCITRAL texts on electronic commerce in order to avoid conflicts with rules of mandatory application, such as those on public policy.

30. In particular, article 4 of the UNCITRAL Model Law on Electronic Commerce allows variation by agreement of the provisions on electronic communications, but sets limits to variation by agreement of functional equivalence rules, also to avoid circumventing form requirements of mandatory application. Moreover, party autonomy may not affect rights and obligations of third parties.[7]

31. In addition, article 5 of the UNCITRAL Model Law on Electronic Signatures indicates that parties may derogate from all provisions of that Model Law, unless derogation would not be valid or effective under applicable law, i.e. it would affect rules of mandatory application such as those relating to public policy.[8] A similar approach is adopted in article 3 of the Electronic Communications Convention.[9]

32. Similarly, the Model Law provides party autonomy within the limits of mandatory law and without affecting rights and obligations of third parties. The Model Law does not indicate which provisions may be derogated from or varied by agreement; it is for enacting jurisdictions to identify them. In doing so, it may be useful to consider that variance in the enactment of the Model Law may significantly disrupt uniformity. In that respect, enacting jurisdictions should carefully consider the possibility of allowing derogation of the fundamental principles underlying the Model Law (see above, para. 26) and, in particular, functional equivalence rules, and the consequences thereof.

33. Certain jurisdictions, in particular those belonging to the civil law tradition, recognize the principle of *numerus clausus* of transferable documents or instruments. The Model Law does not aim at offering manners to circumvent by agreement that principle, in line with the general principle that the Model Law does not affect substantive law provisions. At the same time, and based on the same general principle, the Model Law does not limit in any manner the ability of the parties to derogate from or vary substantive law.

34. Therefore, a careful analysis is necessary to ascertain which provisions of the Model Law could be derogated from or varied by the parties. The Model Law leaves this assessment to the enacting jurisdiction, in order to accommodate differences in legal systems. To that end, paragraph 1 contains square brackets, in which the enacting

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[7] UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, paras. 44-45.
[8] UNCITRAL Model Law on Electronic Signatures, Guide to Enactment, paras. 111-114.
[9] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 85.

jurisdiction could identify the provisions which could be derogated from or varied (see also below, paras. 119-120).

References

A/CN.9/768, paragraphs 36-37; A/CN.9/797, paragraphs 30-32 and 113; A/CN.9/869, paragraphs 32-44.

Article 5. Information requirements

35. Article 5, inspired by article 7 of the Electronic Communications Convention,[10] highlights the need to comply with possible disclosure obligations that might exist under other law. Examples of those information requirements include information to be provided under consumer protection law and to prevent money-laundering and other criminal activities.

36. The obligation to comply with those information requirements arises from the principle that the Model Law does not affect substantive law that is contained in article 1, paragraph 2, of the Model Law. The reference to other law containing the information requirements provides desirable flexibility since those requirements are likely to change over time. Article 5 does not deal with the legal consequences attached to violating information requirements, which are to be found, like the information requirement itself, in other law.

37. Article 5 does not prohibit the issuance of an electronic transferable record to bearer when permitted under substantive law. In that respect, it should be noted that an electronic transferable records management system may allow to identify the person in control of an electronic transferable record for regulatory purposes (e.g., anti-money-laundering) but not for commercial law purposes (e.g., for an action in recourse).

References

A/CN.9/768, paragraph 38; A/CN.9/797, paragraph 33; A/CN.9/869, paragraphs 45-47.

Article 6. Additional information in electronic transferable records

38. As a general rule, according to article 10, subparagraph 1(a) of the Model Law an electronic transferable record shall contain the information required to be contained in a transferable document or instrument (see below, paras. 71-75; see also below, paras. 151 and 166). The Model Law does not require the insertion of information additional to that contained in a transferable document or instruments for the issuance and use of an electronic transferable record. Requiring that additional information would create a legal requirement that does not exist with respect to the issuance and use of transferable documents or instruments and therefore could constitute discrimination against the use of electronic means.

39. Adding to that general rule, article 6 clarifies that the electronic transferable record may, but does not need to contain information additional to that contained in the transferable document or instrument. In other words, while the Model Law does not impose any additional information requirement for electronic transferable records, it also does not prevent the inclusion in those records of additional information that may not be contained in a transferable document or instrument due to the different nature of the two media.

40. Examples of such additional information include information necessary due to technical reasons, such as metadata or a unique identifier. Moreover, such additional information could consist of dynamic information, i.e. information that may change periodically or continuously based on an external source, which may be included in an electronic transferable record due to its nature but not in a transferable document

[10] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, paras. 122-128.

or instrument. The price of a publicly-traded commodity and the position of a vessel are examples of dynamic information.

References

A/CN.9/761, paragraph 32; A/CN.9/768, paragraph 66; A/CN.9/797, paragraphs 70-73; A/CN.9/869, paragraphs 101-102.

Article 7. Legal recognition of an electronic transferable record

Paragraph 1

41. Paragraph 1 restates the general principle of non-discrimination against the use of electronic means that is set forth in article 5 of the UNCITRAL Model Law on Electronic Commerce [11] and in article 8, paragraph 1, of the Electronic Communications Convention.[12]

42. By stating that information "shall not be denied validity or enforceability on the sole ground that it is in electronic form", paragraph 1 merely indicates that the form in which an electronic transferable record is presented or retained cannot be used as the only reason for which that record would be denied legal effectiveness, validity or enforceability. However, the provision should not be misinterpreted as establishing the legal validity of an electronic transferable record or any information therein.

Paragraphs 2 and 3

43. Paragraphs 2 and 3 are inspired by article 8, paragraph 2, of the Electronic Communications Convention.[13]

44. Paragraph 2 clarifies that legal recognition of electronic transferable records does not imply a requirement to use or accept them. However, this does not preclude enacting jurisdictions from mandating the use of electronic transferable records, at least with respect to some categories of users and some types of transferable documents and instruments, in light of the policy goals pursued.

45. The requirement of consent to the use of an electronic transferable record is a general one and applies to all instances where an electronic transferable record is used under the Model Law and to all parties involved in the life cycle of the electronic transferable record. Therefore, other provisions of the Model Law do not contain an explicit reference to consent.

46. The consent to using electronic transferable records does not need to be expressly indicated or given in any particular form and may be inferred from all circumstances, including parties' conduct. While absolute certainty can be accomplished by obtaining an explicit consent before using an electronic transferable record, such an explicit consent should not be mandated as it would create an unreasonable barrier to the use of electronic means.

47. Certain systems used for electronic transferable records management, such as registry-based systems, may require acceptance of system rules prior to authorizing access to the system. Those system rules may include or imply consenting to the use of electronic transferable records.

48. Consent to the use of an electronic transferable record in systems that lack a centralized operator, such as token-based and distributed ledger-based systems, may be implicit and inferred by circumstances such as exercise of control on the record or performance of the obligation contained in the record.

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[11] UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, para. 46.

[12] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 129.

[13] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, paras. 131-132.

References

A/CN.9/768, paragraphs 39, 57-58; A/CN.9/797, paragraphs 34-35, 62-63; A/CN.9/804, paragraph 17; A/CN.9/869, paragraphs 93 and 94.

CHAPTER II. PROVISIONS ON FUNCTIONAL EQUIVALENCE

49. Any reference to a legal requirement contained in the provisions of the Model Law setting forth functional equivalence rules implies a reference to the consequences arising when a legal requirement is not met, making it not necessary to explicitly refer to those consequences. Accordingly, the Model Law does not contain the words "or provides consequences" after the words "when the law requires" (A/CN.9/834, paras. 43 and 46).

Techniques of enactment of articles 8 and 9

50. Provisions indicating the requirements for functional equivalence of the notions of "writing" and "signature" in an electronic environment are of fundamental importance for the application of UNCITRAL texts on electronic commerce. While the enactment of the Model Law on Electronic Transferable Records requires the adoption of those functional equivalence standards, such adoption could take place with different techniques.

51. A law on electronic transactions is likely to contain such functional equivalence provisions, possibly based on UNCITRAL uniform texts. The general rules on functional equivalence between electronic and written form contained in the law on electronic transactions apply to all electronic records that are not transferable.

52. If the Model Law on Electronic Transferable Records is adopted by consolidation with an enactment of the UNCITRAL Model Law on Electronic Commerce or other text providing general rules on functional equivalence, it may be possible to adopt provisions for the functional equivalence of the paper-based notions of "writing" and "signature" that will apply to both transferable and non-transferable electronic records.

53. However, it may also be that those functional equivalence provisions do not exist in a jurisdiction wishing to enact the Model Law on Electronic Transferable Records. In that case, the adoption of articles 8 and 9 would address the legislative need.

54. In any case, careful consideration should be given to the consequences of establishing a dual regime setting forth different functional equivalence requirements for electronic records and electronic transferable records.

Reference

A/CN.9/897, paragraphs 54-57.

Article 8. Writing

55. Article 8 establishes the requirements for the functional equivalence of the written form with respect to information contained in or related to electronic transferable records. It is inspired by article 6, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce.[14] Article 8 refers to the notion of "information" rather than "communication" as not all relevant information might necessarily be communicated, depending on the system chosen for electronic transferable records management.

56. Article 8 sets forth a functional equivalence rule for the notion of "writing" with respect to electronic transferable records only. The use of writing is instrumental in

[14] UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, paras. 47-50.

performing several actions that may occur during the life cycle of an electronic transferable record, such as endorsement (see below, para. 138). The general rule on functional equivalence of written and electronic form contained in the law on electronic transactions applies to all electronic records that are not transferable.

References

A/CN.9/768, paragraphs 40-44; A/CN.9/797, paragraphs 36-39; A/CN.9/804, paragraphs 18-19.

Article 9. Signature

57. Article 9 establishes the requirements for the functional equivalence of "signature" when substantive law either contains an explicit signature requirement or provides consequences for the absence of a signature (implicit signature requirement). The words "or permits" clarify that article 9 shall apply also to cases when the law permits, but does not require a signature.

58. Article 9 is inspired by article 7, subparagraph 1(a), of the UNCITRAL Model Law on Electronic Commerce.[15] Moreover, following the text of article 9, paragraph 3, of the Electronic Communications Convention, it refers to the "intention" of the party so as to better capture the different functions that may be pursued with the use of an electronic signature.[16] The reliability of the method referred to in article 9 shall be assessed according to the general reliability standard contained in article 12.

59. The reference to the signature requirement being fulfilled "by" an electronic transferable record is meant to clarify that article 9 applies to electronic transferable records only and not to other electronic records that are not transferable but are somehow related to an electronic transferable record. Hence, article 9 sets forth a functional equivalence rule for the notion of "signature" with respect to electronic transferable records only.

60. Certain electronic transferable records management systems, such as those based on distributed ledgers, may identify the signatory by referring to pseudonyms rather than to real names. That identification, and the possibility to link pseudonym and real name, including based on factual elements to be found outside distributed ledger systems, could satisfy the requirement to identify the signatory.

61. The general rule on functional equivalence of electronic and handwritten signatures contained in the law on electronic signatures applies to signatures used in relation to all electronic records that are not transferable.

References

A/CN.9/768, paragraphs 41 and 43; A/CN.9/797, paragraphs 40-47; A/CN.9/804, paragraph 20; A/CN.9/869, paragraphs 48-49.

Article 10. Requirements for the use of an electronic transferable record

62. Article 10 provides a functional equivalence rule for the use of transferable documents or instruments by setting forth the requirements to be met by an electronic record. The reliability of the method referred to in article 10 shall be assessed according to the general reliability standard contained in article 12.

63. Article 10 represents the outcome of discussions originating from the notion of "uniqueness". Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance and thus to avoid multiple claims. Providing a guarantee of uniqueness in an electronic environment equivalent to possession of a document of title or negotiable instrument has long been considered a peculiar challenge.

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[15] UNCITRAL Model Law on Electronic Commerce, Guide to Enactment, paras. 53-56.

[16] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, para. 160.

64. Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible. In fact, the notion of uniqueness poses challenges also with respect to transferable documents or instruments, since paper does not provide an absolute guarantee of non-replicability. However, centuries of use of paper in business transactions have provided sufficient information to commercial operators for an assessment of the risks associated with the use of that medium while practices on the use of electronic transferable records are not yet equally well-established.

65. Article 10 aims at preventing the possibility of multiple requests to perform the same obligation by combining two approaches, i.e. "singularity" and "control".

66. The "singularity" approach requires reliable identification of the electronic transferable record that entitles its holder to request performance of the obligation indicated in it, so that multiple claims of the same obligation would be avoided, while the "control" approach focuses on the use of a reliable method to identify the person in control of the electronic transferable record (see also below, paras. 87-102).

67. One effect of the adoption of the notions of "singularity" and "control" in the Model Law is the prevention of unauthorized replication of an electronic transferable record by the system.

68. The definition of "electronic transferable record" reflects the functional equivalent approach and refers to electronic transferable records that are equivalent to transferable documents or instruments. It does not aim at affecting the fact that substantive law shall determine the rights of the person in control. Likewise, it 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 Model Law.

69. In line with the general approach and the scope of the Model Law, the definition of "electronic transferable record" is meant to apply to electronic transferable records that are functionally equivalent to transferable documents or instruments. Yet, the Model Law does not preclude the development and use of electronic transferable records that do not have a paper equivalent as those records are not governed by the Model Law.

70. The definition of "electronic transferable record" does not cover certain documents or instruments, which are generally transferable, but whose transferability may be limited due to other agreements. This could be the case, in certain jurisdictions, of straight or nominative instruments, such as promissory notes, bills of lading and bills of exchange. The definition of "electronic transferable record" should not be interpreted as preventing the issuance of those documents or instruments in an electronic transferable records management system (see also above, para. 4). Substantive law shall determine which documents or instruments are transferable.

Subparagraph 1(a)

71. Subparagraph 1(a) states that the electronic record should contain the information required to be in a transferable document or instrument. Since that information is contained in writing in a transferable document or instrument, its inclusion in an electronic transferable record must comply with article 8 of the Model Law. The definition of "electronic record" contained in article 2 of the Model Law clarifies that the electronic record may, but does not need to, have a composite nature.

72. The information that would be required to be contained in a transferable document or instrument allows determining the substantive law applicable to the electronic transferable record (e.g., the law applicable to a bill of lading, rather than the law applicable to a promissory note). Nevertheless, one electronic transferable record may contain information that would be required to be contained in more than one type of transferable document or instrument.

73. A law that does not contain a provision akin to that contained in article 10, subparagraph 1(a), but sets forth directly the information requirements to be contained

in an electronic transferable record, is likely to provide for electronic transferable records that are not functionally equivalent to transferable documents or instruments, but exist only in an electronic environment.

74. Accordingly, an electronic transferable record existing only in electronic form would not satisfy the requirements of article 10 and would not fall under the definition of electronic transferable record contained in article 2. Namely, while an electronic transferable record existing only in electronic form could satisfy other requirements set forth in the Model Law, that record would define autonomously the information requirements and therefore would not comply with article 10, subparagraph 1(a).

75. Subparagraph 1(a) does not contain any qualifier as "equivalent", "corresponding" or "as having the same purpose" given that under that provision an electronic transferable record must indicate the same information required for a transferable document or instrument of the same type. Insertion of a further qualifier might create uncertainty.

Subparagraph 1(b)(i)

76. Subparagraph 1(b)(i) sets forth the requirement to identify an electronic record as the record containing the information necessary to establish that record as the electronic transferable record. That requirement implements the "singularity" approach.

77. The purpose of the provision is to identify the electronic transferable record as opposed to other electronic records that are not transferable. Identification alone suffices to express the singularity approach. The article "the" in the English, French and Spanish language versions of the Model Law suffices to point at the singularity approach, thus avoiding the use of any qualifier and related challenges. The Arabic, Chinese and Russian language versions of the Model Law intend to convey the same notion.

78. Unlike other legislation on electronic transferable records, subparagraph 1(b)(i) does not refer to a qualifier such as "authoritative", "operative" or "definite" to identify the electronic record as the electronic transferable record. The reasons for that omission are that: insertion of a qualifier could create interpretative challenges, especially in certain languages; it could be interpreted as referring to the notion of "uniqueness", which has been abandoned; and it could ultimately foster litigation.

Subparagraph 1(b)(ii)

79. Subparagraph 1(b)(ii) sets forth the requirement that the electronic transferable record should be capable of being controlled from its creation until it ceases to have any effect or validity, particularly in order to allow for its transfer. That requirement implements the "control" approach.

80. The reference to a reliable method with respect to subparagraph 1(b)(ii) refers to the reliability of the system used to render the electronic record capable of being subject to control.

Subparagraph 1(b)(iii)

81. The notion of integrity is an absolute one. It refers to a fact, and as such, is objective, i.e. either an electronic transferable record retains integrity or not. The reference to the reliable method used to retain integrity is relative or subjective and the general reliability standard contained in article 12 applies to the assessment of that method.

Notion of "Original"

82. Unlike other UNCITRAL texts on electronic commerce, the Model Law does not contain a functional equivalence rule for the paper-based notion of "original". In that respect, it should be noted that article 8 of the UNCITRAL Model Law on Electronic Commerce refers to a static notion of "original" while electronic transferable records are meant, by their own nature, to circulate. Therefore, the notion

of "original" in the context of electronic transferable records is different from that adopted in other UNCITRAL texts. Accordingly, article 10, subparagraph 1(b)(iii), of the Model Law refers to integrity of the electronic transferable record as one of the requirements that needs to be fulfilled in order to achieve functional equivalence with a transferable document or instrument.

83. Hence, while the notion of "original" of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying both the person entitled to performance and the object of control (see above, paras. 65-67).

Paragraph 2

84. Paragraph 2 sets forth a provision on the assessment of the notion of integrity. It indicates that an electronic transferable record retains integrity when any set of information related to authorized changes (as opposed to changes of purely technical nature) remains complete and unaltered from the time of the creation of the electronic transferable record until it ceases to have any effect or validity. It is inspired by article 8, paragraph 3, of the UNCITRAL Model Law on Electronic Commerce. However, it should be noted that article 8, subparagraph 3(a), of the Model Law on Electronic Commerce refers to a notion of integrity with respect to the use of the notion of "original" that may be more appropriate for electronic contracting. On the other hand, the notion of integrity contained in article 10, paragraph 2, of the Model Law necessarily takes into account the fact that the life cycle of electronic transferable records implies a number of events that need to be accurately reflected in those records.

85. "Authorized" changes are those changes agreed upon by the parties to contractual obligations related to electronic transferable records throughout the life cycle of an electronic transferable record and permitted by the electronic transferable records management system. The term "authorized" does not refer to whether the changes are legitimate, which would introduce a standard presupposing a legal assessment under substantive law. For instance, unauthorized changes would be those performed by a hacker who must compromise the integrity of the electronic transferable record in order to have access to it.

86. The words "apart from any change which arises in the normal course of communication, storage and display" refer to information added to an electronic transferable record for purely technical purposes. For instance, that could be the case of changes necessary to store the electronic transferable records in a dedicated repository. The same words are used in article 8, subparagraph 3(a), of the UNCITRAL Model Law on Electronic Commerce. However, the notion of purely technical change should be evaluated against the notion of integrity contained in the Model Law, which differs from the notion of original contained in the Model Law on Electronic Commerce (see above, para. 82). The fact that information may be added automatically by the electronic transferable records management system, for instance in form of metadata, is not per se evidence that that information is of purely technical nature.

References

A/CN.9/768, paragraphs 48-56, 75-76 and 85; A/CN.9/797, paragraphs 47-60; A/CN.9/804, paragraphs 21-40, 70-75; A/CN.9/828, paragraphs 31-40, 42-49; A/CN.9/834, paragraphs 21-30, 85-90, 92, 99-108; A/CN.9/869, paragraphs 50-68.

Article 11. Control

87. Article 11 provides a functional equivalence rule for the possession of a transferable document or instrument. Functional equivalence of possession is achieved when a reliable method is employed to establish control of that record by a person and to identify the person in control.

88. The notion of "control", which is closely related to the requirement contained in article 10, subparagraph 1(b)(ii), is not defined in the Model Law since it is the functional equivalent of the notion of "possession", which, in turn, may vary in each jurisdiction.

89. The Model Law is concerned with identifying a functional equivalent to the fact of possession. In line with the general principle that the Model Law does not affect substantive law, the notion of control does not affect or limit the legal consequences arising from possession. Consequently, parties may agree on the modalities for the exercise of possession, but may not modify the notion of possession itself.

90. The title of article 11 refers to "control" and not to "possession", thus departing from the naming style of other articles of the Model Law, since the notion of "control" is particularly relevant in the Model Law. While a notion of "control" may exist in national legislation, the notion of "control" contained in article 11 needs to be interpreted autonomously in light of the international character of the Model Law.

Paragraph 1

91. The reliability of the method referred to in article 11 shall be assessed according to the general reliability standard contained in article 12.

Subparagraph 1(a)

92. Subparagraph 1(a) refers to "exclusive" control for reasons of clarity, since the notion of "control", similarly to that of "possession", implies exclusivity in its exercise. Yet, control, like possession, could be exercised concurrently by more than one person in control. The concept of "control" does not refer to "legitimate" control, since this is a matter of substantive law.

93. Although both the notion of "control" and the notion of "singularity" aim at preventing multiple requests of performance of the same obligation, the two notions operate independently and should be distinguished (see above, paras. 65-67). For instance, it is possible to conceive exclusive control over a multiple record, i.e. a record that does not meet the requirement of singularity. Conversely, it is also possible to conceive non-exclusive control over a single record.

Subparagraph 1(b)

94. Subparagraph 1(b) requires to reliably identify the person in control as the holder of the electronic transferable record. The person in control of an electronic transferable record is in the same legal position as the holder of an equivalent transferable document or instrument.

95. The reference to the "person in control" of the electronic transferable record in subparagraph 1(b) does not imply that the person is also the rightful person in control of that record as this is for substantive law to determine (A/CN.9/828, para. 61). Further, the reference to the person in control does not exclude the possibility of having more than one person exercising control or of attributing selectively control on one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (e.g., title to property of goods, security interests, etc.).

96. The person in control may be a natural or a legal person or other entity able to possess a transferable document or instrument under substantive law. The use of the services of a third party to exercise exclusive control does not affect exclusivity of control or imply that the third party service provider or any other intermediary is a person in control.

97. The requirement to identify the person in control does not imply that an electronic transferable record in itself shall contain the identification of the person in control. Rather, that requirement demands that the method or system employed to establish control as a whole shall perform the identification function. Moreover, identification should not be understood as implying an obligation to name the person in control, as the Model Law allows for the issuance of electronic transferable records to bearer, which implies anonymity.

98. Certain electronic transferable records management systems, such as those based on distributed ledgers, may identify the person in control by referring to pseudonyms rather than to real names (see above, para. 60). That identification, and the possibility to link pseudonym and real name, if need be, would satisfy the requirement to identify the person in control. In any case, anonymity for commercial law purposes may not preclude the possibility of identifying the person in control for other purposes, such as law enforcement (see above, para. 37).

99. Article 11 will also assist in carrying out those necessary steps occurring in the life cycle of the electronic transferable record that require demonstration of control of that record. For instance, the notion of "presentation" in the paper environment relies on demonstration of possession of a transferable document or instrument as its core element. That demonstration may be given by identifying the person in control. In practice, the electronic transferable records management system may rely on the requirement to identify the person in control contained in article 11 when dealing with presentation of a record. Accordingly, the Model Law does not contain a separate provision on presentation.

Paragraph 2

100. Transferable documents or instruments, and therefore also electronic transferable records, may circulate by delivery and by endorsement. Paragraph 2 sets forth that transfer of control over an electronic transferable record is the functional equivalent of delivery, i.e. transfer of possession, of a transferable document or instrument (see also below, paras. 137-141).

101. Paragraph 2 includes the words "or permits" in order to clarify its application to cases in which the law merely permits, but does not require transfer of possession of a transferable document or instrument.

102. The delivery of a transferable document or instrument may be a necessary step in the life cycle of that document or instrument. For instance, the request for delivery of goods typically requires surrendering a bill of lading. The Model Law does not contain specific provisions on surrender as paragraph 2, on transfer of control as functional equivalent of delivery, would apply also to those cases.

References

A/CN.9/761, paragraphs 24-25, 38-41 and 50-58; A/CN.9/768, paragraphs 45-47 and 75-85; A/CN.9/797, paragraphs 66 and 74-90; A/CN.9/804, paragraphs 51-70; A/CN.9/828, paragraphs 50-67; A/CN.9/834, paragraphs 31-33 and 83-94; A/CN.9/863, paragraphs 27-36 and 99-102; A/CN.9/869, paragraphs 103-110.

CHAPTER III. USE OF ELECTRONIC TRANSFERABLE RECORDS

Article 12. General reliability standard

103. Article 12 provides a consistent and technology neutral general standard on the assessment of reliability that applies whenever a provision of the Model Law requires the use of a "reliable method" for the fulfilment of its functions. The concept of reliability refers to the reliability of the method used. In turn, reference to the method implies reference to any system used to implement that method.

104. Article 12 aims to increase legal certainty by indicating elements that may be relevant in assessing reliability. The list of circumstances contained in article 12 is illustrative and, as such, not exhaustive and does not prevent the parties from allocating liability contractually (see also paras. 119-120 below). The general reliability standard is applicable to all electronic transferable records management system providers and not only to third-party service providers.

105. Though article 12 aims at providing guidance on the assessment of the reliability of the electronic transferable records management system in case of dispute ("ex post"

reliability assessment), its content will necessarily also influence the design of the system ("ex ante" reliability assessment) since system designers pursue offering reliable systems.

106. Each provision of the Model Law referring to the use of a reliable method aims at fulfilling a different function. Accordingly, the reference to "the purposes of articles" contained in the chapeau of article 12 aims to clarify that the assessment of the reliability of each relevant method should be carried out separately in light of the function specifically pursued with the use of that method. That approach provides needed flexibility when assessing the application of the reliability standard in practice as it allows customizing the reliability assessment to each function fulfilled by the system.

Subparagraph (a)

107. Subparagraph (a) contains a list of circumstances that may assist in determining reliability. The words "which may include" clarify that the list is not exhaustive and has an illustrative nature only. The words "all relevant circumstances" include the purpose for which the information contained in the electronic transferable record was generated.

108. The list of circumstances aims at achieving a balance between providing guidance on the assessment of reliability and imposing requirements that may result in excessive costs on business, ultimately hampering electronic commerce and leading to increased litigation on complex technical matters. Additional possibly relevant circumstances include: quality of staff; sufficient financial resources and liability insurance; and existence of a notification procedure for security breaches and of reliable audit trails.

"Operational rules"

109. Subparagraph (a)(i) refers to "operational rules" that are usually contained in an operating manual whose application could be monitored by an oversight body and that, as such, may not have a purely contractual nature. The words "relevant to the assessment of" clarify that only operational rules regarding the reliability of the system, and not operational rules in general, should be considered.

"Assurance of data integrity"

110. Subparagraph (a)(ii) refers to the "assurance of data integrity" as an absolute notion since data integrity cannot be expressed by reference to a level. The notion of "integrity" as an element in the assessment of the general reliability standard is different from that contained in article 10. More precisely, the notion of integrity contained in subparagraph (a)(ii) applies when integrity is in fact relevant to assess the reliability of the method used and, ultimately, the achievement of functional equivalence. As such, that notion is relevant also to articles other than article 10.

"Prevent unauthorized access to and use of the system"

111. The circumstance refers to the ability to prevent access to and use of the system by parties, including third parties not authorized to do so, as authorization of access to and use of the system is a notion relevant to all parties. In that respect, it should be noted that the notion of integrity in the Model Law refers to "authorized" changes. A reliable method shall therefore prevent unauthorized changes. Moreover, the notion of control is based on exclusivity, which presupposes the ability to exclude parties without authorized access to the system.

"Security of hardware and software"

112. Reference to "security of hardware and software" is included in the list of criteria for the assessment of the general reliability standard for electronic transferable records, since security of hardware and software has a direct impact on the reliability of the method used. That reference is found also in article 10, subparagraph (b), of the UNCITRAL Model Law on Electronic Signatures, which

refers to the "quality of hardware and software systems" as one of the factors to be regarded for the determination of trustworthiness of any systems, procedures and human resources utilized by a certification service provider. The term "security" is used in subparagraph (a)(iv) instead of "quality" since the notion of security lends itself more easily to an objective assessment of the method used.

"Regularity and extent of audit by an independent body"

113. The existence of regular accurate audits carried out by an independent body may be seen as evidence of validation of the reliability of the system by a third party. Similarly, article 10, subparagraph (e), of the UNCITRAL Model Law on Electronic Signatures refers to the "regularity and extent of audit by an independent body" as one of the factors to be considered for the determination of trustworthiness of any systems, procedures and human resources utilized by a certification service provider.

"Declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method"

114. The criteria of "regularity and extent of audit by an independent body" is inspired by article 10, subparagraph (f), of the UNCITRAL Model Law on Electronic Signatures, which refers to the "declaration by the State, an accreditation body or the certification service provider regarding compliance with or existence of the foregoing" as one of the factors to be regarded for the determination of trustworthiness of any systems, procedures and human resources utilized by a certification service provider. A declaration by such body may guarantee a certain level of objectivity in the assessment of the reliability of the method.

"Any applicable industry standard"

115. The reference to "any applicable industry standard" stems from a suggestion to refer to internationally accepted standards and practices in order to avoid increased litigation based on complex technical matters and to allow flexibility in technology choice while providing guidance, in light also of the fact that electronic transferable records management systems are likely to be designed and maintained by highly-specialized professionals.

116. Reference to "any applicable industry standard" is more suitable than reference to "industry best practices" since the former can be more easily ascertained. Applicable industry standards should preferably be internationally recognized. In fact, the use of international standards may promote the emergence of a common notion of reliability across jurisdictions. Reference to industry standards shall not be interpreted so as to violate the principle of technological neutrality.

Subparagraph (b)

117. Subparagraph (b) provides a "safety clause" with the purpose of preventing frivolous litigation by validating methods that have in fact achieved their function regardless of any assessment of their reliability. It refers to the fulfilment of the function in the specific case under dispute and does not aim at predicting future reliability based on past performance of the method. The provision may operate with respect to any of the functions pursued with the use of electronic transferable records. A similar mechanism is contained in article 9, subparagraph (3)(b)(ii), of the Electronic Communications Convention, relating to the functional equivalence of electronic signatures.

118. In practice, the fact that the method used has achieved the function pursued with its use will prevent any discussion on the assessment of its reliability according to subparagraph (a).

Party autonomy

119. Article 12 does not contain an explicit reference to the relevance of an agreement of the parties when assessing reliability. That omission is due to the desire to set forth an objective reliability standard and therefore not to make it dependent on

party autonomy. In particular, the inclusion of a reference to party autonomy could be read as: (a) introducing different standards for the assessment of reliability whose application would depend on the parties involved; (b) leading to inconsistent findings in respect of the validity of the electronic transferable record; and (c) circumventing substantive law, especially provisions of mandatory application, and ultimately affecting third parties. Hence, party autonomy with respect to the assessment of reliability is limited to allocation of liability under the limits set forth in applicable law.

120. The relevance of party agreements may be particularly significant in the context of closed systems or when referring to industry standards, since those agreements often contain useful guidance on technical details and may promote technological innovation within the limits of mandatory substantive law.

References

A/CN.9/804, paragraphs 41-49 and 63; A/CN.9/828, paragraphs 47-49; A/CN.9/863, paragraphs 37-76; A/CN.9/869, paragraphs 69-78.

Article 13. Indication of time and place in electronic transferable records

121. Significant legal consequences are attached to the indication of time and place in transferable documents and instruments. For instance, recording the time of an endorsement is necessary to establish the sequence of the obligors in the action of recourse. Article 13 allows for that indication in electronic transferable records. In the case of endorsements, this is particularly important given that the dematerialized nature of electronic transferable records does not make their temporal sequence apparent as in transferable documents or instruments.

122. Provisions relating to the indication of time and place, if any, are to be found in substantive law, which may indicate to what extent and which parties may agree on it. If the indication of time and place is mandatory under substantive law, that requirement must be complied with in accordance with article 10, subparagraph 1(a), of the Model Law, mandating that the electronic transferable record shall contain the information "required to be contained in a transferable document or instrument".

123. The words "or permits" clarify that article 13 shall apply also to cases when the law permits, but does not require, the indication of time or place with respect to a transferable document or instrument. In line with the general rule that the Model Law does not impose any additional information requirement, article 13 does not require the indication of time and place when that information is not mandatory under applicable law.

124. Methods available to indicate time and place in electronic transferable records may vary with the system used. Therefore, article 13 is based on a technology-neutral approach compatible with systems based on registry, token, distributed ledger or other technology. The reference to the use of a reliable method in indicating time points at the possibility of using trust services such as trusted time stamping.

125. The nature of the electronic transferable record may enable automation of certain steps in the life cycle of the record related to time. For instance, promissory notes may be presented for payment automatically on due date.

126. The provisions on time and place of dispatch and receipt of data messages (article 15 of the UNCITRAL Model Law on Electronic Commerce) and of electronic communications (article 10 of the Electronic Communications Convention) are relevant for contract formation and management but may not be appropriate with respect to the use of electronic transferable records.

References

A/CN.9/797, paragraph 61; A/CN.9/834, paragraphs 36-46; A/CN.9/863, paragraphs 23-24, 26; A/CN.9/869, paragraphs 79-82.

Article 14. Determination of place of business

127. The law may attach a number of consequences to the place of business. In particular, the place of business may be relevant for the cross-border use of electronic transferable records. Substantive law shall indicate how to identify the relevant place of business, which, in principle, does not need to be different only because of the use of electronic or paper medium. The scope of article 14 is limited to clarifying that the location of an information system, or parts thereof, is not an indicator of a place of business as such. That clarification may be particularly useful in light of the likelihood that third parties providing services relating to the management of electronic transferable records will use equipment and technology located in various jurisdictions, or whose location may change regularly, such as in the case of use of cloud computing.

128. Article 14, whose text is inspired by article 6, paragraphs 4 and 5, of the Electronic Communications Convention, [17] aims at providing guidance on the determination of a place of business when electronic means are used by indicating that certain elements do not per se identify a place of business. Its scope is therefore different from that of article 13, which relates to the indication of the place in the electronic transferable record, and not to its determination.

129. Reference to "place of business" shall be interpreted as reference to the various notions related to geographic location (e.g., residence, domicile, etc.) that may be relevant during the life cycle of the electronic transferable record. While the elements listed in article 14 do not, per se, determine the location of a place of business, those elements may be used together with other elements to determine that location.

130. Substantive law may allow parties to identify the place of business by agreement. In that case, article 14 may provide a set of suppletive rules on the determination of the place of business that could usefully complement parties' agreements.

References

A/CN.9/863, paragraphs 25-26; A/CN.9/869, paragraphs 83-92.

Article 15. Issuance of multiple originals

131. The possibility of issuing multiple originals of a transferable document or instrument exists in several fields of trade. An example of legal provisions recognizing that practice may be found in article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation. It has been reported that the practice of issuing multiple originals exists also in the electronic environment.

132. Article 15 aims to enable the continuation of that practice with respect to the use of electronic transferable records when that practice is permitted under applicable law. Similarly, the Model Law does not prevent the possibility of issuing multiple originals on different media (e.g., one on paper and one in electronic form), when this is permitted under applicable law.

133. As noted (see above, para. 82), the Model Law does not contain a functional equivalent of the paper-based notion of "original". Instead, the functions fulfilled by the original of a transferable document or instrument with respect to requesting performance are satisfied in an electronic environment by the notions of "singularity" and "control" (see above, paras. 65-67). Hence, the transposition of the practice of issuing multiple original transferable documents or instruments in an electronic environment requires the issuance of multiple electronic transferable records relating to the performance of the same obligation.

134. However, caution should be exercised when issuing multiple electronic transferable records. In fact, that practice may expose to the possibility of multiple claims for the same performance based on the presentation of each original. Moreover,

[17] United Nations Convention on the Use of Electronic Communications in International Contracts, Explanatory Note, paras. 116-121.

the same functions pursued with the issuance of multiple original transferable documents or instruments may be achieved in an electronic environment by attributing selectively control on one electronic transferable record to multiple entities on the basis of the legal rights attributed to each entity (e.g., title to property of goods, security interests, etc.). In practice, for instance, an electronic transferable records management system could provide information on multiple claims having different objects and relating to the same electronic transferable record.

135. Article 15 does not contain an obligation to indicate whether multiple originals have been issued. If substantive law contains that obligation, the electronic transferable record must comply with it in accordance with the information requirements contained in article 10, subparagraph 1(a), of the Model Law.

136. Similarly, article 15 does not specify whether one or all originals must be presented to request the performance of the obligation contained in the electronic transferable record as this matter is determined by applicable law or, where possible, by contractual agreement.

References

A/CN.9/768, paragraphs 71-74; A/CN.9/797, paragraphs 47, 68-69; A/CN.9/804, paragraph 50; A/CN.9/834, paragraphs 47-52; A/CN.9/869, paragraphs 95-99.

Article 16. Endorsement

137. Transferable documents or instruments may be transferred by delivery and by endorsement. Substantive law sets forth the conditions for the circulation of transferable documents or instruments, which apply to functionally equivalent electronic transferable records. Article 16 identifies the requirements that need to be complied with in order to achieve functional equivalence of endorsement in addition to the requirements for functional equivalence of written form and signature.

138. While national laws may contain a wide range of formal prescriptions for endorsement in a paper-based environment, article 16 aims to achieve functional equivalence of the notion of endorsement regardless of those requirements and in line with the approach taken for other functional equivalence rules in the Model Law. Hence, article 16 adds to the functional equivalence rules for writing, signature and transfer already contained in the Model Law by providing also for specific forms of endorsement required under substantive law, such as endorsements on the back of a transferable document or instrument or by affixing an *allonge*.

139. Inserting in article 16 specific references to certain form requirements, but not to others, might be interpreted as excluding those other requirements from the scope of the article, thus ultimately frustrating its purpose. Hence, article 16 does not refer to any specific form of requirement, but includes all of them.

140. The words “or permits” are included in article 16 to provide for instances when substantive law allows for, but does not require endorsement.

141. The words “included in” have been chosen as reflecting more accurately current practice and to encompass instances when the information is logically associated with or otherwise linked to the electronic transferable record, thus enabling the use of different models for electronic transferable records management systems in line with the principle of technological neutrality.

References

A/CN.9/768, paragraphs 46, 102; A/CN.9/797, paragraphs 95-97; A/CN.9/804, paragraphs 80-81; A/CN.9/828, paragraphs 76-80; A/CN.9/869, paragraphs 111-114.

Article 17. Amendment

142. Substantive law or contractual agreements may allow for the amendment of a transferable document or instrument and specify who has the authority to amend, under what circumstances and whether a duty to notify third parties of the amendment

exists. Article 17 provides a functional equivalence rule for instances in which an electronic transferable record may be amended.

143. The amendments referred to in article 17 are of legal nature. Amendments of purely technical nature do not fall under the scope of article 17. (See also above, para. 86, on the reference to "any change which arises in the normal course of communication, storage and display" contained in article 10, paragraph 2, of the Model Law.)

144. Article 17 sets forth an objective standard, as indicated by the use of the word "identified", for the identification of amended information in an electronic environment. The rationale for requesting the identification of the amended information lies in the fact that, while amendments may be easily identifiable in a paper-based environment due to the nature of that medium, that may not be the case in an electronic environment. Qualifiers to identification, such as "accurately" or "readily", do not provide an objective standard while introducing an additional burden and imposing cost on system operators.

145. Thus, article 17 aims to provide evidence of and trace all amended information. The article is in line with the general obligation to preserve the integrity of the electronic transferable record contained in article 10, paragraph 2, of the Model Law. It does, however, go beyond that general obligation, as the amended information shall not only be recorded but also identified as such and therefore recognizable.

146. Article 17 requires that a reliable method shall be used to identify the amended information, but does not set out the method to be employed to identify the amendment or the amended information, as that could impose an additional burden on the management of the electronic transferable record. The reliability of the method shall be assessed according to the general reliability standard contained in article 12.

147. The words "or permits" aim at capturing those instances in which applicable substantive law allows for amendment of the electronic transferable record but does not require it.

References

A/CN.9/761, paragraphs 45-49; A/CN.9/768, paragraphs 93-97; A/CN.9/797, paragraph 101; A/CN.9/804, paragraph 86; A/CN.9/828, paragraphs 85-90; A/CN.9/863, paragraphs 83-87.

Article 18. Replacement of a transferable document or instrument with an electronic transferable record

148. If the law recognizes the use of both transferable documents or instruments and electronic transferable records, the need for a change of medium may arise during the life cycle of those documents, instruments or records. Enabling change of medium is critical for the wider acceptance and use of electronic transferable records, especially when used across borders, given the different levels of acceptance of electronic means and readiness for their use in different States and business communities.

149. While legal texts based on the principle of medium neutrality may recognize the possibility of change of medium, laws dealing exclusively with transferable documents or instruments are unlikely to foresee it. Articles 18 and 19 of the Model Law aim to fill that gap.

150. Articles 18 and 19 have a substantive nature and aim at satisfying two main goals: enabling change of medium without loss of the information required by substantive law; and ensuring that the replaced transferable document or instrument will not further circulate so as to prevent the coexistence of two claims to performance of the same obligation and, more generally, not to affect in any manner the rights and obligations of any party.

151. As a general rule, according to article 10, subparagraph 1(a), of the Model Law an electronic transferable record shall contain the information required to be contained in a transferable document or instrument (see above, paras. 71-75).

However, article 18 does not require that all information contained in a transferable document or instrument shall be contained in the replacing electronic transferable record. Substantive law determines the information necessary to be contained in the replacing electronic transferable record in order to preserve rights and obligations of all concerned parties.

152. Article 18 omits the reference to substantive legal notions such as “issuer”, “obligor”, “holder” and “person in control” in order to accommodate the variety of schemes used in the various transferable documents or instruments, thus providing the flexibility needed to accommodate business practice.

153. Substantive law, including parties’ agreement, identifies those parties whose consent is relevant for the change of medium and which parties, if any, need to be notified of the change.

154. Paragraph 1 requires that a reliable method shall be used for the change of medium. The reliability of the method shall be assessed according to the general reliability standard contained in article 12.

155. The word “replace” in paragraph 1 does not refer to the notion of reissuance, since reissuance and change of medium are distinct concepts and article 18 is clearly meant to refer to the latter.

156. The legal consequence for non-compliance with the requirement set forth in paragraph 2 is the invalidity of the change of medium and, consequently, of the electronic transferable record.

157. Paragraph 3 sets forth that, when the change of medium has taken place, the transferable document or instrument ceases to have any effect or validity. This is necessary to avoid multiple claims for performance. The word “upon” indicates that there should be no interval between the issuance of the replacement and the termination of the replaced document or instrument.

158. The words “shall be made inoperative and” before the word “ceases” reflect that the transferable document or instrument cannot be further transferred after change of medium. They leave sufficient flexibility on the choice of the method to render the transferable document or instrument inoperative.

159. If a transferable document or instrument or an electronic transferable record is invalidated on the wrong assumption of the validity of the replacing record, document or instrument, substantive law would apply to the reissuance of the invalidated document, instrument or record, or to the issuance of the replacing record, document or instrument.

160. A transferable document or instrument or an electronic transferable record could fulfil other functions besides transferability, such as providing evidence of a contract for the carriage of goods and of receipt of the goods, or, with respect to transferable documents or instruments, providing evidence of the chain of endorsements for an action in recourse. The ability to fulfil those additional functions may continue after the document, instrument or record has been made inoperative.

161. Paragraph 3 refers to the issuance of the electronic transferable record in accordance with paragraphs 1 and 2, to clarify that the electronic transferable record has to be issued in accordance with both paragraphs.

162. Paragraph 4 is intended to clarify as a statement of law that the rights and obligations of the parties are not affected by the change of medium. In particular, the replacing record should contain all the information necessary in order not to affect those rights and obligations, regardless of the nature of that information. Though restating a general principle already contained in the Model Law, the paragraph was retained in view of its declaratory function.

References

A/CN.9/761, paragraphs 72-77; A/CN.9/768, paragraph 101; A/CN.9/797, paragraphs 102-103; A/CN.9/828, paragraphs 94-102; A/CN.9/834, paragraphs 53-64; A/CN.9/869, paragraphs 116-120.

Article 19. Replacement of an electronic transferable record with a transferable document or instrument

163. Article 19 provides for the replacement of an electronic transferable record with a transferable document or instrument. A survey of business practice indicates that such replacement is more frequent than the reverse case due to the fact that a party whose involvement was not envisaged at the time of the creation of the electronic transferable record does not wish or is not in a position to use electronic means.

164. Under certain national laws, a paper-based print-out of an electronic record may be considered as equivalent to an electronic record. Under article 19 a print-out of an electronic transferable record needs to meet the requirements of that article in order to have effect as a transferable document or instrument replacing the corresponding electronic transferable record.

165. The content of article 19 mirrors that of article 18 on the replacement of a transferable document or instrument with an electronic transferable record. Therefore, the comments in paragraphs 148-162 above also apply, mutatis mutandis, to article 19.

166. Article 19 does not require that all information contained in an electronic transferable record shall be contained in the replacing transferable document or instrument. In particular, an electronic transferable record could contain information, e.g. metadata, that cannot be reproduced in a transferable document or instrument (see also above, paras. 38-40). Substantive law determines the information necessary to be contained in the replacing transferable document or instrument in order to preserve rights and obligations of all concerned parties.

References

A/CN.9/768, paragraph 101; A/CN.9/797, paragraphs 102-103; A/CN.9/828, paragraphs 94-102; A/CN.9/834, paragraphs 53-64; A/CN.9/869, paragraphs 121-122.

Third-party service providers

167. Depending on the model chosen, electronic transferable records management systems may require the use of services provided by third parties. The Model Law is technology neutral and therefore compatible with all models. Reference in the Model Law to electronic transferable records management systems does not imply the existence of a system administrator or other form of centralized control.

168. UNCITRAL texts on electronic commerce have sometimes dealt with the conduct of third-party service providers. In particular, articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures provide guidance on the assessment of the conduct of a third-party service provider and of the trustworthiness of its services.[18]

169. However, the Model Law has an enabling nature and does not deal with regulatory matters, which should be addressed in other legislation. Moreover, expected developments in technology and business practice recommend a flexible approach when assessing the conduct of third-party service providers. Hence, the Model Law leaves freedom of choice of third-party service providers as well as of the type of services requested and of their technology.

170. In that respect, it should be noted that the general reliability standard set forth in article 12 of the Model Law, and specific standards such as the criterion to assess integrity contained in article 10, paragraph 2, of the Model Law provide parameters

[18] UNCITRAL Model Law on Electronic Signatures, Guide to Enactment, paras. 142-147.

to assess the reliability of an electronic transferable record and of its management system. Designers of those management systems need to comply with those standards in order to set up commercially viable enterprises.

Reference

A/CN.9/834, paragraphs 78-82.

CHAPTER IV. CROSS-BORDER RECOGNITION OF ELECTRONIC TRANSFERABLE RECORDS

Article 20. Non-discrimination of foreign electronic transferable records

171. Article 20 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the fact that it was issued or used abroad. It does not affect private international law rules.

172. The need for an international regime to facilitate the cross-border use of electronic transferable records was already recognized at the outset of the work and reiterated throughout the deliberations on the Model Law. That need was also emphasized by the Commission at its forty-fifth session (A/67/17, para. 83).

173. However, different views were expressed on how to achieve that goal. On the one hand, there was the desire not to displace existing private international law rules and to avoid the creation of a dual regime applying a special set of conflict of laws provisions for electronic transferable records. On the other hand, there was awareness of the importance of dealing adequately with aspects relating to the international use of the Model Law for its success and expression of the desire to favour its cross-border application regardless of the number of enactments.

Paragraph 1

174. Paragraph 1 aims at eliminating obstacles to cross-border recognition of an electronic transferable record arising exclusively from the place of origin or of use of the electronic transferable record. In other words, paragraph 1 aims to prevent that the place of origin or of use of the electronic transferable record could be considered in itself the reason to deny legal validity or effect to an electronic transferable record. A provision similar in scope may be found in article 12, paragraph 1, of the UNCITRAL Model Law on Electronic Signatures.

175. The words “issued or used” aim at covering all events occurring during the life cycle of an electronic transferable record. In particular, they include endorsement and amendment of the electronic transferable record. In determining the location of the place of business, article 14 of the Model Law may also be relevant.

176. Paragraph 1 does not affect substantive law, including private international law. Thus, for instance, paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that does not recognize the legal validity of electronic transferable records. However, paragraph 1 also does not prevent that an electronic transferable record issued or used in a jurisdiction not allowing the issuance and use of electronic transferable records, and that otherwise complies with the requirements of applicable substantive law, could be recognized in a jurisdiction enacting the Model Law.

177. The word “abroad” is used to refer to a jurisdiction other than the enacting one, including a different territorial unit in States comprising more than one.

178. Paragraph 2 reflects the understanding that the Model Law should not displace existing private international law applicable to transferable documents or instruments, which is considered substantive law for the purposes of the Model law (see para. 5 above). The introduction of a special set of private international law provisions for electronic transferable records would lead to a dual private international law regime, which is not desirable.

179. Since paragraph 1 refers only to non-discrimination while paragraph 2 relates to private international law, the two paragraphs operate on different levels and do not interfere.

References

A/67/17, paragraph 83; A/CN.9/768, paragraph 111; A/CN.9/797, paragraph 108; A/CN.9/863, paragraphs 77-82; A/CN.9/869, paragraphs 124-131.

K. Draft Model Law on Electronic Transferable Records: compilation of comments by Governments and international organizations

(A/CN.9/921 and Add.1-3)

[Original: English/Spanish]

Contents

I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated its Working Group IV (Electronic Commerce) to undertake work on electronic transferable records. At its forty-ninth session in 2016, the Commission, expressing its appreciation to Working Group IV (Electronic Commerce) for the progress made in the preparation of a draft Model Law on Electronic Transferable Records, indicated that it expected that the Model Law would be adopted at the Commission's fiftieth session, in 2017.

2. At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group requested the Secretariat to revise the draft Model Law on Electronic Transferable Records and explanatory materials contained in document A/CN.9/WG.IV/WP.139 and its addenda to reflect the deliberations and decisions at that session and transmit the revised text to the Commission for consideration at its fiftieth session. The Working Group recalled that UNCITRAL practice was to circulate the text as recommended by an UNCITRAL working group to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft Model Law, so that the comments would be before the Commission at its fiftieth session (A/CN.9/897, para. 20).

3. By a note verbale dated 16 February 2017, the Secretariat transmitted the text of the draft Model Law with explanatory notes (A/CN.9/920) to States and to invited international organizations. The present document reproduces the first comments received by the Secretariat on the draft Model Law and the explanatory notes. Comments are reproduced as received by the Secretariat with some formatting changes. Comments received by the Secretariat after the issuance of the present document will be published as addenda thereto in the order in which they are received.

II. Compilation of comments

A. States

1. Colombia

[Original: Spanish]
[3 April 2017]

1. The model law should state that electronic transferable records should take into account States' domestic regulations relating to the protection of personal data.

2. Article 18, paragraphs 3 and 4: These provisions establish that upon issuance of an electronic transferable record replacing a transferable document, that document ceases to be valid. In that regard, it is suggested that such a document should not cease to be valid but, rather, it should be considered as another original, since legally it would be possible to have one or more originals of that document. Accordingly, there should be notes referring to the existence of both paper-based and electronic originals.

3. Article 19, paragraph 1: The model law should clarify what is considered a "reliable method". This can be done by establishing the criteria that determine such characteristics or by formulating a definition that standardizes the term.

4. It is important that the storage of electronic data should be taken into account. While the draft model law focuses on the transferability of an electronic record, it should stipulate that the processing of personal data, and in particular the storage of such data, should be carried out in accordance with relevant local regulations.

5. While the draft model law seeks to ensure technological neutrality, it is also important to clarify what would be considered a "reliable method" for member States. It is suggested that generic criteria or a clarificatory definition should be included.

6. The minimum metadata to be included in an electronic transferable record should be specified, as should the minimum technical characteristics with respect to format.

7. Since it is often the case that, rather than a single document, an electronic file is transferred, it might be useful to describe such situations and the specific characteristics of such files.

2. Germany

[Original: English]
[4 April 2017]

Chapter III. Use of electronic transferable records

Article 12 (a):

Although we agree that a functional approach should generally be followed in defining the reliability standard, and we support flexible criteria in order to avoid the excessive costs that would be incurred by business if requirements were too narrowly defined, we are strongly convinced, that at least (ii) "The assurance of data integrity", (iii) "The ability to prevent unauthorized access to and use the system" and (iv) "The security of hardware and software" are mandatory requirements for the reliability of transferable electronic records, especially insofar as cross-border recognition is concerned. These three requirements should be made mandatory for example by way of an "at least" clause so that they feature in all assessments of reliability. We therefore suggest revising Article 12 (a) to that effect.

Article 15:

We suggest revising the notion of "originals" in order to reflect the outcome of discussions surrounding the notion of "uniqueness" in Article 10. We take the view that Article 15 refers to copies and duplications of transferable documents as is the case in Article e8 of the Supplement to the Uniform Customs and Practice for

Documentary Credits for Electronic Presentation. This should be expressly clarified in Article 15 in order to avoid the possibility of multiple claims.

Explanatory Notes to the Model Law on Electronic Transferable Records

Article 1:

Para. 9:

We suggest deleting in the first sentence the words "securities and other" insofar as it specifies that only financial securities, e.g. mid- and long-term securities traded on capital markets, are excluded. The general determination as to which instruments are to be counted as securities is a matter of substantive law.

Suggestion:

> "Paragraph 3 clarifies that the Model Law does not apply to investment instruments."

Article 2:

Para. 19:

Since the second sentence of paragraph 19 refers to transferable records or instruments, i.e. the "paper-world", the reference to the "person in control" should be replaced by a reference to the "paper-world" equivalent, i.e. the "possessor". In order to make this statement more comprehensive, the sentence could be drafted as follows:

> "It does not aim at affecting the fact that substantive law shall determine the rights of the possessor and determine who is considered as the (rightful) holder."

Article 10:

General Remark:

The explanatory notes on Article 10 are key to the functioning of the Model Law. Article 10 is a central provision in ensuring the "uniqueness" of an electronic transferable record. Uniqueness is an essential feature that contributes to prevent the existence of multiple claims for performance of the same obligation. Another requirement that prevents multiple and repeated requests for performance of the same obligation is, with regard to bills of exchange, for example, the requirement of presentment and surrender for payment. We take the view that uniqueness (in the same way as authenticity) pertains to the document or instrument, and therefore also the electronic record thereof. The singularity of claims is a consequence of uniqueness (and authenticity) of the record that incorporates the performance obligation. Control (the functional equivalent of possession) is something different and not necessarily linked to these notions. The person in control may change throughout the life cycle of an electronic transferable record, for example, by transfer thereof. However, the singularity of the right to claim performance of the obligation is not affected by a change of the person in control. To provide for uniqueness in an electronic environment does not mean establishing full equivalence to the paper document, which, as a physical object, is by nature unique. That may not be technically feasible. Rather, uniqueness should provide for a functional equivalent of the effects linked to an original/authentic paper document in the paper world. Since the distinction between transferability and negotiability and the distinction between financial instruments and documents of title is not known to all jurisdictions (it is unknown to German law) and since the Model Law focuses on transferability (see in particular para. 3 of the Explanatory Notes), it does not seem useful to refer to the terms "document of title or negotiable instrument" in the last sentence of paragraph 63.

Para. 63:

We suggest: (a) adding in the second sentence "the existence of" before the words "multiple claims"; (b) adding the words "for performance of the same obligation" after the word "claims"; and (c) for clarity and correctness, we suggest revising the last sentence as follows:

> "Providing a guarantee of uniqueness in an electronic environment functionally equivalent to an original or authentic document or instrument in the paper world has long been considered a peculiar challenge".

Suggestion:

> "Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance and thus to avoid the existence of multiple claims for performance of the same obligation."

Para. 64:

We suggest: (a) revising the first sentence as follows: "Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible and as the identification of the specific record that is supposed to constitute the equivalent to a respective transferable document or instrument is not obvious due to the lack of a tangible medium."; (b) in the third sentence adding the words "a paper document, as a physical object, is by nature unique and, furthermore" after the word "However".

Suggestion:

> "Uniqueness is a relative notion that poses technical challenges in an electronic environment, as providing an absolute guarantee of non-replicability may not be technically feasible and as the identification of the specific record that is supposed to constitute the equivalent to a respective transferable document or instrument is not obvious due to the lack of a tangible medium. In fact, the notion of uniqueness poses challenges also with respect to transferable documents or instruments, since paper does not provide an absolute guarantee of non-replicability. However, a paper document as a physical object is by nature unique and, furthermore, centuries of use of paper in business transactions have provided sufficient information to commercial operators for an assessment of the risks associated with the use of that medium while practices on the use of electronic transferable records are not yet equally well-established."

Para. 65:

We suggest: (a) adding "the existence of" before the word "multiple"; (b) replacing the word "requests" with the word "claims"; and (c) deleting the text after the word "obligation".

Suggestion:

> "Article 10 aims at preventing the possibility of the existence of multiple claims to perform the same obligation."

Para. 67:

For the same reason, we suggest deleting the words "and control".

Suggestion:

> "One effect of the adoption of the notion of "singularity" in the Model Law is the prevention of unauthorized replication of electronic transferable record by the system."

Para. 68:

We take the view that this Model Law applies only to electronic equivalents of what may generally be referred to as "securities". It does not apply to instruments with a mere evidentiary function that do not meet the requirements of transferable records or instruments as defined in Article 2. This should be clearly expressed. We therefore support adding the word "also" in the last sentence after the words "electronic transferable record may".

Suggestion:

> "For instance, an electronic transferable record may also have an evidentiary value […]".

Para. 70:

We take the view that paragraph 70 should be made subject only to paragraph 4. If so, "if these are issued as instruments not to order" should be added to the second sentence.

Suggestion:

> "This could be the case, in certain jurisdictions, of straight or nominative instruments, such as promissory notes, bills of lading or bills of exchange, if these are issued as instruments not to order."

Para. 82:

The provisions of the Model Law do not use the term "original". Nevertheless, its provisions aim at establishing an electronic transferable record that is finally functionally equivalent to what is considered an original or authentic transferable document or instrument in the paper-world. The first and the fourth sentence should therefore be drafted as follows:

> "Unlike other UNCITRAL texts on electronic commerce, the Model Law does not use the term "original" in the provisions that contain the requirements for establishing functional equivalence to the paper-based notion of "original". […] With regard to the dynamic notion of "original" in the context of electronic transferable records, Article 10, subparagraph 1(b)(iii), […]."

Para. 83:

We suggest revising the text in light of the proposed changes above (para. 65), following the line that control must be distinguished from uniqueness. In any case consideration must be given to the fact that "singularity" allows a specific electronic record to be identified as the electronic transferable record entitling the person in control to claim to performance.

Para. 83 should be drafted as follows:

> "Hence, while the notion of "original" of transferable documents or instruments is particularly relevant to prevent multiplicity of claims, the Model Law achieves that goal with the use of the notions of "singularity" and "control" that allow identifying both a specific electronic record as the electronic transferable record to entitle the person in control to claim performance and that is the object of control (see above paras. 65-76)."

Article 11:

Para. 94:

We take the view that the text, as it is currently drafted, does not precisely reflect the statement of Article 11, paragraph 1 (b) and, furthermore, does not reflect the consensus in the Working Group. It should therefore be revised carefully in accordance with the statements contained in paragraph 101 of document A/CN.9/863 (report of the 52nd session): "It was stated that both control and possession were factual situations and that the person in control of an electronic transferable record was in the same position as the possessor of an equivalent transferable document or instrument. It was also stated that control could not affect or limit the legal consequences arising from possession and that those legal consequences would be determined by applicable substantive law. Broad consensus was expressed on those statements. It was further stated that parties could agree on the modalities for the exercise of possession, but not modify the notion of possession itself." Therefore, we suggest: (a) replacing the words "the holder of the electronic transferable record" in the first sentence by the words "as such", since reference to "the holder" at this point would imply a statement about the substantive-law effects of being identified as the

person in control (if an explanatory element is needed, we suggest using the wording of paragraph 101 of document A/CN.9/863); (b) replacing the word "holder" in the second sentence with "possessor" in order to clarify that control in the electronic world is equivalent (only) to possession in the paper world. "Holder" has substantive-law implications, possibly referring to whether the person is a "rightful" holder or not.

Suggestion:

> "Subparagraph 1 (b) requires to reliably identify the person in control as such of the electronic transferable record. The person in control of an electronic transferable record is in the same legal position as the possessor of an equivalent transferable document or instrument."

Para. 96:

We suggest revising the text after the first sentence along the following lines: "The use of the services of a third party to exercise exclusive control does not affect exclusivity of control. It does neither imply nor excludes that the third-party service provider or any other intermediary is a person in control. Rather this is to determine by the applicable substantive law". This would make it clear that the Model Law neither excludes nor contradicts the underlying factual and legal assumptions of intermediate securities holding models, which are reliant on the notion that intermediaries have (indirect or mediate) possession of the securities registered in the securities accounts they maintain and operate (for other intermediaries or the ultimate account holder).

Para. 102:

We suggest revising the last sentence as follows:

> "The Model Law does not contain specific provisions on surrender since paragraph 2, which governs transfer of control as the functional equivalent of transfer of possession and thus of delivery, would apply also to those cases."

Article 12:

General remark:

We are convinced that the reasonable reliability requirements are important for a well-functioning Model Law, especially in cross-border contexts. Article 12 and the corresponding explanatory notes are essential for the common interpretation and therefore the effectiveness of this standard. As mentioned above, we suggest that a mandatory assessment of (at least) data integrity, access protection and hard- and software security, are necessary in order to implement a general reliability standard for electronic transferable records. We therefore suggest revising the explanatory notes in paras. 103-111. It should be clarified that party agreements cannot derogate from these minimum requirements.

Para. 104:

We suggest, for example, revising the text after the words "elements that" to underline the fact that the above (Art. 12) indicated elements contained in Article 12 are "conditio sine qua non" for the reliability of transferable electronic records.

Para. 119:

We suggest adding a text after the words "not to make it dependent on party autonomy" that highlights that the requirements: (ii) "The assurance of data integrity", (iii) "The ability to prevent unauthorized access to and use the system" and (iv) "The security of hardware and software", listed in Article 12, are mandatory.

Article 15:

Para. 133:

We suggest revising the second sentence with regard to the changes proposed above (para. 65) to the effect that control must be distinguished from uniqueness.

3. Hungary

[Original: English]
[4 April 2017]

Article 2 of the draft defined the expression "electronic record" as "information generated, communicated, received or stored by electronic means". Storing and archiving electronic data has encountered several difficulties lately from the aspect of commerce in Hungary: the system and method of e-invoicing is developing rapidly, but the legal framework of archiving the invoices (Hungarian Ministerial Decree 114/2007 (XIJ.29.) on the rules of digital archiving) is no longer applicable to all cases. In the last ten years, e-invoicing, and in general, digitalization became a much more complex and developed area than it was in 2007. Because of this, a modernization and reform of the framework is urgently needed: with a new, more flexible, transitive and business-friendly legal background, the storing and archiving of e-invoices would be quicker and easier (it would significantly help the enforcement of the principle of technology neutrality too). It would also help decreasing the number of regular, paper-based invoices, thus decreasing the administrative burden, and, as a collateral effect, it would increase competition between parties providing archiving services, decrease the prices of such services, and improve their quality as well.

The draft, however does not have an article about storing and archiving any kind of electronic transferable record. With the process of storing is an essential and inevitable part of managing electronic data, Hungary would respectfully suggest the Working Group to include some general provisions about the reliable method and know-how about it in the Model Law.

4. United States of America

[Original: English]
[4 April 2017]

Paragraph 65 of the Explanatory Notes indicates that "singularity" and "control" are intended to prevent the possibility of multiple requests to perform the same obligation. Paragraph 67 of the Explanatory Notes states that an effect of "singularity" and "control" is the prevention of unauthorized replication of an electronic transferable record. In this regard, it is important to recognize that, while unauthorized replication is to be prevented, there may still be multiple versions of the data that constitute the electronic transferable record. It is "control" that will prevent multiple claims for performance.

Unfortunately, there has been confusion between singularity of document or record and singularity of claim. The model law seeks to achieve the latter. As systems may retain copies of data, there might not be a singular record. However, "control" should address concerns stemming from this possibility, because the concept of control in the draft model law specifically deals with the singularity of the claim and thereby eliminates the need to identify a singular record to prevent multiple claims. By definition, control limits the parties that may make a claim on an electronic transferable record without having to design a system that provides for a singular record.

Paragraphs 76-78 of the Explanatory Notes are misguided in this regard. While Article 10(1)(b)(i) of the Model Law contemplates utilization of a reliable method to identify an electronic record as the electronic transferable record that will be relevant to parties to a transaction, it cannot contemplate that this electronic record will necessarily be unique. Instead, working with the concepts of "control" found in Article 10(1)(b)(ii) and Article 11, Article 10(1)(b)(i) operates to identify the relevant electronic record for the transaction to be undertaken. For this reason, the Explanatory Notes should be revised to state instead that the provision will assist in identifying the electronic transferable records for the purpose of the relevant transaction.

In a purely drafting matter, the title of Article 14 does not accurately characterize the text that is contained in the article. While the title refers to the "[d]etermination" of

the place of business, the operative text identifies bases that are not alone sufficient for the determination. Nowhere in the text of that article are there rules for the determination of the place of business. For this reason, the title could be simplified to "Place of business".

B. Intergovernmental organizations

1. World Trade Organization (WTO)

[Original: English]
[3 April 2017]

Facilitating the use of electronic documentation is without question an important feature of the enabling environment for electronic commerce, in which the WTO has pursued a Work Programme since 1998.

The WTO's key area of interest concerns the possible implications of the Draft Model Law for international trade and, in particular, for the WTO's multilateral rules. Among the pillars of the multilateral trade regime are the principles of transparency (making measures public), non-discrimination among Member countries (most favoured nation treatment), and non-discrimination against foreign imports of goods and of services or their suppliers (national treatment). These principles apply both in terms of cross-border transactions, commercially present juridical or natural persons in the case of services trade, and domestic regulatory measures that may haven such effects. In reviewing the provisions of the Draft Model Law, we found no provisions that would explicitly contradict the WTO principles noted above.

Due to its perhaps more direct link to trade concerns, we gave particular attention to Article 20, on non-discrimination of foreign electronic transferable records, as well as the Explanatory Notes and negotiating history, as cited in the Notes. The wording of Article 20, paragraph 1, stating "electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad" is certainly consistent with the most favoured nation trade principle and broader non-discrimination principles. However, we would like to call your attention to jurisprudence in international trade that de facto discrimination would be relevant, for example, in implementation, even where, on a de jure basis, a law's provisions do not explicitly discriminate based on origin.

In this respect, we note with interest the observations in the Explanatory Notes regarding Article 20, paragraph 1, where it is indicated that:

> "paragraph 1 could not per se lead to the recognition of an electronic transferable record issued in a jurisdiction that does not recognize the legal validity of electronic transferable records. However, paragraph 1 also does not prevent that an electronic transferable record issued or used in a jurisdiction not allowing the issuance and use of electronic transferable records, and that otherwise complies with the requirements of applicable substantive law, could be recognized in a jurisdiction enacting the Model Law."

Given this interpretation, and in terms of governments' exercise of the flexibility that is implied, it might be useful to recall that the underlying domestic criteria concerning acceptance or non-acceptance of electronic transferable records issued or used in a jurisdiction not allowing the issuance and use of such records should not only be made public (transparency) but also be non-discriminatory. Therefore, the relevant implementing measures in such cases should be objective in nature and also not, in themselves, based "solely" on origin. This assumes that acceptance of such records from jurisdictions that do allow their issuance or use would normally not raise these issues.

(A/CN.9/921/Add.1) (Original: Arabic/English)

Draft Model Law on Electronic Transferable Records: compilation of comments by Governments and international organizations

ADDENDUM

Contents

II. Compilation of comments

A. States

5. Kuwait

[Original: Arabic]
[4 April 2017]

1. It should be noted that most of the provisions contained in the draft Model Law are taken from other model laws issued by the United Nations Commission on International Trade Law (UNCITRAL), such as the UNCITRAL Model Law on Electronic Commerce (1996) and the UNCITRAL Model Law on Electronic Signatures (2001), in addition to the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the Electronic Communications Convention). As a member of the United Nations, Kuwait has acceded to these international instruments, which have been incorporated into Kuwaiti law through, for example, the Electronic Transactions Act (Act No. 20 of 2014), the Anti-Money Laundering and Combating the Financing of Terrorism Act (Act No. 106 of 2013) and the Anti-Cybercrime Act (Act No. 63 of 2015).

2. Article 1 of the draft Model Law sets out the scope of the law. Under paragraph 3, which lists the exclusions to the law, we wish to include reference to all documents and instruments deemed by the national legislature to fall outside the scope of the Model Law, such as:

(a) Transactions and matters related to personal status, endowment and wills;

(b) Real estate title deeds and the resulting original or consequential real rights;

(c) Promissory notes and negotiable bills of exchange;

(d) Any event that the law requires to be expressed in a written document or to be documented or the making of which is subject to a specific provision in another law.

These exclusions are provided for under article 2 of the Electronic Transactions Act. This exclusion list extends to all other documents and instruments that may not be converted into or issued in electronic record format according to Kuwaiti law.

3. Article 3 on interpretations provides that, when interpreting the law, regard is to be had to the international origin of the law. It is imperative that this interpretation

should not conflict with the provisions set out in the relevant domestic legislation that has already been adopted and implemented, such as the Electronic Transactions Act, in particular given that the provisions of the Act are based on international instruments to which Kuwait has already acceded. The interpretation must also not conflict with the rules of public order and morals in Kuwait as understood when interpreting the law in accordance with the general principles on which it is based.

4. As regards article 5 on information requirements, it is imperative that the law explicitly exempt all persons from liability in the event that they provide incorrect, incomplete, false or non-original information with regard to their personal electronic records or the records held by governmental security agencies or in the electronic processing systems of such agencies. The purpose of this reservation is to respect the sanctity of private life and the interests of the State, both of which are protected under Kuwaiti legislation. These exemptions are provided for in articles 23 and 32 of the Electronic Transactions Act.

5. As regards article 7 on the legal recognition of transferable electronic records, we reiterate the reservations made with regard to article 1 on the scope of the Model Law, namely that it should exclude all documents and instruments that may not be converted into electronic records pursuant to Kuwaiti law, as provided for in article 2, paragraph d, of the Electronic Transactions Act and in all other Kuwaiti legislation pursuant to which certain documents or instruments may not be converted into electronic records.

6. As regards article 8 on the legal recognition of electronic writing in transferable electronic records and article 9 on the legal validity of electronic signatures in electronic records, subject to the relevant legal requirements, we reiterate that all documents and instruments not recognized by the Kuwaiti legislature in electronic record format must be exempt from the provisions set out in those articles and that any electronic writing or signatures on such documents or instruments may not be recognized, in accordance with the references provided in paragraph 5.

7. As regards article 10 on the conditions for the use of transferable electronic records and article 11 on control over the possession of electronic records, we request that these two articles be merged on the grounds that they both deal with the same issue, namely the conditions applicable to electronic records or documents effective at law. Merging these articles would be better legal drafting practice.

The Kuwaiti legislature has combined the content of these articles into a single article, namely article 9 of the Electronic Transactions Act on the conditions applicable to electronic records or documents effective at law.

8. Article 13 on indicating the time and place in electronic transferable records provides that consideration must be paid to any provisions of national law that require an indication to be provided of the time and place at which the electronic record in question was created, on the condition that a secure and electronically documented method is used to indicate the time and place.

No further details are provided with regard to this provision, however. Furthermore, this matter has already been elaborated in various other model laws, such as the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

The Kuwaiti national legislature has issued detailed provisions concerning the requirements regarding the need to indicate the time and place at which the transaction referred to in electronic record in question was carried out, drawing on the provisions set out in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures. Article 13 should therefore provide further details regarding the conditions under which an indication must be given of the time and date at which the legal transaction referred to in a transferrable electronic record was performed, as has been provided in similar international model laws.

9. As regards article 14 on determining the place of business of the creator or addressee party to the legal transactions recorded in the electronic record in question,

it is imperative that commonly accepted and definitive standards be used, namely the headquarters and place of residence of the persons involved.

This was the approach taken by the Kuwaiti legislature when drawing up article 16 of the Electronic Transactions Act:

> "The electronic document or record shall be deemed sent from the place where the creator's headquarter is located, and shall be deemed received in the place where the addressee's headquarter is located.
>
> "If either has a headquarter, his place of residence shall be deemed his headquarter unless the creator of the electronic document or record and the addressee have agreed otherwise.
>
> "If the creator or the addressee had more than one headquarter, the headquarter more relevant to the transaction shall be deemed the place of sending or receipt."

The draft Model Law uses the negative form to indicate what cannot be accepted as the headquarters or the place of business of the creator or addressee of the electronic record, known as definition by exclusion. The legislative method used by the Kuwaiti legislature in this regard is superior, as it provides great precision during legislative drafting. Article 13 should therefore define the place of business of the parties to an electronic record based on their precise location or place of residence, in particular given that Kuwaiti legislature has already issued precise, detailed provisions on these criteria under previous model laws.

10. Article 15 concerning the issuance of multiple originals of an electronic record should include provisions that require that, where the paper document or record had one original source based on which identical originals were made, the transferable electronic record and any identical originals thereof must comply with the requirement that they bear verified, legally recognized electronic signatures and that a certificate of authenticity for the signature must be provided by the authority authorized to issue electronic signatures.

The Electronic Transactions Act contains provisions on the need for legally recognized electronic signatures and the relevant certificates of authenticity, drawing on provisions set out in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

11. Article 16 provides for the endorsement of transferable documents and instruments on the condition that they comply with the provisions set out in articles 8 and 9. It is imperative that all transactions that cannot, under Kuwaiti law, be transferred into electronic record format be excluded from the provisions of this article, in accordance with the Electronic Transactions Act, pursuant to which transactions related to personal status, endowment, wills and real estate title deeds may not be converted into electronic records.

12. Article 17 provides that a transferable electronic document or instrument may be amended on the provision that a reliable method is used. The criteria for reliability of electronic records are set out in article 12 of the draft Model Law. In that regard, and with the aim of adhering to best drafting practice, the following wording should be inserted at the end of article 17: "provided that the amended electronic record meets the standards for reliability set out in article 12 of this Law."

13. As regards articles 18 and 19 on replacing a transferable document or instrument with a transferable electronic record and vice versa, it is imperative to include requirements that must be met before the replacement can be made, for example:

(a) The method or format through which the electronic documents must be created, deposited, saved, submitted or issued without prejudice to the provisions on data privacy and protection;

(b) The type of electronic signature required;

(c) The method and format in which the electronic signature must be inserted into the electronic document or record;

(d) The conditions that must be met by the authentication service provider responsible for issuing certificates of authenticity for electronic signatures on electronic documents and records;

(e) The oversight processes and procedures that must be carried out to ensure the integrity, security and confidentiality of electronic documents, instruments and records.

Most of these requirements are set out in articles 26 and 27 of the Electronic Transactions Act, which draws on the provisions of international law laid down in the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures.

14. Article 20 on non-discrimination of foreign electronic transferable records provides that the validity of all electronic transferable records issued or used abroad must be recognized.

The article should, however, provide for the principle of reciprocity, a well-known principle rooted in international law. It is illogical and inconsistent with considerations of national sovereignty as embodied in their national legislation, that States recognize the validity of foreign electronic records in their national legislation without any assurances that their own electronic records will be treated similarly in other States. Each State should understand that recognition of its electronic records is dependent on whether it treats records issued in Kuwait with reciprocity.

This reservation draws on the provisions set out in Arab domestic legislation on electronic commerce and electronic signatures, which is, in turn, based on the UNCITRAL Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures. These model laws both underscore the importance of upholding the principle of reciprocity in the context of electronic commerce and electronic signatures, in particular with regard to foreign electronic records and to certificates of authenticity for electronic signatures in such records. This principle is upheld in a number of domestic laws, for example:

- 2002 Electronic Commerce Act, Tunisia
- 2002 Electronic Commerce and Electronic Signatures Act, Emirate of Dubai
- 2006 Federal Electronic Transactions and Commerce Act, United Arab Emirates
- 2004 Electronic Signatures Act, Egypt
- 2007 Electronic Commerce Act, Kingdom of Saudi Arabia

On that basis, it is imperative that article 20 of the draft Model Law provide for the principle of reciprocity with regard to recognizing the validity of foreign electronic records. The Kuwaiti legislature has already inscribed this principle in the Electronic Transactions Act, exceptions to which are detailed in article 24 thereof concerning reciprocal treatment regarding electronic signatures on foreign certificates of authenticity.

B. Intergovernmental organizations

2. Caribbean Court of Justice

[Original: English]
[7 April 2017]

1. Stemming from debates on the earlier UNCITRAL model laws it has been observed by several commentators that one of the greatest contributors to the legal barriers to the development of electronic commerce in international instruments relating to international trade was the difficulty in arriving at uniform definitions of the terms “writing”, “signature” and the “notion of the uniqueness or guarantee of

singularity" so as to become legally viable substitutes for paper negotiable instruments and enable the transfer of rights in conditions of legal certainty.[1]

2. In this regard, the Model Law attempts to establish the functional equivalence of transfer of rights and title in an electronic environment. To that end, focus is placed on the notion of control for the transfer of rights and the formal allocation of title to reliably ensure the integrity of the transferable instrument or document. While the Model Law has effectively addressed the main issues identified above, the following articles of the Model Law are of particular concern and will accordingly be addressed.

Article 2 — Definitions

3. The definition of the Electronic Transferable Record ("ETR") in Draft Article 2 provides that an ETR is an electric record that complies with article 10(1) of the Model Law. Draft Article 10 provides (in part) as follows:

> "1. Where the law requires a transferrable document or instrument, that requirement is met by an electronic record if…".

This definition implies the pre-existence of regulatory scheme under the substantive laws of the different jurisdictions. The fact that ETR refers to the substantive laws of the different jurisdictions could lead to varying interpretations and an uneven application of the model law. Such an occurrence would be the exact opposite of what should be achieved by the model law as an instrument of unification.[2]

Article 4 — Party Autonomy and Privity of Contract

4. Draft article 4 of the draft Model Law provides as follows:

> **Article 4. Party autonomy and privity of contract**
>
> "1. The parties may derogate from or vary by agreement the following provisions of this Law: […].
>
> 2. Such an agreement does not affect the rights of any person that is not a party to that agreement."

Draft Article 4 allows the enacting jurisdiction to derogate from the provisions of the Model Law. However, it leaves open the list of provisions that could be derogated from contained in paragraph 1. This variance in its enactment could significantly disrupt uniformity. Similar criticisms were directed at the UNCITRAL Model Law on electronic Signatures (2001) and the UNCITRAL Model Law on Electronic Commerce, (1996). It was noted that many countries around the world including the United States of America, Canada, Australia and China enacted national laws to address legal obstacles faced in electronic commerce. However, the lack of uniformity and harmonization across the enacting jurisdictions "was perceived as a barrier to trade by electronic means".[3]

5. The explanatory notes address the issue of the lack of uniformity, and emphasizes that it's for the enacting jurisdiction to assess which provisions should be derogated from to accommodate the different legal systems. Be that as it may, having a carte blanche on the provisions that can be derogated from poses a greater threat to the successful application of the Model Law. It is recommended that there should be some restrictions on the provisions that may be derogated from.

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[1] United Nations doc. A/CN.9/681/Add.1 — Possible future work on electronic commerce — Proposal of the United States of America on electronic transferable records available at: http://repository.un.org/handle/11176/138448; See also: Zvonimir Safranko — The Notion of Electronic Transferable Records, available at: http://hrcak.srce.hr/174364?lang=en.

[2] UNCITRAL is the core legal body of the United Nations system in the field of trade law and its mandate is to remove legal obstacles to international trade by progressively modernizing and harmonizing trade law by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.

[3] Wei, C. K. and Suling, J. C. (2006) "United Nations Convention on the Use of Electronic Communications in International Contracts — A New Global Standard", Singapore Academy of law Journal 18:116.

Article 11 — Control

6. Under the existing national and international laws, legal rights are attached to the physical possession of the paper document. The possession of the traditional paper bill of lading represents constructive possession of the goods, and the right to delivery of the goods is based on the physical possession of an original document. In this regard, the model law has equated "control" with "possession" thereby providing a "functional equivalence rule for the possession a transferable document or instrument." Additionally, it rests the burden of ascertainability of factual control on a third-party electronic transferable records management systems provider.

7. All that is required is that it can be reliably established that a person has control and that that person can be identified. The model law is silent on who is the person that is required to have control, whether a third-party service provider or one of the parties involved in the creation of the transfer record. The provision as drafted is sufficiently vague and allows for inconsistent interpretations among adopting countries.

C. Non-governmental organizations

1. Comité Maritime International

[Original: English]
[12 April 2017]

1. Introduction

The Comité Maritime International (CMI) is a non-governmental, not-for-profit international organization established in Antwerp in 1897 with the object of contributing, by all appropriate means and activities, to the unification of maritime law in all its aspects. To achieve its end, CMI has promoted the establishment of national associations of maritime law and cooperated with other international organizations. Because the international regime for the carriage of goods by sea is one of the most important areas of maritime law, CMI participated as an Observer in all the sessions of Working Group III (WG III) of the United Nations Commission on International Trade Law (UNCITRAL) at which the rules, which were finally adopted as the "United Nations Convention on Contracts for the International Carriage of Goods by Sea" (New York, 2008), known as the "Rotterdam Rules", were negotiated.

CMI has carefully continued to watch the development of the "Draft Model Law on Electronic Transferable Records" (Draft Model Law, currently in A/CN.9/920) since Working Group IV (WG IV) commenced a study on "electronic transferable records" in October 2011. CMI has always been conscious of the possible inconsistencies between the text of the Draft Model Law and the Rotterdam Rules' e-commerce related provisions, inter alia, those on negotiable electronic transport records.

CMI wishes to express its concern on the Draft Model Law as approved by WG IV at its 54th session (31 October-4 November 2016, Vienna), and in particular with Article 15, which allows for the issuance of multiple original electronic transferrable records. CMI is particularly interested in the issue because shipping is virtually the only industry that has the practice of issuing more than one original negotiable instruments (i.e., bills of lading) and CMI wishes to submit to the Commission relevant information regarding the custom and practice of the industry before UNCITRAL adopts the final text of the Draft Model Law.[4]

[4] The Report of the 48th session of WG IV (9-13 December 2013) reads as follows: "It was also indicated that the draft provisions should facilitate the continuation of existing practices and therefore it would be prudent to include a provision on the issuance of multiple originals, ***unless the industry requested that such practice should not be permitted to continue in an electronic environment.***" (A/CN.9/797, para. 68. Emphasis added). The present submission demonstrates that CMI sees it is not only as unnecessary but also as undesirable to continue the practice of issuing multiple originals in an electronic environment.

This document explains why the Rotterdam Rules do not contemplate the issuance of more than one original negotiable electronic transport record and points out a possible inconsistency between the Draft Model Law and the Rotterdam Rules. It also proposes possible alternatives to resolve the problem. Section 2 of this paper reviews the treatment of electronic transport records under the Rotterdam Rules, with special attention paid to the possibility of issuing multiple originals. Section 3 identifies the policy decision on which the Rotterdam Rules rest. The possible inconsistency between the Draft Model Law and the Rotterdam Rules is addressed in Section 4. Section 5 will explain some possible solutions. CMI sincerely hopes that this submission will assist in the discussion of the Draft Model Law at the upcoming Commission Session.

2. Electronic Transport Records under the Rotterdam Rules

(1) Equal treatment of transport documents and electronic transport records under the Rotterdam Rules

Codifying the rules on electronic transport records, the Rotterdam Rules seek the full equalization of an electronic document to its paper equivalent. Article 8 of the Rotterdam Rules declares the legal basis for the approach as follows:

> "Article 8. Use and effect of electronic transport records
>
> Subject to the requirements set out in this Convention:
>
> (a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and
>
> (b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document."

Based on the full equalization approach, the Rotterdam Rules, except for provisions that are necessary for technical reasons, such as security requirements for negotiable electronic transport records (Article 9), include parallel provisions for transport documents and electronic transport records. But there is one exception: *the issuance of multiple originals*.

(2) Issuance of more than one original: Negotiable transport documents

Article 36(2)(d) of the Rotterdam Rules requires that negotiable transport documents (such as bills of lading) should state the number of originals when more than one original negotiable transport document is issued.

Article 36(2):

> "The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include: ……
>
> (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued."

Early drafts of the Convention did not require the carrier to include this information,[5] because most of the delegates agreed that the practice of issuing multiple original transport documents was outdated and should not be encouraged in any way. Historically, there was once a custom to issue three original bills of lading — one for the consignor, one for the consignee, and one for the carrier "following the goods" — and each had a different function.[6] It facilitated dealings in cargoes afloat at a time

[5] See, e.g., Draft Convention, A/CN.9/WG.III/WP.56, art. 38.
[6] See, e.g., KURT GRÖNFORS, TOWARDS SEA WAYBILLS AND ELECTRONIC DOCUMENTS, GOTHENBURG MARITIME LAW ASSOCIATION, 1991, pp. 12, 20-22.

when communications were slow.[7] But that custom lost its rational reason long ago.[8] The practice of issuing multiple originals is not only unnecessary but also harmful because it would cause unnecessary disputes if different originals were negotiated to different persons.[9]

Although UNCITRAL Working Group III maintained its reluctance to endorse the practice,[10] it finally decided that it must address existing practices, however irrational they might be, and that a rule was necessary to protect innocent holders who might otherwise be unable to protect their own interests.[11] It should be emphasized that the reference to the issuance of more than one original in Article 36(2)(d) should not be regarded as an endorsement of such a practice by the Rotterdam Rules.

(3) Issuance of more than one original: Negotiable electronic transport records

Although the Rotterdam Rules do not explicitly prohibit a carrier from issuing more than one original electronic transport record, it is clear that they do not intend to allow such issuance. The possibility of issuing more than one original of a negotiable electronic transport record does not conform with the provisions of the Rotterdam Rules on electronic transport records. For example, Article 36(2)(d) refers only to a negotiable transport document, and not to a negotiable electronic transport record. Because the number of originals would be one of the most relevant pieces of information to include in the contract particulars if more than one negotiable electronic transport record were issued, it is obvious that the Rotterdam Rules assume that multiple negotiable electronic transport records will never be issued.

Furthermore, the provisions on the right of control and delivery of the goods would not work properly if more than one negotiable electronic transport record were issued. Article 51(3) requires the holder to present all original negotiable transport documents when it wishes to exercise the right of control. Article 51(4), corresponding to the provision for a negotiable transport record, does not include such a requirement; it simply provides that the holder should prove that he or she is the holder according to the method that Article 9(1) provides.[12] Accordingly, if more than one original electronic transport record were issued, a holder of each original would be entitled to exercise the right of control. However, besides being highly undesirable from the perspective of legal certainty, such an interpretation is not consistent with the framework devised by the Rotterdam Rules on negotiable electronic transport records.

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[7] See, e.g., GRÖNFORS, *ibid*, G. H. TREITEL AND FRANCIS MARTIN BAILLIE REYNOLDS, CARVER ON BILLS OF LADING 4TH ED., SWEET & MAXWELL, 2017, P. 385 ET SEQ.

[8] Lord Blackburn observed more than a century ago as follows: "I have never been able to learn why merchants and ship owners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regular communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the Master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out." (*Glyn Mills Currie & Co v East and West India Dock Co*, (1882) 7 App. Cas. 591).

[9] See, Carver, supra note 4. At the CMI Colloquium on Bills of Lading in Venice 30 May-1 June, 1983, CMI adopted eight recommendations on bills of lading, which were endorsed by the CMI Assembly. The first states: "The practice of issuing bills of lading in sets of two or more originals should cease." CMI News Letter, June 1983, p. 1 It was explained that "the Colloquium could not find any real practical need for maintaining the practice — or rather malpractice — to issue bills of lading in more than one original." Ibid.

[10] See the Report of the 17th Session of Working Group III, A/CN.9/594, para. 230. ["It was noted that, while the practice of issuing multiple originals of negotiable transport documents *should be discouraged*, the suggested provision could nevertheless be useful as long as the ***undesirable practice* continued**."](emphasis added).

[11] See the Report of the 17th Session of Working Group III, A/CN.9/594, paras. 230 and 233.

[12] Article 9(1) is the corresponding provision to Article10 of the Model Law.

The issuance of more than one original would prevent compliance with the requirements of these and other provisions on negotiable electronic transport records.

For the same reasons, Article 47(1) would also fail to operate properly if multiple original negotiable electronic transport records were issued. It provides that, when the goods are delivered at the place of delivery, it is sufficient to present one of the multiple original negotiable transport documents and, once the goods are delivered upon the presentation, the remaining documents become void (Article 47(1)(c)). There is no corresponding reference to negotiable electronic transport records in Article 47(1). The holder of a negotiable electronic transport record is required to show only that it is a holder, pursuant to the method used for the record (Article 47(1)(a)(ii)). No provision clarifies what would happen to the remaining original records if goods were delivered in accordance with the above procedure.[13]

3. Why do the Rotterdam Rules not provide for the Issuance of Multiple Original Electronic Transport Records?

As is explained in Section 2, it is arguable that the Rotterdam Rules implicitly do not allow the issuance of more than one original negotiable electronic transport record while they, reluctantly, allow for negotiable transport documents. Although the travaux préparatoires are not explicit in this regard, the context in which the Rotterdam Rules were negotiated explains why they do not provide the same rule for negotiable electronic transport records as they do for negotiable electronic transport documents.[14] Because there is no custom or practice for carriers to issue electronic transport records in multiple originals, it was thought neither necessary nor desirable to develop or to encourage such a practice in the electronic environment which was outdated and undesirable even for paper documents. The issuance of multiple original bills of lading may barely be explained on the grounds that merchants could avoid the risk of possible loss by sending separate originals. That explanation, which is unconvincing even for paper documents, would never apply to negotiable electronic transport records. Although the e-commerce provisions of the Rotterdam Rules were intensively discussed in Working Group III, no voice was heard from industry in support of enabling the issuance of multiple original negotiable electronic transport records.

The situation has not changed. Although the explanatory note to the Draft Model Law states, "It has been reported that the *practice of issuing multiple originals exists* also in the electronic environment" (emphasis added),[15] CMI is not aware of any such practice in the shipping industry.

The explanatory note also cites Article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ("eUCP") in support of the commercial practice of or demand for issuing multiple electronic originals.[16] That reference is, to say the least, misleading. Article e8 of eUCP, titled "Originals and Copies", provides: "Any requirement of the UCP or an 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 by the International Chamber of Commerce (ICC)[17] notes that "In the world of eCommerce,

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[13] Article 9(1)(d) requires that the procedures for the use of a negotiable electronic transport record should provide "the manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to ... article 47(1)(a)(ii) and (c), the electronic transport record has ceased to have any effect or validity." It is not clear how the provision would apply if multiple original negotiable transport records were issued.

[14] See, for example, MICHAEL F. STURLEY, TOMOTAKA FUJITA AND GERTJAN VAN DER ZIEL, ROTTERDAM RULES: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA, SWEET & MAXWELL, 2010, p. 217, footnote 110.

[15] A/CN.9/920, para. 131.

[16] A/CN.9/920, para. 131 states "An example of legal provisions recognizing that practice may be found in article e8 of the Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation."

[17] JAMES E. BYRNE AND DAN TAYLOR, ICC GUIDE TO THE EUCP: UNDERSTANDING THE ELECTRONIC SUPPLEMENT TO THE UCP 500 (ICC PUBLICATION, NO. 639), 2002, P. 122. The commentary was

the concept of originality is anachronistic and virtually without meaning." The commentary continues that "*The concept of the full set of bills of lading, is similarly anachronistic in the world of electronic commerce*" and that any requirement for the presentment of the full sets of bills of lading would be satisfied by the presentment of the required electronic record under eUCP, unless the credit expressly provided otherwise with sufficient specificity to indicate what was wanted. (emphasis added) The reference to multiple originals in eUCP indicates the industry's reluctance (or even its aversion) to the use of multiple original bills of lading in the electronic environment rather than supporting or requiring the development of such a practice.

The relevant provisions of the Rotterdam Rules are based on a policy decision that the issuance of multiple originals is not desirable even for negotiable transport documents and that there is no reason to allow such practice for negotiable electronic transport records. The policy decision is clearly incompatible with Article 15 of the current Draft Model Law, which allows the issuance of multiple negotiable electronic transport records. CMI is not aware of any custom or practice of industry that justifies a change to the policy decision underlying the Rotterdam Rules.

4. The Possible Inconsistency between the Current Draft Model Law and the Rotterdam Rules

Even if it were accepted that the Draft Model Law is based on a different policy decision than the Rotterdam Rules and should allow the issuance of multiple original electronic transferrable records, the current text seems problematic for the following reason.

An electronic transport record under the Rotterdam Rules may, if not always,[18] fall within the definition of an "electronic transferable record" in Article 2 of the Draft Model Law.

One may argue that negotiable electronic transport records under the Rotterdam Rules are "electronic transferable records existing only in electronic form" (See footnote 1 to Article 3 of the Draft Model Law) to which the Draft Model Law does not apply. Unfortunately, that is far from clear. As is noted above in Section 2(1), because the Rotterdam Rules adopt a full equalization approach to transport documents and electronic transport records and electronic transport records are equivalent to transport documents under the Rotterdam Rules, it may be questioned whether electronic transport records under the Rotterdam Rules exist only in electronic form.

If an electronic transport record under the Rotterdam Rules is an "electronic transferable record" under the Draft Model Law, and if a Contracting State to the Rotterdam Rules enacts domestic legislation on electronic transferable records based on the Draft Model Law, which allows the issuance of multiple electronic transferable records, it would cause an inconsistency with the provisions of the Rotterdam Rules.

One may argue that this is not problematic, on the theory that in many jurisdictions the provisions of the Rotterdam Rules would supersede the national legislation of the Contracting States to the extent there are conflicts. Nevertheless, it would be most advisable for UNCITRAL to avoid outright inconsistency between its recent texts, even if the conflict could be resolved by the superiority of a convention over national legislation.

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cited in the Note by Secretariat prepared for the 51st session of Working Group IV in 2015 (see para. 12 of A/CN.9/WGIV/WP.130/Add.1).

[18] Since the conditions for the reliability of the system are provided in different wording (compare Article 9 of the Rotterdam Rules with Articles 10 and 12 of the Draft Model Law), it is, at least in theory, possible that negotiable electronic transport records under the Rotterdam Rules will not constitute electronic transferable records under the Model Law and vice versa.

5. Possible Solutions

CMI suggests two alternative ways to solve the problem.

(1) Alternative 1: Delete Article 15 of the Draft Model Law

The simplest solution is to delete Article 15, so that the Draft Model Law does not authorize the issuance of multiple electronic transferable records as the electronic equivalent of multiple original documents or instruments. As far as negotiable transport documents (e.g., bills of lading) are concerned, the situation has not changed since the Rotterdam Rules were adopted in 2008: there is no custom or practice from the industry to issue multiple original negotiable electronic transport records. We see no practice or custom of multiple issuance of transferable or negotiable documents or instruments in the area other than the contract for the carriage of goods although some laws refer to the possibility of the issuance of multiple originals.[19]

If the Commission preserves its previously expressed reluctance to endorse the practice of issuing multiple bills of lading and does not wish to replicate that practice in the electronic environment, this is the most preferred option.

One might argue that multiple issuance is useful to create rights for different persons for different purposes; say, one for transfer and the other for security. But that result can be achieved more easily either by providing access to an electronic transferable record for a qualified purpose (e.g., exercising a security interest) or by attributing specific rights to different persons on the basis of the contents of the record.

(2) Alternative 2: Add references in footnote 1 to Article 1(3)

Article 1(3) of the Draft Model Law provides "This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to [....]." The footnote to the provision currently refers to "(a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of 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); and (c) electronic transferable records existing only in electronic form." UNCITRAL may wish to add an explicit reference to the Rotterdam Rules in the same footnote. Alternatively, it is also possible to make a reference in a more generic form, such as "electronic transferable records that are governed by international conventions [or national law]."

UNCITRAL may also wish to add another footnote along the following lines to Article 15: "The enacting jurisdiction may/must consider the possibility that the issuance of multiple electronic transferrable records that embody the contract for carriage of goods wholly or partly by sea might give rise to inconsistencies in the operation of relevant provisions of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea."

6. Conclusion

When it approved the Rotterdam Rules in 2008, UNCITRAL relied on an important policy decision: the issuance of more than one original negotiable electronic transport record should not be allowed (see, Section 3). CMI firmly believes that there is no reason for UNCITRAL to change that policy decision. This would lead to the deletion of Article 15 of the Draft Model Law (see, Section 5(1)).

If UNCITRAL wishes to adopt a new policy and to allow the issuance of transferable record in multiple originals, it would be best to avoid a possible conflict with the provisions of the Rotterdam Rules. (See, Section 4) This would require explicit reference to the Rotterdam Rules in footnote 1 to Article 3 of the Draft Model Law (See, Section 5(2)).

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[19] See Article 64 of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and Article 49 of the Convention Providing a Uniform Law for Cheques (Geneva, 1931).

Appendix: The Relevant Provisions in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008).

Article 1. Definitions

For the purposes of this Convention:

……

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

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

(b) Evidences or contains a contract of carriage.

19. "Negotiable electronic transport record" means an electronic transport record:

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

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

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

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

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

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

Article 9. Procedures for use of negotiable electronic transport records

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

(a) The method for the issuance and the transfer of that record to an intended holder;

(b) An assurance that the negotiable electronic transport record retains its integrity;

(c) The manner in which the holder is able to demonstrate that it is the holder; and

(d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a)(ii) and (c), the electronic transport record has ceased to have any effect or validity.

.....

Article 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

(a) A description of the goods as appropriate for the transport;

(b) The leading marks necessary for identification of the goods;

(c) The number of packages or pieces, or the quantity of goods; and

(d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

(a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

(b) The name and address of the carrier;

(c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and

(d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.

……

Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

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

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

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

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a)(i) or (a)(ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

Article 51. Identity of the controlling party and transfer of the right of control

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

(A/CN.9/921/Add.2) (Original: Arabic/English/French/Russian)

Draft Model Law on Electronic Transferable Records: compilation of comments by Governments and international organizations

ADDENDUM

Contents

II. Compilation of comments

A. States

6. Côte d'Ivoire

[Original: French]
[4 May 2017]

1. As is known, international commercial transactions now require the use of alternatives to paper documents for the purposes of communicating, recording, authenticating and substantiating information and rights that are to be preserved.

2. I [the Minister of Justice] note that review of the draft Model Law and its explanatory notes highlights:

- The desire to increase legal certainty in electronic commerce
- A legislative framework for the use of modern technologies to foster international trade
- The desired degree of flexibility and clarity in terms of its scope of application on the basis of the needs of each enacting State
- The absence of impact on the substantive law applicable to paper documents or instruments
- Lastly, the proposed legal framework does not prevent the preparation or use of electronic transferable records that have no paper-based equivalent.

3. Therefore, I have the honour to inform you that I have no particular comments regarding this innovative legal framework.

7. Qatar

[Original: Arabic]
[3 May 2017]

1. According to paragraph 3 of article 7, the consent of a person to use an electronic transferable record may be inferred from the person's conduct. This could, however,

give rise to disagreement concerning the nature of the conduct required to prove consent. **We are therefore of the view that consent to use an electronic transferable record may be considered to have been given when provided in writing or in any other reliable form**. This would prevent any disagreement with regard to the matter of consent.

2. According to paragraph 2 of article 10, the criterion for assessing the integrity of an electronic transferable record shall be "whether information contained in the electronic transferable record […] has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display." The exception provided for could give rise to disagreement regarding the nature of such a change and the extent of its impact on the original information contained in the record. Any change which arises in the course of communication, storage and display should not affect any part of the original information contained in the record. **We therefore propose that this exception be deleted**.

3. The draft Model Law does not address situations in which an electronic transferable record is issued outside the country in which the record has been authorized and in which the person in control of the record is located while similar records exist in another country or other countries, nor does it address the extent to which information contained in such records may diverge. **We therefore consider it necessary to insert a provision to address the existence of conflicting information in records issued by more than one country**.

4. The draft Model Law does not address whether electronic transferable records can be traded, despite the importance of this issue, its relevance to the purpose of such records and its impact on the fundamental rights of the holder of the record. **We are therefore of the view that provisions on the tradability of records must be included**.

5. "Investment instruments" is not a commonly used term in law, unlike "financial securities". **We consider that a definition of the term should be provided**.

8. Russian Federation

[Original: Russian]
[27 April 2017]

1. According to subparagraph 1 (b)(i) of article 10 of the draft model law on electronic transferable records, a reliable method of identifying an electronic record as an electronic transferable record is a method that makes it possible to identify that electronic record as the electronic transferable record.

2. In accordance with decisions taken at previous sessions of UNCITRAL Working Group IV (Electronic Commerce), the word "authoritative", which represented an identifying feature of an electronic record, was deleted from that draft provision and replaced in the English-language version of the draft model law with the definite article "the".

3. However, as already indicated by the delegation of the Russian Federation, in the Russian language there is no equivalent of the definite article, and consequently the word "authoritative" cannot be deleted without being replaced with another word.

4. Paragraph 1 of draft article 20 enshrines the principle of non-discrimination of foreign electronic transferable records, in accordance with which an electronic record cannot be denied legal effect, validity or enforceability on the ground that it was issued or used abroad.

5. While that principle is fully in line with the policy framework of the draft model law, we believe that the manner in which it is formulated or the manner in which it is explained in the notes might require clarification. In particular, the draft model law and the explanatory notes should not allow the broad interpretation of that principle, which could result in restriction of the right of States to control the validity of electronic transferable records if they have been issued or used abroad.

6. For example, if no control system ensuring a high level of reliability and authenticity of electronic transferable records is established in a foreign State, the State enacting the model law (if the model law is adopted) must reserve the right to deny enforceability of electronic transferable records issued in the territory of such a foreign State. Any other approach could lead to significant abuse in financial and commodity markets through the use of unreliable electronic transferable records issued or used abroad.

7. It would therefore be appropriate to supplement draft article 20 and (or) the explanatory notes with the following provision: "The principle of non-discrimination of electronic transferable records may not in itself constitute a ground for recognizing the legal effect, validity or enforceability of foreign electronic transferable records if such records do not meet the criteria determining the reliability of the method used, as set out in article 12."

8. Moreover, it is noteworthy that all of the criteria determining the reliability of the method used with respect to an electronic record, as set out in draft article 12, are non-mandatory, which would appear not to be correct in all cases. Criteria relating to technical security (such as assurance of data integrity, prevention of unauthorized access and security of hardware and software) should be applied to all types of electronic transferable record.

9. Furthermore, the note regarding the non-mandatory nature of certain provisions of the draft also applies to the draft as a whole: the draft does not set out any restrictions with respect to the application of reservations and exceptions by States enacting the model law, which could disrupt the uniformity of its application, including with regard to such fundamental matters as identification of the persons who have signed a document and the reliability of the methods used to create and transfer electronic transferable records.

B. Intergovernmental organizations

3. Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States

[Original: Russian]
[24 May 2017]

PROPOSED AMENDMENTS TO THE DRAFT MODEL LAW ON ELECTRONIC TRANSFERABLE RECORDS

The draft Model Law is aimed at harmonizing States' legislation with respect to the legal aspects of actions carried out using electronic means. In that regard, the idea of the law is very timely, useful and relevant. In view of the subject matter and objectives of the Model Law, the following comments and proposals regarding the draft text of the Model Law are considered appropriate.

The definition of "electronic transferable record"

Within the meaning of the Model Law, this term is a broader equivalent of the term "electronic document" used in the legal systems of many countries, including the Russian Federation; the scope of application and legal consequences with respect to an electronic transferable record are identical to those with respect to an electronic document in Russian legislation. Given that an electronic document constitutes a form of electronic transferable record and, moreover, is the form most frequently encountered in business practice, it would be useful to include in the definition of "electronic record" the words "including an electronic document".

Article 6

This article suggests that an electronic transferable record is a transferable document in electronic form. However, the inclusion in an electronic transferable record of information other than that contained in a transferable document makes the

electronic document an independent document, as a result of which the provisions on the equivalent legal force of a transferable document and an electronic transferable record where the document and the record are assumed to be identical for the purposes of a commercial transaction cannot be applied. If article 6 is to provide for the inclusion in the electronic transferable record of information necessary for the process of electronic transfer of data, or if it is to provide for changes to the original format of the record as viewed by the sender or to the final format of the record as viewed by the recipient, this should be duly clarified in the text of the draft article.

Article 7, paragraph 3

It would appear that, for the purposes of determining the voluntariness of use of an electronic transferable record, the general provisions of civil law should be applied in order to verify the voluntariness and reasonableness of a person's actions. One of the means of achieving such a determination might be to analyse the conduct of that person, that is, to consider any statement to the effect that those actions have not been taken voluntarily, together with the necessary proof of the validity of such a statement.

Article 9

It is necessary to establish that the method used to identify a person must be provided for by national legislation and, in the cases specified by national legislation, must be duly authenticated (certified). This provision, for example, is applicable to electronic signature, which is the most common and trusted means of authenticating electronic documents in business practice. Alternative means of identification may be provided for in an agreement between the parties or by national legislation, for example, a login and password (for example, for facilities providing e-government or banking services) or identification through an SMS sent to a mobile telephone.

Article 11

It appears that a definition of control of an electronic transferable record is needed, including a definition of control over the integrity and inalterability of an electronic transferable record.

Article 13

There appears to be a need for a more detailed definition of the concept of reliability of the determination of date and time with respect to an electronic transferable record.

Article 14

The provisions of this article should cover not only businesses, given that entities that carry out electronic transactions may be non-commercial organizations.

Articles 18 and 19

It is proposed that paragraph 3 of each article be deleted, because in many jurisdictions the availability of an electronic document does not mean that a paper document ceases to be legally valid. Also, a definition of "a reliable method for the change of medium" is needed in both articles.

Article 20

It may be that paragraphs 1 and 2 contradict one another to some extent, since, according to the provisions of paragraph 2, any legal requirements that must be met in order for a document issued abroad to be considered legally valid continue to apply, as a result of which paragraph 1 cannot be meaningfully applied in practice.

We kindly request that these comments and proposals be taken into account in the course of further work on the draft Model Law.

C. Non-governmental organizations

2. International Federation of Freight Forwarders Associations

[Original: English]
[2 May 2017]

A. Need and approach of the Draft Model Law on Electronic Transferable Records

1. The International Federation of Freight Forwarders Associations (FIATA) is a non-governmental international organization that represents and unites the freight forwarding industry worldwide. It currently relies on the contribution and active participation of the international forwarders associations in more than 100 countries, comprising more than 40,000 member companies. As such, FIATA is concerned with any practices and legal rules or instruments that may directly or indirectly affect the transportation intermediation or the international freight forwarding industry.

2. FIATA very much welcomes the efforts undertaken by UNCITRAL and its Secretariat to finalize an instrument that addresses the issuance of electronic transferable records in order to provide them with certain and predictable legal effects. The transportation and the freight forwarding industry intensively rely on the issuance of paper and electronic documents. The industry increasingly relies on the use of electronic documents for several different purposes and is slowly migrating documentary processes to the electronic environment, given the many advantages that the use of electronic means brings about in terms of time, security and cost. Among the documents traditionally used in the context of transportation activities prominently stand bills of lading issued as negotiable documents. FIATA perceives that negotiable or transferable electronic records lack a proper legal regime in most of the countries whose industry is involved in international trade and relies or depends on the international transportation network. In FIATA's and FIATA members' experience, it is also clear that in the very few countries that have addressed the issuance and use of electronic negotiable documents, such as bills of lading, the industry has quickly abandoned the use of paper for this purpose and moved to the use of electronic documents and tools.

3. It is FIATA's view that the Draft Model Law on Electronic Transferable Records (DMLETR) may potentially make a valuable contribution to the progress of the law in this field, and to the spread of the use of negotiable records in safe conditions. As a Model Law, the chosen instrument, in the first place and like in previous experiences in the field of electronic commerce, will allow enough flexibility to induce a wider adoption of the proposed set of rules. Also, the basic goal of the DMLETR seems to be to essentially set the conditions for the valid issuance in electronic form of the paper-based documents that existing law currently addresses and regulates, by exclusively setting formal requirements on the basis of the functional equivalent and the technology neutrality principles, among others. FIATA considers that this is a modest and yet balanced approach, which may potentially make an important contribution since, other than opening the door to the use in electronic form of documents that current practice is familiar with, it may help to set the legal basis for the development of new practices and documentary processes akin to those based on the use of negotiable or transferable instruments or documents.

4. Likewise, and in terms of the scope of application of the proposed instrument, the DMLETR builds on the existing rules that allow the use of electronic documents or records, which already provide the basis for their validity and evidentiary effect in all those respects that do not strictly depend on, or relate to their transferable or negotiable character. The freight forwarding industry heavily relies on the use of documents, such as waybills or cargo receipts, which in most countries may already be issued in electronic form and which are not affected by the provisions of the DMLETR.

B. Particular concerns regarding the proposed draft

5. The foregoing being said, FIATA wishes to express certain specific particular concerns as regards some of the provisions that the DMLETR contains in its current wording, and which in FIATA's view may limit or distort the expected or potential usefulness of the proposed framework.

6. The first issue relates to the mandatory or, alternatively, non-mandatory character of the model law, and consequently to whether its provisions (or the national law provisions that enact or implement them) may be modified by contract. The DMLETR wisely reflects, and existing practice clearly shows that the use of electronic transferable or negotiable records requires that the parties involved in their issuance or transfer agree on the technology and the method to be used for that purpose. This being the starting point, the main concern of the DMLETR seems to be to lay down the proper formal requirements that set the threshold for recognition of an electronic transferable record and its effects as such, on the basis of several different elements. Current draft article 4, paragraph 1 does however foresee that the scheme of the DMLETR allows the parties to vary its provisions by contract, and leaves to enacting states to identify the provisions that would fall under this rule. It is the view of FIATA that formal requirements of the kind of those addressed by the DMLETR, which provide the core value of the law, are of a mandatory character in currently existing paper-based law, and it should probably be the same under the DMLETR, in order to make sure that an important part of the goals of negotiable or transferable instruments law in its present state (with a strong formal basis) are preserved. Introducing freedom of contract in too many of the elements of the DMLETR would also undermine another of the important goals of the instrument, which should be ensuring a minimum level of harmonization in the field. Whether it is addressed in the black letter rules or in the explanatory notes of the DMLETR, in FIATA's opinion the provisions that ought to be made or recommended as mandatory should include[20] draft articles 8 to 12 (inclusive) which deal with writing and signature requirements, requirements for the existence of an electronic transferable record, control of an electronic transferable record and the standard for the assessment of reliability. If this issue is addressed in the black letter rules, a revised text for draft article 4, paragraph 1 may be:

> "Except for articles 1 to 3, 5 to 12 and 20, para. 2, the parties may derogate from or vary by agreement the provisions of this law."

7. The DMLETR grounds recognition of the existence and effects of electronic transferable records, as defined by its provisions, on the level of reliability of the method employed by the parties for the use thereof (reliability, therefore, provides the reference to determine compliance — or non-compliance — with formal requirements in the model law that refer to the legal effectiveness of the method used by the parties). A second point of concern for FIATA relates to the elements that may be taken into account in the assessment of the level of reliability of such method. Current draft article 12, paragraph 1 lists several factors that may be relevant in the said context, and seems to intentionally leave outside such list, and deprive of any relevance for these purposes, contractual agreements between the parties relating to the technology or method chosen and its agreed validity or reliability.[21] Such a policy option seems to be based on the assumption that the legal regime of transferable or negotiable instruments or documents is specifically targeted at the protection of the interests of third parties, and consequently allowing the parties to agree on the standard of reliability would fundamentally depart from such basic principle and leave third parties unprotected. It is submitted that such a view may not be completely well grounded, and the deletion of any reference to the agreements of the parties in this context may well deprive the Model Law of some of its potential usefulness.

8. Third parties protected in negotiable instruments' or documents' law are the ones involved in the transfer or circulation of the document itself (e.g., the

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[20] Along with those that relate to the scope of application and interpretation of the law itself (draft articles 1 to 3, and 5 to 7, and 20, para. 2).

[21] See comments in the draft Explanatory Note, para. 119.

third-party transferee/holder in good faith/due course). In light of FIATA's understanding of existing practice, such third parties would not be unprotected by giving relevance to contractual agreements between the parties (to the contrary, they would be protected through contractual arrangements providing a specification of what is considered reliable — and may be relied upon — by contract, something that is otherwise left undetermined in the law). In the said context, other third parties may deserve protection, but such protection would have to be sought in other legal rules. This is what FIATA sees in other UNCITRAL instruments, where the validity of, e.g., an electronic signature is made dependent on whether the method used for signing a document reliably ensures the fulfilment of the functions deemed to be performed by a handwritten signature (and correspondingly required for an electronic one to be valid). For this purpose, relevance is given also to the agreements of the parties, thereby leaving the door open to the recognition of legal effects to signatures between two parties provided they meet the agreed standards, whether the resulting acts indirectly affect third parties or not.[22] The standard of reliability in DMLETR provides an objective reference, whose contents are also and nonetheless fulfilled by the parties involved in transactions through their contracts, as a way to avoid the uncertainty attached to undetermined notions. The exclusion of contractual agreements of the parties from the list in draft article 12, paragraph 1 DMLETR, as well as from the elements that, if relevant, may be considered for the purpose to assess reliability, in current practice will simply and precisely reopen that area of uncertainty, should the Model Law be widely enacted with the terms described.

9. FIATA is aware that Working Group IV has made an effort to reach a consensus on this issue, which is currently reflected in draft article 12 and the accompanying explanatory notes. However, should the foregoing remarks merit any consideration, FIATA would recommend that:

(a) An additional section to paragraph (a) or draft article 12 be added with the following wording: "any relevant agreement existing between the parties"; or

(b) Paragraph 119 in document A/CN.9/920 be deleted, so that no express indication as to the feasible relevance of contractual agreements is made, thus leaving the question to the interpreter under the general wording of draft article 12.

10. Finally, FIATA finds some difficulties in the provision in draft article 15 of the DMLETR. On the basis of the functional equivalence principle, this provision (combined with other provisions of the draft Model Law) allows the issuance of multiple transferable records (provided a reliable method is employed for that purpose) in order to meet requirements of paper-based law relating to the valid issuance of multiple originals of a paper transferable document. FIATA's concerns with regard to this provision focus on whether it is strictly needed and on how it should be interpreted.

11. In FIATA's experience, paper bills of lading started to be issued in more than one original (normally three, one for the shipper, one for consignee and one for the banker/broker, or alternatively three for the banker providing the documentary credit) essentially with the purpose to manage and mitigate travel and delivery risks. The various originals are meant to function as a single bill of lading (all originals must expressly state for this purpose that they are part of a set). The said practice has always been approached with caution, as the mere fact that more than one original is issued entails an increased risk of fraud, theft or unauthorized or otherwise wrongful release of the goods. FIATA finds that all purposes covered in paper-based practice through the use of multiple originals may be achieved in the electronic environment without the need to issue more than one original, or more than one electronic transferable record, a reason for which the provision in draft article 15 is not clearly needed.

12. In addition to the foregoing, the provision in the draft article, as it currently stands, creates in FIATA's view some problems of interpretation, as it seems to equate the issuance of a transferable or negotiable document in more than one original with the issuance of more than one electronic transferable record. Although the logic of the

[22] See, e.g., Art. 6, para. 1 of the UNCITRAL Model Law on Electronic Signatures (2001).

DMLETR seems to indicate that each of these electronic transferable records must be treated as one of the originals of a single set (thus being also necessary under applicable law that each of the electronic transferable records indicates that it is one of a single set to benefit from the principle in draft article 15), from a literal point of view this is not entirely clear, and the provision raises many questions as to its relation with other provisions, including in particular draft articles 2, second paragraph, and 10 (on the notion of electronic transferable record) and draft article 11 (on control). FIATA finds that, whereas there are already several examples in practice of how electronic transferable records are being used on the basis of different systems and methods, there is no indication for the time being of whether such records are issued in more than one "original" or independent copy (with the purpose to replicate the practice based on the issuance of more than one paper original), and consequently there is no useful example that may be taken into account to shape the rule in draft article 15. Until that circumstance changes, FIATA would advise that this provision not be included in the Model Law.

(A/CN.9/921/Add.3) (Original: Chinese)

Draft Model Law on Electronic Transferable Records: compilation of comments by Governments and international organizations

ADDENDUM

Contents

II. Compilation of comments

A. States

9. China

[Original: Chinese]
[28 June 2017]

Proposed Changes to Draft Model Law on Electronic Transferable Records

On the Model Law

1. Article 4

It is suggested to clarify the provisions in the Model Law that can be derogated, in light of the mandatory nature of most national laws on transferable documents or instruments.

2. Article 6

It is suggested that the words "as permitted by law" be inserted after the word "information", so that the article would read as follows: "Nothing in this Law precludes the inclusion of information *as permitted by law* in an electronic transferable record in addition to that contained in a transferable document or instrument." Such qualification is justified on possibilities that substantive laws might not allow certain entries in some transferable documents or instruments, for example, in some countries where cheques are not allowed to have entries on interests and would be considered invalid if such entries are made. Without the proposed qualifier "*as permitted by law*", this article might induce an interpretation that is in conflict with substantive laws.

3. Article 10

(1) It is suggested that the title for article 10 be changed to "Transferable documents or instruments". First, that would be in line with the naming style of other articles in the Model Law. This article is about an electronic record to be functional equivalent to a transferable document or instrument when the law requires a transferable document or instrument, therefore, it should be named after what is to be equivalent to. Furthermore, its current title "Requirements for the use of an electronic transferable record" is easily to be confounded with the title of Chapter III, which is "Use of electronic transferable record".

(2) It is suggested that the different language versions of article 10, subparagraph 1(b)(i) be aligned in order to express the notion of "single" with an explicit term in all six languages. Currently, a specific term is used in three language versions, and the "singular noun prefixed with the definite article" approach is applied in three other language versions, for the expression of that notion. The latter approach

creates two problems. First，the "article plus noun" formulation does not underscore the explicit requirement for "singleness", and may result in confusing interpretation; second, it leads to inconsistency between different language versions. It is already the common understanding among different countries, as well as a core requirement throughout the Model Law, that for each corresponding right there could be only one electronic transferable record. Therefore, it is justified, and proved possible, to find a right term to express that requirement in the former three language versions. The word "single" used in the Explanatory Note might be an option.

It might be necessary to point out that the "exclusive control" is not a substitute for the "single electronic transferable record" (single ETR) requirement. While the single ETR ensures the right ensuing from control that is exercised over the only object (i.e. ETR)，the exclusive control ensures that only one subject is given the right deriving from its control over the ETR. In any case there must be an object to control, and it is not possible to talk about control but not about what to control. In the case of Model Law, the object to control is ETR. Apparently, control over one ETR when there are more than one cannot ensure it is the single right, because other people could have control over the rest ETRs and obtain rights therefrom. For this reason, the singularity of ETR is a core requirement indispensable under the Model Law.

(3) It is suggested to insert the word "exclusive" before the word "control" in article 10, subparagraph 1(b)(ii), so as to be aligned with the wording "exclusive control" in article 11.

4. Article 11

(1) It is suggested to change the title of article 11 to "Possession", in that this article is about functional equivalence of "possession", and its current title "Control" deviates from the naming style of other articles in the Model Law, failing to reflect the substance of this article correctly. Under this article, equivalence for "possession" is fulfilled only when a method meets the two requirements set out in paragraph 1. To use "Control" as its title would trigger discussion on the interactions between "control" and the two requirements set out in paragraph 1 and between "control" and "exclusive control".

(2) It is suggested to insert the word "publicly" before the word "identify" in subparagraph 1 (b), in that "possession", in addition to being the factual state of transferable documents or instruments, also serves as a way to publicize rights. The functions of "possession" cannot be fully fulfilled without making the fact of exclusive control publicly known.

(3) It is suggested to insert the word "exclusive" before the word "control" in paragraph 2, so as to be aligned with paragraph 1.

5. Article 12

It is suggested to include reliability of method in the list of factors which, as currently drafted, are mainly about reliability of computer systems, even though a reliable computer system does not lent itself to a reliable method. "Wide applicability of a method", "maturity of the technology in use" and "rationality of a technical route" are examples of factors to be considered for possible inclusion.

6. Article 13

It is suggested to formulate along the line of "functional equivalence", that is, "Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record". Current formulation is not in line with the formulation of other articles, which may give rise to questions about what consequences will result from not meeting the requirements of this article.

On the Explanatory Notes

1. It is suggested to reverse the order of "technological neutrality" and "functional equivalence", as already agreed, which would accurately reflect their inter-relations.

2. It is suggested to delete paragraph 78, in which reference to "other legislation on electronic transferable records" may lead to difficulties in understanding what it specifically refers to. In the case that the paragraph will be retained, it is suggested to confine its discussion to the difference between "single" and "unique".

3. It is suggested to delete paragraph 80, in which the specific reference to a reliable method in subparagraph 1(b)(ii) may create an assumption that the reliable method mentioned in that subparagraph is different from the reliable methods in other articles.

4. It is suggested to change "the holder of the electronic transferable record" mentioned in paragraph 94 to "the person in control of the electronic transferable record". This is because a "holder" is vis-à-vis a transferable document or instrument, not an electronic transferable record, which only has a "person in control". During the discussion of the Model Law, there was a definition of "a person in control of an electronic transferable record", but it was decided later to delete it and to change "holder" throughout the Model Law to "person in control" (A/CN.9/804, para. 85).

L. Note by the Secretariat on a Draft Model Law on Electronic Transferable Records with explanatory notes: proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission

(A/CN.9/922)

[Original: English]

Contents

I. Introduction

1. At its fiftieth session, in 2017, the Commission will have before it a draft model law on electronic transferable records with explanatory notes (A/CN.9/920) (referred to below as the "draft Model Law" and the "draft Explanatory Notes") that reflects the deliberations and decisions of Working Group IV (Electronic Commerce) at its fifty-fourth session (Vienna, 31 October-4 November 2016). The Working Group, at that session, requested the Secretariat to revise the draft model law and the explanatory materials contained in document A/CN.9/WG.IV/WP.139 and its addenda to reflect those deliberations and decisions and transmit the revised text to the Commission for consideration at its fiftieth session. The Working Group recalled that UNCITRAL practice was to circulate the text as recommended by an UNCITRAL working group to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft model law, so that the comments would be received before the Commission at its fiftieth session (A/CN.9/897, para. 20). The comments of Governments and invited international organizations received by the Secretariat on the draft Model Law and the draft Explanatory Notes are contained in document A/CN.9/921 and addenda (the "comments").

2. Chapter II of this note proposes amendments to the draft Explanatory Notes. The draft Explanatory Notes refer to an introduction whose content was to be inserted by the Secretariat at a later stage. The Secretariat, in section A of chapter II of this note, proposes a draft introduction, which has not been before the Working Group, for consideration by the Commission. Section B of chapter II of this note reflects additional considerations that the Commission may wish to consider in finalizing the draft Model Law and the draft Explanatory Notes, which could be reflected in the article-by-article commentary of what will become the Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records. Those considerations are not raised in the comments or the report of the Working Group on the work of its fifty-fourth session (A/CN.9/897). They were brought to the attention of the Secretariat on the occasion of consultations held by experts around the world on the draft Model Law and the draft Explanatory Notes, including the Roundtable organized by the Centre for Commercial Law Studies at Queen Mary University of London on 15 February 2017, which the Secretariat attended remotely.

3. Finally, chapter III of this note raises issues of enactment of what will become the UNCITRAL Model Law on Electronic Transferable Records (the "Model Law") and the relationship of that model law with other UNCITRAL texts in the area of electronic commerce. The Working Group, at its earlier sessions, only briefly

discussed those issues (most recently, at its fifty-fourth session A/CN.9/897, paras. 54-60).

II. Proposed amendments to the draft Explanatory Notes

A. Proposed introduction

"A. Purpose of this explanatory note

4. In preparing and adopting the UNCITRAL Model Law on Electronic Transferable Records (hereinafter referred to as "the Model Law"), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information would be provided. This Explanatory Note, drawn from the travaux préparatoires of the Model Law, is intended to be helpful to legislators, to providers and users of services related to electronic transferable records as well as to academics.

5. In the preparation of the Model Law, it was assumed that it would be accompanied by explanatory materials. For example, it was decided in respect of certain issues not to settle them in the Model Law but to address them in the explanatory materials so as to provide guidance to States enacting the Model Law. Such information might assist States also in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances.

B. Objectives

6. The increased use of electronic means improves the efficiency of commercial activities, including by allowing reuse and analysis of data, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development both domestically and internationally. However, certainty is needed as to the legal value of the use of those electronic means. In order to address that need, UNCITRAL has prepared a number of texts aimed to remove obstacles to the use of electronic means in commercial activities such as the UNCITRAL Model Law on Electronic Commerce,[1] the UNCITRAL Model Law on Electronic Signatures[2] and the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention").[3] Those texts have been adopted in a large number of jurisdictions so that a uniform law of electronic commerce has effectively been established.

7. Transferable documents and instruments are essential commercial tools. Their availability in electronic form may be greatly beneficial for facilitating electronic commerce in international trade as it could allow for their faster and more secure transmission, among other benefits. Moreover, a fully paperless trade environment may not be established without their use. Electronic equivalents of transferable documents and instruments may be particularly relevant for certain business areas such as transport and logistics, and finance. Finally, the introduction of electronic transferable records may offer an opportunity to review existing commercial practices and introduce new ones. At the same time, the dematerialisation of transferable documents and instruments may pose peculiar challenges given the established practice of employing various paper-based precautions in order to reduce risks associated with the unauthorized duplication of those documents and instruments.

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[1] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication, Sales No. E.99.V.4.

[2] UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication, Sales No. E.02.V.8.

[3] General Assembly resolution 60/21, annex.

8. UNCITRAL dealt with the subject of transferable documents and instruments in electronic forms before the adoption of the Model Law. The possibility of issuing bills of lading electronically is envisaged in article 14(3) of the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules").[4] Articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce provide rules on actions related to contracts of carriage of goods and to transport documents that enable the dematerialization, among others, of documents incorporating a claim to delivery of goods.[5] The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")[6] devotes a chapter to electronic transport records. In particular, article 8 of the Rotterdam Rules provides for the use and effect of electronic transport records, article 9 indicates the procedures for use of negotiable electronic transport records and article 10 sets out rules for the replacement of negotiable transport documents with negotiable electronic transport records and vice versa. Moreover, the Rotterdam Rules define both the notion of electronic transport record (article 1(18))[7] and that of negotiable electronic transport record (article 1(19)).[8]

9. Unlike those instruments, the Electronic Communications Convention excludes from its scope of application "bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money" (article 2(2)). That exclusion was based on the view that finding a solution to the challenges posed by the potential consequences of unauthorized duplication of those documents and instruments required a combination of legal, technological and business solutions, which had not yet been fully developed and tested.[9]

10. In 2011, when the Commission decided to undertake work in the field of electronic transferable records, support was expressed for that work in light of benefits that the formulation of uniform legal standards in that field could bring to the promotion of electronic communications in international trade generally as well as to the implementation of the Rotterdam Rules and to other areas of transport business specifically.[10] UNCITRAL decided to prepare a model law to enable the use of electronic transferable records on the basis of their functional equivalence with transferable documents or instruments, building upon the fundamental principles underlying existing UNCITRAL texts in the area of electronic commerce, namely non-discrimination against the use of electronic communications, functional equivalence and technological neutrality.

11. Facilitating the cross-border use of electronic transferable records is of significant practical importance. In that respect, it should be noted that national legislation predating the adoption of the Model Law and dealing with specific types of electronic transferable records did not address cross-border aspects. Moreover, to

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[4] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

[5] Those provisions have been enacted in national laws. However, details on their application in business practice are not available.

[6] General Assembly resolution 63/122, annex.

[7] Rotterdam Rules, article 1(18): "Electronic transport record" means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; and (b) Evidences or contains a contract of carriage.

[8] Ibid., article 1(19): "Negotiable electronic transport record" means an electronic transport record: (a) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and (b) The use of which meets the requirements of article 9, paragraph 1.

[9] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 17* (A/60/17), para. 27.

[10] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 235.

the extent that that legislation adopted specific models and technologies, the use of those models and technologies could create additional obstacles to the cross-border use of electronic transferable records. The Model Law aims at facilitating the cross-border use of transferable documents and instruments by providing not only a uniform and neutral text for adoption by all jurisdictions but also a dedicated provision addressing cross-border aspects of electronic transferable records.

12. UNCITRAL intends to continue monitoring the technical, legal and commercial developments that underline the Model Law. It may, if advisable, decide to add new model provisions to the Model Law or modify the existing ones.

C. Scope

13. The Model Law applies to electronic transferable records that are functional equivalent to transferable documents or instruments. Transferable documents or instruments are paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring the document or instrument. The law of each jurisdiction will determine which documents or instruments are transferable. Consequently, the Model Law does not apply to electronic transferable records existing only in electronic form and to medium-neutral electronic transferable records as those records do not need a functional equivalent to operate in the electronic environment.

14. The Model Law does not aim to affect in any manner existing law applicable to transferable documents or instruments, which is referred to as "substantive law" and includes rules on private international law.

D. Structure

15. The Model Law is divided in four chapters. The first chapter contains general provisions relating to the scope of application of the Model Law and to certain general principles. The second chapter contains provisions on functional equivalence. The third chapter contains provisions on the use of electronic transferable records. The fourth chapter deals with the cross-border recognition of electronic transferable records.

E. Background and drafting history[11]

16. The possibility of future work by UNCITRAL with regard to issues of negotiability and transferability of rights in goods in an electronic environment was first mentioned at the Commission's twenty-seventh session, in 1994, [12] and subsequently discussed in various sessions of the Commission and its working groups, in particular in the context of electronic commerce and transport law. [13] In that framework, two documents have dealt in depth with substantive aspects of the topic:

(a) Document A/CN.9/WG.IV/WP.69 discussed both paper-based and electronic bills of lading and other maritime transport documents. In particular, that document provided an overview of the attempts to deal with bills of lading in the electronic environment, and made suggestions for model legislative provisions which were eventually adopted as articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce. Furthermore, that document contained a preliminary analysis of the conditions for establishing the functional equivalence of electronic and paper-based bills of lading. In this respect, it highlighted as a key issue the possibility to identify with certainty the holder of the bill, which would be entitled to delivery of

[11] References to specific documents and paragraphs are provided in this section of the note for ease of reference. The editorial style of the section will be aligned with that applied to the rest of the draft Explanatory Notes after their approval.

[12] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17), para. 201.

[13] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 291-293. See also A/CN.9/484, paras. 87-93. For an historical record of previous sessions, see A/CN.9/WG.IV/WP.90, paras. 1-4.

the goods. Such issue brought into focus the need to ensure the uniqueness of the electronic record incorporating the title to the goods;[14]

(b) Document A/CN.9/WG.IV/WP.90 discussed in general legal issues relating to transfer of rights in tangible goods and other rights. It offered a comparative description of the methods used for the transfer of property interests in tangible property and for the perfection of security interests, and of the challenges posed by the transposition of those methods in the electronic environment. It also provided an update on ongoing efforts for the use of electronic means in transfer of rights in tangible goods. With respect to documents of title and negotiable instruments, that document stressed the desirability to ensure control over the electronic transferable record in a manner equivalent to physical possession, and suggested that a combination of a registry system and adequately secure technology could assist in addressing issues relating to the singularity and authenticity of the electronic record.[15]

17. At its forty-first and forty-second sessions, in 2008 and 2009, respectively, the Commission received proposals from States for work on electronic transferable records.[16] After preparatory work,[17] the Commission mandated Working Group IV to undertake work in the field of electronic transferable records.[18]

18. The Working Group worked in that field from its forty-fifth session (Vienna, 10-14 October 2011) to its fifty-fourth session (Vienna, 31 October-4 November 2016).[19] At its forty-seventh session (New York, 13-17 May 2013), the Working Group reached the general understanding that its work should be guided by the principles of functional equivalence and technological neutrality, and should not deal with matters governed by the substantive law (A/CN.9/768, para. 14). At its fiftieth session (Vienna, 10-14 November 2014), the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records (A/CN.9/828, para. 23) with priority given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments (A/CN.9/828, para. 30). At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group completed its work on the preparation of a draft model law on electronic transferable records with accompanying explanatory materials. It authorized the transmission of the text (a) for comments by Governments and international organizations invited to sessions of the Working Group and (b) to the Commission for consideration at its fiftieth session, in 2017, together with any comments from Governments and international organizations (A/CN.9/897, para. 20).

19. At its forty-fifth to forty-ninth sessions, in 2012 to 2016, respectively, the Commission considered the progress report of the Working Group, reaffirming its mandate and endorsing its decision to prepare a model law with explanatory materials.[20] At its forty-ninth Commission session, in 2016, it was noted that the draft model law being prepared by the Working Group 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,

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[14] A/CN.9/WG.IV/WP.69, para. 92.

[15] A/CN.9/WG.IV/WP.90, paras. 35-37.

[16] *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 335; and ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338.

[17] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 245-247 and 250; and ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 232-235.

[18] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

[19] For the reports of the Working Group on the work of those sessions, see A/CN.9/737, A/CN.9/761, A/CN.9/768, A/CN.9/797, A/CN.9/804, A/CN.9/828, A/CN.9/834, A/CN.9/863, A/CN.9/869 and A/CN.9/897.

[20] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90; ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 230; ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149; ibid., *Seventieth Session, Supplement No. 17* (A/70/17), para. 231; and ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 226.

as well as the use of transferable records existing only in electronic form, would be addressed at a later stage.[21]

20. At its fiftieth session, in 2017, the Commission … [*to be added by the Secretariat in due course*]

21. The General Assembly, by its resolution … [*to be added by the Secretariat in due course*]"

B. Proposed amendments to the article-by-article commentary

Article 1. Scope of application

Paragraph 3

22. Paragraph 11(c) of the draft Explanatory Notes indicates that the possible types of exclusion from the scope of application of the Model Law include electronic transferable records existing only in an electronic environment. The Commission may wish to consider whether electronic transferable records whose substantive law is medium neutral should be added as a possible type of exclusion. Negotiable electronic transport records issued under the Rotterdam Rules provide an example of such electronic transferable records. The rationale for such exclusion could be that in both cases the need for a functional equivalent of transferable documents or instruments does not arise.

23. The Commission may also wish to consider whether it should be further explained that the possible exclusion of electronic transferable records existing only in an electronic environment and of electronic transferable records whose substantive law is medium neutral from the scope of application of the Model Law should not be interpreted as preventing the use of the Model Law or of some of its provisions, by contractual integration or as otherwise appropriate, in relation to the use of those electronic transferable records.

Article 2. Definitions

24. The Commission may wish to consider whether a clarification should be added that the reference to insurance certificates contained in paragraph 20 of the draft Explanatory Notes should not be understood as referring to various types of certificates and other documents required and issued under certain treaties concluded by the International Maritime Organization (IMO). Those documents are not "transferable documents or instruments" in the meaning of article 2 of the draft Model Law and therefore the Model Law would not be applicable.

25. In particular, "insurance certificates" issued to fulfil obligations contained in certain IMO treaties do not fall under the definition of "transferable documents or instruments". For instance, the 1992 International Convention on Civil Liability for Oil Pollution Damage,[22] the 2007 Nairobi International Convention on the Removal of Wrecks[23] and other so-called "civil liability conventions" contain the requirement that the shipowner shall maintain insurance in place covering the civil liability and impose an obligation on the government of the ships' flag to issue a certificate confirming that the insurance is in place. That certificate is issued on the basis of an insurance policy, which very often in the shipping industry is called a "Blue Card". The underlying insurance may be considered to be "transferable", but the certificate is an administrative document confirming that the relevant government body has verified that the insurance policy is in place.

Article 4. Party autonomy and privity of contract

26. In light also of the considerations expressed in paragraph 32 of the draft Explanatory Notes, the Commission may wish to consider whether additional

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[21] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 226.
[22] United Nations, *Treaty Series*, vol. 1956, p. 255.
[23] IMO document LEG/CONF.16/19; 46 International Legal Materials 694 (2007).

guidance should be provided in identifying provisions of the Model Law from which the parties may derogate. In that respect, the suggestion has been made that derogations should be allowed only with respect to chapter III of the Model Law and as permitted by substantive law.

Article 7. Legal recognition of an electronic transferable record

27. The Commission may wish to consider whether paragraph 48 of the draft Explanatory Notes should be revised to reflect that not all token-based and distributed ledger-based systems lack a centralized operator. The revised paragraph could read: "… such as some token-based and distributed ledger-based systems, …".

Article 9. Signature

28. The Commission may wish to consider whether a clarification should be added to the draft Explanatory Notes that an electronic record could be signed by a legal person when permissible under substantive law and that therefore reference to electronic signatures in article 9 of the draft Model Law is intended also as reference to electronic seals or other methods used to enable the signature of a legal person electronically.

Article 10. Requirements for the use of an electronic transferable record

Subparagraph 1(b)(iii)

29. In paragraph 81 of the Explanatory Note it is explained that, while integrity is a fact and, as such, is objective, the reliable method used to retain integrity is relative or subjective. In that paragraph it is also explained that the general reliability standard contained in article 12 of the draft Model Law applies to the assessment of the method used to retain integrity. However, paragraph 119 of the Explanatory Note indicates that the general reliability standard contained in article 12 is objective. The Commission may wish to consider whether the relationship between the notion of integrity and the application to that notion of a general reliability standard should be further clarified.

Paragraph 2

30. The Commission may wish to consider whether a clarification should be inserted in the draft Explanatory Notes that the notion of integrity would allow, among others, a reliable assurance of the link between any electronic signature affixed on the electronic transferable record and the content of that record at the time the electronic signature was affixed so that, in practice, that link could permit verification of the content of the record that was actually signed.

Article 12. General reliability standard

31. The Commission may wish to consider whether a clarification should be added to the draft Explanatory Notes indicating that the operational rules referred to in subparagraph (a)(i) of article 12 of the draft Model Law may contain an agreement on reliability and that, in that case, that agreement would not be relevant for third parties.

32. The Commission may also wish to consider whether a clarification should be added to the draft Explanatory Notes indicating that reference to "industry standard" in subparagraph (a)(vii) of article 12 of the draft Model Law should not be interpreted in a manner that could hinder supply chain management. In that respect, the Commission may wish to note that applicable standards are often understood as accepted standards, but that the acceptance of those standards may be limited to a specific business field (e.g. banking or maritime transport). Moreover, the Commission may wish to consider whether a clarification should be added to the draft Explanatory Notes indicating that reference to "industry standard" should not be interpreted in a manner that could hinder competition.

Article 15. Issuance of multiple originals

33. The Commission may wish to consider whether a clarification should be inserted in the draft Explanatory Notes that the issuance of multiple originals does not affect the implementation of the notion of singularity, reflected in article 10, paragraph (1)(b)(i), of the draft Model Law, as each original would be identified as the electronic transferable record. It may further wish to consider whether it should also clarify that, in the case of issuance of multiple originals, control may be exercised on each electronic transferable record by different entities, and therefore it does not need to be necessarily exercised simultaneously on all of the records by the same entity.

34. With respect to paragraph 131 of the draft Explanatory Notes, the Commission may wish to note that, further to enquiry, it was indicated that the practice of issuing multiple originals in an electronic environment did not exist yet, but its implementation had been requested by business. It is therefore suggested to replace the words “the practice of” with the words “a business demand for”.

35. With respect to paragraph 132 of the draft Explanatory Notes, it has been observed that applicable law designed to operate in a paper-based environment is unlikely to provide explicitly for the case of issuance of multiple originals on different media. The Commission may therefore wish to consider whether to further clarify that the Model Law does not prevent the issuance of multiple originals on different media when applicable law permits the issuance of multiple originals on paper.

III. Relationship of the draft Model Law with other UNCITRAL texts in the area of electronic commerce

36. Preliminary work on the enactment of the Model Law has highlighted certain issues relating to the interplay between the draft Model Law and pre-existing UNCITRAL texts on electronic commerce as well as to some issues relating to legislative techniques in the enactment of the Model Law. Those issues may be particularly relevant for jurisdictions that have already enacted UNCITRAL texts in the area of electronic commerce.

37. The Working Group has discussed the relationship between the draft model law and the existing UNCITRAL texts in the area of electronic commerce (most recently, at its fifty-fourth session (A/CN.9/897, paras. 58-60)), and specifically with respect to draft article 9 on electronic signatures (A/CN.9/797, para. 40, and A/CN.9/WG.IV/WP.124, para. 34).

Relationship with articles 16 and 17 of the Model Law on Electronic Commerce

38. UNCITRAL has dealt with electronic transferable records used in conjunction with the carriage of goods in articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce.[24]

39. Articles 16 and 17 of the Model Law on Electronic Commerce are based on an approach different from that adopted in the draft Model Law. For instance, article 17, paragraph 3, of the Model Law on Electronic Commerce refers to the notion of “uniqueness” as a requirement to establish the functional equivalence of “possession”. On the other hand, article 10 of the draft Model Law relies on the notions of “control” and “singularity” to achieve that result.

40. Hence, jurisdictions having enacted articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce may need guidance on the relationship between those articles and the Model Law when reviewing their legislation with a view to modernizing it. The Commission may wish to consider whether it should recommend that those jurisdictions should consider replacing those articles with an enactment of the Model Law.

[24] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication, Sales No. E.99.V.4.

41. The Commission may also wish to consider whether it should recommend that jurisdictions intending to enact articles 16 and 17 of the Model Law on Electronic Commerce should consider instead enacting the Model Law.

Methods of enactment of the Model Law and their effect on functional equivalence standards

42. In national law, provisions on the functional equivalence of the notions of "writing" and "signature" are usually contained in the general law on electronic transactions. They are often based on the corresponding provisions of the Model Law on Electronic Commerce and of the UNCITRAL Model Law on Electronic Signatures.[25]

43. Article 8 of the draft Model Law is inspired by article 6, paragraph 1, of the Model Law on Electronic Commerce. Unlike article 9, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention"),[26] draft article 8 refers to the notion of "information" instead of "communication" as not all relevant information might necessarily be communicated (A/CN.9/797, para. 37).

44. Article 9 of the draft Model Law, on electronic signatures, is inspired by article 7, paragraph 1(b), of the Model Law on Electronic Commerce, as amended by article 9, paragraph 3, of the Electronic Communications Convention. Draft article 9 does not follow the two-tier approach adopted in article 6 of the Model Law on Electronic Signatures (A/CN.9/797, para. 40).

45. Regardless of whether the Model Law is enacted as a stand-alone piece of legislation or as part of the general law on electronic transactions, the enacting jurisdiction may indicate that the general law on electronic transactions will apply to electronic transferable records, unless the law on electronic transferable records provides otherwise.

46. In that case, if articles 8 and 9 of the Model Law are enacted, a special functional equivalence regime would apply to electronic transferable records. However, if articles 8 and 9 of the Model Law are not enacted, the same functional equivalence standard for the notions of "writing" and "signature" would be applicable to transferable and non-transferable electronic records.

47. In light of the above, the Commission may wish to provide guidance on techniques of enactment of the Model Law, in particular, as part of the general legislation on electronic transactions. In doing so, it may wish to indicate whether it would be preferable that different or a single functional equivalence standard for the notions of "writing" and "signature" should apply to transferable and non-transferable electronic records, taking into account that the Model Law may provide a more modern approach with respect to electronic signatures.

48. Moreover, the Commission may wish to clarify the relationship, if any, between article 12 of the draft Model Law, on a general reliability standard, and article 10 of the UNCITRAL Model Law on Electronic Signatures, on trustworthiness of systems, procedures and human resources used by a certification service provider.

Possible compilation of consolidated UNCITRAL model provisions on electronic commerce

49. Although electronic communications have already been used in commercial transactions for some time, increased familiarity of the business community constantly improves the understanding of their possible use. In turn, that additional knowledge leads to the development of new business models and practices, which may require adequate legal treatment.

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[25] UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication, Sales No. E.02.V.8.

[26] General Assembly resolution 60/21, annex.

50. Such evolution suggests verifying periodically the continuing suitability of UNCITRAL texts on electronic commerce for modern commercial operations conducted with electronic means. For instance, article 10 of the Electronic Communications Convention on time and place of dispatch and receipt of electronic communications, modifies certain aspects of article 15 of the Model Law on Electronic Commerce. [27] The introduction of the Model Law may bring an additional layer of complexity in light also of the considerations expressed above (paras. 38-48).

51. In that respect, it should be further noted that a significant amount of jurisdictions have enacted domestically provisions contained in the Electronic Communications Convention without formally adopting the treaty, while others have done so in conjunction with or in preparation for formal adoption of that Convention.

52. Moreover, chapters on electronic commerce contained in free trade agreements and paperless trade facilitation agreements increasingly refer to the Model Law on Electronic Commerce or to the Electronic Communications Convention as desirable legislative standards. However, given the variations introduced with the evolution of those texts, it may not be assured that jurisdictions would always enact the most recent uniform legislative model.

53. In light of the above, the Commission may wish to consider whether the consolidation and compilation of the provisions of the UNCITRAL model laws in the area of electronic commerce and of the substantive provisions of the Electronic Communications Convention could be desirable and useful. That work would exclude the preparation of new legislative provisions. Its outcome would offer a coherent and convenient uniform model to jurisdictions wishing to adopt or modernize laws in that area.

[27] Explanatory Note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts, United Nations Publication, Sales No. E.07.V.2, paras. 177 and 183.

IV. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its fiftieth session (Vienna, 12-16 December 2016)

(A/CN.9/898)

[Original: English]

Contents

Paragraphs

I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] 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. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864) and forty-ninth (May 2016) (A/CN.9/870) sessions and continued its deliberations at the fiftieth session.

B. Recognition and enforcement of insolvency-related judgments

2. At its forty-seventh session (May 2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments. The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864) and forty-ninth (May 2016) (A/CN.9/870) sessions and continued its deliberations at the fiftieth session.

[1] A/CN.9/763, paras. 13-14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259 (a)).

II. Organization of the session

3. Working Group V, which was composed of all States members of the Commission, held its fiftieth session in Vienna from 12-16 December 2016. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte D'Ivoire, Czechia, Denmark, El Salvador, France, Germany, Greece, Hungary, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Libya, Mexico, Nigeria, Pakistan, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Switzerland, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

4. The session was attended by observers from the following States: Algeria, Croatia, Cyprus, Dominican Republic, Estonia, Iraq, Lithuania, Malta, Morocco, Netherlands, Portugal, Republic of Moldova, Slovakia, Tunisia and Viet Nam.

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

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

(a) *Organizations of the United Nations system*: World Bank;

(b) *Intergovernmental organizations:* Asian-African Legal Consultative Organization (AALCO); and

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Investment Bank (EIB), European Law Institute (ELI), Fondation pour le Droit Continental (FDC), INSOL Europe, INSOL International, International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA) and Union Internationale des Avocats (UIA).

7. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Hugo Sánchez (Chile)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.141);

(b) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.142);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: commentary and notes on the draft legislative provisions (A/CN.9/WG.V/WP.142/Add.1);

(d) A note by the Secretariat on the recognition and enforcement of insolvency-related judgments: draft model law (A/CN.9/WG.V/WP.143); and

(e) A note by the Secretariat on the recognition and enforcement of insolvency-related judgments: commentary and notes on the draft model law (A/CN.9/WG.V/WP.143/Add.1).

9. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of: (a) the recognition and enforcement of insolvency-related judgments; and (b) facilitating the cross-border insolvency of multinational enterprise groups.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

10. The Working Group decided to commence its deliberations on the recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/WG.V/WP.143 and A/CN.9/WG.V/WP.143/Add.1, followed by the cross-border insolvency of multinational enterprise groups on the basis of documents A/CN.9/WG.V/WP.142 and A/CN.9/WG.V/WP.142/Add.1. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.143 and Add.1)

Article 1. Scope of application

11. The Working Group approved the substance of draft article 1.

Article 2. Definitions

12. The Working Group agreed to defer its consideration of the definitions in draft article 2 until it had reviewed the remaining text of the draft model law.

Article 3 and 3 bis. International obligations of this State

13. The Working Group supported the substance of draft article 3.

14. The Working Group expressed support in favour of retaining draft article 3 bis with the square brackets around the phrase “in force” removed and the text retained.

15. A proposal was made to add the following additional paragraph to article 3 bis: “A treaty applies [to a judgment] for the purposes of paragraph 1 if it is a treaty to which this State is a party, and is one which is open to accession to the State in which the judgment was rendered.” That new language was proposed with a view to clarifying that the disconnection clause in the draft model law would apply if only the receiving State was a party to the overlapping international treaty, but the State of origin had the opportunity to accede to that treaty. It was further suggested that such a solution would preserve the integrity of the systems of recognition and enforcement adopted in possible conflicting international treaties without posing an insurmountable obstacle for the actual implementation of those systems in relation to the two States concerned by the cross-border enforcement of the judgment. That proposal received some support, however, in response several reservations were expressed, including that the treaty would have to be in force and it would not suffice for the originating State to have the opportunity to accede to the treaty that was thought to be overlapping. It was further observed that since a treaty would take priority over a model law in any event, article 3 would be sufficient to prevent any such conflicts.

16. A proposal was made to merge draft articles 3 and 3 bis into one. That proposal received some support, but no specific text was suggested.

17. After discussion, the Working Group agreed that both draft articles 3 and 3 bis should be retained, that the square brackets surrounding the phrase “in force” should be removed and the text retained, and that the proposed text for an additional paragraph in article 3 bis be retained in square brackets.

Article 4. Competent court or authority

18. The issue was raised as to whether article 4 should be worded in the form of a traditional attributive clause of competence, for example: "A request or application for recognition or enforcement of an insolvency-related judgment shall be submitted to the [*insert name of court*]."

19. The Working Group agreed that the text of article 4 should be retained as drafted, but that further consideration would need to be given to how the article would apply in cases where the foreign judgment was raised as a defence or other incidental matter in a court other than a court specified as competent to deal with these matters in draft article 4.

20. A proposal was made to add a second element to article 4 along the following lines: "A court shall also have jurisdiction in proceedings where the outcome depends on the determination of an incidental question of recognition or where that question is raised as a defence." The Working Group agreed in principle to that text as an addition to the existing text of draft article 4.

Article 5. Authorization to seek recognition and enforcement of an insolvency-related judgment in a foreign State; Article 6. Additional assistance under other laws; and Article 7. Public policy exception

21. The Working Group approved the substance of draft articles 5, 6 and 7.

Article 8. Interpretation

22. Although a proposal to delete the phrase "and the observance of good faith" was made, the Working Group agreed to retain article 8 as drafted.

Article 9. Affect and enforceability of an insolvency-related judgment in the originating State

23. The Working Group agreed to revise paragraph 1 in line with article 4 (3) of the most recent draft of the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (the draft Hague Conference text), which read as follows: "A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin."

24. With respect to paragraph 2, after discussion, the prevailing view was that variant 1 should be retained.

Article 10. Application for recognition and enforcement of an insolvency-related judgment

25. With respect to paragraph 1, various views were expressed regarding the phrase "including by way of defence" at the end of the paragraph. One view was that that drafting was sufficient to enable the issue of recognition to be raised by way of defence before both a court of insolvency jurisdiction and of civil jurisdiction. Another view was that it might be better to delete that phrase and reflect its contents in a separate provision along the lines of: "The recognition of an insolvency-related judgment may be raised by an insolvency representative or any other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment by way of defence in the course of proceedings taking place in the court referred to in article 4 or in another court of this State, and should be accompanied by the documents specified in article 10 (2)." Support was expressed in favour of having such a separate provision and limiting it to recognition of the insolvency-related judgment. It was observed that such a provision would have to be aligned with article 4 or that text along the lines of article 11 (d) might be appropriate in resolving the issue. The Working Group agreed that such a provision needed further consideration.

26. The Working Group expressed its support for variant 2 of subparagraph 2 (b). Support was also expressed in favour of deleting the square brackets and retaining the

text "as required by the law of this State" in subparagraph 2 (c) and retaining subparagraph 2 (d) without square brackets.

Article 11. Decision to recognize and enforce an insolvency-related judgment

27. Some support was expressed in favour of replacing subparagraph (a) with a cross-reference to article 9 and for aligning subparagraph (b) with the definition of "foreign representative" in article 2 (b) and thus broadening the reference to "person or body."

28. With respect to subparagraph (d), there was support for retaining the phrase in square brackets, but keeping it in square brackets subject to resolving the drafting of article 4, as noted above.

29. A question was raised as to whether recognition of the proceeding to which the insolvency judgment was related should be a prerequisite for recognition of that insolvency-related judgment. In response, it was observed that such a prerequisite was not required and that any question concerning the legitimacy of the proceeding to which the insolvency judgment was related should be addressed in terms of the grounds for refusal in article 12. It was also observed that there should be the possibility of refusing recognition if the proceeding to which the insolvency judgment was related raised issues of public policy in the receiving State. After discussion, it was agreed that such a prerequisite ought not to be required for recognition of the insolvency-related judgment.

Article 12. Grounds to refuse recognition and enforcement of an insolvency-related judgment

30. A proposal to use mandatory rather than permissive text in the chapeau was not taken up by the Working Group.

Subparagraph (a)

31. There was support for retaining subparagraph (a) as drafted on the basis that it reflected the equivalent provisions of the draft Hague Conference text. It was agreed that explanations in respect of the scope and meaning of the subparagraph, in particular relating to "notification" and "appearance", should be included in the guide to enactment of the model law.

Subparagraph (b)

32. One view was that the words in square brackets should be deleted, while another view was that that phrase should be retained. Although it was noted that that phrase had been deleted in the most recent version of the draft Hague Conference text, after discussion, there was no agreement by the Working Group, and subparagraph (b) was retained as drafted, but placed in square brackets for future consideration.

Subparagraphs (c) and (d)

33. The Working Group agreed to delete the word "prior" in subparagraph (c), and in subparagraph (d) to retain all of the text in square brackets and delete the brackets, and to align the drafting with article 7 (1)(f) of the draft Hague Conference text, that is, "between the same parties on the same subject matter." A suggestion to add a reference to "the same subject matter" in subparagraph (c) was not supported, nor was a proposal to delete the reference to "the same subject matter" in subparagraph (d).

Subparagraph (e)

34. Support was expressed in favour of the substance of subparagraph (e), and of retaining all of the text without square brackets. It was observed that one issue to be kept in mind was how the current draft text would operate in the context of enterprise groups, where there might be a question not only of interference with the debtor's insolvency proceedings, but also with planning proceedings in which the debtor may be participating in order to develop a group solution.

Subparagraph (f)

35. Some concerns were expressed both with respect to whether the subparagraph was too broadly or too narrowly drafted. An additional concern expressed was that the subparagraph should be deleted in the interests of limiting possible exclusions to recognition in order to achieve the goal of the draft text; reference was made to the limited grounds for refusal in Article V (2) of the New York Convention (1958). Although those concerns received some support, the Working Group agreed after discussion to retain the text of subparagraph (f) as drafted. It was observed that the guide to enactment might clarify that different treatment of creditors did not necessarily equate with unfair treatment of creditors.

Subparagraphs (g)(i) to (iii)

36. The Working Group agreed that those provisions should be redrafted as proposed in note 34 of A/CN.9/WG.V/WP.143/Add.1 so as to avoid the use of a double negative in the chapeau. A proposal to delete subparagraphs (g)(i) to (iii) did not receive sufficient support.

37. Concern was expressed regarding the meaning of the phrase "express consent" in subparagraph (g)(i), and whether it meant, for example, that there was explicit consent prior to the proceedings, explicit consent during the proceedings, tacit consent, or submission to the proceedings. A proposal to clarify the meaning of "express consent" was to adopt drafting based upon article 12 (a)(i), along the following lines: "exercise jurisdiction based on the party entering an appearance and presenting their case without contesting jurisdiction in the originating court, provided that the law of the originating State permitted jurisdiction to be contested." Although it was noted that article 5 (1)(e) of the draft Hague Conference text referred to express consent, the drafting proposal received some support. After discussion, it was agreed that the word "express" should be placed in square brackets pending further consideration, including of how that term might be explained in the guide to enactment.

38. A proposal was made to amend subparagraph (g)(ii) to read: "Exercised jurisdiction on a basis on which a court in this State may recognize and enforce the insolvency-related judgment." Although some support was expressed for that proposal, after discussion, it was agreed that it should not be adopted, and that subparagraph (g)(ii) should be retained as drafted.

39. Although there was some concern that subparagraph (g)(iii) might appear somewhat redundant in light of subparagraph (g)(ii), there was support for retaining them as distinct subparagraphs, even if there was a degree of overlap between them. A view was expressed that subparagraph (g)(iii) granted States a separate ground to refuse recognition of decisions based on exorbitant grounds of jurisdiction. A different view was that subparagraph (g)(iii) did not provide grounds for refusal additional to those in subparagraph (g)(ii).

Subparagraphs (g)(iv) to (v)

40. A number of concerns were expressed with respect to subparagraphs (g)(iv) and (v) including: their relationship with articles 21 (g) and 25 of the Model Law on Cross-Border Insolvency; that subparagraph (g)(iv) was limited to the party against whom the judgment was issued when there could be situations where the judgment related to insolvency proceedings concerning the judgment creditor and not only the judgment debtor; and that the subparagraphs might be better expressed as a separate provision rather than as part of subparagraph (g). One solution to clarify the relationship of these subparagraphs with the Model Law might be to preface the subparagraphs with a qualification along the lines of: "Without limiting any form of cooperation under the Model Law on Cross-Border Insolvency". No clear preference was expressed as between variants 1 and 2 of subparagraph (g)(v). The Working Group was encouraged to develop a proposal on how the two subparagraphs might be redrafted to reflect those concerns.

41. After further discussion, there was support for a proposal to delete both subparagraphs and insert a separate draft article along the following lines: "For greater certainty, the relief available under [*insert a cross-reference to the legislation enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment. It was observed that clarification might be required of whether the reference to "judgment" was to an insolvency-related judgment.

Subparagraph (h)

42. There was support for a proposal to adopt and revise the first sentence of subparagraph (h) as follows: "The judgment is related to a proceeding that has not been, could not be or could not have been recognized under the [*the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*]."

Article 13. Equivalent effect

43. The Working Group agreed to retain article 13 as drafted.

Article 14. Severability

44. A proposal to replace "shall" with "may" did not receive support and article 14 was retained as drafted.

Article 15. Provisional relief

45. The Working Group agreed to remove the square brackets and to retain article 15 as drafted.

Additional matters

46. The issue raised at the end of A/CN.9/WG.V/WP.143/Add.1 relating to article 12 of the draft Hague Conference text was not taken up by the Working Group.

47. A proposal to add an article establishing a procedure for a party in interest to object to an application for recognition and for the receiving court to request additional information from, and to hear, that party on the merits was not taken up.

Article 2. Definitions

(a) "Foreign proceeding"

48. The Working Group agreed that the text should recognize a foreign judgment related to both a foreign insolvency proceeding and an insolvency proceeding taking place in the receiving State. To give effect to that decision, the definition of "foreign proceeding" was to be changed along the lines noted in note 2 (i) of A/CN.9/WG.V/WP.143/Add.1.

(b) "Foreign representative" and (d) "Foreign court"

49. The Secretariat was requested to consider the two definitions in the context of the change made to article 2 (a), as well as the implications of that change throughout the text, and to suggest appropriate revisions for future consideration by the Working Group.

(c) "Judgment"

50. A number of proposals were made with respect to the definition of "judgment": (a) to delete "whatever it may be called"; (b) to delete the language in square brackets at the end of the definition; (c) to add "on the merits" after "any decision"; and (d) to add a specific exclusion to the end of the definition in the following terms: "An interim measure of protection is not a judgment."

51. In support of the proposal to include "on the merits" and to expressly exclude interim measures, reference was made to the decision of the Working Group at its forty-ninth session to "delete all references to provisional or protective

and conservatory measures" (A/CN.9/870, para. 55) from the draft text. It was suggested that although all such references had been deleted from the text contained in A/CN.9/WG.V/WP.143, specific language was required in the text to ensure that such measures were not included. A further reason for excluding provisional measures was said to be that their inclusion might be inconsistent with the Model Law on Cross-Border Insolvency and might operate to discourage States from enacting that text.

52. Although some support was expressed in favour of including "on the merits", concerns were expressed that many judgments issued in the course of insolvency proceedings might not be considered to be judgments on the merits, but would nevertheless be judgments that were important to the conduct of the insolvency proceedings and that should be recognized under this draft instrument. In addition, the term "on the merits" was thought not to provide sufficient legal clarity to avoid litigation.

53. As to the addition of text specifically excluding interim measures, while there was some support for including it, there was considerable support for not adding that phrase to the definition. In support of not including the text, it was observed that many key judgments issued in the course of insolvency proceedings might be considered to be of a provisional nature rather than final judgments; and excluding such decisions from this draft instrument would greatly reduce its usefulness. Further, it was observed that, in any event, in accordance with article 9 (1), such a decision could have no greater effect in the receiving State than it had in the originating State.

54. The Working Group agreed that there was no clear support to delete "whatever it may be called" but that the phrase in square brackets at the end of the definition should be deleted. After discussion, the Working Group agreed that in order to facilitate further consideration at a future session, both the phrase "on the merits" and the sentence concerning interim measures should be added to the text and placed in square brackets. The Working Group did not take up a proposal to consider a definition of "judgment" as follows: "Judgment means any decision or order issuing from a foreign court in a duly recognized foreign proceeding."

(e) "Insolvency-related judgment"

55. To reflect the change made to the definition in subparagraph (a), it was proposed that this definition should be of "an insolvency-related foreign judgment". That proposal received some support.

56. Another proposal was to replace subparagraph (e) with the following:

> "(e) 'Insolvency-related judgment', in respect of a judgment, has the meaning given by Article 2A.
>
> "Article 2A
>
> "1. A judgment is 'insolvency-related' if it satisfies the following conditions:
>
> "(a) It has a connection with a foreign proceeding;
>
> "(b) It was given on or after the commencement of the foreign proceeding to which it is connected;
>
> "(c) It serves the interests of the general body of creditors; and
>
> "(d) The proceedings from which the judgment derives could not have been brought but for the insolvency or those proceedings find their source in rules specific to insolvency law.
>
> "2. Insolvency-related judgments include, inter alia, judgments:
>
> "(i) *(insert subparagraphs 2 (e)(i)-(v) in A/CN.9/WG.V/WP.143)*."

57. After discussion, the proposal set out in the paragraph above was amended as follows: (a) replacing "general body of creditors" in subparagraph (c) with "insolvency estate" and (b) replacing "rules specific to insolvency law" in subparagraph (d) with "the law related to insolvency." A further amendment to the

proposal was to add text to allow States the flexibility to add other examples of insolvency-related judgments to the non-exhaustive list referred to in paragraph 2 of that proposal.

58. In reviewing the text of the definition in A/CN.9/WG.V/WP.143 and the proposal, a number of questions were raised with respect to the criteria for a judgment to be insolvency-related: (a) should the connection to insolvency proceedings be a close one?; (b) were judgments issued on commencement (e.g. the decision commencing insolvency proceedings), as well as after commencement to be included?; (c) which insolvency estate was being referred to in subparagraph (c) of the revised proposal?; and (d) should those criteria be formulated as conditions or factors to be taken into account in determining whether the definition was satisfied?

59. After further consideration, the Working Group heard a proposal for a new approach to the definition of "insolvency-related judgment" in article 2 (e), which provided for two alternatives as follows:

"2 (e): 'Insolvency-related judgment' means:

[***"Alternative A*:**

"a judgment that is related to an insolvency proceeding and was issued after the commencement of that proceeding.

"Insolvency-related judgments include, inter alia, judgments determining whether:

"(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;

"(ii) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;

"(iii) A representative of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate;

"(iv) Sums not covered by (i) or (ii) are owed to or by the debtor or its insolvency estate; or

"(v) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.

"For the purposes of this definition, an 'insolvency-related judgment' includes instances in which the cause of action was pursued by:

"(i) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

"(ii) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

"and the judgment on that cause of action would otherwise be enforceable under this Law.]"

[***"Alternative B*:**

"a judgment that satisfies the following conditions:

"(i) It has a connection with an insolvency proceeding;

"(ii) It was given on or after the commencement of the insolvency proceeding to which it is connected;

"(iii) It affects the interests of the insolvency estate; and

"(iv) The proceedings from which the judgment derives could not have been brought but for the insolvency or those proceedings find their source in law related to insolvency.

"Insolvency-related judgments include, inter alia, judgments determining whether:

"(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;

"(ii) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;

"(iii) A representative of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate;

"(iv) Sums not covered by (i) or (ii) are owed to or by the debtor or its insolvency estate, and the cause of action relating to the recovery or payment of those sums arose after insolvency proceedings commenced in respect of the debtor; or

"(v) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.

"For the purposes of this definition, an 'insolvency-related judgment' includes instances in which the cause of action was pursued by:

"(i) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

"(ii) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

"and the judgment on that cause of action would otherwise be enforceable under this Law.]"

60. Although the view was expressed that including those two alternatives could provide a basis for the future deliberations of the Working Group, concerns were also expressed that the Working Group should continue to attempt to resolve the differences between the two alternatives and seek to achieve consensus on a single definition. After discussion, there was support to add the two proposals and to request the Secretariat to analyse the differences between them with a view to providing a consolidated alternative text for future consideration.

V. Cross-border insolvency of multinational enterprise groups: draft legislative provisions (A/CN.9/WG.V/WP.142 and Add.1)

61. The Working Group agreed to commence its discussions on Chapter 2 of the text contained in A/CN.9/WG.V/WP.142.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

62. The Working Group expressed a preference for variant 2 of draft article 3, and supported the substance of the text.

Article 4. Cooperation to the maximum extent possible under article 3

63. It was noted that subparagraph (f) would need to be considered in the context of the Working Group's conclusion on draft article 21. It was proposed that some additional matters might be added to the draft article, including: (a) recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and (b) approval of the treatment of intergroup member claims, including the possibility of mediation or arbitration to resolve such claims.

64. Support was expressed for including a reference to mediation and arbitration, for variant 2 of subparagraph (g) and for removing the square brackets in subparagraph (b) and retaining the text. A reference to cross-filing and intergroup member claims was also supported, with the suggestion that reference to those matters might be more appropriate in a guide to enactment.

Article 5. Effect of communication under article 3

65. The Working Group supported the substance of draft article 5 with the second sentence of subparagraph (f) being moved to the chapeau. A suggestion was made that the title might be adjusted to include the words "limitation of the".

Article 6. Coordination of hearings

66. The Working Group supported the substance of draft article 6.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

67. The Working Group supported the substance of draft article 7.

Article 7 bis. Cooperation and direct communication between a [*insert the title of a person or body administering a reorganization or liquidation with respect to any enterprise group member under the law of the enacting State*]**, foreign courts, foreign representatives and a group representative**

68. The Working Group supported the substance of draft article 7 bis, with removal of the square brackets, noting that the reference to article 1 might need to be reconsidered when the substance of article 1 had been agreed.

Article 8. Cooperation to the maximum extent possible under articles 7 [and 7 bis]

69. The Working Group adopted the substance of draft article 8, agreeing to remove the square brackets in the chapeau and subparagraph (e), and adopting variant 2 of subparagraph (b). With respect to subparagraph (c), it was observed that that matter was typically addressed in cross-border insolvency agreements and might not be required in article 8. Since no further comment was made, the substance of subparagraph (c) was retained and the square brackets removed.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

70. The Working Group agreed to the substance of variant 2 of draft article 9.

Article 10. Appointment of a single [or the same] insolvency representative

71. The Working Group agreed to delete the remainder of paragraph 1 after the words "different States"; to retain "or the same" without square brackets; and to redraft paragraph 2 in language appropriate for a model law.

Chapter 3. Conduct and recognition of a planning proceeding

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

72. There was agreement in the Working Group that the text should not use the terms "solvent" or "insolvent" (thus the phrase "whether solvent or insolvent" should be deleted in paragraph 1), but should rather focus on group members with respect to which insolvency proceedings had commenced and would thus be, in keeping with the language of part 3 of the Legislative Guide, "subject to insolvency proceedings". It was further agreed that the text should focus on forms of participation available to those subject to insolvency proceedings and to those not subject to insolvency proceedings; in the case of the latter, they should not be prevented from taking part in a group insolvency solution, but the text should clarify the manner in which other provisions of the text might apply to them, particularly draft articles 13, 15 and 17.

73. There was support for variant 2 of paragraph 2 with the following changes: (a) "merely implies" should be replaced with "merely means"; and (b) the word "otherwise" should be deleted. Other proposals were: (a) to retain the formulation from variant 1 that "participation does not subject the group member to the jurisdiction of the courts of this State"; and (b) that the phrase "unless otherwise provided in this law" should be added to the beginning of variant 2.

74. With respect to paragraph 3, there was agreement to delete the word "insolvent" and to revise the drafting along the following lines: "may participate in a proceeding under paragraph 1 unless a court in that other State precludes it from so doing."

Article 12. Appointment of a group representative

75. Some preference was expressed by the Working Group in favour of variant 2. Suggestions were made to improve that text including by: (a) clarifying the procedure through which the group representative was appointed; (b) ensuring that the group representative was authorized to not only seek recognition and participate in a foreign proceeding, but also to seek relief; and (c) expanding the text to enable a group representative to be able to participate in a foreign proceeding relating to a group member not participating in the planning proceeding.

76. The Secretariat was requested to provide a revised text of draft article 12 for future deliberations.

Article 13. Relief available to a planning proceeding

77. In terms of paragraph 1, it was agreed that the two square bracketed phrases in the opening lines should both be retained and the brackets removed, and that the references to insolvent and solvent group members should be deleted. In discussing the group member to which the provision should apply, the Working Group considered the broader question of what constituted participation for the purposes of the draft text. It was observed that the two main issues to be examined were what participation would entail and which group members could participate and in what manner.

78. On the first issue, it was observed that participation should be voluntary (including the right to opt out at a later stage) and should not involve submission to the jurisdiction of the planning court. Further, participation should include the following rights: (a) to appear; (b) to make submissions; (c) to be heard; (d) to participate in negotiations; (e) to be notified of progress made in proceedings; (f) to enter into agreements or settlements, including a group insolvency solution; and (g) to seek approval of a group insolvency solution in the relevant jurisdiction.

79. On the second issue, it was observed that there were at least three modes of participation: (a) as a group member not subject to insolvency proceedings anywhere, including as part of the group insolvency solution process; (b) as a group member for which the insolvency proceedings commenced become the planning proceeding; and (c) as a group member for which insolvency proceedings are commenced in another State (e.g. based on centre of main interests (COMI) or establishment). For those in

(a), participation might entail the rights set out in paragraph 76 above. Those in (b) would be subject to the jurisdiction of the court conducting the planning proceeding. For those in (c), the group member would have various rights as outlined above, but the court of the planning proceeding may be able to stay both individual enforcement actions against the assets of that group member, as well as continuation or commencement of insolvency proceedings sought to be opened with respect to that group member in the State of the planning proceeding, where required to assist the development of the group insolvency solution. With respect to (c), it was observed that additional measures may be required in chapter 2 to enable the foreign court in the COMI State to accede to the relief suggested in the State of the planning proceeding.

80. There was agreement that relief under article 13 was available exclusively in the planning proceeding State.

81. In order to clarify the group members covered by article 13, a suggestion was made to revise paragraph 1 by including the phrase "subject to and participating in" before both references to "planning proceeding". A different view was that paragraph 1 should only refer to group members subject to insolvency proceedings.

82. A question was raised as to whether another group member with its COMI in the State of the planning proceeding would be considered to be subject to or participating in the planning proceeding. It was observed that, to some extent, the answer may depend upon the availability of procedural coordination as recommended in part 3 of the Legislative Guide.

83. In respect of subparagraph 1 (c), support was expressed in favour of retaining the word "any" without square brackets and deleting the phrase "in this State". Further, in respect of subparagraph 1 (g), there was support for the suggestion to delete the word "existing" and the word "continued".

84. In respect of paragraph 2, some support was expressed in favour of retaining the text in the second set of square brackets on the basis that it would be easier to determine than the test in the first option. It was observed that the notion of relief interfering with the administration of a proceeding from article 15 (4) might provide a better test for paragraph 2.

85. With respect to the structure of the text, it was suggested that it might be preferable to arrange the provisions to focus first on the planning proceeding and the provision of relief in the State of that proceeding, as well as the ability of the group representative to seek relief in support of that proceeding, then to deal with recognition issues and, separately, with the rights of other group members in the State of the planning proceeding and in foreign States. A related proposal was to prepare a separate provision dealing with those group members not subject to insolvency proceedings.

Article 14. Recognition of a planning proceeding

86. In respect of paragraph 1, there was support for removing the brackets and retaining the phrase "in this State".

87. With regard to paragraph 2 (a), some slight preference was expressed for retaining the phrase "designated as a planning proceeding" and deleting the square brackets.

88. In paragraph 3 (a), it was suggested that "has agreed to participate" should be changed to "is participating or has participated"; another view was that the more flexible standard of "has agreed to participate" should be retained in order to accommodate situations such as where recognition was required as a matter of urgency to preserve assets before group members had actually participated. A concern was expressed with regard to paragraph 3 (b) that such a requirement could become burdensome and the information outdated. In respect of paragraph 3 (c), it was agreed to retain the text at the end of the paragraph and remove the square brackets.

89. After discussion, it was agreed that the focus should be upon providing evidence of which group members were participating in the planning proceeding at the time of the application for recognition without that affecting the question of whether such a participating member might opt out at some future point. The evidence might relate to agreement to participate and the exercise of some other element of participation, such as the right to appear and be heard. It was also agreed that the question of group members opting in and out of participation might need to be addressed separately.

Article 15. Interim relief that may be granted upon application for recognition of a planning proceeding

90. The Working Group agreed to return to article 15 after considering the articles on the substance of the recognition process.

Article 16. Decision to recognize a planning proceeding

91. Noting that there was no specific public policy exception in the draft text, and that the need for such an article might depend on the form in which the text was adopted, the Working Group agreed that the text should be subject to a public policy exception.

92. In response to a question as to whether a planning proceeding and a main proceeding were synonymous, it was recalled that the definition of "planning proceeding" in draft article 2 required that it be a main proceeding. The added element that it was to be the proceeding in which the group insolvency solution was to be developed was noted.

Article 17. Relief that may be granted upon recognition of a planning proceeding

93. There was some support for the suggestion that the phrase "or at any time thereafter" should be added after "planning proceeding" at the end of the first phrase in paragraph 1. Another suggestion was that the party requesting relief should be broader than the "group representative". In addition, so as to align paragraph 1 with the text approved in respect of draft article 13, there was support for retaining both texts in square brackets in paragraph 1 and removing the brackets. It was agreed that appropriate relief under this article would be the relief provided under article 13 and that it might need to be specified in this article rather than relying on the cross-reference as currently drafted. Further, text limiting the available relief to participating group members might need to be added to the provision. In an additional effort to align the text with that of article 13, it was agreed that the words at the end of the chapeau should be adjusted to read, "may grant any of the following relief".

94. It was observed that relief might be required at three different points in the process to develop a group insolvency solution: (a) the point at which the court is aiming to freeze the situation and preserve the integrity of the assets of a participating group member whilst enabling it to carry out normal business activities; (b) the point at which creditors would be notified of the planning proceeding, of the need to make claims and, following development of the group insolvency solution, the seeking of approval; and (c) following voting on a group insolvency solution, its implementation. It was agreed that those three stages should be borne in mind when developing the relief provisions of the draft text.

95. With respect to paragraph 2, concern was expressed that the measures contained in it related only to the time after approval of a group insolvency solution. A different view was that such measures might apply earlier in the proceeding and that to remove the paragraph from article 17 might be premature at this stage. It was observed that paragraph 2 was similar to article 13 (1)(e), and that while 13 (1)(e) was subject to the qualifications present in the chapeau of article 13, article 17 (2), as a separate paragraph, was not subject to those conditions, although they were replicated in the chapeau of article 17. It was agreed to reconsider placement of paragraph 2 once the Working Group had reviewed the remainder of the text. The question of which creditors' interests would need to be protected could also be considered at a later stage.

Article 18. Participation of a group representative in a proceeding [under [*identify laws of the enacting State relating to insolvency*]][in this State]

96. Although there was some support for a suggestion to broaden the ability to participate to any proceeding concerning an enterprise group member by deleting the phrase "that are participating in the planning proceeding", there were concerns that that change might go too far and that further consideration of the proposal was required. The Working Group agreed to retain the text as drafted for future consideration.

97. There was some support for expanding article 18 to include all types of proceeding, although it was noted that, if that were to be done, the article would need to be aligned with article 12.

Article 19. Protection of creditors and other interested persons

98. In respect of paragraph 1, there was support for the suggestion that the phrase "including the debtor" should be replaced by a reference to the group member subject to the relief to be granted. A proposal to add a reference in paragraph 2 to the provision of security as a specific example of the conditions that might be granted was supported.

Article 20. Approval of local elements of a group insolvency solution

99. The Working Group agreed to keep the reference to establishment and remove the square brackets in paragraphs 1 and 4 on the basis that there may be situations where there was a need to approve elements of a group insolvency solution in a jurisdiction where a relevant group member had an establishment; however, that was not to suggest that that approach would be required in all situations. In addition, there was support to add a reference in paragraph 1 to the group member participating in the planning proceeding and to remove the square brackets around that phrase in paragraph 4 and retain the text.

100. With respect to paragraph 4, a proposal was made to replace the phrase "be approved and by whom" at the end of the paragraph with "take effect". A similar proposal was to replace the remainder of the final sentence after the phrase "in that situation" with the following: "the relevant elements of the group insolvency solution may be made binding and effective as required by local law". A third proposal was to delete paragraph 4 entirely. After discussion, there was some support for the second proposal, with further guidance to be provided in a guide to enactment on what that requirement might mean in practice.

Article 15. Interim relief that may be granted upon application for recognition of a planning proceeding

101. There was agreement to align paragraph 1 of article 15 with the text approved in respect of draft articles 13 and 17 by retaining both phrases in square brackets and removing the brackets. It was also agreed that text limiting the available relief to participating group members might need to be added to the provision. With respect to the relevant subparagraphs of article 13 (1), inclusion of all subparagraphs with the exception of subparagraph (e) received varying degrees of support. It was noted that subparagraph (e) was closely related to article 17 (2) and could be further considered in light of the comments made in respect of that article above. The need to ensure the alignment of the relief provisions was noted, as was the need to consider whether additional forms of interim relief might be required.

Chapter 4. Treatment of foreign claims in accordance with applicable law

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

102. The Working Group was of the general view that the text of draft article 21 was acceptable. There was agreement that, in response to the question raised in note 54 of A/CN.9/WG.V/WP.142/Add.1, the protections included in the Regulation (EU)

2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) were too cumbersome and should not be included in this text. A proposal to add a sentence along the following lines at the end of paragraph 1 received support: "Such undertaking shall be subject to the formal requirements, if any, of the State of the opening of the planning proceeding and shall be enforceable and binding on the insolvency estate." Some concern was expressed as to whether that additional text should be limited to the planning proceeding, since article 21 was intended to apply more broadly.

103. Additional matters were raised in respect of which the text might require more detail, including: (a) the procedures that might be required before the court decided to stay or decline to open the non-main proceedings under paragraph 2; and (b) whether this drafting was sufficiently broad to apply in the case of a debt restructuring in addition to sale of assets in a global distribution.

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

104. Concerns were expressed with respect to the scope of article 22 including: (a) whether the commencement of main proceedings could be renounced on the basis of a commitment made in another proceeding concerning the same group member or a different group member; (b) whether the commencement of main proceedings could be renounced on the basis of a commitment made in a proceeding in a non-COMI State; (c) whether the claims of creditors of one group member could be addressed in a proceeding in the COMI of another group member; (d) what standards a court declining to open a main proceeding under paragraph 2 might use to evaluate whether the interests of creditors were properly protected; (e) how a decision made by a non-COMI court would be implemented through the COMI court; (f) outside of the planning proceeding context, which jurisdictions might be eligible to host a proceeding in which such a commitment might be given; and (g) what happened in a situation where the commitment was not respected.

105. It was observed that some of the issues raised might be addressed by reference to other articles of the draft text, such as article 1 (2) which, inter alia, preserved the jurisdiction of the COMI court at all times, and article 19 (1) dealing with the protection of creditors and other interested persons. Moreover, a consideration of how such mechanisms had been used in practice was thought to be instructive and could provide a source of guidance for inclusion in the guide to enactment.

106. Concern was expressed as to the structure of the draft text and the status of articles 22 and 23 as supplemental. It was recalled that the proposal to add those provisions to the draft text had been made on the basis that they should be supplemental and it was emphasized that that had been the basis for their further consideration. The Working Group agreed to continue on the basis of that working assumption.

107. The Working Group agreed that draft article 22 was not acceptable as drafted and the Secretariat was requested to provide a revised text for future deliberations, taking into account the concerns raised.

Article 23. Additional relief

108. There was support in the Working Group for the substance of article 23 as drafted, subject to the following proposals: (a) to delete the reference to paragraph 1 in the first line of article 23 (2); (b) to add in paragraph 1 after the words "planning proceeding" the phrase "particularly where the group representative has made a commitment under article 22"; and (c) in order to create in paragraph 2 a link to that addition in paragraph 1, to add the words "subject to the same condition" at the beginning of paragraph 2. It was acknowledged that article 23 would need to be reconsidered in light of the concerns expressed in respect of article 22 and how they might be addressed in the draft text.

Preamble

109. The Working Group approved the substance of the preamble. There was support for a suggestion to incorporate language addressing the importance of protecting the interests of the creditors of each individual participating group member and not trade those interests off as against the interests of the group members taken together; whether that language should be placed in the preamble or elsewhere in the text could be considered at a later stage.

Article 1. Scope

110. There was agreement to place paragraph 2 in a separate article. Support was expressed for a proposal to simplify the drafting of paragraph 1 and formulate a more typical scope article along the following lines: "This law applies to judicial cooperation in the context of the cross-border insolvency of multinational enterprise groups."

Article 2. Definitions

111. With respect to subparagraphs (a) to (c), it was noted that although they were based on Part 3 of the Legislative guide, they might helpfully be included in this text unless the specific terms were not used.

112. The Working Group approved the substance of subparagraph (d) as drafted. With respect to "group representative" in subparagraph (e), there was agreement to delete the remainder of the definition after "planning proceeding".

113. In respect of subparagraph (f) on "group insolvency solution", proposals were made to change the word "add" in subparagraph (f)(ii) to "preserve", "preserve or enhance" or "preserve and maximize", and to change "that would be likely to" to "with the goal of".

114. In regard to the definition of "planning proceeding" in subparagraph (g), it was recalled that the three requirements of the definition were essential elements of the draft text. It was agreed that the drafting might be revisited to improve it and to remove any ambiguity. A suggestion to add a definition of "participation" was not supported; it was noted that the addition of a substantive provision might be a better approach.

Additional issues — Principles 4 and 5

115. The general view was that those principles were already covered in the draft text and should not be included as additional articles. It was noted that clearer guidance on the procedural mechanisms used under this model law might be developed once the text reached a more advanced state.

B. Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions

(A/CN.9/WG.V/WP.142 and Add.1)

[Original: English]

Contents

I. 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 articles 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. At its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2014) sessions, the Working Group considered the goals of a text that might be developed to facilitate the cross-border insolvency of multinational enterprise groups; the key elements of such a text, including those that might be based upon part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law); and the form that the text might take, noting that some of the key elements lent themselves to being developed as a model law, while others were perhaps more in the nature of provisions that might be included in a legislative guide.

3. At its forty-eighth session, the Working Group agreed a set of key principles for a regime to address cross-border insolvency in the context of enterprise groups and considered a number of draft provisions addressing three main areas: (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; and (c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings. Two additional supplemental areas were also considered. These might include (d) the use of so-called "synthetic proceedings" in lieu of commencing main proceedings, and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

4. At its forty-ninth session, the Working Group considered a consolidated draft legislative text incorporating the agreed key principles and draft provisions addressing the five areas indicated in paragraph 3.

5. The draft text below reflects the discussion and decisions taken at the forty-ninth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on 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.

draft text. Notes and commentary to this draft text, indicated by a reference number in square brackets, are contained in A/CN.9/WG.V/WP.142/Add.1.

II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups

[Part A]

Chapter 1. General Provisions

[Preamble [1]

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, so as to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency affecting members of an enterprise group;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in cases of cross-border insolvency affecting members of an enterprise group;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment.]

[Article 1. Scope [2]

1. This Law applies where:

(a) Assistance is sought in this State by a foreign court, a foreign representative or a group representative in connection with one or more foreign proceedings relating to members of an enterprise group;

(b) Assistance is sought in a foreign State in connection with one or more proceedings under [*identify laws of the enacting State relating to insolvency*] relating to members of an enterprise group;

(c) Assistance is sought in this State by a foreign court, a foreign representative or a group representative in connection with a group insolvency solution for one or more enterprise group members being developed in a planning proceeding in a foreign State;

(d) Assistance is sought in a foreign State in connection with a group insolvency solution for one or more enterprise group members being developed in this State in a planning proceeding under [*identify laws of the enacting State relating to insolvency*];

(e) A foreign proceeding and a proceeding under [*identify laws of the enacting State relating to insolvency*] are taking place concurrently in respect of the same enterprise group member; or

(f) [Foreign] creditors [or other interested persons] have an interest in requesting the commencement of, or participating in, a proceeding under [*identify*

laws of the enacting State relating to insolvency] in respect of an enterprise group member [2.3].

2. Where the centre of main interests of an enterprise group member is located in this State, nothing in this Law is intended to [2.5]:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member; or

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation [to any extent] in a group insolvency solution being developed in a foreign State; or

(c) Limit the commencement of insolvency proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested to address the insolvency of an enterprise group member. When proceedings are not required or requested in this State, there is no obligation to commence such proceedings.]

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 [3];

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Enterprise group member" means an enterprise referred to in subparagraph (a), which forms part of an enterprise group as defined in paragraph (b) [4];

(e) "Group Representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding in which one or more group members are participating for the purpose of developing [and implementing] a group insolvency solution [5];

(f) "Group insolvency solution" means a set of proposals developed in a planning proceeding [6]:

(i) For the reorganization, sale, or liquidation of some or all of the operations or assets of one or more group members;

(ii) That would be likely to add to the overall combined value of the group members involved; and

(iii) That must be approved, insofar as the proposals relate to a particular group member, in the jurisdiction in which that group member has its centre of main interests;

(g) "Planning proceeding" means a main proceeding commenced in respect of an enterprise group member that is a necessary and integral part of a group insolvency solution, in which one or more additional group members are participating for the purpose of developing [and implementing] a group insolvency solution and in which a group representative has been appointed [7].

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative [8]

Variant 1

1. [In the matters referred to in article 1,] the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, 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 [9].

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative concerning members of the same enterprise group participating in a planning proceeding, and in particular with respect to the development and implementation of a group insolvency solution, including the roles of the different courts with respect to implementation.

Variant 2

1. In the matters referred to in article 1, the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, 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.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative, where appointed.

Article 4. Cooperation to the maximum extent possible under article 3

Cooperation to the maximum extent possible for the purposes of article 3 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with the foreign court, a foreign representative or a group representative[, where appointed];

(c) Coordination of the administration and supervision of the affairs of the enterprise group members;

(d) Coordination of concurrent foreign proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

[(f) Approval of the treatment in a foreign proceeding of the claims of creditors of the enacting State] [10];

(g) *Variant 1* Approval of agreements concerning the coordination of proceedings [to facilitate the development and implementation of a group insolvency solution] [11];

(g) *Variant 2* Approval and implementation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(h) Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication; and

(i) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 5. Effect of communication under article 3 [12]

Participation by a court in communication pursuant to article 3, paragraph 2, does not imply:

(a) A waiver or compromise by the court of any powers, responsibilities or authority [13];

(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 6. Coordination of hearings [14]

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.

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts [15]

1. [In the matters referred to in article 1,] a group representative shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative 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 representatives.

[**Article 7 bis. Cooperation and direct communication between a** [*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*]**, foreign courts, foreign representatives and a group representative**

[1. In the matters referred to in article 1,] a [*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 subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

[2. A [*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, foreign representatives of other group members and a group representative, where appointed.]

Article 8. Cooperation to the maximum extent possible under articles 7 [and 7 bis]

For the purposes of article 7 [and article 7 bis], cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

(b) *Variant 1* Negotiation of agreements concerning the coordination of proceedings [to facilitate the development and implementation of a group insolvency solution] [16];

(b) *Variant 2* Negotiation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between a [[*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*],] a group representative[, where appointed] and a foreign representative [17];

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, [where applicable] [18].

Article 9. Authority to enter into agreements concerning the coordination of proceedings [19]

Variant 1 Agreements concerning the coordination of proceedings may be entered into to facilitate the development and implementation of a group insolvency solution.

Variant 2 Agreements concerning the coordination of proceedings involving two or more enterprise group members located in different States may be entered into, including where a group insolvency solution is being developed.

Article 10. Appointment of a single [or the same] insolvency representative [20]

1. The court may coordinate with foreign courts with respect to the appointment and recognition of a single [or the same] insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different States where a group insolvency solution is being developed, provided the insolvency representative is qualified for appointment in each of the relevant States.

2. To the extent required by applicable law, the insolvency representative is subject to the supervision of each appointing court.

Chapter 3. Conduct and recognition of a planning proceeding

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

1. Subject to paragraph 2, if a proceeding under [*identify laws of the enacting State relating to insolvency*] with respect to an enterprise group member whose centre of main interests is located in this State has commenced, any other group member [(whether solvent or insolvent)] [21] may participate in that proceeding for the purpose of attempting to develop a group insolvency solution.

2. *Variant 1* [22]

[For the purposes of paragraph 1 of this article, participation by a group member does not subject the group member to the [jurisdiction of the courts of this State]

[insolvency law of this State], but the group member has a right to appear and be heard in the proceedings on any issue that affects its rights, obligations or interests and to participate in the development and implementation of a group insolvency solution.]

Variant 2

[For the purposes of paragraph 1 of this article, participation by a group member does not affect whether it is otherwise subject to the insolvency law of this State, but merely implies that it would have the right to appear and be heard in the proceedings and to participate in the development and implementation of a group insolvency solution.]

3. An [insolvent] enterprise group member whose centre of main interests is located in another State may not participate in a proceeding under paragraph 1 if a court in that other State precludes it from so doing.

Article 12. Appointment of a group representative [23]

Variant 1 If one or more enterprise group members participate in a proceeding under article 11, the court may appoint a group representative, who may then seek recognition from foreign courts and may seek to participate in any foreign proceeding related to a participating group member.

Variant 2 If one or more enterprise group members participate in a proceeding referred to in article 11, the court may appoint a group representative. The group representative is authorized to act in a foreign State on behalf of that planning proceeding and to participate in any foreign proceeding relating to a group member participating in the planning proceeding, as permitted by the applicable foreign law [24].

Article 13. Relief available to a planning proceeding [25]

1. To the extent needed to [preserve the possibility of developing a group insolvency solution] [protect the assets of the enterprise group member subject to a planning proceeding or the interests of the creditors], the court may, at the request of the group representative, grant the following relief with respect to the assets or operations located in this State of any [insolvent] [26] enterprise group member [other than a solvent group member] participating in the planning proceeding:

(a) Staying execution against the enterprise group member's assets;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Suspending [the] [any] proceedings [27] [in this State] temporarily to allow for the development [and implementation] of a group insolvency solution;

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;

(e) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group 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;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the enterprise group member's assets, affairs, rights, obligations, or liabilities;

[(g) [28] Recognizing existing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the continued provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply]; and

(h) 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. With respect to the assets or operations located in this State of an enterprise group member that has its centre of main interests in another State, relief under this article may only be granted if that relief is not incompatible [with the laws of that State] [with relief granted in insolvency proceedings taking place in that State] [29].

Article 14. Recognition of a planning proceeding

1. A group representative appointed in a planning proceeding may apply for recognition of that proceeding [in this State] [30].

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the [planning] proceeding [designated as a planning proceeding] [31] and appointing the group representative; or

(b) A certificate from the foreign court affirming the existence of the planning proceeding and of the appointment of the group 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 planning proceeding and of the appointment of the group representative.

3. An application for recognition shall also be accompanied by:

(a) Evidence that each group member sought to be represented in a planning proceeding has agreed to participate in that proceeding. Where such a group member is subject to insolvency proceedings in the court of its centre of main interests, evidence shall be procured that any approval which may be required under the domestic law of the State of the commencement of proceedings for participation in the planning proceeding has been obtained [32];

[(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the planning proceeding that are known to the group representative] [33];

(c) A statement to the effect that a group member [subject to the planning proceeding] has its centre of main interests in the jurisdiction where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group [members involved] [34].

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 15. Interim relief that may be granted upon application for recognition of a planning proceeding [35]

1. From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the group representative, where relief is urgently needed to [preserve the possibility of developing and implementing a group insolvency solution] [protect the assets of the enterprise group member subject to a planning proceeding or the interests of the creditors] [36], grant appropriate relief of a provisional nature, including the relief specified in article 13, subparagraphs 1 [...] [37].

2. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 17, subparagraph 1 (a), 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 [planning proceeding] [proceeding located in the centre of main interests of an enterprise group member participating in the planning proceeding] [38].

Article 16. Decision to recognize a planning proceeding

1. [Subject to any applicable public policy exception] [39], a planning proceeding shall be recognized if:

(a) The application meets the requirements of article 14, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(b) The application has been submitted to the court referred to in article [...] [40];

2. An application for recognition of a planning 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 3, the group representative shall inform the court of changes in the status of the planning proceeding or in the status of their own appointment occurring after the application for recognition is made.

Article 17. Relief that may be granted upon recognition of a planning proceeding [41]

1. Upon recognition of a planning proceeding, where necessary to [preserve the possibility of developing and implementing a group insolvency solution] [protect the assets of the enterprise group member or the interests of creditors] [42] the court, at the request of the group representative and in addition to any relief specified in article 13, subparagraphs 1 […], may grant any appropriate relief including:

(a) Extending of any relief granted under article 13, paragraph 1;

[(b) Subject to article 19, approving of treatment in the foreign proceeding of the claims of creditors located in this State] [43].

2. Upon recognition of a planning proceeding the court may, at the request of the group representative, entrust the distribution of all or part of the enterprise group member's assets located in this State to the group 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. [44]

Article 18. Participation of a group representative in a proceeding [under [*identify laws of the enacting State relating to insolvency*]] **[in this State]**

1. Upon recognition of a planning proceeding, the group representative may participate in any proceeding [45] [under [*identify laws of the enacting State relating to insolvency*]] [in this State] concerning enterprise group members that are participating in the planning proceeding.

Article 19. Protection of creditors and other interested persons [46]

1. In granting or denying relief under article 15 or 17, 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.

2. The court may subject relief granted under article 15 or 17 to conditions it considers appropriate.

3. The court may, at the request of the group representative or a person affected by relief granted under article 15 or 17, or at its own motion, modify or terminate such relief.

Article 20. Approval of local elements of a group insolvency solution [47]

1. Where a group solution affects a group member [48] that has its centre of main interests [or establishment] [49] in this State and a proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced [in this State], the group insolvency solution shall be submitted to the court [in this State] for approval.

2. The court shall refer the portion of the group solution affecting the group member referred to in paragraph 1 for approval in accordance with [*identify the laws of the enacting State relating to insolvency*].

3. If the approval process referred to in paragraph 2 results in approval of the relevant portion of the group insolvency solution, the court shall [confirm and implement those elements relating to assets or operations in this State] [*specify the role to be played by the court in accordance with the law of the enacting State with respect to approval of a reorganization plan*] [50].

4. Where a group solution affects a group member [participating in the planning proceeding] that has its centre of main interests [or establishment] in this State and no proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State or article 21 applies, [*specify how, in that situation, the group insolvency solution will be approved and by whom*].

5. The group representative appointed in the planning proceeding is entitled to apply directly to a court in this State to be heard on issues related to [approval and] implementation of the group insolvency solution [51].

Chapter 4. Treatment of foreign claims in accordance with applicable law [52]

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings [53]

1. To facilitate the treatment of claims that could otherwise be brought by creditors in a non-main proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment [54] in this State that they would have received in a non-main proceeding in that other State.

2. A court in this State may stay or decline to open a non-main proceeding if a foreign representative or group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1.

[Part B]

Supplemental provisions [55]

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

1. To facilitate the treatment of claims that would otherwise be brought by creditors in a proceeding in another State, a foreign representative or group representative appointed in this State may commit to, and the court in this State may approve, providing those creditors with the treatment in this State that they would have received in a proceeding in that other State.

2. A court in this State may stay or decline to open a main proceeding if a foreign representative or group representative from another State in which a proceeding is pending has made a commitment under paragraph 1.

Article 23. Additional relief [56]

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of creditors of affected enterprise group members would be adequately protected in the planning proceeding, the court, in addition to granting any relief described in article 13, may stay or decline to open insolvency proceedings in this State relating to enterprise group members participating in the planning proceeding.

2. Notwithstanding article 20[, paragraph 1,] [57] if, upon submission of a proposed group insolvency solution by the group representative, the court is satisfied that the interests of creditors of the affected enterprise group member are adequately protected in the planning proceeding, the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 13 that is necessary for implementation of the group insolvency solution.

Additional issues

Principle 4, paragraph 1 [58]

The court located in the centre of main interests of an enterprise group member participating in a planning proceeding can authorize the insolvency representative appointed in insolvency proceedings taking place in the centre of main interests to seek:

(i) To participate and be heard in a planning proceeding taking place in another jurisdiction; and

(ii) Recognition by the planning court of the proceeding in the centre of main interests jurisdiction.

Principle 4, paragraph 2 [59]

The court can receive a request for recognition of the type referred to in paragraph 1 of this principle.

Principle 5, sentence 2 [60]

For those group members whose centre of main interests is located in the same jurisdiction as the planning proceeding, the recommendations of part three of the Legislative Guide on Insolvency Law with respect to joint application and procedural coordination could apply.

(A/CN.9/WG.V/WP.142/Add.1) (Original: English)

Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: commentary and notes on the draft legislative provisions

ADDENDUM

Contents

I. General drafting notes

1. The articles in the draft text set out in A/CN.9/WG.V/WP.142 have been renumbered. Numbers/letters appearing below in parentheses following the article number indicate the origin of the article in the previous draft of this text (A/CN.9/WG.V/WP.137/Add.1). With respect to the key principles included in the previous draft, where the Working Group was unable to decide how those principles should be treated, they have been retained at the end of these notes; others have been included as draft articles.

2. References to "development of a group insolvency solution" have been replaced with "development *and implementation* of a group insolvency solution".

3. References to insolvency proceedings in the enacting State have been replaced throughout the text by the words "proceeding under [*identify laws of the enacting State relating to insolvency*]", consistent with the drafting of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law).

4. The terms "foreign proceeding", "foreign representative" and "main proceeding" are used in this text in accordance with the definitions of those terms in the Model Law.

5. The Working Group will recall that this draft text includes both core and supplemental provisions. Accordingly, it has, tentatively, been divided into parts A and B, with part A including the core provisions of articles 1-21 and part B including the supplemental provisions of articles 22 and 23.

6. As previously noted in A/CN.9/WG.V/WP.137, paragraphs 3-4, the supplemental provisions address the effect of the treatment of creditor claims in a foreign insolvency proceeding on the relief that may be ordered in a creditor's home State, as well as an approach to approval of a group insolvency solution based on adequate protection of creditors. Those provisions, which would be optional for a State to enact, go a step further than the core provisions contained in part A. They would permit, in a planning proceeding, treatment of the claims of a group member whose centre of main interests (COMI) is located in a different jurisdiction in accordance with the law applicable to those claims. They would also allow a court to provide additional relief — staying or declining to commence insolvency proceedings, as well as approving the relevant portion of a group insolvency solution without submitting it to the applicable approval procedures under local law — if the court determined that creditors would be adequately protected.

7. The use of the supplemental provisions might result in a group member's insolvency being handled in a manner that was not consistent with the prior expectations of creditors and other third parties, i.e. that the group member would be subject to insolvency proceedings in the jurisdiction of its centre of main interests. As a consequence, any departure from that basic principle of proceedings commenced on the basis of centre of main interests should be limited to exceptional circumstances, namely to cases where the benefit in terms of efficiency outweighed any negative effect on creditors' expectations, in particular, and legal certainty in general. Such a departure would only appear to be justified:

(a) In jurisdictions where courts traditionally hold a large degree of discretion and flexibility in conducting insolvency proceedings;

(b) Where the enterprise group in question was closely integrated and therefore there was an obvious benefit in treating group member claims in the planning proceeding in lieu of commencing main proceedings (conducted at the centre of the group member's main interests); and

(c) Where the use of the provisions of part A (if available) could not achieve a similar result.

II. Notes on draft articles

Part A.

Chapter 1. General provisions

Preamble

[1] 1. The draft preamble is proposed for consideration by the Working Group. It is largely based on the Preamble to the Model Law i.e. subparagraphs (a), (b), (d), (e) and (f), modified to reflect the enterprise group focus of this text. Subparagraph (c) has been added to refer specifically to the development and implementation of a group insolvency solution. The goal of the preamble is to make it clear that this model law is concerned with facilitating cooperation and coordination of insolvency proceedings affecting different members of an enterprise group in order to achieve a solution that might apply to the whole or part of that enterprise group, rather than focusing on multiple proceedings for a single debtor, as covered by the Model Law.

2. The Working Group may wish to consider whether additional paragraphs might be added to the preamble to address, for example, streamlining the procedures for treatment of cross-border enterprise group insolvencies to reflect articles 22-23 of part B of the draft text and the desirability of reducing the impact of multiple proceedings, or whether it might be preferable to address such issues in a preamble to part B (noting the comments in paras. 5-7 of the general drafting notes above with respect to the content of part B).

Article 1. Scope

[2] 1. This draft article is proposed for consideration by the Working Group. A key question to be considered is whether the draft text should apply only where there is to be a planning proceeding and a group insolvency solution or whether, in whole or in part, it might have broader application to group insolvencies in general. As currently drafted, the text attempts to take the broader approach and cover situations where a group insolvency solution cannot be developed, but cooperation and coordination between proceedings affecting group members might nevertheless be useful.

2. Paragraph 1 of draft article 1 draws from the scope article of the Model Law, modified for the enterprise group context. It attempts to cover the different situations in which the provisions of the draft text might be applied, particularly those articles that rely for their scope of application on this article (e.g., arts. 3, 7 and 7 bis). Since they might relate to one or more proceedings affecting members of an enterprise group, subparagraphs (a) and (b) of draft article 1 reflect the more general cooperation elements of the preamble to the Model Law. Subparagraphs (c) and (d) relate specifically to the provisions of chapter 3 of this text concerning development and implementation of a group insolvency solution through a planning proceeding either in the enacting or a foreign State. Subparagraphs (e) and (f) expand upon subparagraphs (c) and (d) of article 1 of the Model Law.

3. With respect to subparagraph (f), it might be noted that although article 1 of the Model Law refers to creditors and other interested persons commencing or participating in local proceedings, the operative articles of the Model Law only provide access to commence and participate in such proceedings for foreign creditors (e.g. art. 13); the interests of interested persons are to be taken into account with respect to relief (art. 22). In other words, although interested persons are referred to in the scope provisions of the Model Law, they are not included in the substantive articles referring to matters mentioned in those scope provisions. The Working Group

may wish to consider the application of subparagraph (f) in this draft text in the light of those observations.

4. Revisions or additions to the draft article might be required, depending on the Working Group's decisions with respect to the articles in chapters 4 and 5 of the draft text, as noted above in note [1]; it may be appropriate to develop a separate scope article for part B (noting the comments in paras. 5-7 of the general drafting notes above with respect to the content of part B).

5. Paragraph 2 is based upon principles 1 and 1 bis of the previous draft of this text (A/CN.9/WG.V/WP.137/Add.1), which the Working Group agreed should be retained and redrafted as articles for future consideration (A/CN.9/870, para. 13). The redrafting focuses on the type of provision that could be included in a model law to be proposed for enactment in a particular State and how the limitations would apply in the enacting State; the drafting of the principles was more universal and potentially unsuitable for inclusion in a model law. In subparagraph (c), a reference to the law of the enacting State has been added to the drafting of the principle to clarify the connection between that State and the enterprise group member referred to.

Article 2. Definitions

[3] The definitions of "enterprise", "enterprise group" and "control" from part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) are included for the information of the Working Group, as agreed at the forty-fifth session (A/CN.9/803, para. 16); if not required in the final text on the basis of the form the Working Group concludes it should take (e.g. if it is to be a part of the Model Law), they can be deleted.

[4] The definition of "enterprise group member" reflects the drafting supported by the Working Group at its forty-ninth session (A/CN.9/870, para. 14).

[5] The definition of "group representative" also reflects the drafting supported by the Working Group at its forty-ninth session (A/CN.9/870, paras. 16-17). The words "and implementing" have been added, as indicated above in the general drafting notes.

Subparagraph (f)

[6] 1. The word "developed" in the chapeau of subparagraph (f) replaces the word "adopted" for reasons of consistency with the usage indicated in the general drafting note; the proposals are not so much adopted as developed in a planning proceeding.

2. Subparagraph (f)(iii) refers to matters that are not strictly definitional in nature, but rather operative i.e. it doesn't describe what a group insolvency solution is, but rather anticipates the manner of its approval. The substance of that subparagraph is currently addressed in draft article 20. The Working Group may wish to consider whether it should be retained in the definition.

Subparagraph (g)

[7] 1. The current revision of the definition of "planning proceeding" reflects the preference of the Working Group at its forty-ninth session (A/CN.9/870, para. 19) for variant 2 of the previous text (A/CN.9/WG.V/WP.137/Add.1, art. 2, subpara. (g)). "Main proceeding" would be defined in accordance with article 2(b) of the Model Law: "'[Foreign] main proceeding' means a [foreign] proceeding taking place in the State where the debtor has the centre of its main interests". Consideration might be given as to whether a definition is required in this draft text (see note [3]).

2. A question that may arise with respect to a planning proceeding is whether that proceeding: (i) is commenced as a planning proceeding; or (ii) becomes a planning proceeding when other group members decide to participate and a group representative is appointed; or (iii) both (i) and (ii) are possible. That issue might be clarified in the drafting or in a guide to enactment.

Chapter 2. Cooperation and coordination

Article 3. (9) Cooperation and direct communication between a court of this State and foreign courts, foreign representatives [and a group representative]

[8] 1. The proposal relating to the structure of this draft text (A/CN.9/864, para. 18) was that it should consist of various chapters, some of which might be regarded as core (chapters 2, 3 and 4) and others as optional (chapter 5). Chapter 2, which is based upon the recommendations of part three, chapter III of the Legislative Guide, might be enacted to improve cooperation and coordination in cross-border insolvency proceedings, in two situations: (i) where a group solution is being developed; and (ii) where there is no group solution, but cooperation and coordination would nevertheless be useful in the conduct of multiple group-related proceedings (see note [2.1] above).

2. As currently drafted, the reference at the beginning of article 3, paragraph 1 to the matters referred to in article 1 may enable the provision to be used in both of the above circumstances. There may be no need to include the references to the development and implementation of a group insolvency solution, e.g. at the end of paragraph 1, as that may serve to narrow the scope of the cooperation provisions. To accommodate the situation where a group solution is to be developed, however, the references to a group representative might be retained, but with the qualification "where appointed" added. This proposal is reflected throughout the draft text. That approach might be explained in a guide to enactment.

[9] 1. Variant 1 of paragraphs 1 and 2 of this article reflects the drafting of the previous version of the text (A/CN.9/WG.V/WP.137/Add.1).

2. Variant 2 of paragraphs 1 and 2 proposes drafting that omits specific reference to a group solution on the basis that it is covered by the reference to draft article 1. A guide to enactment might point out the relevance of these provisions where a group solution is to be developed and implemented. It might be indicated with respect to paragraph 2, for example, that the information or assistance sought may relate, in particular, to the development and implementation of a group solution, including the roles of the different courts with respect to implementation.

Article 4. (10) Cooperation to the maximum extent possible under article 3

Subparagraph (f)

[10] Since it refers to matters addressed in draft article 21, subparagraph (f) may need to be aligned with whatever decision is taken with respect to draft article 21, in particular the application of that article in circumstances where there is no planning proceeding, or it may need to be deleted.

Subparagraph (g)

[11] Although proposed at the forty-ninth session (A/CN.9/870, para. 21), there was no agreement to delete the words at the end of paragraph (g) "to facilitate the development and implementation of a group insolvency solution". However, on the basis of the observation in note [8] above that these provisions might also have application in situations where a group solution is not to be developed, those words at the end of variant 1 of subparagraph (g) might be deleted to broaden the application of the draft article, without losing the essence of the provision. As an alternative, language along the lines of that proposed in draft article 9 might be adopted, as reflected in variant 2.

Article 5. (12) Effect of communication under article 3

[12] Support was expressed at the forty-eighth session (A/CN.9/864, para. 23) in favour of both deleting and retaining draft article 5, but it was ultimately agreed that it should be retained in the text for further consideration. Since no decision was made at the forty-ninth session (A/CN.9/870, para. 22), it remains in the draft text.

Subparagraph (a)

[13] A query was raised at the forty-ninth session as to the meaning of the word "compromise" in the draft article (A/CN.9/870, para. 22). The draft text of subparagraph (a) is based upon recommendation 244 of the Legislative Guide, part three. From the context of that recommendation, it is clear that the word "compromise" refers to a compromise of the court's powers. To remove any possible confusion as to the meaning of that word in this draft text, it is suggested that the order of the words be reversed, as indicated.

Article 6. (13) Coordination of hearings

[14] In response to an observation at the forty-ninth session (A/CN.9/870, para. 23), it may be recalled that an explanation of this draft article is provided in the Legislative Guide, part three, chap. III, paras. 38-40. It is noted, in particular, that coordination of hearings might include a joint hearing. That material could be included in a guide to enactment of this draft text.

Article 7. (14) Cooperation and direct communication between a group representative, foreign representatives and foreign courts

[15] Article 7, as drafted, applies in the context of the development and implementation of a group insolvency solution in the enacting State. It addresses neither the situation where a group solution is being developed in another State and cooperation by local insolvency representatives of group members might be desirable nor the situation where no group solution is being developed, but cooperation between proceedings concerning group members is desirable. Draft article 7 bis aims to address these additional situations to complement the scope of article 7.

Article 8. (15) Cooperation to the maximum extent possible under articles 7 [and 7 bis]

Subparagraph (b)

[16] The words at the end of subparagraph (b) of variant 1 might be deleted to broaden the application of the draft article, as discussed above in note [11], without losing the essence of the provision. As an alternative, language along the lines of that proposed in draft article 9 might be adopted, as reflected in variant 2.

Subparagraph (c)

[17] The drafting of subparagraph (c) might be broadened to provide for allocation of responsibilities between a person appointed in the enacting State, a foreign representative and a group representative, where one has been appointed.

Subparagraph (e)

[18] Draft article 8, subparagraph (e) might be qualified by addition of the words "where applicable".

Article 9. (17) Authority to enter into agreements concerning the coordination of proceedings

[19] The wording of draft article 9 might be broadened, as indicated in variant 2, in line with recommendation 253 of part three of the Legislative Guide to facilitate its use where no group solution is being developed (see notes [11] and [16] above). Reference to a group solution might also be retained, as indicated at the end of the variant.

Article 10. (18) Appointment of a single [or the same] insolvency representative

[20] 1. This draft article has been revised in accordance with the discussion at the forty-ninth session (A/CN.9/870, para. 27). Although the words "where a group insolvency solution is being developed" have been retained, the Working Group may

wish to consider whether (and how) this article could apply in the context of a group solution. To some extent, the appointment of a group representative may reduce the desirability of appointing a single or the same insolvency representative to different group members, particularly with respect to those participating in the development of a group solution. The article may, however, be relevant where no group solution is to be developed. For that reason, the words "where a group insolvency solution is being developed" might be omitted.

2. The drafting of article 10, paragraph 2 may need to be reconsidered in so far as it purports to establish requirements applicable in multiple States, rather than focusing on what should occur under the law of the State enacting this text. Providing, for example, that the insolvency representative is subject to the supervision of each appointing court in different States may be a matter that is difficult to regulate through the law of one enacting State.

Chapter 3. Conduct and recognition of a planning proceeding

Article 11. (B) Participation by enterprise group members in an insolvency proceeding under [*identify laws of the enacting State relating to insolvency*]

Paragraph 1

[21] 1. It may be appropriate to consider whether the reference to "solvent" and "insolvent" group members might be deleted, so that article 11 would focus simply on the participation of "other group members" to avoid the drafting complexities of explaining or defining, in particular, what constitutes an "insolvent" group member. The Working Group may recall that that word is used sparingly, if at all, in the Legislative Guide, where the focus is upon the debtor for which insolvency proceedings can and have commenced under the relevant commencement criteria (recommendations 15 or 16). The phrase used in part three of the Legislative Guide to describe group members that are not solvent is those "subject to insolvency proceedings". While that phrase could be used in this draft, it is implied by draft article 1, subparagraph 2(c) and articles 21 and 22 that insolvency proceedings may not necessarily be commenced for some group members participating in a planning proceeding, even though they might otherwise be eligible for such commencement (this is particularly the case where so-called "synthetic proceedings" are used). If the word "insolvent" is to be retained, a definition might be helpful to explain what is intended.

2. The general principle of draft article 11, paragraph 1 could be that all types of group member might participate in the development of a group solution where they are relevant to that solution (and are not precluded from doing so). The guide to enactment could explain that broad application, without distinguishing between solvent and "insolvent" members. It could also explain that participation by solvent group members would be entirely voluntary on the basis described in part three of the Legislative Guide (rec. 238 and associated commentary), and that solvent group members would not be subject to other provisions of the draft text, for example, those on relief.

Paragraph 2

[22] 1. Variants 1 and 2 of paragraph 2 respond to a request to the Secretariat at the forty-ninth session to reconsider the drafting of that paragraph in the light of the discussion (A/CN.9/870, paras. 28-29). The relevance of the drafting of article 10 of the Model Law might be noted, albeit that it covers a slightly different situation:

> "The sole fact that an application pursuant to this Law is made to a court in this State by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of this State for any purpose other than the application."

2. For the reasons noted above, the word "insolvent" in paragraph 3 might be omitted, however some explanation may be required with respect to how this

provision would operate with respect to solvent group members, whose decision to participate would be an ordinary business decision and would not require the agreement, for example, of creditors, unless required by applicable company law.

Article 12. (B) Appointment of a group representative

[23] 1. This draft article was previously paragraph 3 of draft article 11. Although closely related to draft article 11, it possibly warrants a separate article and has thus been included as draft article 12. At its forty-ninth session, the Working Group agreed to retain both variants for further consideration (A/CN.9./870, para. 30). It might be noted that this draft article overlaps with draft article 18 (see note [45]).

2. The proceeding referred to in article 11 becomes a planning proceeding once a group representative has been appointed. It may be appropriate to include a statement or note to that effect in draft article 12, since the text subsequently refers to "planning proceedings" (see note [7.2] above).

[24] 1. The Working Group may wish to consider the nature of the proceedings in which the group representative is being authorized to participate under draft article 12: is it limited to a "foreign proceeding" as defined in the Model Law, or should it include other proceedings in which the group member is a party (reflecting the idea of article 24 of the Model Law)? It might be noted that the outbound authorization provided by article 5 of the Model Law refers only to the insolvency representative being authorized "to act" in a foreign State on behalf of a proceeding under the law of the enacting State, as permitted by the applicable foreign law. By way of comparison, and noting that the following provisions of the Model Law apply only following recognition of a foreign proceeding (an inbound application), the word "participate' is used in article 12 of the Model Law to refer to participation (following recognition) by the foreign representative in local insolvency proceedings, as opposed to the word "intervene" in article 24, which refers to intervention (following recognition) by the foreign representative in any local proceeding in which the debtor is a party. The meaning of those two words is explained in the Guide to Enactment and Interpretation of the Model Law (paras. 100-102 and 168-172).

2. If the drafting is intended to authorize the group representative to act in a foreign State in accordance with what is permitted by foreign law, that intention could be reflected in whichever variant the Working Group prefers. Further detail may be provided in draft article 18 (see note [45]).

Article 13. (D) Relief available to a planning proceeding

[25] 1. The Working Group requested the Secretariat to consider whether articles 13, 15 and 17 could be rationalized. Before doing so, the Secretariat considered the overall structure of the relief provisions. As currently drafted, a goal of the relief in this draft text is to facilitate conduct of the planning proceeding and the development and implementation of a group insolvency solution.

2. There are several issues that might be considered, including the relief that should be available to support the development of a group solution and the States in which it might be required.

3. As to the first issue, the relief that should be available would include: (a) relief to support the development of a group solution in the planning proceeding State; (b) relief to support recognition of the planning proceeding and development and implementation of a group solution. The relief might thus be granted: (a) in the State in which the planning proceeding is pending, or (b) in another State, which might include the State in which a relevant group member has its COMI or an establishment and a third State in which that group member has assets. That relief might cover assets and operations of: (a) group members subject to the planning proceeding, and (b) group members participating in the planning proceeding.

A. State in which relief might be granted

(a) In the planning proceeding State

4. As indicated above, relief ordered in the State of the planning proceeding might cover both: (a) the group member (or members) subject to the planning proceeding (in other words, the proceeding that becomes the planning proceeding was commenced with respect to that group member or members); and (b) the group member or members, whether foreign or local, participating in that proceeding.

5. As currently drafted, relief relating to (b) is addressed by draft article 13, and could be sought by the group representative, presumably in so far as the group member in question has assets or operations in the State of the planning proceeding that could be subject to the relief sought and the relief granted was not contrary to the law of the State of the centre of main interests of that group member (as required under draft art. 13, para. 2) or incompatible with relief granted in insolvency proceedings taking place in that State, whichever drafting option is appropriate in draft article 13, paragraph 2. The application of the relief provisions to foreign participating group members under this article may need to be aligned with draft article 11, paragraph 2 concerning application of the law of the planning court to participating group members.

6. Relief relating to (a) would be addressed by the insolvency law of the planning proceeding State and may not need to be addressed in this draft text.

(b) In a foreign State

7. If the structure of the Model Law is to be maintained, relief might be available in a foreign State following an application for recognition of a planning proceeding in that State (interim relief) (addressed by draft article 15) and following recognition of that proceeding (currently addressed by draft article 17). It might cover the assets and operations located in that State of a group member subject to the planning proceeding, as well as any assets and operations of participating group members located in the foreign State (based upon centre of main interests, establishment or the presence of the assets). As currently drafted, article 13 might also cover those participating group members, as it is not specific as to which court it refers to — the planning proceeding court or the foreign recognizing court.

8. Given the complexity of these different situations, it is difficult to see how the different types of relief can be drafted in a single article. Separate articles might therefore be maintained, but some degree of rationalization might be achieved to the extent the specific relief sought is the same or similar in each case. Draft article 13 might set out the types of relief available to the planning proceeding. Draft articles 15 and 17 could then refer to the elements of draft article 13 that might apply and to any other relief that should apply in the situations they refer to. Interim relief, for example, is likely to be more restricted than the relief available under article 13, while relief under article 17 might make reference to extension of the relief granted under article 15.

9. Consideration may need to be given as to whether additional articles might be required to address issues of coordination of relief between the different proceedings, along the lines of article 29 of the Model Law.

B. Assets and operations in respect of which relief might be granted

10. While the first optional text in the chapeaus of articles 13, 15 and 17 focuses solely on the development of a group insolvency solution, the second option (which may be more broadly applied) includes references to different group members — article 13 refers to protecting the assets of group members "participating" in a planning proceeding and article 15 refers to protecting the assets of group members "subject" to a planning proceeding, while article 17 simply refers to protecting the interests of "the" group member; the latter would presumably refer only to the group member subject to the planning proceeding that has been recognized, but that would need to be clarified.

11. It might be noted that the recognizing court may be in a position to order relief with respect to both a group member subject to the planning proceeding that has assets or operations in the recognizing State, as well as one participating in the planning proceeding, if that group member has its centre of main interests (or an establishment or assets and operations) in the recognizing State. Resolving the issue of consistency might not be needed if the first optional text is preferred, although that raises in turn the issue of the scope of the draft text.

Paragraph 1, chapeau

[26] Use of the word "insolvent": the use of that word in draft article 13, paragraph 1 may be slightly problematic, for the reasons outlined above in note [21]. It may suggest only that those group members cannot be considered to be solvent, but not necessarily that they are subject to insolvency proceedings in any State. It may also suggest that, in so far as that usage is consistent with part three of the Legislative Guide, those participating group members are subject to insolvency proceedings that are probably taking place in another State (if they were taking place in the planning proceeding State, we can perhaps assume those group members would be "subject" to the planning proceeding following procedural coordination under part three of the Legislative Guide — see principle 5, note [60]). If the word "insolvent" were to be omitted, the draft article may need to clarify that it is not intended to apply to solvent group members participating in the planning proceeding under article 11, along the lines of the drafting suggested in square brackets.

Subparagraph 1(c)

[27] It may be desirable to add further language to clarify which proceeding or type of proceeding subparagraph 1(c) refers to i.e. the planning proceeding or other proceedings (whether relating to insolvency or some other cause of action) that might be taking place in the enacting State with respect to participating members. If the proceedings are under the insolvency law, the words "under [*identify laws of the enacting State relating to insolvency*]" might be added.

Subparagraph 1(g)

[28] Subparagraph 1(g) reflects the relevant subparagraphs of the previous draft articles on interim relief and relief following recognition (A/CN.9/WG.V/WP.137/Add.1 — art. 6, subpara. 1(d) and art. 7, subpara. 1(h)) and includes the reference to safeguards approved at the forty-ninth session (A/CN.9/870, para. 41)). The guide to enactment might note that the funding entity could be another member of the same group.

Paragraph 2

[29] 1. The language of draft article 13, paragraph 2 is based on a decision at the forty-ninth session (A/CN.9/870, para. 34). The report includes the observation that in the event of a conflict between an order issued by the court of the planning proceeding and an order issued by the State in which the affected debtor had its centre of main interests, the practical solution could be that the court of the centre of main interests, under draft article 14, could decline to recognize or enforce the order issued in the planning proceeding. Such an approach, it was suggested, would preserve the pre-eminence of the centre of main interests principle as reflected in draft article 1, paragraph 2.

2. As noted above in note [25.9], it may be appropriate to consider including an article along the lines of article 29 of the Model Law, which specifically addresses consistency of relief between different proceedings, balancing the main proceeding and the local proceeding, to achieve certainty and clarity as to how the relief granted in different States is to be treated.

3. The Working Group may wish to consider whether the incompatibility referred to in draft article 13, paragraph 2 should be to the law of the foreign State or to relief

granted in the insolvency proceedings taking place in that State; the latter issue may be of a different character and might need to be the subject of a separate article.

Article 14. (3) Recognition of a planning proceeding

Paragraph 1

[30] 1. The words "in this State" were included in the previous draft of this text (A/CN.9/WG.V/WP.137/Add.1).

Subparagraph 2(a)

[31] With respect to subparagraph 2(a), see note [7.2] on the issue of when a proceeding becomes a planning proceeding. For that reason, the draft article might use the words "proceeding designated as a planning proceeding" or some other formulation, rather than "commencing the planning proceeding".

Subparagraph 3(a)

[32] Subparagraph 3(a) reflects drafting suggestions made at the forty-eighth session (A/CN.9/864, para. 33(a)), modified in accordance with suggestions made at the forty-ninth session (A/CN.9/870, para. 37). While the Working Group agreed to retain variant 1 of the previous text (A/CN.9/WG.V/WP.137/Add.1, art. 3), as drafted it is potentially inconsistent with draft article 11, paragraph 3, which refers to preclusion from participation, rather than specifying a requirement for approval to participate. The Working Group may wish to reconsider the drafting.

Subparagraph 3(b)

[33] Subparagraph 3(b) was included in the previous draft of article 14 (A/CN.9/WG.V/WP.137/Add.1, art. 3), but since no comment was made on it at the forty-ninth session, it remains in square brackets.

Subparagraph 3(c)

[34] Subparagraph 3(c), proposed at the forty-ninth session (A/CN.9/870, para. 37(c)), includes suggested drafting to clarify the group member to which it applies i.e. a group member subject to the planning proceeding. The Working Group may wish to consider whether the reference to overall combined value should be to the group as a whole or to the group members involved in the planning proceeding, noting that the definition of "group insolvency solution" refers to the overall combined value of the group members involved in the group insolvency solution (see also subpara. (e) of the Preamble).

Article 15. (6) Interim relief that may be granted upon application for recognition of a planning proceeding

[35] Draft article 15 has been redrafted in accordance with the proposal set forth in note [25] above.

Paragraph 1

[36] The optional drafting in square brackets in paragraph 1 of draft article 15 reflects: (i) the chapeau of draft article 13; and (ii) the chapeau of article 19 of the Model Law. If the second optional text is preferred, an issue to be considered is whether the chapeau should also refer to those group members participating in the planning proceeding that may also have assets in the recognizing State.

[37] The Working Group may wish to consider which subparagraphs of draft article 13, paragraph 1 should be available as interim relief. It may be recalled that article 19 of the Model Law includes the equivalents of subparagraphs (a), (b), (e), (f) and (h) of article 13, paragraph 1.

Paragraph 4

[38] The optional drafting in square brackets at the end of paragraph 4 (which was added at the forty-eighth session (A/CN.9/864, para. 36(e)) may need to be aligned with the text determined to be appropriate in draft article 13, paragraph 2, which refers to the issue of incompatibility of relief (see note [29.2 and 3]).

Article 16. (5) Decision to recognize a planning proceeding

[39] and [40] 1. There is neither a public policy exception nor an article specifying the competent court in the draft text; when the Working Group decides whether this draft text should be part of the existing Model Law or a standalone text, it may be appropriate to consider any additional articles that might be required (or incorporated by reference to the Model Law).

2. In the context of recognition under the Model Law, it might be recalled that article 6 applies to any action governed by the Model Law. Accordingly, it relates not only to the question of recognition, but also to relief, whether interim or discretionary, and any other actions that a court might take under the Model Law. It may be appropriate to consider including a public policy exception in the draft text to the extent it relates to the recognition of foreign proceedings and the granting of relief; to the extent it relates to the conduct of local proceedings, such as a planning proceeding, it may not be relevant.

Article 17. (7) Relief that may be granted upon recognition of a planning proceeding

[41] Draft article 17 has been revised as indicated above in note [25]. The Working Group may wish to specify the relevant subparagraphs of article 13, paragraph 1 and any other relief that should be available following recognition of the planning proceeding.

Paragraph 1

[42] As noted with respect to draft article 15 (note [36]), the optional drafting in paragraph 1 repeats the wording used: (i) in draft article 13; and (ii) in article 21 of the Model Law. It may be appropriate to align whichever drafting is chosen across the three articles i.e. articles 13, 15 and 17.

[43] Subparagraph 1(b) may need to be aligned with draft article 21, paragraph 1 and article 22, paragraph 1, noting that those two articles are intended to apply irrespective of whether a planning proceeding is taking place, or it may need to be deleted.

Paragraph 2

[44] In paragraph 2, it may be helpful to indicate which group member's assets are being referred to — a group member subject to the planning proceeding, one participating in the planning proceeding or both. It may also be helpful to indicate which creditors are being referred to — the creditors of the enterprise group member alone, or any creditor of any group member within the jurisdiction of "this State".

Article 18. (D) Participation of a group representative in a proceeding in this State

[45] As noted above (see notes [23-24]), this provision overlaps with draft article 12. If the proceedings referred to in article 18 are insolvency proceedings, the words "[*identify the laws of the enacting State relating to insolvency*]" might be added, as indicated, by way of clarification. The words "in this State" might then be deleted. If this article should be broader to cover both types of proceeding referred to in note [24] (i.e. insolvency proceedings and other proceedings in which the debtor is a party), appropriate wording along the lines of "and intervene in any proceedings in which the group member is a party" might be added.

Article 19. (8) Protection of creditors and other interested persons

[46] There was general support at the forty-eighth session for inclusion of an article along the lines of article 19 as drafted (A/CN.9/870, para. 48). The Working Group may wish to note that draft article 19 may overlap with other articles, including draft article 23, paragraph 2. As currently drafted, this article is based on article 22 of the Model Law and thus applies only in the context of recognition (i.e. to relief under draft articles 15 and 17). The Working Group may wish to consider whether this article would have any application in the context of draft article 13.

Article 20. (E) Approval of local elements of a group insolvency solution

[47] Draft article 20 has been revised to reflect the understanding of the Working Group at its forty-ninth session (A/CN.9/870, para. 49). The article assumes that there is a proceeding underway in the receiving State in which approval of the group insolvency solution can be obtained. The Working Group may wish to consider how approval of the group insolvency solution would be obtained in the absence of such a proceeding, which may be because draft article 21 (dealing with the so-called "synthetic" treatment of creditor claims) applies or for other reasons. The wording of draft paragraphs 1 and 4 anticipates the need to address that issue. One solution to that issue might be to address approval in the context of recognition of the planning proceeding in the States in which approval is required.

2. A further issue that may need to be considered is how the approval procedure will affect any solvent group member participating in the group solution.

Paragraph 1

[48] 1. The definition of group insolvency solution does not address the question of whether a group member must participate in the planning proceeding in order for it to be affected by the group insolvency solution. If the Working Group considers that that should be the case, words such as "[participating in the planning proceeding]" might be added to the chapeau of draft article 20 after the words "affects a group member". The definition of "planning proceeding" might also require adjustment.

2. Not all of the references to "in this State" might be required in the draft article, as indicated by the use of square brackets.

[49] The reference to "establishment" is included in draft article 20 (paras. 1 and 4) in accordance with a suggestion made at the forty-eighth session (A/CN.9/864, subpara. 48(b)). If retained, the Working Group may wish to consider other articles to which that reference should be added, including the definition of a group insolvency solution.

Paragraph 3

[50] Not all insolvency laws provide that courts play a role in confirmation or implementation of an approved reorganization plan. For that reason, it may be appropriate to indicate that this draft text should adopt the same (or a similar) approach to approval of a group solution as national law takes to the approval of a reorganization plan, rather than including a specific requirement that the court confirm and implement the solution. That possibility is reflected in the drafting.

Paragraph 5

[51] Draft paragraph 5 is based upon principle 8, which the Working Group decided at its forty-ninth session to retain and reassess at a future session (A/CN.9/870, para. 50). If this draft paragraph is to be retained, the Working Group may wish to consider whether it might apply to the approval, as well as the implementation, of the group solution.

Chapter 4. Treatment of foreign claims in accordance with applicable law [51]

[52] No comments of a drafting nature were made with respect to draft articles 21-23 at the forty-ninth session (A/CN.9/870, para. 51).

Article 21. (F) Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

[53] It may be recalled that draft articles 21 and 22 are not limited to cases where a group solution is being developed through a planning proceeding.

[54] 1. A suggestion was made at the forty-ninth session that additional safeguards might be required in draft articles 21 and 22 (A/CN.9/870, para. 51) and that Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the Regulation recast) might provide some guidance.

2. Firstly, with respect to the treatment that creditors might receive as a result of the commitment under draft article 21, paragraph 1 of this text, it may be noted that under article 36 of the Regulation recast the terms of a similar undertaking that may be given by an insolvency representative concern compliance with the distribution and priority rights under the law of the non-main State that creditors would have when the insolvency representative was distributing either assets located in the non-main State or the proceeds received as a result of the realization of those assets.

3. Second, as to safeguards, the Regulation recast (art. 36, para. 5) requires approval of the undertaking by known local creditors in accordance with the rules applicable to approval of a recognition plan in the non-main State. Further detail on the procedure associated with the undertaking and the effect of giving an undertaking are addressed in article 36, paragraphs 6-11.

4. With respect to draft article 20, paragraph 2 of this text, the Regulation recast provides that the court can decline to commence a non-main proceeding if the undertaking adequately protects the general interests of local creditors (art. 38, para. 2). In certain circumstances, it is possible to stay the non-main proceeding for up to 3 months provided suitable measures are taken to protect the interests of local creditors (art. 38, para. 3). An insolvency representative of a main proceeding has a right to be heard on an application for commencement of a non-main proceeding (art. 31, para. 1).

5. The Working group may wish to consider the relevance of this information to the draft text.

Part B

Supplemental provisions

[55] Draft articles 22 and 23 are supplemental components, which would be additional options for a State to enact, and would go a step further than the core provisions in part A, chapters 1-3 and paragraph 1 of article 21.

Article 22. (G) Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

Article 23. (H) Additional relief

[56] The type of additional relief referred to in draft article 23, paragraph 1 is potentially covered by draft article 17. The two articles may need to be aligned.

[57] The cross-reference in draft article 23, paragraph 2 to article 20, paragraph 1 may need to be reconsidered in view of the revision of draft article 20.

Additional issues

Principle 4, paragraph 1

[58] The Working Group was unable to decide whether principle 4, paragraph 1 should remain in the draft text or be deleted or redrafted. It may be covered by article 5 of the Model Law, which provides general authorization to act in a foreign State on behalf of local proceedings (an outbound request). Draft article 1, subparagraph 1(b) of this text refers to assistance being sought in such a situation, but although draft articles 12 and 18 provide equivalent outbound authorization in respect of the planning proceeding, the draft text does not include a substantive equivalent to article 5 for proceedings that are not the planning proceeding. It remains for further consideration.

Principle 4, paragraph 2

[59] 1. There was no agreement on the substance of the principle at the forty-ninth session (A/CN.9/870, para. 31), nor on the question of whether it should be redrafted as a substantive provision.

2. Principle 4, paragraph 2 provides that the planning court can receive a request for recognition of the type referred to in paragraph 1 of this principle i.e., recognition by the planning court of a proceeding taking place at the centre of main interests of a group member, along the lines of article 15, paragraph 1 of the Model Law. That issue is not addressed in this draft text, although it is potentially covered by the Model Law. It may be appropriate to consider the purpose for which recognition might be required and in particular, the relationship between recognition and the planning proceeding.

Principle 5, sentence 2

[60] 1. There was no agreement on either the substance of the principle at the forty-ninth session (A/CN.9/870, para. 31) or whether it should be redrafted as a substantive provision.

2. Principle 5 provides that, for those group members whose centres of main interest are located in the same jurisdiction as the planning proceeding, the recommendations of part three of the Legislative Guide with respect to joint application and procedural coordination could apply. This notion is not addressed in the draft text.

C. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law

(A/CN.9/WG.V/WP.143 and Add.1)

[Original: English]

Contents

I. 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 judgments.[1]

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 judgments, including the types of judgments 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), but that the Model Law provided an appropriate context for the new instrument.

3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130).

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

The content and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgment 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).

4. At its forty-seventh session, the Working Group had a preliminary exchange of views on draft articles 1 to 10 of the text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); draft articles 11 and 12 of that text were not reached due to lack of time and were included as draft articles 12 and 13 of the text considered at the forty-ninth session (A/CN.9/WG.V/WP.138). At its forty-eighth and forty-ninth sessions, the Working Group considered revised versions of the draft text, which reflected the decisions and proposals made at the forty-seventh and forty-eighth sessions respectively (A/CN.9/WG.V/WP.135 and 138).

5. The draft text below reflects the discussion at the forty-ninth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text. Notes and commentary to this draft text, indicated by a reference number in square brackets, are contained in A/CN.9/WG.V/WP.143/Add.1.

II. Draft model law on the recognition and enforcement of insolvency-related judgments

Article 1. Scope of application

1. [1] This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different to the State where recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) [2] "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a foreign court for the purpose of reorganization or liquidation;

(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;

(c) [3] "Judgment" means [any decision, whatever it may be called, issued by a court [or administrative authority, provided an administrative decision has the same effect as a court decision]. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court [provided that the determination relates to a decision that may be recognized [or] [and] enforced under this Law] [4];

(d) [5] "Foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding;

(e) [6] "Insolvency-related judgment" means a judgment that is closely related to a foreign proceeding and was issued after the commencement of that proceeding. Insolvency-related judgments include, inter alia, judgments determining whether:

(i) An asset is [7] [part of] [included in], should be turned over to, or was properly disposed of by the insolvency estate;

(ii) [8] A transaction involving the debtor or assets of [the] [its] insolvency estate should be [overturned] [avoided] [because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate] [on the grounds that it had the effect of either reducing the value of the insolvency estate or upsetting the principle of equitable treatment of creditors];

(iii) A [9] [representative] [director] of the debtor is liable for action taken when the debtor was insolvent or in the [10] period approaching insolvency, [11] [and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate];

(iv) [Alternative A: Sums [12] [not covered by (i) or (ii)] are owed to or by the debtor or [its insolvency] estate;]

[Alternative B: Sums [not covered by (i) or (ii)] are owed to or by the debtor or [its insolvency] estate, and the cause of action [13] [relating to the recovery or payment of those sums] arose after insolvency proceedings commenced in respect of the debtor]; or

(v) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary restructuring agreement should be approved.

For the purposes of this definition, an "insolvency-related judgment" includes instances in which the cause of action was pursued by:

(i) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

(ii) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

[and the judgment on that cause of action would otherwise be enforceable under this Law].

[Article 3. International obligations of this State [14]

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.]

[Article 3 bis. International obligations of this State

1. [15] This [Law] shall not apply to a judgment where there is a treaty [in force] concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after [this Law] comes into force), and that treaty applies to the judgment [or where the provisions of the law of this State on recognition [and enforcement] of insolvency proceedings apply to that judgment].

2. A judgment is to be treated for the purposes of paragraph 1 of this article as falling within the class of judgments to which a treaty applies even where the particular judgment is not enforceable under the treaty because of the particular circumstances of the case.

Article 4. Competent court or authority [16]

[17] The functions referred to in this Law relating to recognition and enforcement of insolvency-related judgments 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 recognition and enforcement of an insolvency-related judgment in a foreign State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to seek recognition and enforcement of an insolvency-related judgment, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign representative under other laws of this State.

Article 7. Public policy exception [18]

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy [19] [of this State] including the fundamental principles of procedural fairness of this State.

Article 8. Interpretation

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 9. Effect and enforceability of an insolvency-related judgment in the originating State [20]

1. An insolvency-related judgment shall be recognized and enforced only if it has effect and is enforceable in the originating State.

2. *Variant 1 of paragraph 2*

Recognition and enforcement of an insolvency-related judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make enforcement conditional on the provision of such security as it shall determine.

Variant 2 of paragraph 2 [21]

(a) If an insolvency-related judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired, the court may:

(i) Grant recognition and enforcement;

(ii) Postpone recognition and enforcement; or

(iii) Refuse recognition and enforcement;

(b) The court may grant [conditional] recognition and enforcement under paragraph 2 (a) subject to the provision of such security as the court determines.

3. A refusal under paragraph [2] [2 (a)] does not prevent a subsequent application for recognition and enforcement of the judgment.

Article 10. Application for recognition and enforcement of an insolvency-related judgment

1. [22] A foreign representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may apply to the court in this State for recognition and enforcement of that judgment, including by way of defence.

2. An application for recognition and enforcement of an insolvency-related judgment shall be accompanied by:

(a) A certified copy of the insolvency-related judgment;

(b) *Variant 1 of subparagraph (b)* [23]

[Information relating to any current review of the insolvency-related judgment, including whether any notice of intended appeal has been received, the time limit (if any) for seeking review has expired in the originating State, and whether the judgment is enforceable in the originating State];

(b) *Variant 2 of subparagraph (b)*

Any documents necessary to establish that the insolvency-related judgment has effect and is enforceable in the originating State, including information on any current review of the judgment;

(c) Evidence [24] [as required by the law of this State] that the party against whom relief is sought was notified of the application in this State for recognition and enforcement of the insolvency-related judgment; and

(d) [25] [In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court].

3. The court may require translation of documents supplied in support of the application for recognition and enforcement of the insolvency-related judgment into an official language of this State.

4. The court is entitled to presume that documents submitted in support of the application for recognition and enforcement of the insolvency-related judgment are authentic, whether or not they have been legalized.

Article 11. Decision to recognize and enforce an insolvency-related judgment

An insolvency-related judgment shall be recognized and enforced provided:

(a) [26] It is effective and enforceable in the originating State;

(b) The person seeking recognition and enforcement of the insolvency-related judgment is a person within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The requirements of article 10, paragraph 2 are met;

(d) The court from which recognition and enforcement is sought is the court referred to in article 4, [27] [unless the requirement for recognition arises by way of a defence in another court]; and

(e) Articles 7 and 12 do not apply.

Article 12. Grounds to refuse recognition and enforcement of an insolvency-related judgment

Recognition and enforcement of an insolvency-related judgment may be refused if:

(a) [28] The party against whom the proceeding giving rise to the insolvency-related judgment 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;

(b) The insolvency-related judgment was obtained by fraud [29] [in connection with a matter of procedure];

(c) [30] The insolvency-related judgment is inconsistent with a [prior] judgment issued in this State in a dispute involving the same parties;

(d) The insolvency-related judgment is inconsistent with an earlier judgment issued in another State [in a dispute] involving the same parties [31] [and the same subject matter], provided that the earlier judgment fulfils the conditions necessary for its recognition [and enforcement] in this State;

(e) [32] Recognition and enforcement would interfere with the administration of the [debtor's] insolvency proceedings or would be inconsistent with a stay or other order issued in insolvency proceedings [relating to the same debtor] commenced in this State or another State;

(f) [33] The judgment falls within article 2, subparagraph (e)(v) and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) [The insolvency-related judgment was not issued by a court that] [The originating court does not satisfy one of the following conditions] [34]:

(i) Exercised jurisdiction based on the basis of the express consent of the party against whom the judgment was issued;

(ii) Exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction;

(iii) Exercised jurisdiction on a basis that was not inconsistent with the law of this State; [or]

States that have enacted the Model Law on Cross-Border Insolvency might wish to add subparagraphs (g) (iv) and (v) and subparagraph (h) [35]

[(iv) Was supervising a [foreign] main proceeding regarding the insolvency of the [party against whom the judgment was issued] [judgment debtor], or was another court in the State in which that [foreign] main proceeding was being conducted]; or

[(v) *Variant 1 of subparagraph (v)* [36]

Was supervising a [foreign] main proceeding [or was another court in the State in which that foreign main proceeding was being conducted] regarding the insolvency of a debtor for which the party against whom the judgment was issued was serving as a director, if the judgment was based on that party's conduct as a director, including breach of fiduciary duty.]

[(v) *Variant 2 of subparagraph (v)*

Was supervising a foreign main proceeding or was another court in the State in which that foreign main proceeding was being conducted and the judgment was issued against a person who is, or had been, serving as a director of the debtor in the foreign main proceeding and was based on that person's conduct as a director, including any breach of a fiduciary duty.]

(h) [37] [The judgment was not issued in a proceeding that has been, or could have been, recognized under [*identify the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*],] [The judgment relates to a debtor that had neither the centre of its main interests nor an establishment in the originating State], unless the judgment relates solely to assets that were located in the originating State at the time the foreign proceeding commenced.]

Article 13. Equivalent effect [38]

1. An insolvency-related judgment recognized or enforceable under this Law shall be given the same effect it has in the originating State.

2. If the insolvency-related judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 14. Severability [39]

Recognition and enforcement of a severable part of an insolvency-related judgment shall be granted where recognition and enforcement of that part is applied for, or where only part of the judgment is capable of being recognized and enforced under this Law.

Article 15. Provisional relief [40]

From the time recognition and enforcement of an insolvency-related judgment is sought until a decision is made, the court may, [at the request of a foreign representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment], where relief is urgently needed [to preserve the possibility of recognizing and enforcing an insolvency-related judgment] grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related judgment.

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 judgment is made.

(A/CN.9/WG.V/WP.143/Add.1) (Original: English)

Note by the Secretariat on recognition and enforcement of insolvency-related judgments: commentary and notes on the draft model law

ADDENDUM

Contents

I. General drafting notes

1. The articles of the draft text set forth in A/CN.9/WG.V/WP.143 have been renumbered. Numbers/letters appearing below in parentheses following the article number indicate the origin of the article in the previous drafts of the text (A/CN.9/WG.V/WP.138 and 140). The previous order of the articles has been maintained in this revision of the text, but might need to be reviewed as the text develops.

2. To simplify the drafting, the State in which the judgment was issued is referred to throughout this draft of the text as the “originating State”, while the State in which recognition and enforcement is sought is referred to as the “receiving State”.

3. References to the debtor or the debtor’s insolvency estate should be read as references to the debtor in the insolvency proceeding to which the insolvency judgment is related. The “judgment debtor” refers to the party against whom the insolvency-related judgment was issued, which may be the debtor or another person.

4. The text refers to “recognition and enforcement” — see note [21] on whether a distinction might be drawn in some articles between recognition on the one hand, and enforcement on the other.

5. Articles not referred to in the following notes remain unchanged from the previous draft of this text.

II. Notes on draft articles

Article 1. Scope

[1] At the end of draft paragraph 1 the words "where recognition and enforcement are sought" reflect the decision of the Working Group at its forty-ninth session (A/CN.9/870, para. 52).

Article 2. Definitions

Subparagraph (a) "Foreign proceeding"

[2] As currently drafted, the definitions of "foreign proceeding" and "insolvency-related judgment" mean that the judgments covered by the draft text are only those issued in a proceeding outside the receiving State and closely related to a foreign proceeding; it does not cover judgments issued in a proceeding outside the receiving State, but closely related to an insolvency proceeding (of the type defined in subparagraph (a)),[1] taking place in the receiving State. If the Working Group is of the view that the text should also cover the second type of insolvency-related judgment, there may be several possible drafting solutions, including the following:

(i) To change subparagraph (a) to be a definition of a term such as "insolvency proceeding" and remove any reference to the "foreign" State or the "foreign" court as follows:

> "(a) 'Insolvency proceeding' means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;"

Other definitions would need to be conformed with that definition and the impact on several articles, such as article 12, subparagraph (h) (the only article that refers to "foreign proceeding") and those articles that refer only to the "foreign representative" (e.g. article 10) would need to be considered.

(ii) To change the definition of insolvency-related judgment as follows:

> "(d) 'Insolvency-related judgment' means a judgment that is closely related to a foreign proceeding [or to an insolvency proceeding taking place in the receiving State] and was issued after the commencement of that proceeding;"

If the second solution were to be adopted, the use of the words "insolvency proceeding" in the bracketed text would have to be understood as being "a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation)". As noted above, other definitions and articles would need to be conformed to that revision if it were to be adopted.

Subparagraph (c) "Judgment"

[3] 1. The definition of "judgment" is based upon the Working Group's preference for variant 2 of the draft text contained in A/CN.9/WG.V/WP.138 as expressed at the forty-ninth session (A/CN.9/870, para. 55). The Secretariat was requested to prepare a revised text, taking into consideration the desirability of focusing on the nature of

[1] Para. (a) provides that a foreign proceeding is "a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation"; the glossary to the Legislative Guide, introduction, subpara. 12 (u), provides that insolvency proceedings are "collective proceedings, subject to court supervision, either for reorganization or liquidation", where the term "court" means "a judicial or other authority competent to control or supervise insolvency proceedings".

the decision rather than the body issuing it. On that basis, it might be desirable to return to the formulation "a judicial or administrative decision, including a decree …" or to retain the words "any decision issued by a court or administrative authority" and delete the proviso language, which to some extent is addressed in draft article 9.

2. It was suggested at the forty-ninth session that language from the glossary of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide), paragraph 8 might be used, referring to an authority which supports or has specified roles in insolvency proceedings, but which does not have adjudicative functions with respect to those proceedings and would not be regarded as within the meaning of the term "court" as that term is used in this text. That language may be too narrow for the purposes of this text, unless the judgments to be recognized are to be confined to those issued by a foreign court, as defined in article 2, subparagraph (d) i.e. the court competent to control or supervise insolvency proceedings (see also note 2 above). For example, the bankruptcy court in State A supervises and controls insolvency proceedings. Other courts have jurisdiction with respect to matters connected with insolvency proceedings, such as the examples in article 2, subparagraph (e), and those decisions are closely connected with insolvency proceeding, but they do not have jurisdiction to supervise or control insolvency proceedings.

3. If the words "decree or order" are retained in the second sentence, the Working Group may wish to consider whether the words "whatever it may be called" are required in the first sentence.

[4] A guide to enactment might explain that the draft text refers to "recognition and enforcement" notwithstanding that there are judgments that will require only recognition (e.g. declarations as to the existence of rights), and not enforcement (see note [21]). Relevant explanatory material from the 2005 Convention on Choice of Court Agreements (the 2005 Convention) might be included.

Subparagraph (d) "Foreign court"

[5] A review of the draft text indicates that this term is not used and the definition thus not required, unless it is changed to be a note along the lines of the notes on use of the term "court" in the Legislative Guide (Glossary, para. 8).

Subparagraph (e) "Insolvency-related judgment" [art. 2, para. (d) of A/CN.9/WG.V/WP.140]

[6] 1. The drafting of this definition reflects a preference expressed at the forty-ninth session for the drafting of the version contained in A/CN.9/WG.V/WP.140. The drafting and format of the paragraphs has been revised to take account of that preference.

2. A guide to enactment might explain that a judgment may be considered to be "closely related to a foreign proceeding" when it has an effect upon the insolvency estate of the debtor and either is based on a law relating to insolvency or, due to the nature of its underlying claims, would not have been issued without the commencement of the foreign proceeding. A guide could further explain that an insolvency-related judgment would include any equitable relief, including the establishment of a constructive trust, provided in that judgment or required for its enforcement, but would not include a judgment imposing a criminal penalty.

3. A guide might also consider the relevance, if any, to interpretation of this text of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (the EU Regulation recast) (art. 32) which refers to judgments that "derive directly from … and are closely linked to" insolvency proceedings, as well as the examples of judgments held to fall within and outside that category of judgments, as set out in A/CN.9/WG.V/WP.126, paragraphs 21 and 22.

Subparagraph (e)(i)

[7] The Legislative Guide generally refers to assets that are "included in" the insolvency estate; for consistency it may be desirable to use that phrase in this text, rather than the words "part of". "Insolvency estate" is defined in the Legislative Guide, glossary, subparagraph 12(t).

Subparagraph (e)(ii)

[8] 1. The chapeau of recommendation 87 of the Legislative Guide, on which this drafting is based, refers to the overturning of transactions, although what is being referred to in subparagraph (e)(ii) may be more readily apparent if the word "avoided" were to be used.

2. The second optional language in square brackets at the end of the definition is also consistent with drafting of recommendation 87, which it might be noted refers only to reduction of the value of the insolvency estate, rather than "improper" reduction of that value. The Working Group may wish to consider these drafting questions.

Subparagraph (e)(iii)

[9] The Working Group may wish to consider whether the word "representative" requires some further specificity; if what is intended is a person serving as a director, consistent with the usage of that term in recommendation 258 of part four of the Legislative Guide, being "any person formally appointed as a director and any other person exercising factual control and performing the functions of a director", the word "director" might be used in this draft text. A guide to enactment might include or refer to the relevant material in the Legislative Guide.

[10] The words "vicinity of" have been replaced with the words "period approaching" for consistency with the terminology used in part four of the Legislative Guide.

[11] The draft paragraph is based on the definition contained in A/CN.9/WG.V/WP.140. The words in square brackets at the end of the draft paragraph relating to the party pursuing the cause of action were previously included in A/CN.9/WG.V/WP.138, reflecting a proposal made at the forty-eighth session (A/CN.9/864, paras. 68, 69). The words have been included in this draft in square brackets for further consideration.

Subparagraph (e)(iv) [(d)(ii) of A/CN.9/WG.V/WP.138 and (d)(v) of A/CN.9/WG.V/WP.140]

[12] Alternatives A and B have been retained for further consideration, in accordance with the decision of the Working Group at its forty-ninth session (A/CN.9/870, para. 57); the intention of the proposal to include both options was that enacting States could choose whichever was the most appropriate. The words in square brackets are intended to clarify that the sums referred to in this subparagraph are sums not already covered by the other items of subparagraph (e), specifically (i) and (ii). As a matter of drafting, the reference to "the estate" might be expanded to refer to "its insolvency estate" or "the debtor's insolvency estate".

[13] The additional language in alternative B is intended to clarify the reference to "the cause of action".

Article 3. International obligations of this State

[14] At its forty-ninth session (A/CN.9/870, para. 62), the Working Group agreed to retain both article 3 and article 3 bis for further consideration.

Article 3 bis. International obligations of this State

[15] Draft article 3 bis has been revised in accordance with the decisions made at the forty-ninth session (A/CN.9/870, paras. 61-62). The words in square brackets at the

end of paragraph 1 have been included, as proposed, with an added reference to the provisions "of the law of this State" to clarify the reference to "provisions", on the assumption that that was what was intended by the proposal. The Working Group may wish to consider whether the reference to the "enforcement" of insolvency proceedings should be retained.

Articles 4, 5 and 6

[16] 1. Draft articles 4, 5, 6 and 8 are based on articles 4, 5, 7 and 8 of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) and have been revised for consistency with the subject matter of this draft instrument. Article 5 has been revised in accordance with a decision at the forty-ninth session (A/CN.9/870, para. 65).

Article 4

2. The Working Group may wish to consider whether a footnote should be included in this draft text, along the lines of the footnote to article 4 of the Model Law (appropriately revised):

> "A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:
>
> > "Nothing in this Law affects the provisions in force in this State governing the authority of [*insert the title of the government-appointed person or body*]."

3. A guide to enactment might refer to the material in the Guide to Enactment and Interpretation of the Model Law on articles 4, 5 and 6, revised as appropriate for this instrument.

[17] Given that the chapeau of article 10 refers to the possibility that a judgment may be raised by way of defence, it may be appropriate either to note in any guide to enactment of draft article 4 that a judgment may be raised by way of defence in a court other than the one specified in this draft article or to include some reference to that issue in the drafting of this article.

Article 7 [6 bis]. Public policy exception

[18] 1. Draft article 7 is based upon article 6 of the Model Law, revised in accordance with the decisions of the Working Group at its forty-ninth session (A/CN.9/870, para. 67). As originally formulated, article 6 refers to the "public policy of this State", but does not include the words referring to procedural fairness, which derive from article 9, subparagraph (e) of the 2005 Convention. The addition of those words is intended to focus attention on situations where there are serious procedural failings. The explanatory note to the draft text emanating from the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (1-9 June 2016) (Prel. Doc. No. 2 of April 2016 — Explanatory Note providing background on the proposed draft text and identifying outstanding issues, para. 167) (the draft Hague Conference text) indicates that the wording relating to procedural fairness was included because not all States regard procedural fairness as part of public policy.

2. A guide to enactment might refer to the material in the Guide to Enactment and Interpretation of the Model Law on public policy, revised as appropriate for this instrument, as well as to any relevant explanatory material from the draft Hague Conference text.

[19] As formulated in article 6 of the Model Law, the words "of this State" refer to public policy. For clarification, given the addition of the final phrase, it may be desirable to retain two references to "this State" so that it is clear that both the public policy and the rules of procedural principles are those "of this State", or to revise the

drafting in some other manner to achieve that result. A reference to procedural fairness without a connection to the enacting State might be too broad and too vague.

Article 9 [7 bis and 8 bis]. Effect and enforceability of an insolvency-related judgment in the originating State

Generally

[20] Draft article 9, which gives effect to revisions agreed by the Working Group at its forty-ninth session (A/CN.9/870, para. 69), also reflects article 4, paragraph 3 of the draft Hague Conference text. It incorporates draft article 8 bis of the previous draft of this text, as contained in A/CN.9/WG.V/WP.138. The final sentence of variant 1 and paragraph 3 of variant 2 have been moved from footnote 24 of the previous draft of this article (A/CN.9/WG.V/WP.138), as decided by the Working Group at its forty-ninth session (A/CN.9/870, para. 72).

Paragraph 2

[21] 1. Variant 2 of draft article 9, paragraph 2 reflects the changes made to draft article 4, paragraph 4 of the draft Hague Conference text and clarifies that conditions might apply only where recognition and enforcement are granted under subparagraph 2(a). While the drafting proposed in variant 2 is essentially the same in substance as that in variant 1, the drafting in variant 1 is somewhat broader and suggests conditions might also apply in the case of postponement, which might seem inappropriate. The Working Group may wish to consider whether some distinction might be made in this draft article between recognition and enforcement e.g. recognition might be granted, but enforcement made subject to conditions, or postponed. As currently drafted, the article makes no such distinction, treating them as a single package.

2. A guide to enactment might include material based upon the explanatory note accompanying the draft Hague Conference text (Prel. Doc. No. 2 of April 2016 — Explanatory Note providing background on the proposed draft text and identifying outstanding issues, paras. 62 and 63).

Article 10 [8]. Application for recognition and enforcement of an insolvency-related judgment

Paragraph 1

[22] The wording of the paragraph 1 of draft article 10 may require some clarification. As previously drafted (A/CN.9/WG.V/135, art. 8, variant 2), there was a second sentence to the effect that: “a judgment may be enforced by pleading the rights created or recognized by the judgment by way of defence.” The drafting change now suggests that the “application for recognition and enforcement may be made … by way of defence”. The Working Group may wish to consider how that would be implemented in practice — e.g. when pleading a judgment by way of defence, is the procedure for applying for recognition and enforcement contained in the remainder of the article to be followed, or is a different procedure required? If the former, the article does not need to specify that an application may be made by way of defence and this matter can be addressed in a guide to enactment. If the latter, further drafting may be required.

Subparagraph 2(b)

[23] Variant 1 of subparagraph 2(b) reflects the previous draft as contained in A/CN.9/WG.V/WP.138, which was felt to be too broad and too detailed. Variant 2 is based upon the discussion at the forty-ninth session (A/CN.9/870, para. 71) and focuses only upon the requirement that the judgment is effective and enforceable and that information about any current review should be provided. The reference to “any documents” reflects the approach taken in article 11 of the draft Hague Conference text.

Subparagraph 2(c)

[24] The addition of the words in square brackets to article 10, subparagraph 2(c) was suggested at the forty-eighth session (A/CN.9/864, para. 74), but since the addition has not been considered by the Working Group, the words remain in square brackets.

Subparagraph 2(d)

[25] Subparagraph 2(d) of draft article 10 is included for the consideration of the Working Group. It repeats the substance of article 15, subparagraph 2(c) of the Model Law and article 11, paragraph 2 of the draft Hague Conference text.

Article 11 [9]. Decision to recognize and enforce an insolvency-related judgment

Subparagraph (a)

[26] If article 11 should refer to all articles relevant to the decision to recognize, a cross-reference to article 9 might be appropriate, in addition to the references to articles 7 and 12. The substance may be repeated as suggested in subparagraph (a) or as a specific reference to article 9, paragraph 2.

Subparagraph (d)

[27] The words in square brackets have been added to draft article 11, subparagraph (d) to take account of the issue noted above in notes [17] and [22].

Article 12 [10]. Grounds to refuse recognition and enforcement of an insolvency-related judgment

The following explanatory notes are included to assist discussion of the various paragraphs of draft article 12. They could be included in any guide to enactment of the draft text.

Subparagraph (a)

[28] Subparagraph (a) permits the court to refuse recognition and enforcement if the defendant in the proceedings giving rise to the judgment was not properly notified of that proceeding. Subparagraph (a)(i) is concerned with the interests of the defendant, while subparagraph (a)(ii) is concerned with the interests of the receiving State, provided that the receiving State is the State in which the defendant was notified of the proceeding giving rise to the judgment.

Subparagraph (b) [art. 10 (c), A/CN.9/WG.V.WP.138]

Subparagraph (b) deals with the situation where the judgment was obtained by fraud in connection with a matter of procedure. While in some legal systems procedural fraud may fall within the scope of the public policy exception, this is not the case for all, hence the inclusion of this provision.

[29] The words “in connection with a matter of procedure” were deleted from the equivalent provision — article 7, subparagraph 1(b) — of the draft Hague Conference text. The basis of that deletion was that the limitation was not necessarily reflected in domestic law or bilateral agreements (although it was noted that it was included in the 2005 Convention), and that fraud should not be restricted to matters of procedure. It was also noted, however, that the originating court may be in a better position than the receiving court to address evidentiary matters related to substantive fraud. The Working Group may wish to consider whether this language should be retained in this draft article.

Subparagraphs (c) and (d) [art. 10 (g), A/CN.9/WG.V.WP.138]

[30] 1. Subparagraphs (c) and (d) are both concerned with the situation where there is a conflict between the judgment for which recognition and enforcement is sought and another judgment given in a dispute between the same parties. Subparagraph (c)

addresses the situation where the inconsistent judgment was issued by a court in the receiving State. As currently drafted, the judgment of the receiving State can only take precedence over the foreign judgment if it was issued before the foreign judgment. It might be noted that the draft Hague Conference text (art. 7, subpara. 1 (e)) refers only to inconsistency between the receiving State judgment and the foreign judgment, irrespective of the time of issue of the two judgments. If the word "prior" were to be deleted from subparagraph (c), the receiving State judgment could always take precedence over the foreign judgment, irrespective of the time of its issue relative to the foreign judgment. The Working Group may wish to consider that issue.

2. The parties to the conflicting judgments must be the same, but that requirement may be satisfied if the parties bound by the judgment are the same, even if the parties to the proceedings are different.

3. Subparagraph (d) is concerned with the situation where both judgments are given by foreign courts. Recognition and enforcement of the later of those judgments may be refused, provided the parties are the same, the subject matter is the same and the earlier conflicting judgment fulfils the conditions necessary for recognition and enforcement.

[31] The requirement in subparagraph (d) that the earlier judgment refer not only to the same parties, but also to the same subject matter, is included in article 7, subparagraph 1(f) of the draft Hague Conference text, as it is in the 2005 Convention. It has been added here for consideration by the Working Group.

Subparagraph (e) [art. 10 (h), A/CN.9/WG.V.WP.138]

[32] 1. The first part of subparagraph (e) deals with the desirability of avoiding interference with the conduct and administration of the foreign proceeding, a concept found in article 19, paragraph 4 of the Model Law and concerning the granting of relief. It is explained in paragraph 175 of the Guide to Enactment and Interpretation of the Model Law as having the objective, in the event there is a foreign main proceeding pending, that any relief granted in favour of a foreign non-main proceeding is consistent (or does not interfere) with the foreign main proceeding.

2. In this draft, however, it is somewhat broader and refers both to interference with administration of the debtor's insolvency proceedings and inconsistency with a stay or other order in the insolvency proceedings. The concept of interference is somewhat broad and may cover instances where recognition of the insolvency-related judgment might upset the cooperation between multiple proceedings or give effect to a judgment that should have been pursued in the jurisdiction of the foreign proceeding (e.g. the foreign proceeding is a main proceeding or the foreign proceeding is taking place in the State in which the assets the subject of the judgment are located). It should not be possible, however, that the drafting could allow selective recognition of foreign judgments on the basis that, for example, the judgment creditor was the debtor in the foreign proceeding and thus the value of the insolvency estate could be increased, while judgments where the judgment creditor was a creditor might deplete the value of the estate and thus be refused recognition on this ground of interference.

3. The second part of subparagraph (e) addresses the situation of concurrent insolvency proceedings, where one of those proceedings is taking place in the receiving State. The concurrent proceedings must relate to the same debtor i.e. the debtor subject to the foreign proceeding to which the insolvency judgment is related. Inconsistency with a stay issued in such proceedings might arise where the stay permitted individual actions to the extent necessary to preserve a claim, but did not permit subsequent recognition or enforcement of that judgment or where the stay did not permit such individual actions and the proceeding giving rise to the judgment was commenced after the issue of the stay.

4. The words "relating to the same debtor" have been added to the subparagraph clarify which insolvency proceedings are being referred to.

Subparagraph (f) [11 (j) A/CN.9/WG.V.WP.138 and 12 (j), A/CN.9/WG.V.WP.140]

[33] 1. Subparagraph (f) applies only to those judgments falling within article 2, subparagraph (e)(v) as those judgments can directly affect the rights of creditors or other stakeholders and their interests should have been taken into account in the proceeding giving rise to the judgment. It is intended to reflect the types of protection available under article 22 of the Model Law. It does not apply more generally to other types of insolvency-related judgments that resolve bilateral disputes; even though creditors and other stakeholders may be affected by those judgments, those effects are indirect (e.g. through the judgment's effect on the size of the estate).

2. At its forty-ninth session, the Working Group expressed a preference for subparagraph (j) as drafted in A/CN.9/WG.V.WP.140. The inclusion of this paragraph replaces draft article 11 as it was included in A/CN.9/WG.V/WP.138: "In recognizing and enforcing an insolvency-related judgment under article .., the court must be satisfied that the interests of the creditors and other interested persons, including the judgment debtor, are adequately protected."

Subparagraph (g) [10 (i), A/CN.9/WG.V.WP.138 and 140]

[34] 1. As currently drafted, article 12 provides a long list of grounds upon which recognition and enforcement might be refused. Several of these grounds, like subparagraph (g), involve complex negatives. To facilitate clarity, an alternative drafting of the chapeau of subparagraph (g) is offered in the second set of square brackets. If drafting along those lines is preferred, the subparagraphs might be drafted, for example, as follows: "(i) The basis of the court's jurisdiction was the express consent of the party against whom the judgment was issued;".

2. Subparagraph (g) permits refusal of recognition and enforcement if the originating court exercised jurisdiction over the judgment debtor on grounds other than those listed; in other words, if the originating court exercised jurisdiction on one of the grounds listed, subparagraph (g) does not apply. As such, subparagraph (g) works differently to the other paragraphs of article 12, each of which create a free-standing discretionary ground on which the court may refuse recognition of a judgment; if one of them is met, the judgment can be refused.

3. Subparagraph (g) can thus be seen as a broad exception, permitting refusal on grounds of inadequate jurisdiction in the originating court (as determined by the receiving court) with four "safe harbours" that render the provision inapplicable if the originating court satisfies any one of them.

Subparagraphs (g)(i)-(iii)

4. The text of subparagraphs (g)(i)-(iii) has been revised in accordance with the discussion at the forty-ninth session (A/CN.9/870, para. 76).

5. Subparagraph (g)(i) provides that the originating court's exercise of jurisdiction must be seen as adequate if the judgment debtor expressly consented to that exercise of jurisdiction; the judgment debtor cannot subsequently resist recognition and enforcement by claiming that the originating court did not have jurisdiction.

6. Subparagraph (g)(ii) provides that the originating court's exercise of jurisdiction must be seen as adequate if it exercised jurisdiction on a basis on which the receiving court could have exercised jurisdiction had an analogous dispute taken place in the receiving State. If the law of the receiving State would have permitted a court to exercise jurisdiction in parallel circumstances, the receiving court cannot refuse recognition and enforcement on the basis that the originating court did not properly exercise jurisdiction.

7. Subparagraph (g)(iii) is similar to subparagraph (g)(ii), but broader. While subparagraph (g)(ii) is limited to jurisdictional grounds explicitly permitted under the law of the receiving State, subparagraph (g)(iii) applies to any additional jurisdictional grounds which, while not explicitly grounds upon which the receiving court could have exercised jurisdiction, are nevertheless not incompatible with the

law of the receiving State. The purpose is to discourage courts from refusing recognition and enforcement under subparagraph (g) in cases in which the originating court's exercise of jurisdiction was not unreasonable, even if the precise basis of jurisdiction would not be available in the receiving State, provided it was not incompatible with the central tenets of procedural fairness in the receiving State.

Subparagraphs (iv)-(v)

[35] 1. Subparagraphs (g)(iv) and (v) are optional provisions intended for enactment in States that have already implemented the Model Law, based as they are upon the concept of foreign main proceedings from the Model Law. In subparagraph (g)(iv), if the originating court or another court in the originating State was supervising a foreign main proceeding concerning the judgment debtor, subparagraph (g) does not apply as a ground to refuse recognition.

2. Subparagraph (g)(v) addresses situations in which a judgment is issued against a director of an insolvent company by a court located at that company's centre of main interests. Provided the judgment was based on the director's conduct as a director, the court's exercise of jurisdiction would not provide grounds for refusal. If the judgment relates to something other than that conduct (e.g. the director as a creditor of the debtor company), subparagraph (g) could provide a basis for refusal of recognition. As in subparagraph (g)(iv), the subparagraph also clarifies that recognition and enforcement should not be refused for jurisdictional reasons solely because the judgment came from a court in the debtor's centre of main interests other than the court actually supervising the main proceeding.

3. The reference to "main proceeding" in subparagraphs (g)(iv) and (v) is based on the definition in the Model Law, article 2, subparagraph (b). Since the defined term is "foreign main proceeding" it may be appropriate to include the word "foreign" in this draft article or to include a definition of "main proceeding" in this draft text.

[36] 1. Variant 1 of subparagraph (g)(v) reflects the draft text as presented in A/CN.9/WG.V/WP.140, with the words "was supervising a main proceeding regarding the insolvency of" removed from the chapeau and placed in the text of the subparagraph. Variant 2 is an attempt to make the text easier to understand. The words "or another court in the State in which that foreign main proceeding was being conducted" have been added to both variants to accommodate the possibility that the insolvency-related judgment might not always be issued by the court that has the power to control or supervise an insolvency proceeding in a particular State.

2. The Working Group may wish to consider subparagraph (g)(v) and the example of an "insolvency-related judgment" in article 2, subparagraph (e)(ii). The latter refers specifically to the period approaching insolvency, the former does not and is thus potentially much broader. It might be recalled that part four of the Legislative Guide focuses on that period approaching insolvency on the basis that such causes of action can be addressed in the insolvency law and pursued once insolvency proceedings commence. Broader aspects of director conduct typically would be covered by law other than insolvency law. It may be helpful for reasons of consistency to align the language of both provisions or to indicate in a guide to enactment why they are not the same or do not need to be the same.

Subparagraph (h) [10 (k), A/CN.9/WG.V/WP.140]

[37] 1. Article 12, subparagraph (h) reflects the drafting as presented to the Working Group in A/CN.9/WG.V/WP.140 and for which a preference was expressed at the forty-ninth session (A/CN.9/870, para. 76). Like subparagraphs (g)(iv) and (v), this paragraph is also intended primarily for use by States that have enacted the Model Law, as it relies upon the Model Law framework of recognition of specific types of foreign proceeding (i.e. main or non-main proceedings). If the judgment was issued in a type of proceeding that cannot be recognized under the Model Law, recognition of the judgment can be refused unless it relates only to assets that were located in the originating State. The provision is designed to help ensure that the Model Law framework is not undermined by the recognition and enforcement of judgments

resolving issues that should have been resolved in the State where the debtor had its centre of main interests or an establishment (i.e. the foreign main or non-main proceedings). In the circumstances where the judgment addresses only assets located in the originating State it may be useful, notwithstanding that that State is not the location of a main or non-main proceeding, for that judgment to be recognized — for example, it may resolve issues of ownership that are relevant to the insolvency estate.

2. The reference to "assets located in the originating State" may be sufficiently broad to cover, for example, intellectual property registered in the originating State where it is neither the centre of the debtor's main interests nor a State in which the debtor has an establishment. The broad definition of "assets of the debtor" in the Legislative Guide might be noted; even though not applicable to all circumstances arising under the current text, it does provide a broad definition of what the reference to "assets" might include.

3. Subparagraph (h) may be a specific example of circumstances that could be covered more generally by subparagraph (e). The Working Group may recall that this subparagraph was originally added to the text as an alternative to restricting the draft text to recognition of judgments originating only from a main or non-main proceeding (see A/CN.9/829, para. 70). If subparagraph (h) can be regarded as a specific example of subparagraph (e), the substance of subparagraph (h) might be included in a guide to enactment, explaining the context in which a State that has enacted the Model Law might wish to interpret draft subparagraph (e).

Article 13 [10 bis]. Equivalent effect

[38] The Working Group agreed at its forty-ninth session (A/CN.9/870, para. 78) to retain this draft article and remove the square brackets.

Article 14 [12]. Severability

[39] Draft article 14 is based on article 14 of the draft Hague Conference text. At its forty-ninth session (A/CN.9/870, para. 80-81), the Working Group agreed to retain the draft article without square brackets.

Article 15 [13]. Provisional relief

[40] 1. The words in square brackets in the chapeau of paragraph 1 respond to some of the requests at the forty-ninth session to add various elements to the draft text (A/CN.9/870, para. 82). Paragraph 2 adopts the approach of the Model Law on provisional relief (art. 19), leaving it to domestic law to address that issue of procedure.

2. The Working Group may wish to consider how the suggestion made at the forty-ninth session (A/CN.9/870, para. 82) to provide additional examples of relief, including orders not addressed to any particular party, but rather in respect of assets, might be addressed in the draft article. The request to address the procedure for obtaining relief, including whether there would be a hearing, is not addressed on the basis that that is a matter of local law, which UNCITRAL texts typically do not cover (see, for example, art. 19 of the Model Law). The request to address requirements for notice is already covered by paragraph 2.

Additional matters

1. In response to a suggestion at the forty-ninth session that an article should be added to the draft text along the lines of article 12 of the draft Hague Conference text, the Working Group felt that it might be addressed in part by article 1, but could be considered further in its deliberations on the revised draft of this text. Article 12 of the draft Hague Conference text provides:

> 1. The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment are governed by the law of the requested States unless this Convention provides otherwise. The court addressed shall act expeditiously.

2. The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.

2. The first sentence of paragraph 1 would appear to be inappropriate for inclusion in a model law which, once enacted, becomes the law of the enacting State. The second sentence of paragraph 1, which echoes article 17, paragraph 3 of the Model Law, is not currently addressed in this draft text. The substance of paragraph 2 is also not addressed in this text, except to the extent it is covered by article 12, subparagraph (h).

D. Report of the Working Group on Insolvency Law on the work of its fifty-first session (New York, 10-19 May 2017)

(A/CN.9/903)

[Original: English]

I. Introduction

A. Facilitating the cross-border insolvency of multinational enterprise groups

1. At its forty-fourth session (December 2013), the Working Group agreed to continue its work on cross-border insolvency of multinational enterprise groups[1] 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 and part three of the UNCITRAL Legislative Guide on Insolvency Law and involve reference to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation. The Working Group discussed this topic at its forty-fifth (April 2014) (A/CN.9/803), forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870) and fiftieth (December 2016) (A/CN.9/898) sessions and continued its deliberations at the fifty-first session.

B. Recognition and enforcement of insolvency-related judgments

2. At its forty-seventh session (2014), the Commission approved a mandate for Working Group V to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[2] The Working Group discussed this topic at its forty-sixth (December 2014) (A/CN.9/829), forty-seventh (May 2015) (A/CN.9/835), forty-eighth (December 2015) (A/CN.9/864), forty-ninth (May 2016) (A/CN.9/870) and fiftieth (December 2016) (A/CN.9/898) sessions and continued its deliberations at the fifty-first session.

C. Insolvency of micro, small and medium-sized enterprises (MSMEs)

3. At its forty-seventh session (2014), the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments.[3]

4. At its forty-ninth session (2016), the Commission clarified that the mandate of Working Group V with respect to the insolvency of MSMEs was to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the Legislative Guide

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[1] A/CN.9/763, paras. 13-14; A/CN.9/798, para. 16; see the mandate given by the Commission at its forty-third session (2010): *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17, para. 259(a)).

[2] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.

to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed.[4]

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its fifty-first session in New York from 10-19 May 2017. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, Brazil, Bulgaria, Burundi, Canada, Chile, China, Colombia, Czechia, Denmark, El Salvador, France, Germany, Greece, Indonesia, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Namibia, Nigeria, Panama, Pakistan, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Spain, Sri Lanka, Switzerland, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

6. The session was attended by observers from the following States: Congo, Democratic Republic of Congo, Estonia, Iraq, Malta, Netherlands, Saudi Arabia, Syrian (Arab Republic) and Viet Nam.

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

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF); World Bank; World Intellectual Property Organization (WIPO);

(b) *Invited inter-governmental organizations*: International Association of Insolvency Regulators;

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), European Investment Bank (EIB), Fondation pour le Droit Continental (FDC), Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI), INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), National Law Center for Inter-American Free Trade (NLCIFT), The European Law Students Association (ELSA), The Law Association for Asia and the Pacific (LAWASIA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Wisit Wisitsora-At (Thailand)

Rapporteur: Sanjay Rajaratnam (Sri Lanka)

10. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.144);

(b) A note by the Secretariat on recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.145);

(c) A note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.146);

(d) A note by the Secretariat on the insolvency of micro, small and medium-sized enterprises (A/CN.9/WG.V/WP.147); and

[4] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

(e) Comments by Canada on the draft model law on the recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.148).

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 insolvency of micro, small and medium-sized enterprises; (b) the cross-border recognition and enforcement of insolvency-related judgments; and (c) facilitating the cross-border insolvency of multinational enterprise groups.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group commenced its deliberations on the insolvency of micro, small and medium-sized enterprises on the basis of documents A/CN.9/WG.V/WP.147 and A/CN.9/WG.V/WP.121 and a number of presentations by States and other delegations. It then took up the cross-border recognition and enforcement of insolvency-related judgments on the basis of documents A/CN.9/WG.V/WP/145 and A/CN.9/WG.V/WP.148, followed by the cross-border insolvency of multinational enterprise groups on the basis of document A/CN.9/WG.V/WP.146. The Working Group completed its work by considering a revised text of the draft model law on the cross-border recognition and enforcement of insolvency-related judgments, as indicated in the deliberations and decisions of the Working Group reflected below.

IV. Insolvency of micro, small and medium-sized enterprises (A/CN.9/WG.V/WP.147 and A/CN.9/WG.V/WP.121)

13. The Working Group commenced its deliberations on the insolvency of micro, small and medium-sized enterprises (MSME) on the basis of documents A/CN.9/WG.V/WP.147 and A/CN.9/WG.V/WP.121 and a number of presentations by the delegations of the International Monetary Fund and the World Bank on the work they had undertaken in respect of MSME insolvency; by Japan and the Republic of Korea on their legislation specifically addressing MSME insolvency; and by a group of interested experts on a modular approach to the design of MSME insolvency regimes. Those presentations were made available on the dedicated Working Group V webpage on the UNCITRAL website: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html. Additional information on the approach to MSME insolvency in other States was provided by various delegations. The Working Group acknowledged the usefulness of the presentations to the manner in which its work might be taken forward and the issues to be covered.

14. Following discussion, the Working Group agreed that the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) provided an appropriate framework for structuring future work on this topic. That work could proceed by examining each of the topics addressed in the Legislative Guide and considering whether the treatment provided was appropriate and necessary for an MSME insolvency regime, building upon the brief outline provided in A/CN.9/WG.V/WP.121. If such treatment was not appropriate, consideration should be given to how it might need to be adjusted for MSME insolvency. Additionally, consideration should be given to issues not covered by the Legislative Guide that should nevertheless be addressed in an MSME insolvency regime. The Working

Group also expressed interest in considering how the modular approach might contribute to the arrangement of the elements required for an effective and efficient insolvency regime for MSMEs.

V. Cross-border recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.145 and A/CN.9/WG.V/WP.148)

15. The Working Group next addressed the text on cross-border recognition and enforcement of insolvency-related judgments.

Preamble

Article 1. Scope of application; Article 2. Definitions

16. The Working Group agreed to defer its consideration of a possible preamble, the scope of application in article 1 and the definitions in draft article 2 until it had reviewed the remaining text of the draft model law.

Article 3 and 3 bis. International obligations of this State

17. The Working Group approved the substance of draft article 3.

18. It was suggested that a note along the lines of paragraph 93 in the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency (the Model Law), which explained that a provision along the lines of draft article 3 in the current text might not be required in all States, should be included in the guide to enactment for the current text. It was also suggested that that guide to enactment might clarify that binding legal obligations issued by regional economic integration organizations (REIOs) that were applicable in the member States of a REIO could be treated as obligations arising from an international treaty.

19. In respect of draft article 3 bis there was support for both retaining and deleting the article in its entirety and for retaining and deleting certain elements of it.

20. After discussion, it was agreed that paragraphs 1 bis and 2 of article 3 bis should be deleted. The relationship between article 3 and article 3 bis (consisting only of paragraph 1) was questioned and the Working Group agreed that paragraph 1 of article 3 bis should remain in square brackets pending further consideration and clarification of that relationship.

Article 4. Competent court or authority

21. The Working Group considered draft article 4 (WP.145) and the proposal for new article 4.1 (WP.148). With respect to the latter, concerns were raised that it did not include the reference in article 4 (WP.145) to “any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings”, and that the use of the word “application” might be too narrow. After discussion, the drafting of article 4 (WP.145) was approved.

Article 5. Authorization to [seek recognition and enforcement of an insolvency-related judgment in a foreign State] [act in another States in respect of an insolvency-related judgment issues in this State]

22. As between the two phrases in square brackets, preference was expressed in favour of the second. Proposals to add the phrase “recognition of” after “with respect to” and to delete the final phrase “as permitted by the applicable foreign law” did not receive support. The Working Group approved the substance of draft article 5 with the second alternative text and without square brackets, and agreed to conform the title to those changes.

Article 6. Additional assistance under other laws

23. The Working Group approved the substance of draft article 6.

Article 7. Public policy exception

24. A proposal to add the words "including situations involving the infringement of the security or sovereignty of this State" to article 7 did not receive sufficient support, but it was agreed that the guide to enactment could clarify that those situations would be covered by the public policy exception. It was noted that, in any event, the interpretation of what was covered by public policy was a matter for the enacting State. The Working Group approved the substance of draft article 7.

Article 8. Interpretation

25. Although a proposal to delete the phrase "and the observance of good faith" was made, it did not receive sufficient support. It was observed that since the phrase was used in the Model Law and there was a close relationship between that text and the present text, its deletion might raise questions of interpretation and it would be preferable to maintain conformity between the two texts. The Working Group agreed to retain article 8 as drafted.

Article 9. Effect and enforceability of an insolvency-related [foreign] judgment in the originating State

26. Proposals were made to change "recognition and enforcement" at the beginning of paragraph 2 to "recognition or enforcement" and to add the words "recognition or" before the word "enforcement" at the end of that paragraph. Those proposals were accepted by the Working Group.

27. A question was raised as to whether the "review" in paragraph 2 referred to appellate review or review by the originating court. It was explained that in some jurisdictions, an originating court had a short period before an appeal to a higher court was made in which it could review its own judgment; once the appeal was launched, the lower court no longer had the ability to review its decision. After discussion, article 9 was approved with the revisions noted above and it was agreed that the guide to enactment would include some explanation of the notion of "review."

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related [foreign] judgment

28. Various proposals were made with respect to paragraph 1: (a) to replace the first sentence with New Article [4] (Interest to bring an application) in A/CN.9/WG.V/WP.148 and to make clear the persons who might be entitled to apply for recognition and enforcement of an insolvency-related judgment; (b) to limit the persons able to seek recognition and enforcement to the insolvency representative and avoid reference to any "person entitled under the law of the originating State."; and (c) to retain the second sentence without square brackets and amend it to read: "The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings."

29. With respect to the proposals in (a) and (b) above, the reference to a "foreign representative or group representative" was not supported and it was agreed that the term "insolvency representative" should be retained. Although there was some support for including a reference to "a creditor whose interests are affected by the judgment", it was the view of the Working Group that they would be covered as a "person entitled under the law of the originating State" to seek recognition and enforcement. It was observed that the persons entitled to seek recognition and enforcement in the receiving State should mirror those entitled to do so in the originating State. After discussion, the proposals in (a) and (b) above did not receive sufficient support and the first sentence of paragraph 1 was retained as drafted. The proposals in (c) above were also agreed.

30. With respect to subparagraph 2(a), it was suggested that the guide to enactment should explain that the meaning of what constituted a "certified copy" should be determined by reference to the law of the State in which the judgment was issued.

31. With respect to subparagraph 2(c), various observations were made: firstly, that since the subparagraph addressed notification of the application, that notification could only be provided after the application had been made and therefore evidence of that notification could not be submitted with the application; secondly, in some legal systems, the notification of the making of the application was given by the court and the applicant would therefore not be in a position to provide the evidence required by subparagraph 2(c); and thirdly, it was not clear whether the standard for notification was that of the law of the originating State or the receiving State. Reference was made to draft article 15(1) of the most recent draft of the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (the draft Hague Conference text) as a possible approach that might be followed. A question was raised as to the purpose of subparagraph 2(c), and the Working Group agreed that the aim of the provision was to ensure the rights of parties to be heard and to present arguments against recognition and enforcement of the judgment. It was suggested that drafting along the lines of "the court shall ensure that the party against whom relief is sought should be given the right to be heard on the application" could be included as a new paragraph to article 10 and that subparagraph 2(c) could be deleted. That approach was agreed and the Secretariat was requested to propose appropriate drafting.

32. Proposals to change the word "may" in paragraph 3 to "shall" and to delete "whether or not they have been legalized" in paragraph 4 were not taken up by the Working Group. With respect to the latter, the Working Group was of the view that since that phrase was in the existing Model Law and since it provided flexibility to enable the courts of the enacting State to rely upon the presumption or to refer to local rules in the event of any doubt as to the authenticity of documents, that phrase should be retained.

Article 11. Decision to recognize and enforce an insolvency-related [foreign] judgment

33. The Working Group approved the substance of draft article 11 with the deletion of the text in square brackets in subparagraph (d). There was no support to add a provision along the lines of paragraph 2 of New Article [4.2] (Notification of application and summary recognition where not contested) in A/CN.9/WG.V/WP.148. A question was raised as to whether the drafting of subparagraph (e), and in particular, the use of the words "do not apply", was appropriate or sufficiently clear.

Article 12. Grounds to refuse recognition and enforcement of an insolvency-related [foreign] judgment

34. Proposals were made to add new grounds for refusal of recognition based upon public policy and satisfaction of the judgment as set forth in subparagraphs (a.1) and (e.1) of Article [12] (Grounds to refuse recognition and enforcement of an insolvency-related judgment) in A/CN.9/WG.V/WP.148.

35. With respect to the proposal to add a new subparagraph (a.1), a number of suggestions were made: (a) to delete "manifestly"; (b) to adopt a different drafting solution making article 12 subject to article 7 along the lines of the approach of article 17 of the Model Law; and (c) to consider the relationship between subparagraph (a.1), article 9(1) and article 11(e), and whether the public policy question was sufficiently addressed by those other provisions.

36. There was no agreement to delete the word "manifestly". After further discussion, it was agreed that even though the references in articles 9 and 11 might be sufficient to address refusal on the basis of public policy, a further reference should be added at the beginning of the chapeau of article 12 along the lines of "Subject to article 7,".

37. The proposal to add a new subparagraph (e.1) did not receive sufficient support.

Subparagraph (a)

38. The Working Group approved the substance of subparagraph (a) as drafted.

Subparagraph (b)

39. To maintain consistency with the Hague Convention of 30 June 2005 on Choice of Court Agreements, it was suggested that the entire text of subparagraph (b) should be retained without square brackets. A different view was that the subparagraph should be retained without the text in the second set of square brackets to maintain consistency with the most recent draft Hague Conference text. After discussion, the Working Group agreed to remove the square brackets from around the entire subparagraph, and to delete "[in connection with a matter of procedure]".

Subparagraphs (c) and (d)

40. The Working Group approved the substance of subparagraphs (c) and (d) as drafted.

Subparagraph (e)

41. Several concerns were expressed including whether the reference to "the debtor's insolvency proceedings" included proceedings in both the enacting State and foreign proceedings, and how the subparagraph could be applied in a situation where there were competing insolvency proceedings. After discussion, there was strong support in the Working Group to retain the substance of subparagraph (e) as drafted.

Subparagraph (f)

42. It was noted that with the proposed revision of the definition of "insolvency-related judgment" in article 2, the cross-reference to subparagraph (e)(v) was no longer appropriate. Various proposals were made for revision of subparagraph (f), including: (a) to reproduce the content of subparagraph 2(e)(v) in subparagraph 12(f); (b) to delete the limitation and apply the requirement for adequate protection to all judgments to be covered by the draft instrument; and (c) to refer to the types of judgment to which the requirement for adequate protection might apply. It was recalled that there had been extensive discussion as to the judgments that would fall within the scope of subparagraph 12(f), and agreement had been reached on those referred to in subparagraph 2(e)(v). After discussion, it was agreed that the substance of subparagraph 2(e)(v) should be repeated in subparagraph 12(f), subject to conforming it to any revisions that might be agreed by the Working Group when it considered the definition of that term.

Subparagraph (g)

43. After extensive discussion and in order to maintain consistency with the approach in the most recent draft Hague Conference text, noting that if further changes were made to that text the issues might have to be reconsidered, the Working Group agreed that subparagraph (g)(i) should be redrafted as follows:

> "(g) The originating court did not satisfy one of the following conditions:
>
> "(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;
>
> "(i bis) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;"

44. The Working Group approved the substance of subparagraphs (g)(ii) and (iii) as drafted.

Subparagraph (h)

45. Text to replace subparagraph (h) was proposed along the following lines:

> "(h) The judgment originates from a proceeding that is not recognizable under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*], unless:
>
> "(i) The insolvency representative of a proceeding that could have been recognized under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*] participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which those proceedings related; and
>
> "(ii) The *judgment* relates solely to assets that were located in the originating state at the time that proceeding commenced."

46. A concern was raised regarding the temporal application of "not recognizable", and in particular, how it would be interpreted where the relevant proceeding had concluded prior to the time recognition of the judgment was being considered. In response, it was suggested that that matter might be addressed in the guide to enactment, which would clarify that the drafting was intended to cover a proceeding that had not been, could not be, or could not have been recognized.

47. Another concern was whether the phrase "originates from a proceeding" was narrower than the phrase used in the previous version of subparagraph (h) (A/CN.9/WG.V/WP.145) "is related to an insolvency proceeding". In particular, it was questioned whether a judgment on an avoidance action issued by a court other than the court supervising the insolvency proceeding could be considered to "originate from" an insolvency proceeding; it would clearly have been covered by the phrase "related to an insolvency proceeding". In response, it was observed that there may be circumstances, particularly where there were a number of competing proceedings, in which it would not be clear which of those proceedings the judgment related to, but it would be clear from which proceeding it originated. On that basis, it was felt that the use of the term "originated from" was clearer and would save the court from having to consider the question of relationship.

48. A further issue concerned which proceeding was referred to in the first line of the chapeau. In response, it was noted that while it might be the insolvency proceeding or another proceeding, that distinction was not material for the purposes of the subparagraph. However, it was acknowledged that explanatory material could be included in the guide to enactment. After discussion, it was agreed that the issues raised should be noted, that there was support for the text as drafted, and that the paragraph could be reconsidered if a proposal for revision was made.

Article 13. Equivalent effect

49. The Working Group approved the substance of draft article 13.

Article 14. Severability

50. A proposal was made to replace "shall" with "may" in the draft article in order to provide better protection for creditors and more discretion and flexibility to the court. Although that proposal received some support, it was observed that the change proposed might not accomplish the protection sought; what might be required was language that conferred upon the court the power to enforce the severable part of a judgment on a conditional basis. It was noted that a court should not be able to refuse recognition or enforcement of one part of a judgment only on the basis that another part was not enforceable; the severable part should be treated no differently than a judgment that was not severable. It was also noted that articles 11 and 14 should contain the same mandatory language and it was further noted that the corresponding article of the most recent draft Hague Conference text also used the word "shall". It

was suggested that an approach along the lines of conditional enforcement under article 9 of the present text or the approach of article 22 of the Model Law providing for adequate protection of the interests of creditors and other interested parties might be relevant to this article.

51. After discussion, the Working Group approved the substance of draft article 14. Delegations were encouraged to make proposals relating to any additional language concerning the protection of creditors.

Article 15. Provisional relief

52. Reference was made to the proposal for New Article 4.3 (Interim Protective Relief) in A/CN.9/WG.V/WP.148 that would add express provision for ex parte relief and additional safeguards to article 15. Although there was some support for that proposal, it was observed that the combination of the chapeau of article 15 and paragraph 2 would already enable provisional relief to be sought on an ex parte basis, unless such relief was not permitted in the enacting State. In addition, it was felt that matters of notice were best left to the enacting State as provided in the present article 15 and article 19(2) of the Model Law.

53. A proposal was made to add the phrase "including whether notice would be required under this article" at the end of paragraph 2. After discussion, it was agreed that the question of notice should be addressed in accordance with domestic law, that paragraph 15(1) could encompass ex parte relief and that the proposed text should be added at the end of paragraph 2. Further, it was observed that the guide to enactment could also address the issue.

Article 16. Recognition of an insolvency-related [foreign] judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]

54. Preference was expressed in favour of Variant 1 with the deletion of the phrases "For greater certainty" and "insolvency-related [foreign]". In response to concerns about the relationship of article 16 to the Model Law, it was confirmed that its sole purpose was to affect the interpretation of article 21 of the Model Law and not to have any effect on the present text. If article 21 was interpreted by an enacting State to cover recognition and enforcement of a judgment as a form of discretionary relief, that relief would be subject to the applicable provisions of the Model Law.

55. As to placement of the provision, it was suggested that it might appear at the end of this text as an unnumbered optional provision with a heading along the lines of "States that have enacted legislation based upon the Model Law may wish to consider the following".

56. After discussion, a proposal was made that the draft article should be revised as follows:

> "*States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of decisions which may have cast doubt on whether judgments can be recognized and enforced under article 21. States may therefore wish to consider enacting the following provision*:
>
> "*Article X. Recognition of an insolvency-related [foreign] judgment under [insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]
>
> "Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment."

57. Although some concern was expressed about the appropriateness of including such an article in this draft text, after discussion, there was support in the Working Group for the proposed text.

Preamble

58. The Working Group agreed that a preamble should be included in the draft text, and a proposal along the following lines was widely supported:

"The purpose of this Law is:

"(a) To create greater certainty for parties in regard to their rights and remedies for *enforcement* of insolvency-related judgments;

"(b) To avoid the duplication of proceedings;

"(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

"(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

"(e) To protect and maximize the value of the insolvency estate; and

"(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation."

Article 1. Scope of application

59. A proposal to add words to the following effect in paragraph 2 of article 1 was not supported:

"This Law is not intended to apply to the recognition and enforcement of judgments falling under the scope of the 1997 UNCITRAL Model Law on Cross-Border Insolvency."

60. It was indicated that paragraph 2 of article 1 was not intended to contain such material, based as it was upon the same paragraph of article 1 of the Model Law, which was designed to enable States to specify the types of proceeding to which the Model Law would not apply (with examples of such proceedings being provided in that text). It was also observed that to add such words might essentially eviscerate this model law, leaving little that could be subject to recognition under it. Another concern raised was how that proposed language would interact with the text of draft article 16 that had been agreed by the Working Group.

61. Such a limitation, it was suggested, would only have relevance for States that had enacted the Model Law, not States that had only enacted this model law. In the latter case, it was observed, there should be no such limitation to application of this model law. It was observed that this model law was not intended to be a supplement to the Model Law and recalled that the mandate of the Working Group was to develop a model law or model legislative provisions to provide for the recognition and enforcement of insolvency-related judgments, without any reference being made to the relationship of the text to be developed to the Model Law. It was also recalled that the Working Group had itself decided, at its forty-sixth session (2014), that the text should be developed as a stand-alone instrument, rather than forming part of the Model Law.

62. After discussion, a suggestion to add the text proposed in footnote 3 of A/CN.9/WG.V/WP.145 as a second paragraph to the preamble along the following lines received strong support:

"The purpose of this Law is not:

"(a) To displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment;

"(b) To replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation if it is interpreted as applying to the recognition and enforcement of an insolvency-related [foreign] judgment;

"(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

"(d) To apply to the judgment commencing the insolvency proceedings to which the judgment is related."

63. The text of draft article 1 set forth in A/CN.9/WG.V/WP.145 was approved without change.

Article 2. Definitions

(a) "Insolvency proceeding"

64. The substance of the definition of "insolvency proceeding" was approved as drafted.

(b) "Insolvency representative"

65. The substance of the definition of "insolvency representative" was approved as drafted.

(c) "**Judgment**"

66. The Working Group agreed to delete the square brackets surrounding the definition; to delete the words "on the merits"; and to retain without the square brackets the text "or administrative authority, provided an administrative decision had the same effect as a court decision".

67. With respect to the final sentence of the definition concerning interim measures, there was support both for its retention and for its deletion. In support of its retention, it was observed that it was quite possible to have final judgments relating to interim measures issued in insolvency proceedings, as well as pre-trial judgments that were properly insolvency-related. Moreover, the nature of insolvency proceedings often required provisional measures to be issued to protect the insolvency estate and the collective interests of creditors and speed was often a necessity; providing for cross-border recognition of such measures would be of assistance to the insolvency proceedings. In support of deletion, it was observed that such judgments were often issued ex parte and many, such as orders preserving the status quo, could not be considered to be final judgments and thus were not intended to be the subject of foreign recognition. After discussion, the prevailing view was that the sentence should be retained, but revised to read "An interim measure of protection should not be considered to be a judgment for the purposes of this Law."

(d) "Insolvency-related [foreign] judgment"

68. The Working Group agreed that the defined term should be "insolvency-related foreign judgment". The Working Group considered that definition on the basis of the various elements contained in the draft text set forth in A/CN.9/WG.V/WP.145 and the proposed text in A/CN.9/WG.V/WP.148. There was insufficient support in the Working Group to replace subparagraphs (i), (ii) and (iii) of the definition in A/CN.9/WG.V/WP.145 with the chapeau proposed in A/CN.9/WG.V/WP.148. With respect to subparagraph (i) (WP.145), a proposal was made that the words "Is related to" were too broad and should be replaced with the phrase "derives directly from or is closely connected to" an insolvency proceeding. It was noted that because that formulation was used in the European Union and was the subject of substantial interpretative jurisprudence by the European Court of Justice, it established an appropriate standard for the current instrument. Support was expressed, however, in favour of retaining the phrase "Is related to" on the basis that the proposed language was too narrow and that following that jurisprudence might not be appropriate for other jurisdictions not subject to that jurisprudence. After discussion, there was support to retain both formulations in the text in square brackets as optional alternatives for States to choose between and for including an explanation of both alternatives in the guide to enactment.

69. In relation to the definition proposed in A/CN.9/WG.V/WP.148, it was mentioned that it was aimed at ensuring a predictable and simple determination of whether a judgment was covered or not, which was consistent with an expedited recognition and enforcement regime. It was further mentioned that such a definition would facilitate implementation of the text in developing countries.

70. With respect to subparagraph (ii) (WP.145), there was general agreement that the words "[on or]" should be retained and the square brackets removed. With respect to subparagraph (iii) (WP.145), it was generally agreed that the words "[interests of the]" could be deleted without affecting the substance of the subparagraph.

71. A concern was expressed that the cumulative effect of subparagraphs (i), (ii) and (iii) might be to exclude judgments relating to an insolvency proceeding issued after the proceeding had concluded. For example, in some jurisdictions avoidance actions may be pursued after the confirmation of a reorganization plan, which was to be considered conclusion of the proceedings; judgments relating to those avoidance actions should be covered by the present instrument. In order to address that concern, text along the following lines was proposed: "Subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has been concluded." That proposal was agreed and the Secretariat was requested to consider the appropriate placement for its inclusion.

72. The Working Group considered the exclusions provided in subparagraphs (a) to (e) of the text proposed in A/CN.9/WG.V/WP.148. After discussion, there was insufficient support for including the text proposed in those subparagraphs. The Working Group agreed to place the examples set out in footnote 9 of A/CN.9/WG.V/WP.145 in the guide to enactment.

73. A question was raised as to whether paragraph 2 of the definition might need to be extended to exclude other judgments, such as the judgment appointing an insolvency representative. In response, it was observed that recognition of the order appointing the insolvency representative was often a critical factor in demonstrating that the insolvency representative had standing to apply for recognition and enforcement of the judgment and should thus be covered by the definition. After discussion, paragraph 2 was retained as drafted.

Title

74. The Working Group agreed that the title of the draft text should be "Model Law on Cross-Border Recognition and Enforcement of Insolvency-Related Judgments".

Further consideration of the draft model law

75. The Working Group considered a revision of the draft model law reflecting the decisions taken earlier in the session. Amendments were only proposed in respect of the following articles; other provisions were adopted without comment.

Preamble

76. The Working Group agreed to number the two purpose paragraphs and to delete in the second paragraph (b) the phrase "if it is interpreted as applying to the recognition and enforcement of an insolvency-related [foreign] judgment".

Article 2. Definitions

77. In respect of paragraph (d)(i), a proposal was made to replace the two alternative texts with the following: "stems intrinsically from or is materially associated with". After discussion, it was agreed that that proposal should be added to the text as a third alternative in square brackets.

Article 3. International obligations of this State

78. The Working Group agreed to remove the square brackets around paragraph 2 and retain the text.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related [foreign] judgment

79. The Working Group agreed to delete the phrase "be inconsistent" in paragraph (e) and replace it with "conflict".

80. With respect to paragraph (f), a proposal was made to adjust the existing text as follows:

> "The judgment determines whether:
>
> > "(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;
> >
> > "(ii) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate; or
> >
> > "(iii) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary or out-of-court restructuring agreement should be approved;
> >
> > "and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued."

81. Concerns were expressed that such an approach would be problematic in that it would allow re-litigation of many bilateral disputes. The Working Group agreed to place proposed subparagraphs (i) and (ii) in square brackets in paragraph (f).

82. The Working Group preferred Variant 1 of the chapeau of paragraph (h), and supported adding the words "State whose" between "a" and "proceeding", and deleting the word "that" after "proceeding"; deleting Variant 2; and deleting the square brackets around the words "is or" in paragraph (h)(i).

Article 14. Equivalent effect

83. A proposal was made to replace the phrase "has in the originating State" in paragraph 1 with the phrase "would have had if it had been issued by a court of this State". Since some jurisdictions adopted the approach of exporting the effect given to a judgment in the originating State, as reflected in the existing text, while others adopted the approach in the proposed text, the Working Group agreed to include both texts in square brackets for further consideration.

Article X. Recognition of an insolvency-related [foreign] judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*]

84. The Working Group agreed to replace the word "decisions" in the introductory text before the article with the word "judgments". A proposal to delete the phrase "Notwithstanding any prior interpretation to the contrary" did not receive sufficient support.

85. The Working Group agreed that the draft text would be revised to reflect the changes noted above and attached as an annex to this report.

VI. Facilitating the cross-border insolvency of multinational enterprise groups (A/CN.9/WG.V/WP.146)

[Part A]

Chapter 1. General provisions

Preamble

86. The Working Group approved the substance of the preamble as drafted.

Article 1. Scope

87. The Working Group agreed to remove the square brackets and to add the phrase "and the conduct and administration of insolvency proceedings" from footnote 3 after the word "cooperation" in article 1. With that change, the Working Group approved the substance of article 1.

Article 2. Definitions

(a) "Enterprise"; (b) "Enterprise group"; (c) "Control"; (d) "Enterprise group member"; (e) "Group Representative"

88. The Working Group approved the substance of the definitions as drafted.

(f) "Group insolvency solution"

89. In subparagraph (ii), the Working Group expressed a preference for the second text in square brackets, replacing "and" with "or", and agreed to delete the other text in square brackets. Further, there was agreement to delete subparagraph (iii) in line with the suggestion in footnote 6. With those adjustments, the Working Group approved the substance of the definition.

(g) "Planning proceeding"

90. The Working Group approved the substance of the definition as drafted.

Additional definitions

91. The Working Group agreed that no additional definitions were needed at this time, but that they might become necessary at a later stage, for example, in respect of the terms "insolvency representative" and "foreign court".

Article 2 bis. Jurisdiction of the enacting State

92. The Working Group agreed to remove the square brackets around article 2 bis, to delete "[to any extent]" in subparagraph (b), and to move the last sentence of subparagraph (c) to become a separate subparagraph (d) along the following lines: "(d) Create an obligation to commence insolvency proceedings in this State when there is no obligation to commence such proceedings." With those amendments, the Working Group approved the substance of article 2 bis.

Article 2 ter. Public policy exception; Article 2 quater. Competent court or authority

93. The Working Group approved the substance of the articles as drafted.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

94. The Working Group approved the substance of the article as drafted.

Article 4. Cooperation to the maximum extent possible under article 3

95. The Working Group agreed to move the phrase "for the purposes of article 3" to the beginning of the chapeau and to delete subparagraph (f) with a view to including its content in chapter 5. With those changes, the Working Group approved the substance of article 4.

Article 5. Limitation of the effect of communication under article 3

96. The Working Group agreed to refer to "the court" rather than "each court" and to insert the phrase "With respect to communication under article 3" at the beginning of article 5(1). With those amendments, the Working Group approved the substance of article 5.

Article 6. Coordination of hearings

97. The Working Group agreed to change "each court" in article 6(2) and (3) to "the court", and in order to clarify who was to reach agreement, to insert "the parties" before "reaching" and the phrase "and the court approving that agreement" at the end of subparagraph 2. With those changes, the Working Group approved the substance of the article.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

98. The Working Group agreed to delete the phrase in square brackets at the beginning of article 7(1), and to include in a guide to enactment a reference to coordination and cooperation between the group representative and an insolvency representative appointed in other proceedings in the State of the planning proceeding. With that amendment, the Working Group approved the substance of article 7.

Article 7 bis. Cooperation and direct communication between a [*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*]**, foreign courts, foreign representatives and a group representative**

99. The Working Group agreed to delete the phrase in square brackets at the beginning of article 7 bis(1), and with that change, the Working Group approved the substance of the article.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis

100. The Working Group approved the substance of article 8 as drafted.

Article 9. Authority to enter into agreements concerning the coordination of proceedings

101. The Working Group agreed that the article should be drafted to identify the party authorized to enter into agreements concerning coordination proceedings along the following lines: "A [*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*] may enter into an agreement concerning the coordination of proceedings involving two or more enterprise group members located in different States, including where a group insolvency solution is being developed."

Article 10. Appointment of a single or the same insolvency representative

102. Since it was not an uncommon practice for the appointment referred to in the draft article to be of more than one individual, it was suggested that that point could be addressed in the guide to enactment. If a definition of insolvency representative were to be added to the text, along the lines specified in paragraph 12(v) of the Legislative Guide, the use in that definition of the phrase "person or body" might be sufficient to address that point. Alternatively, it might be clarified as appropriate that references to the singular in the text also referred to the plural. The Working Group approved the substance of article 10.

Chapter 3. Conduct of a planning proceeding in this State

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

103. The Working Group agreed to retain the term "prohibits" in paragraph 2 without square brackets and to delete "[precludes]".

104. Concern was expressed as to the relationship between articles 11 and 12 and the point at which the elements of the definition of "planning proceeding" in article 2 would become applicable. It was explained that article 11 was intended to refer only to the commencement of a main proceeding with respect to at least one group member

in the enacting State in which other group members might participate with a view to, inter alia, developing a group insolvency solution. Such a proceeding did not necessarily become a planning proceeding under article 12 unless required and then only provided that the elements of article 2(g) were fulfilled. As such, it was suggested that article 11 might be better located in chapter 2 as an additional tool for cooperation, with the addition of the word "including" in the closing phrase of paragraph 1 to indicate that the development of a group insolvency solution was only one possible result of the participation referred to.

105. After extensive discussion and a number of different proposals, the Working Group agreed to move article 11 into chapter 2 and add the word "including" in paragraph 1 as indicated above.

106. A question was raised as to whether article 11 addressed the participation of a group member that had its centre of main interests (COMI) in the enacting State. It was explained that paragraph 1 was the general provision with respect to participation by any other group member wherever located; the qualification "subject to paragraph 2" meant that the limitations in paragraphs 2 and 3 applied only in the case of group members with their COMI located in another State.

Article 12. Appointment of a group representative

107. To further clarify the relationship between articles 11 and 12 and to reflect the definition of "planning proceeding" in article 2(g), it was proposed that paragraph 1 be revised along the following lines: to substitute for the phrase after the words "in article 11" the phrase "and the requirements of article 2(g) are otherwise met, the court may appoint a group representative, by which the proceeding becomes a planning proceeding." There was support in the Working Group for that proposal.

108. A question was raised as to the procedure for appointment of a group representative and whether that representative could be the same person as the insolvency representative of the COMI proceeding. It was observed that in practice they were very often the same person, but that there were circumstances in which the tasks of the insolvency representative and of the group representative might be different. In terms of the text, it was noted that with respect to substantive articles such as those dealing with relief, it would be important to ensure that the correct officeholder was referenced. As to article 12(2), it was intended that the procedure for appointment of the group representative was left to the law of the enacting State, as different laws adopted different approaches to that issue.

109. Another question concerned the powers of the group representative. It was noted that the group representative was authorized under article 12 to take various actions with respect to the planning proceeding, but since the COMI proceeding could become the planning proceeding, it was unclear whether the group representative was also authorized to act with respect to the COMI proceeding. In response, it was explained that the group representative's focus was to act as a representative of the planning proceeding, in keeping with articles 2(e) and 12, in order to develop and implement a group insolvency solution.

Article 13. Relief available to a planning proceeding

110. The Working Group agreed: (a) in respect of the chapeau of paragraph 1, to replace "and" with "or" and to retain the text but remove all of the square brackets; (b) in paragraph (c), to delete "temporarily" and to retain "insolvency" without square brackets; and (c) to delete the square brackets and retain the text in paragraph (g).

111. The Working Group agreed to delete the first alternative text and to retain the second alternative text in paragraph 2 without square brackets.

112. In response to a query as to the meaning of the phrase "subject to insolvency proceedings", it was clarified that it referred to the group member in respect of which the proceeding referred to in article 11(1) had commenced. The Working Group agreed that the distinction between group members that were "subject to" or

"participating in" insolvency proceedings should be carefully considered in the articles in which those phrases were used and that the distinction should be explained in the guide to enactment.

Chapter 4. Recognition of a foreign planning proceeding and relief

Article 14. Application for recognition of a foreign planning proceeding

113. With respect to paragraph 2, after extensive discussion, the prevailing view was that the requirements should be as simple as possible and that an application for recognition should be accompanied by evidence of the appointment of the group representative: in subparagraph (a), a certified copy of the decision appointing; in subparagraph (b), a certificate affirming the appointment; or in subparagraph (c), any other evidence of that appointment. The Secretariat was requested to redraft paragraph 2 to reflect that view, ensuring that subparagraphs (a), (b) and (c) were drafted in the alternative.

114. In respect of paragraph 3(a), it was agreed that the second sentence should be deleted. It was also agreed that paragraph 3(b) should be retained without square brackets.

Article 15. Interim relief that may be granted upon application for recognition of a foreign planning proceeding

115. The Working Group agreed that the text of the chapeau of paragraph 1 and the text of paragraph 1(c) should be conformed to the corresponding parts of article 13.

116. With respect to paragraph 1(e), concern was expressed that it might not be appropriate for the group representative to be entrusted with the task set out in that paragraph. It was suggested that, in the first instance, it should be entrusted to the insolvency representative appointed to proceedings in the receiving State, provided that person had the capacity or ability to perform the task; only where that was not the case could it be entrusted to the group representative. Various drafting proposals were made to address that concern. After discussion, a proposal to address the drafting along the following lines received support: "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, entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to an insolvency representative appointed in this State. Where that insolvency representative is not able to administer or realize all or part of the enterprise group member's assets located in this State, the group representative or another person designated by the court may be entrusted with that task."

117. Although there was a proposal to delete paragraph 1(g), the prevailing view was that it should be retained.

118. The Working Group agreed to replace the two alternative texts in square brackets in paragraph 4 with text along the following lines: "Relief under this article may not be granted with respect to the assets and operations located in this State of any group member participating in a planning proceeding if that group member would not be eligible for commencement of insolvency proceedings in the State in which its COMI is located." There was some support for that proposal, and also for retaining the first alternative bracketed text. Some support was also expressed for an additional suggestion to add to that first alternative text along the following lines: "unless not commencing insolvency proceedings was a part of the proposals being developed in the planning proceeding". After discussion, the Working Group agreed to retain the first alternative text without the brackets (and to delete the second alternative) as a basis for further consideration at a future time, and to retain the phrase in square brackets "[in any jurisdiction]".

119. The Working Group agreed to retain in paragraph 5 the second alternative text without square brackets, and to delete the first alternative text.

Article 16. Decision to recognize a foreign planning proceeding

120. A question was raised as to whether changes in the status of the planning proceeding referred to in paragraph 4 would include changes relating to the status of the participating group members and changes that might bear upon the relief granted on the basis of recognition (as noted in paragraph 168 of the Guide to Enactment and Interpretation of the Model Law with respect to article 18). It was also queried why the draft article did not mirror the content of article 18 of the Model Law. Various proposals were made to revise paragraph 4 as follows: (a) to add the word "substantial" or "material" before the word "changes"; (b) to add to the end of the paragraph "and changes that might bear upon the relief granted on the basis of recognition"; and (c) to place paragraph 4 in a separate article. After discussion, the Working Group agreed to place the changes suggested in (a) and (b) in square brackets for discussion at a future time.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

121. The Working Group agreed that the text of the chapeau of paragraph 1 and the text of paragraph 1(d) should be conformed to the corresponding parts of articles 13 and 15. The Working Group also agreed that the references "[or at any time thereafter]" and "or […]" in the chapeau of paragraph 1 could be deleted. Further, the reference in footnote 42 to the interpretation of the words "upon recognition" in article 21 of the Model Law should be included in the guide to enactment.

122. It was further agreed that paragraphs 1(f) and 2 should be conformed with the Working Group's decision on article 15(1)(e), that paragraph 3 should be conformed with article 15(4), and that article 15(4) should also be added to article 13. A proposal to insert in article 17 a paragraph along the lines of the text agreed in respect of article 15(5) was supported.

123. With respect to paragraph 1(i), there was support for a proposal that the cross-reference to article 19 was unnecessary. A further proposal was to add the cross-reference "pursuant to article 21(1)" at the end of the paragraph or to add the words "pursuant to a commitment made under article 21" before the word "approving".

124. After discussion, a proposal to delete paragraph 1(i) and to deal with that issue in article 21 (and possibly article 22) was supported.

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

125. Although there were suggestions to retain the text in square brackets at the end of the article, the prevailing view was that it should be deleted. It was observed that deletion of that text would not prevent an enacting State from allowing such participation in accordance with its law.

Article 19. Protection of creditors and other interested persons

126. To resolve a concern about the need to identify the specific articles in the cross-reference, a drafting proposal along the following lines was made to replace the opening phrase before "the court must" with: "In granting, denying, modifying or terminating relief under this Law". That proposal received support and it was agreed that in paragraphs 2 and 3, the references to articles 15 and 17 should be replaced with "under this Law". It was noted that, since article 21(2) was not designated as a form of relief, its reference to article 19 should be retained.

Article 20. Approval of local elements of a group insolvency solution

127. A proposal was made to clarify the application of paragraphs 4 and 5 as follows:

(a) To replace paragraph 4 with text along the following lines: "Nothing in this article requires the commencement of a proceeding if unnecessary to implement the portion of a group insolvency solution affecting a group member."; and

(b) To add text along the following lines to the end of paragraph 5: "and to request additional assistance under other laws of this State for implementing the group solution."

128. Although some support was expressed for that proposal, support was also expressed in favour of retaining the text as drafted. It was agreed that for future consideration, the proposed text should be added in square brackets to the draft, and square brackets should be placed around the current text of paragraph 4.

129. Following further discussion, the Working Group agreed to insert for future discussion additional text along the following lines:

> "[4. Where a group solution affects a group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting state relating to insolvency*] has commenced in this State or article 21 applies, no such proceeding needs to be commenced if unnecessary to implement the portion of the group insolvency solution affecting the group member.]
>
> "[4 bis. Where a group solution affects a group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting state relating to insolvency*] has commenced in this State or article 21 applies, the group representative may request additional assistance under other laws of this State to implement the portion of the group insolvency solution affecting the group member.]"

Chapter 5. Treatment of foreign claims

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

130. Concerns were expressed that because the group representative did not necessarily represent an insolvency estate (unless the group representative and the insolvency representative of the underlying COMI proceeding were the same person), permitting the group representative to make the commitment referred to in paragraph 1 might not be appropriate. Preference was expressed in favour of deleting any reference to the group representative in paragraph 1. Although some support was expressed in favour of that proposal, it was also noted that since the goal of the text was to create a new framework in which the group representative would have some authority, removing that reference in paragraph 1 would effectively reduce the value of the text. There was support for a proposal to require the commitment to be given jointly by the insolvency representative appointed in the main proceeding and the group representative, where such a representative was appointed and was a person different to the insolvency representative. It was felt that such a requirement would address concerns that the group representative did not represent any particular insolvency estate that could provide the assets necessary to support the undertaking.

131. In response to concerns that the drafting was confusing, it was clarified that the main proceeding and the non-main proceeding referred to in paragraph 1 were proceedings relating to the same debtor.

132. A question was raised as to the meaning of "treatment" and it was suggested that article 36 of the European Insolvency Regulation might provide some text to clarify that issue.

133. A number of proposals were made to revise paragraph 1 to address the concerns raised and to provide greater clarity. After extensive discussion, support was expressed by the Working Group in favour of a text for article 21 that included elements along the following lines:

> "To facilitate the treatment of claims that could otherwise be brought by a creditor in a non-main proceeding for an enterprise group member in another State, an insolvency representative of an enterprise group member appointed in the main proceeding taking place in this State may jointly with a group

representative (if any) where another person has been appointed to that role, commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a non-main proceeding in that other State. Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate."

134. There was some support for retaining the cross reference to article 19 in paragraph 2, although there was concern that the redrafting of article 19 made the cross reference too general. In response, it was observed that the court referred to in paragraph 2 could only be concerned about the creditors located within its jurisdiction, which should be sufficiently specific. Recalling the agreement to address the issue raised in article 17(1)(i) in the context of article 21 (and possibly article 22), it was agreed that appropriate text should be added to paragraph 2. It was also agreed that further consideration needed to be given to the linkage with article 21, and in particular the words "a commitment made under paragraph 1". The Working Group agreed that paragraph 2 should be a separate article, as it addressed a different court to the court referred to in paragraph 1, and that the heading of article 21 needed to be revisited in light of the agreed changes.

135. The Secretariat was requested to provide a revised text of article 21 for future consideration by the Working Group.

[Part B]

Supplemental provisions

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

136. It was recalled that while article 21 dealt with the same debtor, article 22 might potentially address the treatment of creditors of different debtors in a group context. Although it was suggested that the changes made to article 21(1) should be reflected in article 22(1), the Working Group was reminded that as a supplemental provision, article 22 was intended to expand upon article 21 and provide solutions for those States wanting greater flexibility than provided in article 21. Accordingly, the changes made to article 21 did not need to be reflected in article 22. After discussion, the Working Group agreed to retain the text of paragraph 1 and delete the square brackets around the second sentence, to reconsider the heading, and to make paragraph 2 a separate article. As noted above, appropriate text should be added to paragraph 2 to address the issue raised in article 17(1)(i).

137. A question was raised as to which insolvency estate was being referred to in the second sentence, and the matter was left for future consideration by the Working Group.

Article 23. Additional relief

138. There was support to change the words "where a group representative has made a commitment under article 21 or 22" in paragraph 1 to "where a commitment under article 21 or 22 has been made" and to delete the text in both sets of square brackets in paragraph 2.

Annex

Draft model law on cross-border recognition and enforcement of insolvency-related judgments: revised text

Preamble

1. The purpose of this Law is:

(a) To create greater certainty for parties in regard to their rights and remedies for enforcement of insolvency-related judgments;

(b) To avoid the duplication of proceedings;

(c) To ensure timely and cost-effective recognition and enforcement of insolvency-related judgments;

(d) To promote comity and cooperation between jurisdictions regarding insolvency-related judgments;

(e) To protect and maximize the value of the insolvency estate; and

(f) Where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation.

2. The purpose of this Law is not:

(a) To displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment;

(b) To replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation;

(c) To apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) To apply to the judgment commencing the insolvency proceedings to which the judgment is related.

Article 1. Scope of application

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different from the State where recognition and enforcement are sought.

2. This Law does not apply to [...].

Article 2. Definitions

For the purposes of this Law:

(a) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;

(b) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the insolvency proceeding;

(c) “Judgment” means any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. An interim measure of protection is not to be considered a judgment for the purposes of this Law;

(d) "Insolvency-related foreign judgment" means a judgment that:

(i) [Is related to] [Derives directly from or is closely connected to] [Stems intrinsically from or is materially associated with] an insolvency proceeding;

(ii) Was issued on or after the commencement of the insolvency proceeding to which it is related; and

(iii) Affects the insolvency estate;

and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has been concluded.

For the purposes of this definition:

1. An "insolvency-related foreign judgment" includes a judgment issued in a proceeding in which the cause of action was pursued by:

(a) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

(b) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

and the judgment on that cause of action would otherwise be enforceable under this Law; and

2. An "insolvency-related foreign judgment" does not include a judgment commencing an insolvency proceeding.

Article 3. International obligations of this State

1. 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.

2. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment.

Article 4. Competent court or authority

The functions referred to in this Law relating to recognition and enforcement of an insolvency-related foreign judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.

Article 5. Authorization to act in another State in respect of an insolvency-related judgment issued in this State

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law.

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign insolvency representative under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

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 9. Effect and enforceability of an insolvency-related foreign judgment in the originating State

1. An insolvency-related foreign judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.

2. Recognition or enforcement of an insolvency-related foreign judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make recognition or enforcement conditional on the provision of such security as it shall determine.

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related foreign judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings.

2. When recognition and enforcement of an insolvency-related foreign judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related foreign judgment;

(b) Any documents necessary to establish that the insolvency-related foreign judgment has effect and is enforceable in the originating State, including information on any current review of the judgment; and

(c) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

5. The court shall ensure that the party against whom relief is sought should be given the right to be heard on the application.

Article 11. Provisional relief

1. From the time recognition and enforcement of an insolvency-related foreign judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related foreign judgment, the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related foreign judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related foreign judgment.

2. [*Insert provisions (or refer to provisions in force in the enacting State) relating to notice, including whether notice would be required under this article*.]

3. Unless extended by the court, relief granted under this article terminates when a decision on recognition and enforcement of the insolvency-related foreign judgment is made.

Article 12. Decision to recognize and enforce an insolvency-related foreign judgment

Subject to articles 7 and 13, an insolvency-related foreign judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;

(b) The person seeking recognition and enforcement of the insolvency-related foreign judgment is a person or body within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The application meets the requirements of article 10, paragraph 2; and

(d) Recognition and enforcement is sought from or arises by way of defence or as an incidental question before a court referred to in article 4.

Article 13. Grounds to refuse recognition and enforcement of an insolvency-related foreign judgment

Subject to article 7, recognition and enforcement of an insolvency-related foreign judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment 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;

(b) The judgment was obtained by fraud;

(c) The judgment is inconsistent with a judgment issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings or would conflict with a stay or other order issued in insolvency proceedings relating to the same debtor commenced in this State or another State;

(f) The judgment determines whether:

[(i) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;]

[(ii) A transaction involving the debtor or assets of the insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate; or]

(iii) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary or out-of-court restructuring agreement should be approved;

and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:

(i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;

(ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without contesting jurisdiction within the time frame provided in the law of the originating State unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;

(iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or

(iv) The court exercised jurisdiction on a basis that was not inconsistent with the law of this State;

States that have enacted legislation based on the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment originates from a State whose proceeding is not recognizable under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*], unless:

(i) The insolvency representative of a proceeding that is or could have been recognized under the [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*] participated in the originating proceeding to the extent of engaging in the substantive merits of the claim to which those proceedings related; and

(ii) The judgment relates solely to assets that were located in the originating State at the time that proceeding commenced.

Article 14. Equivalent effect

1. An insolvency-related foreign judgment recognized or enforceable under this Law shall be given the same effect it [has in the originating State] [would have had if it had been issued by a court of this State].

2. If the insolvency-related foreign judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 15. Severability

Recognition and enforcement of a severable part of an insolvency-related foreign judgment shall be granted where recognition and enforcement of that part is sought, or where only part of the judgment is capable of being recognized and enforced under this Law.

States that have enacted legislation based on the UNCITRAL Model Law on Cross-Border Insolvency will be aware of judgments which may have cast doubt on whether judgments can be recognized and enforced under article 21 of the Model Law. States may therefore wish to consider enacting the following provision:

Article X. Recognition of an insolvency-related judgment under *[insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency]*

Notwithstanding any prior interpretation to the contrary, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of a judgment.

E. Note by the Secretariat on recognition and enforcement of insolvency-related judgments: draft model law

(A/CN.9/WG.V/WP.145)

Contents

I. 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 judgments.[1]

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 judgments, including the types of judgments 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

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Cross-Border Insolvency (the Model Law), but that the Model Law provided an appropriate context for the new instrument.

3. At its forty-seventh session, the Working Group considered the first draft of a model law to be given effect through enactment by a State (A/CN.9/WG.V/WP.130). The content and structure of the draft text drew upon the Model Law, as suggested by the Working Group at its forty-sixth session (A/CN.9/829, para. 63) and sought to give effect to the conclusions of the Working Group at its forty-sixth session relating to the types of judgment 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).

4. At its forty-seventh session, the Working Group had a preliminary exchange of views on draft articles 1 to 10 of the text and made a number of proposals with respect to the drafting (A/CN.9/835, paras. 47-69); draft articles 11 and 12 of that text were not reached due to lack of time and were included as draft articles 12 and 13 of the text considered at the forty-ninth session (A/CN.9/WG.V/WP.138). At its forty-eighth, forty-ninth and fiftieth sessions, the Working Group considered revised versions of the draft text, which reflected the decisions and proposals made at the forty-seventh, forty-eighth and forty-ninth sessions respectively (A/CN.9/WG.V/WP.135, 138 and 143).

5. The draft text below reflects the discussion and conclusions at the fiftieth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text. Notes to this draft text are included as footnotes. The proposal for revision of the definition of "insolvency-related judgment" made at the fiftieth session of the Working Group has not been repeated in this text, but remains available in the report of the fiftieth session (A/CN.9/898, para. 59); as requested, the Secretariat has prepared a further version for consideration.

II. Draft model law on the recognition and enforcement of insolvency-related judgments

Preamble[2]

Article 1. Scope of application[3]

1. This Law applies to the recognition and enforcement of an insolvency-related judgment issued in a proceeding taking place in a State that is different from the State where recognition and enforcement are sought.

2. This Law does not apply to [...].

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[2] The Working Group may wish to consider whether a preamble is required. A provision might be included along the lines of: The purpose of this Law is to provide effective mechanisms of the recognition and enforcement of insolvency-related [foreign] judgments so as to promote the objectives of: (a) Efficient conduct of cross-border insolvency proceedings; (b) Protection and maximization of the value of the insolvency estate; and (c) Greater certainty for trade and investment.

[3] A number of concerns have been expressed with respect to the scope of the draft text and what it is not intended to cover. The subparagraphs below, which are intended to capture those concerns, might be included as part of the text or as part of the guide to enactment:
This Law is not intended to:

(a) Displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment (previously the second sentence of paragraph 1 of draft article 3bis);

(b) Replace legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation if it is interpreted as applying to the recognition and enforcement of an insolvency-related [foreign] judgment;

(c) Apply to the recognition and enforcement in the enacting State of an insolvency-related judgment issued in the enacting State; or

(d) Apply to the judgment commencing the insolvency proceedings to which the foreign judgment is related.

Article 2. Definitions

For the purposes of this Law:

(a) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court for the purpose of reorganization or liquidation;[4]

(b) "Insolvency representative" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the insolvency proceeding;[5]

(c) "Judgment" means [any decision, [on the merits,] whatever it may be called,[6] issued by a court [or administrative authority, provided an administrative decision has the same effect as a court decision]. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court. [An interim measure of protection is not a judgment];[7]

[*(d) "Foreign court"*];[8]

(e) "Insolvency-related [foreign] judgment"[9] means a judgment that:

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[4] Revised in accordance with A/CN.9/898, para. 46.

[5] Revised in accordance with A/CN.9/898, para. 47.

[6] The words "whatever it may be called" originate from the definition of "judgment" in the draft text of the Hague Conference Special Commission on the Recognition and Enforcement of Foreign Judgments (the draft Hague Conference text). A proposal at the fiftieth session to delete those words was not supported (A/CN.9/898, paras. 50, 54).

[7] See A/CN.9/898, paras. 51-54. The words "on the merits" and the exclusion contained in square brackets in the third sentence were discussed at the fiftieth session. It was acknowledged that further discussion was required. It may be noted that although such a limitation is included in other instruments addressing recognition and enforcement of judgments more generally, matters related to insolvency are specifically excluded from those instruments. The special nature of insolvency proceedings and the various types of judgment that may be issued in the course of such proceedings, particularly judgments relating to preservation of the insolvency estate, and recognition and enforcement of those judgments, may be crucial to the successful resolution of those proceedings. The Working Group may wish to consider the specific relevance of interim or provisional measures to insolvency.

[8] The term "foreign court" is not used in the draft text, and has thus been deleted.

[9] See also A/CN.9/898, para. 59 for proposals made at the fiftieth session. The word "foreign" has been added to the text in response to a suggestion that received some support at the fiftieth session (A/CN.9/898, para. 55), but is placed in square brackets pending resolution of the final definition. If the word is not retained, the Working Group may wish to consider whether the definition should include a cross-border element along the lines of art. 1, that is, confirming that the judgment was issued in a State other than the State in which recognition and enforcement is sought (see also footnote 3, subpara. (c)).
This version of the definition has been prepared by the Secretariat in response to a request by the Working Group at the fiftieth session to provide an alternative for future consideration.
Subparas. (i) to (iii) establish the basic definition and reflect the characteristics generally agreed upon by the Working Group, with the exception of the words "on or after" in subpara. 2 (e) (ii) and "interests of the" in subpara. 2 (e) (iii), which remain in square brackets. With respect to the latter, it is not clear whether those additional words add anything to the subpara. and the words "affect the insolvency estate" may be sufficient. The substance of draft art. 2, subpara. (e) 1 also reflects general agreement and has been included as an explanatory paragraph of the definition.
Subpara. (e) 2 is included to address concerns that the draft text might overlap with the Model Law on Cross-Border Insolvency if it were to apply to decisions commencing insolvency proceedings (see also footnote 3, subpara. (d)).
It is suggested that the remaining material from the definitions included in A/CN.9/898, para. 59 might usefully be placed in a guide to enactment of the model law, as follows:
"Additional factors that may be relevant to determining whether a judgment is insolvency-related might include consideration of whether the judgment was issued in pursuit of a cause of action that arose under a law related to insolvency or that could not have been pursued but for the commencement of the insolvency proceedings.
Insolvency-related foreign judgments might include, inter alia, judgments determining whether:
(a) An asset is part of, should be turned over to, or was properly disposed of by the insolvency estate;

(i) Is related to an insolvency proceeding;

(ii) Was issued [on or] after the commencement of the insolvency proceeding to which it is related; and

(iii) Affects the [interests of the] insolvency estate.

For the purposes of this definition:

1. An "insolvency-related [foreign] judgment" includes a judgment issued in a proceeding in which the cause of action was pursued by:

(a) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or

(b) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;

and the judgment on that cause of action would otherwise be enforceable under this Law; and

2. An "insolvency-related [foreign] judgment" does not include a judgment commencing an insolvency proceeding.

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.

[Article 3 bis. International obligations of this State

1. This Law shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment.[10]

[1bis. A treaty applies [to a judgment] for the purposes of paragraph 1 if it is a treaty to which this State is a party, and is one which is open to accession by the State in which the judgment was issued.][11]

2. A judgment is to be treated for the purposes of paragraph 1 of this article as falling within the class of judgments to which a treaty applies even where the

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(b) A transaction involving the debtor or assets of its insolvency estate should be avoided because it upset the principle of equitable treatment of creditors or improperly reduced the value of the estate;

(c) A representative or director of the debtor is liable for action taken when the debtor was insolvent or in the period approaching insolvency, and the cause of action relating to that liability was one that could be pursued by or on behalf of the debtor's insolvency estate;

(d) Sums not covered by (i) or (ii) are owed to or by the debtor or its insolvency estate — the enacting State may wish to consider adding the following wording to paragraph 3(d): "and the cause of action relating to the recovery or payment of those sums arose after the commencement of insolvency proceedings in respect of the debtor"; or

(e) A plan of reorganization or liquidation should be confirmed, a discharge of the debtor or of a debt should be recognized, or a voluntary or out-of-court restructuring agreement should be approved. With respect to the list of examples, that approach may avoid concerns that including examples in the definition could raise uncertainty as to how the list should be interpreted."

[10] The words previously at the end of para. 1 ("or where the provisions of the law of this State on recognition of insolvency proceedings apply to that judgment"), which did not relate to the international obligations of the enacting State, but rather to the relationship of the draft text to the existing legislation of an enacting State, have been added to the issues addressed in footnote 3.

[11] Para. 1bis has been added to draft art. 3bis and it remains in square brackets following the fiftieth session (A/CN.9/898, paras. 14-17). With respect to this para., it might be noted that other instruments dealing with the recognition and enforcement of judgments, e.g. the draft Hague Conference text, apply only as between States that are contracting parties and not by virtue of the instrument being open for accession, but not acceded to, by one of the relevant States (see the draft Hague Conference text, art. 17).

particular judgment is not enforceable under the treaty because of the particular circumstances of the case.]

Article 4. Competent court or authority

1. The functions referred to in this Law relating to recognition and enforcement of an insolvency-related [foreign] judgment shall be performed by [*specify the court, courts, authority or authorities competent to perform those functions in the enacting State*] and by any other court before which the issue of recognition is raised as a defence or as an incidental question in the course of proceedings.[12]

Article 5. Authorization to [seek recognition and enforcement of an insolvency-related judgment in a foreign State] [act in another State respect of an insolvency-related judgment issued in this State]

A [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] [is authorized to seek recognition and enforcement of an insolvency-related judgment in another State, as permitted by the applicable foreign law] [is authorized to act in another State with respect to an insolvency-related judgment issued in this State, as permitted by the applicable foreign law].[13]

Article 6. Additional assistance under other laws

Nothing in this Law limits the power of a court or a [*insert the title of the person or body administering a reorganization or liquidation under the law of the enacting State*] to provide additional assistance to a foreign insolvency representative under other laws of this State.

Article 7. Public policy exception

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State.

Article 8. Interpretation

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 9. Effect and enforceability of an insolvency-related [foreign] judgment in the originating State

1. An insolvency-related [foreign] judgment shall be recognized only if it has effect in the originating State and shall be enforced only if it is enforceable in the originating State.[14]

2. Recognition and enforcement of an insolvency-related [foreign] judgment may be postponed or refused if the judgment is the subject of review in the originating State or if the time limit for seeking ordinary review in that State has not expired. In such cases, the court may also make enforcement conditional on the provision of such security as it shall determine.

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[12] The words at the end of the paragraph have been added pursuant to a decision at the fiftieth session (A/CN.9/898, para. 19) to broaden art. 4 beyond any specified court to address courts before which recognition may be raised as an incidental question or as a defence.

[13] It has been suggested that the first alternative text in draft art. 5 may not be sufficiently broad to capture all of the acts that might be covered by the draft text. Accordingly, it is suggested that the formulation "authorized to act in another State", based on the language of art. 5 of the Model Law, might resolve that concern in the draft article.

[14] Para. 1 has been revised to align it with the formulation used in art. 4 (3) of the draft Hague Conference text.

Article 10. Procedure for seeking recognition and enforcement of an insolvency-related [foreign] judgment

1. An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may seek recognition and enforcement of that judgment in this State. [The issue of recognition may also be raised as a defence by an insolvency representative or [….] or as an incidental question in the course of proceedings taking place in a court referred to in article 4].[15]

2. When recognition and enforcement of an insolvency-related [foreign] judgment is sought under paragraph 1, the following shall be submitted to the court:

(a) A certified copy of the insolvency-related [foreign] judgment;

(b) Any documents necessary to establish that the insolvency-related [foreign] judgment has effect and is enforceable in the originating State, including information on any current review of the judgment;

(c) Evidence as required by the law of this State that the party against whom relief is sought was notified that recognition and enforcement of the insolvency-related [foreign] judgment was being sought in this State; and

(d) In the absence of evidence referred to in subparagraphs (a) and (b), any other evidence on those matters acceptable to the court.

3. The court may require translation of documents submitted pursuant to paragraph 2 into an official language of this State.

4. The court is entitled to presume that documents submitted pursuant to paragraph 2 are authentic, whether or not they have been legalized.

Article 11. Decision to recognize and enforce an insolvency-related [foreign] judgment

An insolvency-related [foreign] judgment shall be recognized and enforced provided:

(a) The requirements of article 9, paragraph 1 with respect to effectiveness and enforceability are met;[16]

(b) The person seeking recognition and enforcement of the insolvency-related [foreign] judgment is a person or body [17] within the meaning of article 2, subparagraph (b) or another person entitled to seek recognition and enforcement of the judgment under article 10, paragraph 1;

(c) The application meets the requirements of article 10, paragraph 2;

(d) Recognition and enforcement is sought from [or arises by way of defence or as an incidental question before][18] a court referred to in article 4; and

(e) Articles 7 and 12 do not apply.

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[15] A proposal was made at the fiftieth session (A/CN.9/898, para. 25) to add the following as a separate provision: "The recognition of an insolvency-related judgment may be raised by an insolvency representative or any other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment by way of defence in the course of proceedings taking place in the court referred to in article 4 or in another court of this State, and should be accompanied by the documents specified in article 10 (2)." A version of that drafting has been added to the chapeau. However, the Working Group may wish to consider who may seek to raise recognition by way of defence or as an incidental question, e.g. whether it would be limited to the insolvency representative or the person authorised to seek recognition and enforcement of the judgment or include other persons. Art. 10 has otherwise been revised in accordance with A/CN.9/898, para. 26.

[16] A/CN.9/898, para. 27.

[17] A/CN.9/898, para. 27.

[18] The words in square brackets in subpara. 11 (d) have been included on the basis that the word "sought" by itself may not be sufficient to include cases where recognition arises by way of defence or as an incidental question.

Article 12. Grounds to refuse recognition and enforcement of an insolvency-related [foreign] judgment

Recognition and enforcement of an insolvency-related [foreign] judgment may be refused if:

(a) The party against whom the proceeding giving rise to the judgment 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;

[(b) The judgment was obtained by fraud [in connection with a matter of procedure]];[19]

(c) The judgment is inconsistent with a judgment[20] issued in this State in a dispute involving the same parties;

(d) The judgment is inconsistent with an earlier judgment issued in another State in a dispute between the same parties on the same subject matter, provided that the earlier judgment fulfils the conditions necessary for its recognition and enforcement in this State;

(e) Recognition and enforcement would interfere with the administration of the debtor's insolvency proceedings or would be inconsistent with a stay or other order issued in insolvency proceedings relating to the same debtor commenced in this State or another State;[21]

(f) The judgment falls within article 2, subparagraph (e) (v) and the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued;

(g) The originating court did not satisfy one of the following conditions:[22]

(i) The court exercised jurisdiction on the basis of the [express] consent [or submission] of the party against whom the judgment was issued; [The court exercised jurisdiction on the basis that the party against whom the judgment was issued entered an appearance and presented their case without contesting jurisdiction, provided that the law of the originating State permitted jurisdiction to be contested;][23]

(ii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction;

(iii) The court exercised jurisdiction on a basis that was not inconsistent with the law of this State;[24]

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[19] Subpara. 12 (b) was placed in square brackets pending further consideration (A/CN.9/898, para. 32).

[20] The word "prior" has been deleted from subpara. 12 (c) (A/CN.9/898, para. 33).

[21] Subpara. 12 (e) has been revised in accordance with A/CN.9/898, para. 32.

[22] Subpara. 12 (g) has been revised in accordance with A/CN.9/898, para. 36.

[23] Additional language has been included in subpara. 12 (g) (i) as decided at the fiftieth session (A/CN.9/898, para. 37), to more clearly explain what is meant by the word "express". It might be noted that the equivalent provision in the draft Hague Conference text (art. 5 (f)) now includes the following drafting: "The defendant argued on the merits before the court of origin without contesting jurisdiction within the timeframe provided in the law of the State of origin, unless it is evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law."

[24] Subparas. previously numbered 12 (g) (iv) and (v) have been deleted in accordance with A/CN.9/898, paras. 40-41.

States that have enacted the Model Law on Cross-Border Insolvency might wish to enact subparagraph (h)

(h) The judgment is related to an insolvency proceeding that [is not recognizable] [has not been, could not be or could not have been recognized] under [*insert a reference to the law of the enacting State giving effect to the Model Law on Cross-Border Insolvency*].[25]

[The judgment relates to a debtor that had neither the centre of its main interests nor an establishment in the originating State, unless the judgment relates solely to assets that were located in the originating State at the time the insolvency proceeding [to which it is related] commenced.]

Article 13. Equivalent effect

1. An insolvency-related [foreign] judgment recognized or enforceable under this Law shall be given the same effect it has in the originating State.

2. If the insolvency-related [foreign] judgment provides for relief that is not available under the law of this State, that relief shall, to the extent possible, be adapted to relief that is equivalent to, but does not exceed, its effects under the law of the originating State.

Article 14. Severability

Recognition and enforcement of a severable part of an insolvency-related [foreign] judgment shall be granted where recognition and enforcement of that part is sought, or where only part of the judgment is capable of being recognized and enforced under this Law.

Article 15. Provisional relief

1. From the time recognition and enforcement of an insolvency-related [foreign] judgment is sought until a decision is made, where relief is urgently needed to preserve the possibility of recognizing and enforcing an insolvency-related [foreign] judgment,[26] the court may, at the request of an insolvency representative or other person entitled to seek recognition and enforcement under article 10, paragraph 1, grant relief of a provisional nature, including:

(a) Staying the disposition of any assets of any party or parties against whom the insolvency-related [foreign] judgment has been issued; or

(b) Granting other legal or equitable relief, as appropriate, within the scope of the insolvency-related [foreign] judgment.

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 [foreign] judgment is made.

States that have enacted the UNCITRAL Model Law on Cross-Border Insolvency might wish to enact article 16

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[25] The first sentence of subpara. 12 (h) has been revised in accordance with A/CN.9/898, para. 42 and alternative language proposed to simplify the drafting, referring to a judgment that "is not recognizable" under that Model Law. Since no comment was made with respect to the second sentence it remains in square brackets for further consideration; a few changes to the language of the subpara. have been made to conform it to the changes made to the definitions in art. 2.

[26] The text of draft art. 15, para. 1 has been retained as drafted and the square brackets removed in accordance with A/CN.9/898, para. 45.

Article 16. Recognition of an insolvency-related [foreign] judgment under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*][27]

Variant 1

For greater certainty, the relief available under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of an insolvency-related [foreign] judgment.

Variant 2

Where an insolvency-related [foreign] judgment relates to:

(a) Insolvency proceedings, whether pending or closed, recognized under [*insert a cross-reference to the legislation of this State enacting the Model Law on Cross-Border Insolvency*]; or

(b) The debtor in respect of which those insolvency proceedings commenced, the relief available in respect of those insolvency proceedings under [*insert a cross-reference to the legislation of this State enacting article 21 of the Model Law on Cross-Border Insolvency*] includes recognition and enforcement of that judgment.

[27] This art. was proposed at the fiftieth session (A/CN.9/898, para. 41) to replace subparas. (g) (iv) and (v) of draft art. 12. Since this draft art. does not establish a ground for refusal of recognition, but relates to interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, it has been placed at the end of the draft instrument. Variant 1 reflects the language as proposed at the fiftieth session. Variant 2 attempts to clarify the concerns giving rise to this provision and separate the various elements that might be included in such a provision.

F. Note by the Secretariat on facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions

(A/CN.9/WG.V/WP.146)

[Original: English]

Contents

I. 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 articles 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. At its forty-fifth (April 2014), forty-sixth (December 2014) and forty-seventh (May 2014) sessions, the Working Group considered the goals of a text that might be developed to facilitate the cross-border insolvency of multinational enterprise groups; the key elements of such a text, including those that might be based upon part three of the UNCITRAL Legislative Guide on Insolvency Law (the Legislative Guide) and on the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law); and the form that the text might take, noting that some of the key elements lent themselves to being developed as a model law, while others were perhaps more in the nature of provisions that might be included in a legislative guide (A/CN.9/WG.V/WP.120, 124 and 128 respectively).

3. At its forty-eighth session, the Working Group agreed a set of key principles for a regime to address cross-border insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.133) and considered a number of draft provisions addressing three main areas (A/CN.9/WG.V/WP.134): (a) coordination and cooperation of insolvency proceedings relating to an enterprise group; (b) elements needed for the development and approval of a group insolvency solution involving multiple entities; and (c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings. Two additional supplemental areas were also considered. These might include (d) the use of so-called "synthetic proceedings" in lieu of commencing main proceedings, and (e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

4. At its forty-ninth session, the Working Group considered a consolidated draft legislative text incorporating the agreed key principles and draft provisions addressing the five areas indicated in paragraph 3 (A/CN.9/WG.V/WP.137 and

[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.

Add.1). That draft text was further considered at the fiftieth session (A/CN.9/WG.V/WP.142 and Add.1)

5. The draft text below reflects the discussion and decisions taken at the fiftieth session and the revisions the Secretariat was requested to make, together with various suggestions and proposals arising from the Secretariat's work on the draft text. Notes and commentary to the draft text are included in this document as footnotes. It may be noted that the draft text has been divided into 5 chapters — chapter 1 deals with general provisions, chapter 2 with cooperation and coordination, chapter 3 with conduct of a planning proceeding in the enacting State, chapter 4 with recognition of a foreign planning proceeding and relief and chapter 5 with treatment of foreign claims.

II. Draft legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups

[Part A]

Chapter 1. General Provisions

Preamble

The purpose of this Law is to provide effective mechanisms to address cases of cross-border insolvency affecting the members of an enterprise group, so as to promote the objectives of:

(a) Cooperation between courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency affecting members of an enterprise group;

(b) Cooperation between insolvency representatives appointed in this State and foreign States in cases of cross-border insolvency affecting members of an enterprise group;

(c) Development of a group insolvency solution for the whole or part of an enterprise group and cross-border recognition and implementation of that solution in multiple States;

(d) Fair and efficient administration of cross-border insolvencies concerning enterprise group members that protects the interests of all creditors and other interested persons, including the debtors;

(e) Protection and maximization of the overall combined value of the operations and assets of enterprise group members affected by insolvency and of the enterprise group as a whole;

(f) Facilitation of the rescue of financially troubled enterprise groups, thereby protecting investment and preserving employment; and

(g) Adequate protection of the interests of the creditors of each individual group member participating in a group insolvency solution.[2]

[Article 1. Scope

This Law applies to cooperation in the context of the cross-border insolvency of multinational enterprise groups.][3]

Article 2. Definitions

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[2] Para. (g) has been added to draft art. 1 in response to a proposal at the fiftieth session (A/CN.9/898, para. 109).

[3] Draft art. 1 has been revised as proposed at the fiftieth session (A/CN.9/898, para. 110), with omission of the word "judicial" on the basis the text provides for cooperation that is broader than cooperation between courts. Since the draft text applies to more than cooperation in the context of the cross-border insolvency of enterprise groups, in particular in chapter 3, it may be appropriate to include additional words such as "and the conduct and administration of insolvency proceedings" after the word "cooperation".

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;

(b) "Enterprise group" means two or more enterprises that are interconnected by control or significant ownership;

(c) "Control" means the capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;

(d) "Enterprise group member" means an enterprise referred to in subparagraph (a), which forms part of an enterprise group as defined in subparagraph (b);

(e) "Group Representative" means a person or body, including one appointed on an interim basis, authorized to act as a representative of a planning proceeding;[4]

(f) "Group insolvency solution" means a set of proposals developed in a planning proceeding:

(i) For the reorganization, sale, or liquidation of some or all of the operations or assets of one or more group members;

(ii) With the goal of [preserving] [preserving and enhancing] [preserving and maximizing] the overall combined value of the group members involved;[5] and

(iii) That must be approved, insofar as the proposals relate to a particular group member, in the jurisdiction in which that group member has its centre of main interests;[6]

(g) "Planning proceeding" means a main proceeding:[7]

(i) Commenced in respect of an enterprise group member, which is a necessary and integral part of a group insolvency solution;

(ii) In which one or more additional group members are participating for the purpose of developing and implementing a group insolvency solution; and

(iii) In which a group representative has been appointed.

Additional definitions: foreign representative, insolvency representative, foreign proceeding[8]

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[4] The definition of "group representative" has been revised as proposed at the fiftieth session (A/CN.9/898, para. 112).

[5] Subpara. (f) (ii) of the definition of "group insolvency solution" includes various alternatives as proposed at the fiftieth session (A/CN.9/898, para. 113).

[6] With respect to subpara. (f) (iii), it might be questioned whether a mandatory requirement for approval should be included in the definition of "group insolvency solution" or whether it might not be more appropriate to leave that requirement to an operative provision (e.g. art. 20) and delete subpara. (iii) from the definition.

[7] At the fiftieth session, it was suggested that the definition of "planning proceeding" as drafted was ambiguous (A/CN.9/898, para. 114). The revised drafting of subpara. (g) (i) is intended to clarify that ambiguity — a planning proceeding is a main proceeding (where main proceeding has the same meaning as art. 2(b) of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) commenced with respect to a group member where the group member is a necessary and integral part of the group insolvency solution.

[8] It might be noted that depending on the final form of the text, additional definitions of foreign representative, insolvency representative and foreign proceeding might be required.

Article 2 bis. Jurisdiction of the enacting State[9]

[Where the centre of main interests of an enterprise group member is located in this State, nothing in this Law is intended to:

(a) Limit the jurisdiction of the courts of this State with respect to that enterprise group member;

(b) Limit any process or procedure (including any permission, consent or approval) required in this State in respect of that enterprise group member's participation [to any extent] in a group insolvency solution being developed in another State; or

(c) Limit the commencement of insolvency proceedings in this State under [*identify laws of the enacting State relating to insolvency*], if required or requested to address the insolvency of an enterprise group member. When proceedings are not required or requested in this State, there is no obligation to commence such proceedings.]

Article 2 ter. Public policy exception[10]

Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.

Article 2 quater. Competent court or authority[11]

The functions referred to in this Law relating to the recognition of an insolvency proceeding or a planning proceeding and cooperation with foreign courts shall be performed by *[specify the court, courts, authority or authorities competent to perform those functions in the enacting State]*.

Chapter 2. Cooperation and coordination

Article 3. Cooperation and direct communication between a court of this State and foreign courts, foreign representatives and a group representative

1. In the matters referred to in article 1,[12] the court shall cooperate to the maximum extent possible with foreign courts, foreign representatives and a group representative, where appointed, 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.

2. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts, foreign representatives or a group representative, where appointed.

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[9] This draft art. has been included as a separate provision in response to a decision at the fiftieth session (A/CN.9/898, para. 110) to remove it from the scope in art. 1. A new heading is suggested.

[10] Following agreement that the draft text should be subject to a public policy exception, draft art. 2 ter has been added (A/CN.9/898, para. 91). If not ultimately required because of the form the final text takes (i.e. as part of the Model Law), it can be deleted.

[11] Draft art. 2 quater has also been added for the sake of completeness, given the substance of draft art. 16(1)(b). Like draft art. 2bis, it may also be deleted if not required because of the final nature of the text.

[12] Given that revised art. 1 refers only to cooperation, the Working Group may wish to consider whether the opening phrase of art. 3 (as well as arts. 7 and 7bis) — "In the matters referred to in article 1" — remains appropriate or might be modified, for example, to something narrower such as "In the context of article 1", or deleted entirely.

Article 4. Cooperation to the maximum extent possible under article 3

Cooperation to the maximum extent possible for the purposes of article 3 may be implemented by any appropriate means, including:

(a) Communication of information by any means considered appropriate by the court;

(b) Participation in communication with the foreign court, a foreign representative or a group representative, where appointed;

(c) Coordination of the administration and supervision of the affairs of the enterprise group members;

(d) Coordination of concurrent foreign proceedings commenced with respect to enterprise group members;

(e) Appointment of a person or body to act at the direction of the court;

[(f) Approval of the treatment in a foreign proceeding of the claims of creditors of the enacting State];

(g) Approval and implementation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(h) Cooperation among courts as to how to allocate and provide for the costs associated with cross-border cooperation and communication;

(i) Use of mediation or, with the consent of the parties, arbitration, to resolve disputes between members of an enterprise group concerning claims;[13]

(j) Approval of the treatment of claims between members of an enterprise group;

(k) Recognition of the cross-filing of claims by or on behalf of enterprise group members and their creditors; and

(l) [*The enacting State may wish to list additional forms or examples of cooperation*].

Article 5. Limitation of the effect of communication under article 3

1. 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.[14]

2. Participation by a court in communication pursuant to article 3, paragraph 2, does not imply:

(a) A waiver or compromise 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;

[13] Subparas. (i), (j) and (k) have been added to draft art. 4 pursuant to agreement at the fiftieth session (A/CN.9/898, paras. 63-64). With respect to subpara. (i), para. 63 of A/CN.9/898 refers to the use of mediation and arbitration to resolve "intergroup claims" (clarified in subpara. (i) to mean claims between members of an enterprise group); the Working Group may wish to consider whether mediation and arbitration might also be used to resolve claims against group members more generally, and not only between group members.

[14] Para. 1 of draft art. 5 is based upon the words previously contained at the end of subpara. 2 (f) and states the general principle of art. 5 (A/CN.9/898, para. 63).

(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.

Article 6. Coordination of hearings

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.

3. Notwithstanding the coordination of hearings, each court remains responsible for reaching its own decision on the matters before it.

Article 7. Cooperation and direct communication between a group representative, foreign representatives and foreign courts

1. [In the matters referred to in article 1,][15] a group representative appointed in this State shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts and foreign representatives of other enterprise group members to facilitate the development and implementation of a group insolvency solution.

2. A group representative 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 representatives of other enterprise group members.

Article 7 bis. Cooperation and direct communication between a [*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*]**, foreign courts, foreign representatives and a group representative**

1. [In the matters referred to in article 1,][16] a [*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 subject to the supervision of the court, cooperate to the maximum extent possible with foreign courts, foreign representatives of other enterprise group members and a group representative, where appointed.

2. A [*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, foreign representatives of other group members and a group representative, where appointed.

Article 8. Cooperation to the maximum extent possible under articles 7 and 7 bis[17]

For the purposes of article 7 and article 7 bis, cooperation to the maximum extent possible may be implemented by any appropriate means, including:

(a) Sharing and disclosure of information concerning enterprise group members, provided appropriate arrangements are made to protect confidential information;

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[15] With respect to the opening words, see footnote 12, relating to draft art. 3 (and 7 bis). The words "appointed in this State" have been added in para. 1 to clarify the scope of this draft art.

[16] See footnotes 12 and 15, relating to opening words in square brackets.

[17] Draft art. 8 has been revised in accordance with decisions of the Working Group at its fiftieth session (A/CN.9/898, para. 69).

(b) Negotiation of agreements concerning the coordination of proceedings relating to two or more enterprise group members located in different States, including where a group insolvency solution is being developed;

(c) Allocation of responsibilities between a [*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*], a foreign representative and a group representative, where appointed;

(d) Coordination of the administration and supervision of the affairs of the enterprise group members; and

(e) Coordination with respect to the development and implementation of a group insolvency solution, where applicable.

Article 9. Authority to enter into agreements concerning the coordination of proceedings[18]

Agreements concerning the coordination of proceedings involving two or more enterprise group members located in different States may be entered into, including where a group insolvency solution is being developed.

Article 10. Appointment of a single or the same insolvency representative[19]

1. The court may coordinate with foreign courts with respect to the appointment and recognition of a single or the same insolvency representative to administer and coordinate insolvency proceedings concerning members of the same enterprise group in different States.

2. The appointment of an insolvency representative in this State and in another State under paragraph 1 does not diminish the obligations of the insolvency representative under the law of this State.

Chapter 3. Conduct of a planning proceeding in this State[20]

Article 11. Participation by enterprise group members in a proceeding under [*identify laws of the enacting State relating to insolvency*]

1. Subject to paragraph 2, if a proceeding under [*identify laws of the enacting State relating to insolvency*] has commenced with respect to an enterprise group member whose centre of main interests is located in this State, any other group member may participate in that proceeding for the purpose of developing and implementing a group insolvency solution.[21]

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[18] Draft art. 9 has been revised in accordance with decisions of the Working Group at its fiftieth session (A/CN.9/898, para. 70).

[19] Para. 1 of draft art. 10 has been revised as agreed at the fiftieth session (A/CN.9/898, para. 71) by deleting the words at the end of the draft para. and retaining the words "or the same" without square brackets. While it was suggested that para. 2 — "To the extent required by applicable law the insolvency representative is subject to the supervision of each appointing court" — might be redrafted as a model law provision, it is perhaps a matter for consideration by enacting States in the light of their approach to the regulation of insolvency representatives; it might be noted that not all States regulate such professionals. Accordingly, it may be appropriate to address that issue in a guide to enactment, rather than in the draft text. Draft para. 2 proposes addressing slightly different issues, clarifying that the obligations of an insolvency representative under the law of the enacting State are not diminished when they are also appointed in other States.

[20] In accordance with a suggestion at the fiftieth session, draft arts. 11-13 are now included in chapter 3, which addresses the national law elements relevant to the commencement and conduct of a planning proceeding in the enacting State (A/CN.9/898, para. 85). Chapter 4 deals with cross-border provisions on recognition of the planning proceeding and relief.

[21] Draft art. 11 has been revised in accordance with a number of decisions taken at the fiftieth session (A/CN.9/898, paras. 72-78), including removing references to "solvent" and "insolvent" group members.

2. An enterprise group member whose centre of main interests is located in another State may participate in a proceeding referred to in paragraph 1 unless a court in that other State [precludes] [prohibits] it from so doing.[22]

3. Participation in a proceeding referred to in paragraph 1 does not subject an enterprise group member to the jurisdiction of the courts of this State. Participation means that the group member has the right to appear, make written submissions and be heard in that proceeding on matters affecting that group member's interests and to take part in the development and implementation of a group insolvency solution.[23]

4. Participation in a proceeding referred to in paragraph 1 by any other enterprise group member is voluntary. The group member may commence its participation or opt out of participation at any stage of such a proceeding.[24]

5. A participating enterprise group member shall be notified of actions taken with respect to the development of a group insolvency solution.[25]

Article 12. Appointment of a group representative[26]

1. When one or more enterprise group members are participating in a proceeding referred to in article 11, the court may appoint a group representative to that proceeding, which is then a planning proceeding.

2. [*Specify the procedure for appointment of a group representative*].[27]

3. [The group representative is authorized to seek relief in this State to support the development and implementation of a group insolvency solution.][28]

4. The group representative is authorized to act in a foreign State on behalf of a planning proceeding [as permitted by the applicable foreign law] and, in particular, to:

(a) Seek recognition of the planning proceeding and relief to support the development and implementation of the group insolvency solution;

(b) Seek to participate in a foreign proceeding relating to a group member participating in the planning proceeding; and

(c) Seek to participate in a foreign proceeding relating to a group member not participating in the planning proceeding.[29]

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[22] Draft para. 2 of art. 11 addresses the group members that may participate in a proceeding described in para. 1 — rather than referring to "preclusion", which may have a specific meaning in some jurisdictions, for greater clarity it is suggested that the word "prohibit" might be preferable.

[23] Draft para. 3 of art. 11 seeks to clarify that participation does not involve submission to the jurisdiction of the planning proceeding court, as well as what participation might encompass. The second sentence might be considered as a definition for inclusion in draft art. 2.

[24] Draft para. 4 of art. 11 confirms that participation is voluntary and that it may commence and end at any stage of the planning proceeding.

[25] Draft para. 5 of art. 11 deals with the provision of notice to participating group members; the reference to "actions taken" is intended to indicate that notice might be required of specific steps taken, such as the sale of assets, rather than notice of progress towards the development of the group insolvency solution in some more general manner that might prove difficult to satisfy.

[26] Draft art. 12 reflects a number of agreements at the fiftieth session (A/CN.9/898, para. 75). Para. 1 deals with appointment of a group representative to a proceeding of the type referred to in art. 11, which thus becomes, in accordance with the definition in draft art. 2 (g), a planning proceeding. The definition in draft art. 2 (e) of "group representative" clarifies that that person is authorized to act as representative of that planning proceeding.

[27] Draft para. 2 of art. 12 reflects a suggestion at the fiftieth session that the draft text might address the procedure for appointment of a group representative (A/CN.9/898, para. 75). Since no details were proposed, para. 2 serves to note that the enacting State may wish to specify the procedure in this art.

[28] Draft para. 3 of art. 12 reflects a suggestion at the fiftieth session that the draft text might include authorization for the group representative to seek relief in the enacting State to support the group insolvency solution (A/CN.9/898, para. 75).

[29] Draft para. 4 of art. 12 provides the authorization for the group representative to act in a foreign State for the purposes indicated in subparas. (a) through (c), including as suggested at the fiftieth session that they should be able to participate in a foreign proceeding with respect to a

Article 13. Relief available to a planning proceeding

1. To the extent needed to preserve the possibility of developing a group insolvency solution and to protect the assets of an enterprise group member [subject to or participating in] a planning proceeding or the interests of the creditors [of such a group member], the court, at the request of the group representative, may grant any of the following relief:[30]

(a) Staying execution against the enterprise group member's assets;

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying [temporarily] any [insolvency] proceedings concerning a participating enterprise group member;[31]

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;

(e) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group 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;

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the enterprise group member's assets, affairs, rights, obligations, or liabilities;

(g) Recognizing arrangements concerning the funding of enterprise group members [participating in the planning proceeding] where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply;[32] and

(h) 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. With respect to the assets or operations located in this State of an enterprise group member that has its centre of main interests in another State, relief under this article may only be granted if that relief [is not incompatible with relief granted in insolvency proceedings taking place in that State] [does not interfere with the administration of insolvency proceedings taking place in that State].[33]

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group member not participating in the planning proceeding (A/CN.9/898, para. 75).

[30] The chapeau of draft art. 13 has been aligned with the chapeaux of draft arts. 15 and 17 and revised to reflect suggestions made at the fiftieth session (A/CN.9/898, para. 81) to include references to group members both "subject to" and "participating in" the planning proceeding, noting that the Working Group has not yet reached a clear decision on that issue (A/CN.9/898, para. 81). The draft chapeau also seeks to clarify which creditors are being referred to.

[31] Subpara. 1 (c) of draft art. 13 includes some alternative language to clarify which proceedings concerning which group member are the subject of the temporary stay (to distinguish that subpara. from subparas.1 (a) and (d)) (see also draft arts. 15, subpara. 1(c) and 17, subpara. 1(d).

[32] Subpara. 1 (g) of draft art. 13 reflects agreement to delete certain words (A/CN.9/898, para. 83). In view of the fact that no conclusion has yet been reached with respect to whether the provision applies to group members "subject to" or "participating in" a planning proceeding or both, the limitation in subparagraph (g) to group members "participating in" the planning proceeding has been placed in square brackets and will need to be further considered in the context of the drafting of the chapeau. The equivalent provisions in draft arts. 15, subpara. 1(g) and 17, subpara. 1(h) are limited in scope to participating group members.

[33] Draft para. 2 of draft art. 13 reflects a suggestion that a different standard might be appropriate for assessing the relief to be granted (A/CN.9/898, para. 84), based upon draft art. 15 (5).

Chapter 4. Recognition of a foreign planning proceeding and relief[34]

Article 14. Application for recognition of a foreign planning proceeding

1. A group representative may apply in this State for recognition of the planning proceeding to which the group representative was appointed.[35]

2. An application for recognition shall be accompanied by:

(a) A certified copy of the decision commencing the proceeding designated as a planning proceeding and appointing the group representative;

(b) A certificate from the foreign court affirming the existence of the planning proceeding and of the appointment of the group 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 planning proceeding and of the appointment of the group representative.

3. An application for recognition shall also be accompanied by:

(a) Evidence identifying each enterprise group member participating in the planning proceeding. When a participating group member is subject to insolvency proceedings in the court of its centre of main interests, the application shall be accompanied by evidence that [any approval which may be required under the domestic law of the State of the commencement of proceedings for participation in the planning proceeding has been obtained] [participation has not been precluded in accordance with article 11, paragraph 2];

[(b) A statement identifying all members of the enterprise group and all proceedings commenced in respect of enterprise group members participating in the planning proceeding that are known to the group representative]; and

(c) A statement to the effect that a group member subject to the planning proceeding has its centre of main interests in the jurisdiction where the planning proceeding is taking place and that that proceeding is likely to result in added overall combined value for the enterprise group members involved.

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 15. Interim relief that may be granted upon application for recognition of a foreign planning proceeding

1. From the time of filing an application for recognition until the application is decided upon, where urgently needed to preserve the possibility of developing and implementing a group insolvency solution and to protect the assets of an enterprise group member participating in a planning proceeding or the interests of the creditors [of such a group member], the court, at the request of the group representative, may grant appropriate relief of a provisional nature, including:[36]

(a) Staying execution against the enterprise group member's assets;

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[34] Chapter 4 addresses provisions on recognition of a foreign planning proceeding and the relief available to assist that proceeding.

[35] The drafting of para. 1 of draft art. 14 has been revised to streamline the language. Revisions to paras. 2 and 3 reflect decisions taken at the fiftieth session (A/CN.9/898, paras. 87, 88 and 89). The closing words of subpara. 3(a) may need to be aligned with draft art. 11 (2) to focus on preclusion or prohibition, rather than on approval. While it was noted (A/CN.9/898, para. 88), that the test in subpara. 3 (b) might be burdensome, no alternative test was provided.

[36] As noted above, the chapeau of draft art. 15 has been broadly aligned with draft arts. 13 and 17. In accordance with agreement at the fiftieth session (A/CN.9/898, para. 101), language limiting the provision to participating group members has been introduced (see para. 101), and the reference to group members subject to the planning proceeding deleted. The Working Group may wish to confirm the group members in respect of which the relief under draft arts. 15 and 17 should be available. Is the limitation to participating group members intended to indicate, for example, that relief with respect to those group members subject to the planning proceeding is not required or that it should be sought under some other instrument, such as the Model Law?

(b) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(c) Staying [temporarily] any [insolvency] proceedings concerning the enterprise group member;[37]

(d) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;

[(e) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group 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;][38]

(f) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the enterprise group member's assets, affairs, rights, obligations, or liabilities;

(g) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply;[39] and

(h) 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. [*Insert provisions of the enacting State relating to notice*.]

3. Unless extended under article 17, subparagraph 1 (a), the relief granted under this article terminates when the application for recognition is decided upon.

[4. Relief under this article may not be granted with respect to the assets and operations located in this State of any group member participating in a planning proceeding [if that group member is not subject to insolvency proceedings] [if insolvency proceedings with respect to that group member have not commenced] [in any jurisdiction]].[40]

5. The court may refuse to grant relief under this article if such relief would interfere with the administration of a [planning proceeding] [proceeding located in the centre of main interests of an enterprise group member participating in the planning proceeding].

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[37] Subpara. 1 (c) of draft art. 15 includes some alternative language to clarify which proceedings are the subject of the temporary stay (to distinguish that subpara. from subparas.1 (a) and (d)) (see also draft arts. 13, subpara. 1(c) and 17 subpara. 1(d)).

[38] A further issue to be considered relates to draft art. 17, subpara. 1 (e), which has been placed in square brackets pending further consideration of draft art. 17, para. 2. It might be noted that draft subpara. 1 (e) parallels art. 19 (1)(b) of the Model Law addressing interim relief, while draft art. 17 (2) parallels art. 21 (2) of the Model Law, addressing discretionary relief available following recognition of a foreign proceeding. Draft subpara. 1 (e) focuses on interim relief available to protect assets in jeopardy, but is limited to administration or realization of those assets, while draft art. 17 (2) addresses distribution following recognition and requires the court to be satisfied that the interests of creditors are protected. See draft art. 17, para. 2 below.

[39] See footnote 32 above with respect to subpara. 1 (g) of draft art. 15. Given that draft art. 15, like draft art. 17, applies only to those group members participating in the planning proceeding, it is potentially narrower in scope than draft art. 13. In view of the limitation included in the chapeau to draft art. 15, the words "participating in the planning proceeding" do not need to be repeated in the subpara.

[40] Draft para. 15, para. 4 has been included in the text as a possible means of clarifying that relief is not available with respect to those group members participating in a planning proceeding that are "solvent" or, in other words, not subject to any insolvency proceeding (A/CN.9/898, para. 85).

Article 16. Decision to recognize a foreign planning proceeding

1. Subject to article 2 ter, a planning proceeding shall be recognized if:[41]

(a) The application meets the requirements of article 14, paragraphs 2 and 3;

(b) The proceeding is a planning proceeding within the meaning of article 2, subparagraph (g); and

(c) The application has been submitted to the court referred to in article 2 quater;

2. An application for recognition of a planning 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 3, the group representative shall inform the court of changes in the status of the planning proceeding or in the status of their own appointment occurring after the application for recognition is made.

Article 17. Relief that may be granted upon recognition of a foreign planning proceeding

1. Upon recognition of a planning proceeding [or at any time thereafter], where necessary to preserve the possibility of developing and implementing a group insolvency solution and to protect the assets of an enterprise group member participating in the planning proceeding or the interests of the creditors [of such a group member] the court, at the request of the group representative or […], may grant any of the following relief:[42]

(a) Extending of any relief granted under article 15, paragraph 1;

(b) Staying execution against the enterprise group member's assets;

(c) Suspending the right to transfer, encumber, or otherwise dispose of any assets of the enterprise group member;

(d) Staying [temporarily] any [insolvency] proceedings concerning the enterprise group member;[43]

(e) Staying the commencement or continuation of individual actions or individual proceedings concerning the enterprise group member's assets, rights, obligations, or liabilities;

(f) Entrusting the administration or realization of all or part of the enterprise group member's assets located in this State to the group representative or another person designated by the court, in order to protect and preserve the value of assets

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[41] It was agreed at the fiftieth session that draft art. 16 should be subject to a public policy exception (A/CN.9/898, para. 91); this exception is now reflected in draft art. 2 ter.

[42] The chapeau of draft art. 17 has been revised to align it generally with draft arts. 13 and 15 and in accordance with suggestions made at the fiftieth session (A/CN.9/898, para. 93) — addition of the words "or at any time thereafter", the place holder for a reference to persons other than the group representative that might apply for such relief (while no indication was provided as to which other persons might be appropriate), the limitation of the provision to group members "participating in the planning proceeding" and the reference to the creditors "of such group members".
By using the words "Upon recognition", the drafting of the chapeau of para. 1 follows that of art. 21 of the Model Law. Art. 21 has been interpreted to mean that recognition is the pre-condition to granting discretionary relief and that that relief may be sought at any time after recognition; its availability is not limited to the time recognition is granted. Accordingly, the words "at any time thereafter" are not required and the availability of relief at any time after recognition might be clarified in the guide to enactment.

[43] Subpara. 1 (d) of draft art. 17 includes some alternative language to clarify which proceedings are the subject of the temporary stay (to distinguish that subpara. from subparas.1 (b) and (e)) (see also draft arts. 13, subpara. 1(c) and 15 subpara. 1(c)).

that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy;

(g) Providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the enterprise group member's assets, affairs, rights, obligations, or liabilities;

(h) Recognizing arrangements concerning the funding of enterprise group members participating in the planning proceeding where the funding entity is located in this State and authorizing the provision of finance under those funding arrangements, subject to any appropriate safeguards the court may apply;[44]

[(i) Subject to article 19, approving the treatment in the foreign proceeding of the claims of creditors located in this State]; and

(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 planning proceeding the court, at the request of the group representative, may entrust the distribution of all or part of the enterprise group member's assets located in this State to the group 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.][45]

[3. Relief under this article may not be granted with respect to the assets and operations located in this State of any group member participating in a planning proceeding [if that group member is not subject to insolvency proceedings] [if insolvency proceedings with respect to that group member have not commenced] [in any jurisdiction]].[46]

Article 18. Participation of a group representative in a proceeding under [*identify laws of the enacting State relating to insolvency*]

Upon recognition of a planning proceeding, the group representative may participate in any proceeding under [*identify laws of the enacting State relating to insolvency*] concerning enterprise group members that are participating in the planning proceeding [and enterprise group members that are not participating in the planning proceeding].[47]

Article 19. Protection of creditors and other interested persons[48]

1. In granting or denying relief under article 15 or 17 [or 21], 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 enterprise group member subject to the relief to be granted, are adequately protected.

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[44] Subpara. 1(h) of draft art. 17 has been revised in accordance with the equivalent provisions in 13 (1) (g) and 15 (1). In view of the limitation included in the chapeau to draft art. 17, the words "participating in the planning proceeding" do not need to be repeated in the subpara. (g). Given that draft art. 17, like draft art. 15, applies only to those group members participating in the planning proceeding, it is potentially narrower in scope than draft art. 13.

[45] With respect to draft art. 17, para. 2, concerns were expressed about the similarity with draft art. 17, subpara. 1(f), and the absence in para. 2 of the protections applicable by virtue of the chapeau to subpara. 1(f). The origin of these provisions in the Model Law might be noted, as explained above in footnote 37.

[46] Draft art. 17, para. 3 has been added to the draft art. in response to a suggestion at the fiftieth session (A/CN.9/898, para. 85) to emphasize that relief cannot be ordered with respect to the assets and affairs of a group member not subject to insolvency proceedings (previously described as a solvent group member.

[47] The phrase in square brackets at the end of draft art. 18 has been added to provide authorization in the receiving State that parallels the authorization provided under draft art. 12 in the originating State.

[48] Revisions to paras. 1 and 2 of draft art. 19 are in accordance with proposals made at the fiftieth session (A/CN.9/898, para. 98); the Working Group may wish to consider whether draft art. 21 should also be subject to the protections of draft art. 19.

2. The court may subject relief granted under article 15 or 17 to conditions it considers appropriate, including the provision of security.

3. The court may, at the request of the group representative or a person affected by relief granted under article 15 or 17, or at its own motion, modify or terminate such relief.

Article 20. Approval of local elements of a group insolvency solution[49]

1. Where a group solution affects a group member participating in a planning proceeding that has its centre of main interests or establishment in this State and a proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced [in this State], the group insolvency solution shall be submitted to the court [in this State] for approval.

2. The court shall refer the portion of the group solution affecting the group member referred to in paragraph 1 for approval in accordance with [*identify the laws of the enacting State relating to insolvency*].

3. If the approval process referred to in paragraph 2 results in approval of the relevant portion of the group insolvency solution, the court shall [confirm and implement those elements relating to assets or operations in this State] [*specify the role to be played by the court in accordance with the law of the enacting State with respect to approval of a reorganization plan*].

4. Where a group solution affects a group member participating in the planning proceeding that has its centre of main interests or establishment in this State and no proceeding under [*identify the laws of the enacting State relating to insolvency*] has commenced in this State or article 21 applies, [*specify how, in those situations, the relevant elements of the group insolvency solution may be made binding and effective as required by the law of the enacting State*].

5. A group representative is entitled to apply directly to a court in this State to be heard on issues related to approval and implementation of the group insolvency solution.

Chapter 5. Treatment of foreign claims

Article 21. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: non-main proceedings

1. To facilitate the treatment of claims that could otherwise be brought by a creditor in a non-main proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a non-main proceeding in that other State. [Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.][50]

2. [Subject to article 19], a court in this State may stay or decline to commence a non-main proceeding if a foreign representative of an enterprise group member or a group representative from another State in which a main proceeding is pending has made a commitment under paragraph 1.

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[49] Draft art. 20 has been revised in accordance with proposals at the fiftieth session (A/CN.9/898, paras. 99-100). The words in square brackets in para. 4 have been revised and redundant language in paragraph 5 deleted (referring to the group representative as "appointed in a planning proceeding").

[50] Draft art. 21, para. 1 has been revised in accordance with A/CN.9/898, paras. 102-103 and to give effect to the changes made to the definitions in draft art. 2. Given the nature of the draft text, the drafting has been amended to indicate that the reference to "formal requirements" is to the requirements "of this State", rather than to the State in which the planning proceeding commenced as previously specified. Draft para. 2 includes a possible reference to the qualifications of draft art. 19. The Working Group may wish to recall and consider the questions raised at the fiftieth session in para. 103 of A/CN.9/898.

[Part B]

Supplemental provisions

Article 22. Commitment to and approval of the treatment of foreign claims in accordance with applicable law: main proceedings

1. To facilitate the treatment of claims that would otherwise be brought by a creditor in a proceeding in another State, an insolvency representative of an enterprise group member or a group representative appointed in this State may commit to, and the court in this State may approve, providing that creditor with the treatment in this State that they would have received in a proceeding in that other State. [Such undertaking shall be subject to the formal requirements, if any, of this State and shall be enforceable and binding on the insolvency estate.][51]

2. Subject to article 19, a court in this State may stay or decline to commence a main proceeding if a foreign representative of an enterprise group member or a group representative from another State in which a proceeding is pending has made a commitment under paragraph 1.

Article 23. Additional relief

1. If, upon recognition of a planning proceeding, the court is satisfied that the interests of the creditors of affected enterprise group members would be adequately protected in the planning proceeding, particularly where a group representative has made a commitment under article 21 or 22, the court, in addition to granting any relief described in article 17, may stay or decline to commence insolvency proceedings in this State relating to enterprise group members participating in the planning proceeding.[52]

2. Notwithstanding article 20 if, upon submission of a proposed group insolvency solution by the group representative, [particularly where a commitment under article 21 or 22 has been made,] the court is satisfied that the interests of the creditors of the affected enterprise group member are adequately protected [in the group insolvency solution], the court may approve the relevant portion of the group insolvency solution and grant any relief described in article 17 that is necessary for implementation of the group insolvency solution.[53]

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[51] The second sentence of draft art. 22, para. 1 includes the formal requirements from draft art. 21 and subjects the draft art. to the protections of draft art. 19, which might be sufficient to address considerations such as whether local creditors covered by the commitment would be adequately protected in the planning proceeding and whether the protection of those local creditors would be improved by the commencement of a local proceeding. Other considerations a court might take into account could include: whether the realization of assets located in the main jurisdiction would be facilitated by commencement of an insolvency proceeding; the court's ability or preparedness to coordinate and cooperate with the planning proceeding court; and the extent to which commencement of an insolvency proceeding might impede achievement of the purpose of the planning proceeding or might interfere with the administration of that proceeding. The Working Group may wish to consider whether further protections should be included in the drafting or whether the reference to draft art. 19 is sufficient. The Working Group may also wish to recall and consider the questions raised at para. 104 of A/CN.9/898 concerning the scope and operation of draft art. 22.

[52] Draft art. 23, para. 1 reflects proposals made at the fiftieth session (A/CN.9/898, para. 108). The cross-reference should probably be to draft art. 17, which relates to relief available on recognition, rather than to draft art. 13, which refers to relief available in the State of the planning proceeding.

[53] In draft art. 23, para. 2, the first set of words in square brackets has been added to reflect the addition to para. 1 (A/CN.9/898, para. 108). The reference to the protection of the group member's interests in the planning proceeding has been amended to refer to protection of those interests in the group insolvency solution, since it is the approval of that solution that is under consideration. As noted above, the cross-reference in the last part of the draft art. should be to draft art. 17, rather than draft art. 13.

G. Note by the Secretariat on insolvency of micro, small and medium-sized enterprises

(A/CN.9/WG.V/WP.147)

[Original: English]

Contents

I. Introduction

1. At its forty-sixth session (2013), the Commission requested Working Group V to conduct, at its Spring 2014 session, a preliminary examination of issues relevant to the insolvency of MSMEs, and in particular to consider whether the UNCITRAL Legislative Guide on Insolvency Law provided sufficient and adequate solutions for MSMEs. If it did not, the Working Group was requested to consider what further work and potential work product might be required to streamline and simplify insolvency procedures for MSMEs. Its conclusions on those MSME issues were to be included in its progress report to the Commission in 2014 in sufficient detail to enable the Commission to consider what, if any, future work might be required.[1]

2. At its forty-fifth session (April 2014), Working Group V considered the topic as requested and agreed that the issues facing MSMEs were not entirely novel and that solutions for them should be developed in light of the key insolvency principles and the guidance already provided by the Legislative Guide (see A/CN.9/WG.V/WP.121). The Working Group further agreed that it would not be necessary to wait for the results of the work being done by Working Group I in order to commence the study of insolvency regimes for MSMEs. As to the form that work might take, the Working Group agreed that, while such work might form an additional part to the Legislative Guide, no firm conclusion on that point could be reached in advance of undertaking a thorough analysis of the issues at stake.[2]

3. At its forty-seventh session (2014), the Commission gave Working Group V a mandate to undertake work on the insolvency of MSMEs as a next priority, following completion of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments.[3]

4. At its forty-ninth session (May 2016), Working Group V noted the importance of MSME insolvency and the wide support that had been expressed in favour of work being undertaken on that topic. The Working Group agreed to recommend that the Commission should clarify, at its forty-ninth session (2016), the mandate given at its forty-seventh session to Working Group V as follows: “Working Group V is mandated to develop appropriate mechanisms and solutions, focusing on both natural and legal persons engaged in commercial activity, to resolve the insolvency of MSMEs. While the key insolvency principles and the guidance provided by the UNCITRAL Legislative Guide on Insolvency Law should be the starting point for discussions, the Working Group should aim to tailor the mechanisms already provided in the

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 326.
[2] Report of Working Group V on the work of its forty-fifth session, A/CN.9/803, para. 14.
[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 156.

Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms as required, taking into account the need for those mechanisms to be equitable, fast, flexible and cost efficient. The form the work might take should be decided at a later time based on the nature of the various solutions that were being developed."[4]

5. At its forty-ninth session (2016), the Commission noted that report of the Working Group and clarified the mandate of Working Group V with respect to the insolvency of MSMEs in accordance with the wording of the recommendation set forth in paragraph 4.[5]

6. In accordance with that mandate, and in view of the progress of the work on facilitating the cross-border insolvency of multinational enterprise groups and recognition and enforcement of insolvency-related judgments, the Working Group may wish to use some of the additional time allocated to its fifty-first session to hold a preliminary discussion on how the work on MSMEs might be developed.

II. Considerations specific to MSME insolvency

7. Recent work by the World Bank[6], the IMF[7] and others suggest that a properly implemented insolvency regime may help mitigate many of the challenges facing MSMEs, including access to credit, job preservation, facilitating entrepreneurship and reducing the personal risk of individuals who create enterprises. It might be noted, however, that the majority of MSMEs facing insolvency are likely to liquidate, with only a small fraction being able to take advantage of a restructuring regime. Insolvency frameworks for MSMEs thus should not focus solely on restructuring, but also aim to facilitate liquidation in the majority of cases.

A. Specific challenges for MSMEs entering insolvency

8. When MSMEs experience acute financial distress, they often face several challenges relating to access to insolvency procedures, creditor passivity, availability of appropriate and useful information during the insolvency process, difficulty accessing new finance and, potentially, the insufficiency of assets to cover the costs of the proceedings (the so called "no-asset cases" or "insolvent insolvencies").[8]

1. Access to insolvency procedures

9. Many MSMEs are disadvantaged because they lack the skills to identify and react to financial distress, often resulting in them waiting too long before initiating an insolvency process, which may, in any event, prove to be too complex, costly, lengthy and rigid, particularly for small family businesses and unincorporated MSMEs. Some of the features of insolvency regimes that act as a disincentive may include the automatic separation of management from the ordinary administration of the business upon applying for insolvency (including reorganization); the amount and complexity of documentation required to start the process, which often includes the legal requirement to file audited balance sheets; and the uncertainty of costs generated by the numerous participants involved in the process.

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[4] Report of Working Group V on the work of its forty-ninth session, A/CN.9/870, para. 87.

[5] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 246.

[6] World Bank Group, "Report by the Working Group on the Treatment of MSME Insolvency" (2017 forthcoming). Paras. 9 to 24, 26 to 31 and 38 to 42 of this Working Paper are based upon the material provided by that report.

[7] "Tackling Small and Medium Sized Enterprise Problem Loans in Europe", Bergthaler, Kang, Liu and Monaghan, March 2015, SDN/15/04. Paras. 9 to 15 and 25 of this Working Paper draw upon the material contained in that report.

[8] See also para. 14 below under subheading 6, "Overlap between business insolvency and personal insolvency regimes."

2. Availability of a "fresh start"

10. For unincorporated MSMEs, the treatment of individual defaulters (and in some cases their guarantors) in some insolvency regimes is very severe, leaving full personal liability for many years beyond liquidation of the business and, in some cases, limitations on freedom of movement and other such personal restrictions. The lack of a "fresh start" for insolvent owners who have demonstrated good faith in making payments can reduce the incentives to seek protection and restructuring within the courts. Some personal insolvency regimes also fail to clearly distinguish between bona fide and fraudulent default, resulting in stricter standards for a fresh start.

3. Creditor Passivity

11. Creditor passivity often arises when creditors weigh up the amount they estimate they will receive from the parties involved in the insolvency process against the amount of time and money this effort requires. If the costs outweigh the return, creditors are more likely to not become involved. In the case of many MSME insolvencies, particularly where the debtor is towards the "micro" end of the spectrum, the return creditors can expect to receive is insufficient to justify the costs of participating.

4. Limited information during insolvency

12. Insolvency systems work best when debtors provide creditors and other relevant parties with appropriate and pertinent information, particularly financial information. Many MSME debtors, however, may have difficulties collecting and distributing the relevant information because of inefficient or non-existent record keeping systems, whether due to a lack of resources, of formal obligations to maintain such records or of an understanding of any need for them. The lack of such information can make it hard to judge whether an MSME is approaching insolvency, and even if it is, to provide the information required to access insolvency procedures.

5. Accessibility of finance

13. Many insolvency systems do not make it easy for MSMEs to access post commencement financing. Even where legislation does contemplate the possibility for the parties or a court to grant, for example, a super-priority to the creditors who will provide additional finance, the lack of reliable MSME financial data makes it difficult to assess their viability and the feasibility of any restructuring plan. Moreover, MSMEs may lack the assets and resources to make obtaining post-commencement finance feasible, especially where high levels of collateral are a pre-requisite.

6. Overlap between business insolvency and personal insolvency regimes

14. The nature of many MSMEs, particularly microbusinesses, is such that a clear distinction between the business and the operating person does not always exist, making it unclear whether a business or a personal insolvency regime is the one most suited to a particular MSME's financial difficulties. Directors of MSMEs frequently provide not just equity but also debt funding, there will often be poor or non-existent records in respect of transactions and relationships between entrepreneurs and the company, there may be no clearly established ownership of key commercial assets (such as tools or other essential equipment), the entrepreneur and their family members' work for the MSME may not be documented or remunerated in accordance with typical commercial practices, the entrepreneur may use their own finances to fund or support the business without necessarily documenting that expenditure and, where funds are borrowed, the creditor may consider the natural person to be the relevant debtor, rather than the MSME. The personal assets of the entrepreneur may also be of equal or greater value than that of the MSME, which encourages lenders to seek recourse personally from the entrepreneur rather than from the MSME; a personal guarantee will typically extend liability for the debts of the MSME to the entrepreneur, affecting both personal effects (such as the family home) and business

assets. The lack of personal insolvency systems that carve out personal assets and provide a discharge means that financial difficulty can have a significant impact upon entrepreneurs personally.

7. Insufficient assets to fund insolvency proceedings

15. Many MSMEs which meet the criteria for commencement of insolvency proceedings are never formally declared bankrupt and are eventually liquidated. As a result of late filing, many MSME insolvency filings are classified as "no asset cases" and insolvency laws differ in the approach to their administration, including denying the application or ordering termination of the proceedings or providing funding from individual creditor contributions and/or the public budget.[9]

B. Responses to MSME insolvency

16. MSME insolvency has been approached differently around the world. In some jurisdictions, such as Argentina and the 17 countries of the Organization for the Harmonization of Business Laws in Africa (OHADA), certain requirements of the general insolvency law are eliminated for MSME insolvency. In Japan and Korea, in contrast, the insolvency framework for MSMEs differs from the "general" insolvency framework.

1. Mechanisms modifying general insolvency regime

17. As discussed below, some jurisdictions opt to modify certain parts of the "general" insolvency procedures to accommodate some of the needs of MSMEs.

(a) Argentina

18. The law contemplates four differences for small cases that are available to qualified small businesses:[10] (a) there are fewer formalities for commencing the process; (b) establishment of a creditors' committee is not mandatory; (c) special provisions relating to the opportunity for creditors to compete with the debtor in proposing alternative restructuring proposals do not apply; and (d) the insolvency practitioner's functions do not end with the ratification of the agreement, unless creditors determine that it should do so.

(b) Germany

19. The German Insolvency Code (Insolvenzordnung) envisages a simplified pre-packaged procedure for the reorganization of qualifying debtors,[11] which includes three steps:

(i) Extra-judicial settlement of debts

20. Consumers and small debtors are required to attempt an out-of-court settlement before applying for the commencement of formal proceedings. With the application for those formal proceedings, the debtor must submit a certificate issued by a suitable person or authority[12] that, within the last six months before the application, an

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[9] Greece and Poland are among the countries that have opted not to commence insolvency proceedings if the debtor's assets are insufficient to cover the costs.

[10] In order to qualify for special treatment, the debtor must have one of the following characteristics: (i) liabilities do not exceed 300 minimum wages (approximately US $154,650); (ii) no more than 20 unsecured creditors; or (iii) no more than 20 employees.

[11] Part Nine of the German Insolvency Code (Insolvenzordnung) submits "small insolvencies" to the same process as for consumers (defined as a natural person who does not and has not pursued self-employed business activity) and applies to other debtors who have pursued self-employed activity provided their assets are comprehensible (which means they have less than 20 creditors) and there are no claims from employment contracts against them (Art. 304).

[12] Suitable agencies might include debtor advisory agencies of welfare organizations; suitable persons are mainly lawyers.

unsuccessful attempt has been made to settle out of court with creditors on the basis of a plan, together with an explanation for its failure.[13]

(ii) Judicial settlement plan proceedings

21. If the extra-judicial settlement fails, the debtor can request commencement of insolvency proceedings. A plan for settlement of its debts and records of the debtor's assets, income, creditors and debts together with a certificate from a suitable agency or person are to be submitted. The court can accept what is referred to as a "zero-plan", which is a plan for a debtor with no income and no assets and providing for no payments to the creditors. The effect of the acceptance of a "zero-plan" by the court is that the debtor can be freed from their debts, either in the settlement plan proceedings or following a discharge period. Upon submission of the application, the court suspends proceedings for a maximum of 3 months and communicates the plan to the creditors designated by the debtor. If creditors do not object to the plan, it will be deemed approved and binding upon the parties. If the majority of the creditors object to the plan, the settlement plan proceeding ends and the insolvency proceedings commence, if the insolvency estate covers the costs of the proceedings.

(iii) Insolvency and discharge proceedings

22. Once insolvency proceedings commence, the court appoints a trustee who liquidates the debtor's estate and distributes the proceeds among the creditors. A period of five to six years then starts, during which an attachable part of the debtor's wages is collected and distributed to creditors.

(c) Greece

23. A simplified insolvency procedure had been included in the Insolvency Code, which provided an accelerated process for the verification of creditors' claims and for resolving contested claims, but did not address other aspects of the insolvency process. Since it was found to be inadequate to address the rising number of non-performing loans affecting SMEs in the Greece, a new, voluntary, out-of-court restructuring framework for SMEs was introduced in 2014.[14]

24. The small enterprise or professional[15] needs to fulfil certain requirements to access the framework: (i) they must not be subject to any procedure under the law relating to the restructuring of debts of natural persons; (ii) they must be active in business and not subject to any formal insolvency procedure; and (iii) the person in charge of the business or the professional must not have been convicted of tax evasion, trafficking or racketeering or any form of fraud. The framework allows qualified persons to request lenders to write-down their financial obligations; a write-down cannot exceed EUR 500,000 and must include at least 50 per cent of the credit institution's total claim against the debtor or such an amount that, following the write-down, outstanding debts do not constitute more than 75 per cent of the debtor's net financial position. The credit institution can accept or reject the proposed write-down or offer it under different terms.

(d) Iceland

25. In 2010, the Icelandic Government, banks, and social partners entered into a voluntary debt restructuring scheme based on "joint rules on the financial restructuring of companies" specifically targeting SMEs with less than ISK 1 billion (approximately US $9 million) of liabilities and aimed at writing down debt to the value of the SME (that is, no equity value was created). Viability was determined to exist when the projected liquidation value was less than the going concern value. For SMEs below a certain debt-to-equity ratio threshold, liabilities were restructured

[13] German Insolvency Code, Art. 305.

[14] Law 4307/14.

[15] Small enterprises are identified as businesses that, for the year ending 31/12/2013, had a turnover of less than EUR 2.5 million. Professionals are defined as legal or natural persons, who are registered to conduct their businesses and for the year ending 31/12/2013, had a turnover of less than EUR 2.5 million.

based on the SMEs' capacity to pay. For SMEs with a high debt-to-equity ratio, the feature of "deferred loans" (that is, reduced interest rates for three years) was used. The scheme included an arbitration committee to resolve disputes among parties involved. The Government supported the scheme through various tax incentives and banks were subject to monthly targets to successfully restructure SMEs.

(e) India

26. The 2016 Insolvency and Bankruptcy Code includes a fast track corporate insolvency resolution process for qualified debtors,[16] which envisages shorter deadlines for the completion of proceedings. It may be initiated either by the debtor or its creditors upon submission of the documents that prove the debtor's insolvency as well as its eligibility (under the implementing regulations) to undergo a fast track resolution process. The process needs to be completed within 90 days from commencement, although the insolvency professional can request the deadline to be extended by the court for an additional 45 days if approved by 75 per cent of the creditors. Such an extension may only be requested once and shall only be granted if justified by the complexity of the case. The general provisions of the Insolvency Resolution Procedure apply to other aspects of the fast track process, "as the context may require".[17]

(f) United States of America

27. In 2005, the United States introduced special provisions for SMEs into Chapter 11 of the Bankruptcy Code. The main features of the United States simplified expedited reorganization process for small business debtors[18] are standardized forms, simplified voting requirements, shorter deadlines, no requirement for a creditor committee and more stringent oversight and reporting obligations. The application should include the debtor's most recently prepared balance sheet, statement of operations, cash flow statement and federal tax return. The debtor is under a strict deadline to propose a plan which has to be approved within 45 days of the application. The debtor is not required to file a disclosure statement with the reorganization plan, provided adequate information is included in the plan. The law sets no limit on the duration of the reorganization plan, which may be favourable for small businesses that need additional time to restructure their mortgage or equipment loans. During the course of the proceedings, the debtor's viability, business plan and activities are monitored and the proceedings may be dismissed if the debtor is not viable or otherwise able to confirm a plan. Periodic reporting on financial matters, cash flow and profitability is also required.

(g) OHADA

28. The focus of recent reforms in OHADA was upon establishing simplified, cheaper procedures to attempt the rescue of qualified small businesses.[19] The simplified proceedings apply the following procedures and the simplification relates to formalities concerning applications and hearings.

(i) Règlement Préventif (Preventive Settlement)

29. These procedures are in the form of simplifications of the main or overall *règlement préventif* proceeding. Any qualified small business can apply to commence simplified proceedings before they become insolvent and even if no plan or

[16] Debtors with assets and income below a level prescribed by the Central Government, debtors with a certain number of creditors and a certain amount of debt prescribed by the Central Government and any other type of debtors, as prescribed by the Central Government.

[17] 2016 Insolvency and Bankruptcy Code, art. 58.

[18] Small business debtors are classified in Chapter 11 of the United States Bankruptcy Code on the basis of a two part test: 1) the debtor is engaged in non-real estate activity with total fixed debts of US$2,566,050 or less; and 2) the United States trustee has not appointed a committee of unsecured creditors or the court determines that the committee of unsecured creditors is not sufficiently active.

[19] A "small business" would constitute a proprietorship, partnership or other legal entity having less than or equal to 20 employees and a turnover not exceeding 50 million francs CFA (approximately US$80,000) in the 12 months prior to proceedings.

arrangement is provided; although documents relating to the debtor's financial situation do have to be submitted, those documents do not need to be audited and there is no requirement for comprehensive financial or cash-flow statements, unlike in the general proceedings. Shorter time frames are applicable and the required restructuring plan, to be prepared by the debtor with the assistance of an administrator, can be simpler than under the general proceeding. The procedure is commenced, monitored and closed by a judge.

(ii) *Redressement judiciaire* (reorganization)

30. As with the general proceeding, the application for a simplified reorganization proceeding must be made by an insolvent debtor within 30 days of insolvency (based upon the cash-flow test). Fewer documents are required to support the application and they must include a sworn statement indicating that the conditions for simplified reorganization are met. A reorganization plan must be filed, with the assistance of an administrator, within 45 days of the declaration of insolvency and, unlike the more detailed plan required in the general reorganization process, the plan can be limited to payment terms, debt relief and the possible guarantees that the entrepreneur must give to ensure its execution. Financial statements and records are not required. Conversion is available between general reorganization and the simplified proceeding.

(iii) *Liquidation des biens* (liquidation)

31. The conditions for commencing simplified liquidation are the same as for reorganization. However, as well as being a qualified small business, the debtor must not own any immovable property and must attest to meeting the relevant conditions for a simplified liquidation proceeding. After commencement, the liquidator can, within thirty days of appointment, prepare and file a report with the competent court, on the basis of which the court can apply the procedure, after having heard or summoned the debtor. The court can refuse to apply the procedure even where the conditions are met. Sale of the debtor's property can proceed by way of private agreement, as well as public auction.

(h) European Union

32. In 2014, the European Commission issued a non-binding Recommendation on a new approach to business failure and insolvency, which although not targeting MSMEs specifically, does include provisions for a discharge of individual debtors.[20] The Recommendation essentially addressed two main issues: first, the features of a restructuring mechanism with minimal court intervention (the mechanism); and second, the availability of a discharge for individual entrepreneurs within a short time frame. The mechanism was to be available to distressed entrepreneurs as early as possible, leave the debtor in control and be as informal as possible in order to reduce costs. Court involvement was not required, except where the rights of dissenting creditors were affected, either at the stage of imposing or lifting a stay of individual enforcement actions, or at the stage of validating a restructuring plan which affected such creditors or which provided for new finance directly or indirectly affecting the rights of certain creditors.

33. The mechanism was to include a stay of all creditor actions, limited to four months, but extendable up to twelve months. Creditors would be bound by a restructuring plan if it was approved by a majority of affected creditors in value (as determined under national law) according to separate classes (at a minimum, secured and unsecured creditors). Protective measures for dissenting creditors were to be included, that is, that no dissenting creditor could receive less under the plan than in liquidation. New finance was to be exempt from avoidance actions in any subsequent liquidation and providers of such finance were to be exempt from civil and criminal liability, where it existed.

34. Discharge would be available to all honest entrepreneurs after a maximum of three years from the commencement of liquidation proceedings or, where a repayment

[20] COM (2014) 1500 final.

plan was approved, from the moment the plan took effect. Exemptions were included to, for example, safeguard the livelihood of the debtor and discourage dishonest entrepreneurs from taking advantage of a quick discharge.

35. In 2015, the Commission reviewed implementation of the Recommendation, concluding that, while it had provided a useful focus for Member States undertaking reforms in the insolvency area, it had not had the desired impact on facilitating business rescue and giving a second chance to entrepreneurs due to only partial implementation in a significant number of Member States and the differences in implementation across those States.[21]

36. In November 2016, the Commission announced a proposal for a Directive to focus on three elements: (i) common principles on the use of early restructuring frameworks to help companies continue their activity and preserve jobs; (ii) rules to allow entrepreneurs to benefit from a second chance and be fully discharged of their debt after a maximum period of three years; and (iii) targeted measures for Member States to increase the efficiency of insolvency, restructuring and discharge procedures in order to reduce the excessive length and costs of procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates of unpaid debts.[22]

2. Comprehensive MSME insolvency regimes

37. Some countries, like Japan and the Republic of Korea, have adopted comprehensive laws that are specifically designed to apply to MSMEs and thus significantly different to the regimes applicable to larger enterprises.

(a) Japan

38. Although aimed at the restructuring of MSMEs, the Japanese legislation[23] also contains provisions on the rehabilitation of individuals with small scale debt.[24] The main differences from the general insolvency regime are that: (i) creditors are not generally required to file their claims with the court, as claims are regarded as filed when the schedule of the creditors prepared by the debtor is submitted to the court; (ii) avoidance claims are generally not permitted; and (iii) discrimination among creditors in a reorganization plan is not permitted. Both creditors and the debtor are able to initiate the procedure.

39. The court may appoint an "individual rehabilitation commissioner", who may be assigned one or more of the following tasks: (i) investigating the status of the debtor's property and income; (ii) assisting the court in the valuation of claims; or (iii) making recommendations necessary for the debtor to prepare and propose a proper plan. The commissioner is not significantly involved with the debtor and its business and the costs are thus reduced. The debtor is subject to the duty to act honestly and fairly, and requires court permission to undertake certain actions (for example, liquidate assets, acquire new loans, settle or pursue lawsuits, and hand over collateral).

40. There is no automatic stay, but temporary stays can be imposed by a court to enable negotiation. The consent of shareholders is not required to dispose of the business or reduce capital and post-petition financing has first priority in a class together with administrative expenses. Procedural requirements regarding proof of, and objection to, claims are less stringent than for the general regime and the debtor

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[21] "Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency", 30 September 2015, Directorate-General Justice & Consumers of the European Commission.

[22] "Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU", 22 November 2016, COM(2016) 723 final, 2016.0359 (COD).

[23] Civil Rehabilitation Act of Japan (Act No. 225 of 22 December 1999).

[24] These provisions apply to an individual debtor who is likely to earn income continuously or regularly in the future and whose total claims amount to less than JPY 50 million (approximately US $455,000).

is exempted from the duty to prepare balance sheets. Where an objection is made to a claim by the debtor or creditors, the court reviews the legitimacy or amount of the claim in a summary, rather than a plenary, proceeding.

41. The plan may only provide for an extension of the term of the debt if the creditor is to receive a payment more than once in three months and the extension does not exceed three years from the date of confirmation of the plan. The law also adopts a "negative approval standard" for a plan: a plan is accepted if the creditors rejecting the plan are owed half or less of the total allowed claims and number less than half of all the creditors. Rights of secured creditors cannot be changed without their consent. Following approval, the court will confirm the plan if: (i) creditors receive at least as much as they would in liquidation; and (ii) the minimum payment thresholds prescribed by the law are met.

(b) Republic of Korea

42. The Republic of Korea has introduced a specialized procedure for small businesses,[25] the Small Business Rehabilitation Procedure, which can only be commenced by debtors. Upon the commencement of the court proceedings, the debtor retains the management of its business. An examiner is appointed, usually an experienced deputy court clerk or an accounting firm, who uses a simplified accounting method. No fee is required for the court clerk to perform his or her functions. The small business procedure also simplifies the requirements for the approval of a plan — for secured creditors, approval is required by 3/4 in amount (the same as for ordinary business reorganization), while for unsecured creditors, approval is required by either 2/3 in amount of total claims or 1/2 in amount of total claims and 1/2 in number of total creditors.

3. A modular approach to MSME insolvency

43. A "modular" approach to the design of insolvency regimes has been proposed for MSMEs, whether incorporated or unincorporated entities or sole traders or entrepreneurs. The purpose of the approach is to accommodate differences in the scope of insolvency regimes and to offer options for the allocation of various functions during the insolvency process — management (e.g. to the entrepreneur or an administrative agency), administrative (to a public body or a private sector official) and decision-making (to the court, an administrative agency or an insolvency professional). The following paragraphs provide a very brief summary of some of the elements of the proposal.[26]

44. The core objectives of the approach are the same as those for standard insolvency regimes, that is, preserving and maximizing the value in the insolvency estate, ensuring distribution of the highest feasible proportion of that value to those entitled to it, providing due accountability for any wrongdoing connected with the insolvency, and enabling discharge of over-indebted natural persons. However, the approach differs in the way it pursues those objectives. The basic assumption is that the parties to a particular insolvency case are best placed to select the tools appropriate to that case. The role of the legal regime is to make those tools available in a flexible manner and to create appropriate incentives for their use.

45. Traditionally, insolvency regimes provide particular "packages" or combinations of these tools and label them "liquidation" and "restructuring". The

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[25] In order to be able to request the opening of this specialized procedure, the debtor: (i) has to be a business income earner (not wage income earner); (ii) may be an individual or a legal entity; and (iii) must have less than 3,000,000,000 KRW (approximately US $2,570,000) in total secured and unsecured debts.

[26] See "The Modular Approach to Micro, Small and Medium Enterprise Insolvency", SSRN 26 January 2017 — The Bowen Island Group (Dr. Ronald Davis, University of British Columbia; Dr. Stephan Madaus, Martin-Luther-University Halle-Wittenberg; Dr. Alberto Mazzoni, Catholic University of Milan, Unidroit; Dr. Irit Mevorach, University of Nottingham; Dr. Riz Mokal, South Square Chambers; University College London; Justice Barbara Romaine, Court of Queen's Bench of Alberta; Dr. Janis Sarra, University of British Columbi; Dr. Ignacio Tirado, Universidad Autonoma De Madrid, European Banking Institute).

modular approach unpacks those combinations. It assumes a core process, geared towards enabling the entrepreneur to propose a restructuring of the business' liabilities and to obtain discharge of any obligations that cannot be repaid. The entrepreneur may access any of the full range of insolvency law mechanisms to enable attainment of these objectives. At the same time, creditors and other stakeholders have the right to adequate notification of each step in the process, coupled with the power to override the entrepreneur's choices where a sufficient proportion of them consider it appropriate to do so. The process may obtain and retain momentum by virtue of the presumptions that failure to take action is interpreted as consent and the failure to exercise procedural rights within the process precludes a stakeholder from objecting to the part of the process to which those rights related.

46. The modular approach provides for processes to liquidate or rescue a small business, with stakeholders being able to adapt the process to their specific needs by employing various modules; the choice of which modules to include in the regime is left to lawmakers to consider in the light of the social, economic and political factors underpinning the local insolvency regime. Modules that can be used by the debtor include: (a) mediation, which requires the agreement of the various parties in dispute to ensure it is not being improperly invoked to delay the proceedings, and (b) a creditor action moratorium, which is available only upon request. It is treated as optional because it may not be required in all cases and it is thus not necessary to incur the associated costs in all cases. The moratorium could affect, for example, creditor claims enforcement, as well as ipso factor clauses and set-off rights.

47. Modules that may be employed by creditors (subject to specific thresholds) include: (a) mediation, to address disputes concerning, for example, admissibility or quantum of claims, plan formulation or treatment of guarantees; (b) a debtor action moratorium, which affects the debtor's rights to remain in possession and allows creditors to veto disposal of assets or the incurring of liabilities; (c) insolvency professional involvement, which allows creditors to seek to veto a debtor's decisions by appointing an insolvency professional to replace the debtor; and (d) "doomed to failure", which allows debtor-initiated rescue to be terminated where it can be demonstrated that the debtor's plan is doomed to failure and to be converted to liquidation.

III. Issues for consideration

48. As previously noted by Working Group V, solutions to the issues facing MSMEs in insolvency could be developed in light of the key principles and guidance already provided by the Legislative Guide.[27]

49. Working Group V may thus wish to approach the insolvency of MSMEs through the issues addressed in the Legislative Guide, taking the topics covered by each chapter as a starting point. If that approach is to be followed, document A/CN.9/WG.V/WP.121 provides a starting point for that task, as it has already identified the relevance to MSMEs of many of the key topics in the Legislative Guide, as well as outlining some of the modifications that might be required in addition to issues not currently covered by the Legislative Guide. That document might be amplified in greater detail to facilitate future discussion.

50. As part of its future discussion of those key issues to be addressed, Working Group V may wish to consider how the various elements could be combined in an insolvency regime for MSMEs and, in particular, the form that its final work product might take (e.g. a legislative guide).

[27] See footnote 2 above.

H. Note by the Secretariat: comments submitted by Canada on a draft model law on recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.143)

(A/CN.9/WG.V/WP.148)

[Original: English/French]

The Government of Canada 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

Introduction

This document contains comments and suggested language in relation to the recognition and enforcement of insolvency-related judgments. Part A describes the guiding principles applicable to the elaboration of model provisions to cover the recognition and enforcement of foreign judgments in the context of insolvency law. Part B contains suggested wording for the Draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments. Each drafting suggestion is followed by a comment explaining the rationale for the suggested change. Part C contains suggested language for a change to the Model Law on Cross-border Insolvency.

In this text, "this Law" means the Draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments.

A. Guiding Principles

Scope of application — Provisional relief

It is expedient that the scope of application of the Draft Model Law on the Recognition and Enforcement of Insolvency-related Judgments covers protective measures, including stays of proceedings, freezing orders and other orders or decrees intended to preserve the value of the estate of the insolvent debtor. When insolvency is imminent, money can flow easily and assets can be dispersed rapidly. The value added of an instrument dealing with the recognition and enforcement of insolvency judgments is precisely to preserve the value of the business in financial distress, to enable a restructuring, thereby avoiding destruction of wealth, to protect creditors' and debtors' rights and to maintain jobs.

Indeed, the value added of the proposed instrument does not rest with the recognition and enforcement of an order confirming a restructuring plan or of a liquidation judgment. When these orders are rendered, creditors usually know what they will be able to obtain given the outcome of the insolvency proceeding and those orders are very seldom the subject of enforcement procedures. Where a restructuring takes place, creditors, the insolvent entity and stakeholders often have entered into agreements with binding effects. The order confirming the restructuring is only an additional element to existing binding obligations.

For these reasons, the scope of the proposed instrument should not be restricted to decisions on the merit or final judgments. Such a limited scope would not allow the recognition and enforcement of a number of interim protective measures essential for the effective resolution of the insolvency. Instead, the scope of the proposed instrument should be responsive to evolving situations insolvency courts commonly face, such as risks that assets be dispersed, the need for stays of proceedings against the insolvent debtor or the need for the orderly treatment of claims.

Simplicity and clarity

We are grateful to the UNCITRAL Secretariat for having drafted provisions that are clear, concise and simple. It will ensure they are applied in a consistent manner in the various jurisdictions choosing to adopt them. Simplicity also reflects the fact that model provisions are designed to be adapted to the various legal systems of both developed and developing countries and common law and civil law jurisdictions. We urge delegations to support choices and provisions that are simple and clear, because they lead to less litigation and better judicial cooperation.

For that reason, the provisions dealing with the preservation of assets in the period where enforcement of the foreign judgment is sought are concise (see new Article 4.3 below). The drafting promotes simplicity and clarity by being consistent with other UNCITRAL instruments. Similarly, insolvency-related judgments on directors' liability in the period leading to insolvency have been excluded from the scope of the instrument. Drawing the line between situations where an insolvency-related duty is involved versus those where there is no such duty can be challenging. For that reason, the deliberate choice of excluding from the scope of application of the model provisions judgments on directors' liability has been made in order to promote simplicity, clarity and consistent applications.

Promoting harmonization of laws

UNCITRAL seeks to facilitate international trade and business through the modernization and harmonization of rules on international commercial law. Harmonized rules lead to a more stable and predictable environment for commercial enterprises. In the case of insolvency law, they also facilitates judicial cooperation and coordination by ensuring the fair and predictable treatment of creditors' rights, by making similar remedies available in the various insolvency courts, and by enabling the mutual recognition of insolvency decisions. Harmonized rules contribute to a functional system of cross-border cooperation and coordination, because the various courts involved in the insolvency of a given economic entity do not issue inconsistent decisions.

For that reason, it is only with great caution that recommendations for the adoption of alternative options for a given provision should be made. In particular, definitions which set the basic requirements for the application of various provisions in a model law should, to the greatest extent possible, not include alternative language or options. The proposal to include variants in relation to the definition of insolvency-related judgment is a major concern in that respect.

The Benefits of increased cooperation

The Model Law on Cross-border Insolvency has been a success. It has been adopted by some 40 states and is operating well in those jurisdictions. Experience has shown that judicial cooperation can significantly contribute to the positive resolution of difficulties that arise in cross-border insolvency proceedings. Although not common at the inception of the Model Law, the form of judicial cooperation encouraged by the Model Law is now recognized and promoted in a large number of jurisdictions.

From a Canadian perspective, judicial cooperation, through the use of cross-border insolvency agreements or protocols setting the parameters to assist in the management of cross-border proceedings and the harmonization of procedural issues, has been very effective and these tools play an important role in the promotion of judicial cooperation to the benefit of creditors and stakeholders. Experience shows that there is mutual benefit to cross-border cooperation and coordination of insolvency proceedings.

B. Drafting Suggestions and Justifications

New Article [2] Definitions

"Foreign main proceeding" means a foreign main proceeding as defined in [*insert reference to provisions implementing the Model Law on Cross-border Insolvency*];

For jurisdictions not having implemented the Model Law on Cross-border Insolvency, but still wishing to exclude decisions rendered from non-COMI jurisdictions, the following definition can be included: **"Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;**

Comment

This definition is needed because of the reference to foreign main proceeding in the definition of "insolvency-related judgment" proposed in this text.

"Insolvency-related judgment" means a judgment issued by a court supervising a foreign proceeding and which is issued on or after the commencement of that proceeding, but does not include:

(a) a judgment relating to directors' liability;

[(b) a judgment covering transfers at under value in the period prior to insolvency;]

(c) a judgment recognizing contract-based remedies exercised by creditors in the period prior to insolvency; or

(d) a judgment rendered by a court that is not a foreign main proceeding, except if the judgment is issued by a court acting as a planning proceeding[1];

[and]

[(e) a judgment from a jurisdiction that does not recognize insolvency-related judgments issued by a court in this State.]

Comment

Chapeau

To fall within the scope of this Law, a judgment must be issued by a court supervising a foreign insolvency proceeding. As is the case under the Model Law on Cross-border Insolvency, the proceeding needs to possess certain attributes. These include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and reorganization or liquidation of the debtor as the purpose of the proceeding.[2]

Within those parameters, a variety of collective proceedings would be eligible to qualify as a foreign proceeding, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. It also includes those in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, "debtor in possession").[3]

Subparagraph (a)

Judgments dealing with directors' liability are excluded from the definition of insolvency-related judgment as some of these judgments are decided on the basis of corporate law (as well as other laws) and it would be difficult to distinguish between "true" insolvency-related judgments and the others (subparagraph a)).

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[1] This definition of "planning proceeding" based on the draft Model Law on Corporate Groups is added to this draft.

[2] Paragraph 66, Guide to Enactment to the Model Law on Cross-border Insolvency.

[3] Paragraph 71, Guide to Enactment to the Model Law on Cross-border Insolvency.

Subparagraph (b)

Undervalued transactions are subject to varying standards under insolvency laws depending on the jurisdiction. For example, as illustrated in the Legislative Guide on Insolvency Law, Part II, some jurisdictions might use deeming provisions whereby, a transaction is deemed to be undervalued if below a certain threshold, they might require specific modes to determine the value of the transaction which are not known in other jurisdictions, or they might offer defences that are unknown in other jurisdictions (see paragraphs 175-176). In the domestic context, those transfers are subject to local rules, but one could argue that defendants who relied on legal standards known to them should not be found liable for transactions at undervalue determined against standards of another jurisdiction. For that reason, transactions at undervalue entered into in the period prior to the insolvency are excluded from the definition (subparagraph b)). Note that it is suggested that judgments covering transactions at undervalue entered into after the commencement of the insolvency proceeding be covered. The commencement of an insolvency proceeding constitutes sufficient notice that transactions could be reviewed and that the insolvency laws of the jurisdiction of the insolvent entity will apply. Avoidance transactions, or transactions intended to defeat, hinder or delay creditors, would remained covered by the definition of insolvency-related judgment. These transactions differ from transactions at undervalue because they show an intention to deceive.

Subparagraph (c)

As a general rule, claims based on general contract law, whether determined by an insolvency court or a court of general civil jurisdiction, should not be covered by the definition. Contractual remedies are grounded in the contract to which they relate and, by their nature, can be exercised without the assistance of a court. Contractual remedies covered by this exclusion encompass title reservation agreements, *ipso facto* clauses, set-offs and other forms of legal compensation. The exclusion aims only at contractual remedies exercised in the period prior to the insolvency. This distinction is justified because contract-based remedies exercised under the supervision of the insolvency court are considered to be insolvency judgments.

Subparagraph (d)

By incorporating references to concepts found in the Model Law on Cross-border Insolvency, the definition clarifies the relationship between this Law and the Model Law on Cross-border Insolvency. It means that a judgment from a foreign main proceeding, as defined under the Model Law, can be recognized and enforced in the receiving jurisdiction by application of this Law, both in situations where the receiving jurisdiction is a non-main proceeding or has not open insolvency proceeding in relation to the insolvent debtor (subparagraph d)). The recognition and enforcement of judgments offered under this Law do not prevent the application of relief available under the Model Law on Cross-border Insolvency should those seeking enforcement prefer to follow that approach (The relationship between this Law and the Model Law is also discussed in Part C).

By including judgments from planning proceedings (through the exception to the exclusion for subparagraph d)), the definition recognizes that, in some situations, a planning court may be issuing a judgment in relation to a corporate group member which does not have its center of main interest in the jurisdiction of the planning court. Covering insolvency-related judgments of planning courts enables a better coordination of planning proceedings in a manner that is consistent with the draft Model Law on Enterprise Groups.

Establishing as a principle that only insolvency-related judgments from a foreign main or a planning proceeding fall under the scope of this Law prevents the application of chain recognition of judgments. As such, a judgment issued in state A, subsequently recognized in state B, could only be recognized in state C on the basis of the original judgment in state A, not of the judgment from state B.

Subparagraph (e)

[Subparagraph e) provides a mechanism whereby only a judgment from a reciprocating jurisdiction may be recognized and enforced under this Law. A reciprocating jurisdiction is a place (other than the enacting jurisdiction) that has enacted similar legislation on the recognition and enforcement of insolvency-related judgments. The reciprocating jurisdiction may be limiting the application of its similar legislation to reciprocating jurisdictions or not. Although that provision is not necessary in order to have a functioning law and, therefore, not recommended for adoption, enacting jurisdictions might be concerned about extending the benefit of this Law to jurisdictions that do not cooperate in the same manner. This provision recognizes that, from a policy perspective, some jurisdictions will wish to limit the application of their Law.]

Examples — Guide to Enactment

The illustrative list in [Alternative A] should be found in the Guide to Enactment. It does not add any additional legal foundation for a judgment to qualify as an insolvency judgment. However, it provides useful illustrations of the situations that are intended to be covered.

"Planning proceeding" means a foreign planning proceeding as defined in [*insert the reference to the provisions implementing the draft Model Law on Enterprise Groups*];

For jurisdictions that have not adopted a group solution, but still wish to recognize and enforce decisions from a planning proceeding: **"Planning proceeding" means a main proceeding commenced in respect of an enterprise group member that is a necessary and integral part of a group insolvency solution, in which one or more additional group members are participating for the purpose of developing [and implementing] a group insolvency solution and in which a group representative has been appointed;**

Comment

This definition is necessary because of the reference to planning proceeding in the definition of insolvency-related judgment.

The other definitions in the draft remain unchanged.

New Article [4] Interest to bring an application

A foreign representative, or a group representative in a planning proceeding, appointed in the court where the judgment was issued, a judgment debtor or any creditors whose interest is affected by the judgment [or other persons entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment] may bring an application for recognition of that judgment.

Comment

This provision is based on existing Article [10(1)]. The conditions that need to be met in order to have standing under this Law are brought upfront in the legislation. The proposed drafting also resolves an issue under Article [10] which is the linkage between the foreign representative or the group representative in a planning proceeding, on the one hand, and the court having issued the judgment for which recognition is sought, on the other hand. It would be inappropriate to grant standing to any foreign representative, such as foreign representatives in unrelated-insolvency proceedings, to seek recognition and enforcement of a judgment. In practice, it means that, in a group proceeding, a foreign representative of a group member who sought and obtained a judgment in the planning court would not necessarily be in a position to seek recognition and enforcement of the resulting insolvency-related judgment in a third state. The resulting judgment would have to be recognized and enforced upon

application by the group representative, the judgment debtor or creditors affected by the judgment.

The current text of Article [10(1)] referring to other persons entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment has been maintained. It is understood, however, that applicants will prefer to fall in the other categories of persons listed in the provision if possible, because relying on this last category would require producing evidence on foreign law.

New Article [4.1] Competent court or authority

An application for the recognition and enforcement of an insolvency-related judgment shall be brought to [*specify the court, courts, authority or authorities competent to perform recognition or enforcement in the enacting State*].

Comment

Guidance is needed for the applicant as there will not necessarily be an insolvency proceeding open in the state where enforcement is sought. As opposed to the Model Law on Cross-border Insolvency, which deals with the coordination of opened insolvency proceedings for the same debtor in various jurisdiction, this Law is intended to apply primarily in situations where there is no insolvency proceedings open in the state where enforcement is sought. This provision is intended to specify where the application can be brought.

New Article [4.2] Notification of application and summary recognition where not contested

1. An application for the recognition and enforcement of an insolvency-related judgment shall be notified to the judgment debtor and the insolvency representative, or the group representative of the planning proceeding, of the court where the judgment was obtained and the judgment can only be recognized after the other parties have been given the opportunity to present arguments against the application.

2. Where the application is not contested, the insolvency-related judgment may be recognized summarily, without a formal hearing.

3. An application for the recognition and enforcement of an insolvency-related judgment can be accompanied by a request for provisional relief under Article 15.

4. A request for provisional relief under Article 15 does not prevent a party from seeking any additional provisional relief available under the law of the jurisdiction where enforcement is sought.

Comment

The procedural requirements should clearly spell out that the party seeking recognition should properly notify the judgment debtor of the action taken against him. This procedural requirement is consistent with the ground for refusing recognition and enforcement found in Article [12(a)] dealing with notification in the originating state.

New Article [4.3] Interim Protective Relief

1. A party may, without notice to any other party, make a request for interim protective relief together with an application for recognition and enforcement of an insolvency judgment directing a party not to frustrate the purpose of the provisional relief requested or the judgment, as the case may be.

2. Immediately after the receiving court has made a determination in respect of an application for an interim protective relief ex parte, the court shall order notice to be given to all parties of the request for the interim measure, the application for the interim protective relief, the interim protective order, if any,

and all other communications between any party and the court in relation thereto. At the same time, the court shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

3. The court may require any party to disclose promptly any material change in the circumstances on the basis of which the interim or provisional relief was requested or granted.

Comment

Article [15] provides the ability for the receiving court to grant relief of a provisional nature. That provision is needed in order to ensure the protection of assets in the period between the application for recognition and enforcement and the decision by the court to recognize and enforce it. New Article [4.3] empowers receiving courts to issue interim protective measures *ex parte*. Given the nature of the remedy, a number of procedural safeguards are put in place to ensure the party(ies) against whom the measures are issued is (are) adequately protected.

The proposed wording is inspired from the Model Law on International Arbitration.

Article [7] Public policy exception

Comment

Article [7], as currently drafted, only preserves the ability of a court to have recourse to public policy for refusing to take action, if the action that it is requested to be carried out is manifestly contrary to public policy. In order to benefit from the public policy exception, the party relying on the exception must identify elsewhere in the domestic legislation of the enacting state a public policy principle that is applicable. The provision merely preserves existing public policy principles. For that reason, it is suggested that a specific ground for exclusion be included in Article [12] dealing with the grounds to refuse recognition and enforcement of an insolvency-related judgment. No changes to Article [7] are suggested.

Article [8] Interpretation

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~~.

Comment

The good faith requirement is typically found in substantive international instruments, such as the *United Nations Convention on the International Sale of Goods*, the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, or the *United Nations Convention on the Use of Electronic Communications in International Contracts*. It is usually not found in instruments dealing with the recognition and enforcement of foreign decisions or in instruments setting procedural mechanisms, such at the *Hague Convention on Choice of Court Agreements*, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, or the *ICSID Convention*. One notable exception to that dichotomy is the UNCITRAL Model Law on Cross-border Insolvency.

Article [9] Effect and Enforceability

Comment

It is suggested to consider eliminating redundancies between Articles 9 and 11. In our view, it might be counterproductive to state twice that for a judgment to be enforceable, it needs to have effect and be enforceable in the originating state.

Article [10] Application for recognition and enforcement of an insolvency-related Judgment

~~1. A foreign representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment may apply to the court in this State for recognition and enforcement of that judgment, including by way of defence.~~

[…]

Comment

Because of the changes to Article [4], paragraph [10 (1)] should be deleted.

New Article [10.1] Judgment used by way of defence

Nothing in this Law requires a party to seek recognition and enforcement of an insolvency-related judgment where the judgment is used as a defence in a proceeding and the judgment can be received in evidence by the court, without the formal procedural requirements of this Law, by application of its rules of procedure and evidence.

Comment

In some jurisdictions, a foreign judgment is a fact that can be introduced as evidence in a court proceeding and, as a result, be used as a defence in that court proceeding. This provision is intended to preserve this evidentiary rule for enacting states wishing to allow the presentation of judgments as defence without the formal requirement of recognition and enforcement set out in this Law.

Article [12] Grounds to refuse recognition and enforcement of an insolvency-related judgment

Recognition and enforcement of an insolvency-related judgment may be refused if:

[…]

a.1) Recognition and enforcement of the insolvency-related judgment would be manifestly contrary to the public policy of this State;

[…]

[e.1) the judgment has been satisfied or the parties have agreed, by agreement to that effect or through a reorganization or other court-supervised mechanisms, that the obligations found in the judgment have been replaced by new legal obligations].

[…]

Comment

In addition to the subparagraphs found in Article [12], it is proposed to add a new subparagraph a.1) to deal with the public policy exception. The reasons for this inclusion are found in the comment on Article [7].

Some international instruments specifically cover the satisfaction of a judgment as a ground for setting aside the enforcement of a foreign judgment (e.g., Canada-United Kingdom Civil and Commercial Judgments Convention, Article IV).

A number of decisions rendered by insolvency courts are transitory or their legal effect is superseded by subsequent developments, such as reorganization plans. In order to prevent creditors from seeking payment in a foreign jurisdiction of such extinguished or superseded judgments rendered during the insolvency proceeding, subparagraph e.1) prevents a judgment that is either satisfied or the subject of a novation from being recognized and enforced. For example, provisional freezing orders requiring that assets be vested in the insolvency administrator pending a final

decision on priority rights of secured creditors, which is extinguished after the adoption of a reorganization plan, would fall under this exclusion. As a result, a court where recognition and enforcement of the freezing order is sought would refuse recognition and enforcement.

Given the suggested changes to the definitions, in particular to the definition of "insolvency-related judgment" the Working Group might wish to consider whether some of the exclusions are still needed (subparagraphs c) to h)).

Article [14] Severability

Recognition and enforcement of a severable part of an insolvency-related judgment ~~shall~~ may be granted where recognition and enforcement of that part is applied for, or where only part of the judgment is capable of being recognized and enforced under this Law.

Comment

Replacing the word "shall' by "may" allows the protection of creditors' whose interests might be adversely affected by the recognition of only part of a judgment. With this change, a court is not compelled to recognize part of a judgment because the unenforceable portion of the judgment is severable. It may however recognize it.

C. Relationship between this Law on the Model Law on Cross-border Insolvency

An important aspect for the effective operation of this Law is that it applies in a manner that is not inconsistent with the Model Law on Cross-border Insolvency. This means avoiding inconsistencies in the event the receiving state has adopted the Model Law as well as in situations where the receiving state has not adopted the Model Law, but only this Law with the view of recognizing foreign insolvency-related judgments. The latter situation may be chosen by states that have not decided to foster judicial cooperation in the form promoted by the Model Law, but are of the view recognition and enforcement of insolvency-related judgments is an adequate tool in achieving greater cross-border judicial cooperation. The work of UNCITRAL should not *de facto* exclude this form of judicial cooperation. It too may lead to the better coordination of cross-border insolvency proceedings. For that reason, both this Law and its related Guide to Enactment should discuss the options open to enacting states, including for those wishing to enact this Law, but not the Model Law on Cross-border Insolvency.

Some comments in Part B already discussed the relationship between the existing Model Law and this Law (see comments in relation to the definition of "insolvency-related judgment", "foreign main proceeding" and "planning proceeding"). They are designed to ensure a consistent treatment of the same concepts across the various pieces of insolvency legislation.

As discussed above, this Law can be used to ensure recognition and enforcement of an insolvency-related judgment issued by a foreign main proceeding. This Law is therefore complementary to the Model Law on Cross-border Insolvency. However, this Law is not intended to ensure recognition of judgments in the situations where such recognition can be sought under the Model Law.

There is an inconsistency in the interpretation of the Model Law on Cross-border Insolvency that may justify a slight clarification. Domestic courts in some jurisdictions have been tempted to limit the recourses that are available as "relief" under Article 21 of the Model Law. Specifically, some courts have taken the view the recognition and enforcement of a judgment is not a relief available under the Model Law. As this Law does not cover all situations that fall under the scope of the Model Law on Cross-border Insolvency, it is recommended that the following amendment to the Model Law be adopted.

The Model Law on Cross-border Insolvency is amended as follows:

Article 21. Relief that may be granted upon recognition of a foreign proceeding

1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:

[…]

c.1) the recognition or the enforcement of a judgment;

V. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its thirtieth session (Vienna, 5-9 December 2016)

(A/CN.9/899)

[Original: English]

Contents

Paragraphs

I. Introduction

1. At its present session, Working Group VI (Security Interests) commenced its work on the preparation of a draft guide to enactment (the "draft Guide to Enactment") of the UNCITRAL Model Law on Secured Transactions (the "Model Law"), pursuant to a decision taken by the Commission at its forty-eighth session (Vienna, 29 June-16 July 2015).[1] At that session, the Commission had noted that, in preparing a draft model law, the Working Group was mindful of the fact that it would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering it for enactment. In addition, the Commission noted that, in the preparation of a draft model law, the Working Group had assumed that it would be accompanied by such a guide and referred a number of matters to that guide for clarification.[2]

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 215.
[2] Ibid.

2. The Commission also agreed that the draft Guide to Enactment should: (a) be as short as possible; (b) include cross-references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and the other texts of the Commission 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"); (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; and (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.[3]

3. At its forty-ninth session (New York, 27 June-15 July 2016), the Commission adopted the Model Law.[4] At that session, the Commission had before it the draft Guide to Enactment (A/CN.9/885 and Add.1-4). The Commission noted that the draft Guide to Enactment provided background and explanatory information that could assist States in considering the Model Law for adoption. In addition, the Commission noted with appreciation that the draft Guide to Enactment was already at an advanced stage. Moreover, the Commission noted that a number of issues were referred to the draft Guide to Enactment even at its forty-ninth session, and thus the draft Guide to Enactment was an extremely important text for the implementation and interpretation of the Model Law. After discussion, the Commission agreed to give the Working Group up to two sessions to complete its work and submit the draft Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session in 2017.[5]

4. In addition, the Commission agreed that, if the Working Group completed its work in less than two sessions it should use any time remaining to discuss its future work in a session or in a colloquium to be organized by the Secretariat. Moreover, the Commission agreed that, subject to further discussion of the overall future work of the Commission, a colloquium to discuss future work on security interests should be held even if the Working Group used the full time of the two sessions to complete its work on the draft Guide to Enactment.[6]

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its thirtieth session in Vienna from 5 to 9 December 2016. The session was attended by representatives of the following States members of the Working Group: Australia, Brazil, Bulgaria, Canada, China, Colombia, Côte d'Ivoire, Czechia, El Salvador, France, Germany, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Mexico, Pakistan, Panama, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Spain, Switzerland, Thailand, Turkey, United States of America, Venezuela (Bolivarian Republic of) and Zambia.

6. The session was attended by observers from the following States: Croatia, Cyprus, Dominican Republic, Mali, Portugal, Republic of Moldova, Slovakia, Sudan, Syrian Arab Republic and Tunisia. 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 Bank;

[3] Ibid., para. 216.
[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 119.
[5] Ibid., paras. 120-122.
[6] Ibid., paras. 122 and 356.

(b) *Intergovernmental organizations*: Asian Clearing Union (ACU) and Asian-African Legal Consultative Organization (AALCO);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Centro de Estudios de Derecho, Economía y Política (CEDEP), Commercial Finance Association (CFA), European Banking Federation (EBF), European Investment Bank (EIB), Factors Chain International and the EU Federation for Factoring and Commercial Finance Industry (FCI and EUF), Forum for International Conciliation and Arbitration (FICACIC), INSOL Europe, International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Centre for Inter-American Free Trade (NLCIFT) and The European Law Students' Association (ELSA).

8. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Jennifer Wanjiru NG'ANG'A (Kenya)

9. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.70 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.71 and Add.1 to 6 (Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions).

10. 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 Guide to Enactment of the UNCITRAL Model Law on Secured Transactions.
5. Future work.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered notes by the Secretariat entitled "Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.71 and Add.1-4, and part of 5) and its future work. The deliberations and decisions of the Working Group are set forth below in chapters IV and V respectively. The Secretariat was requested to revise the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group.

IV. Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

A. General part of the draft Guide to Enactment (A/CN.9/WG.VI/WP.71, paras. 1-33)

12. At the outset, it was agreed that the draft Guide to Enactment should be addressed mainly to the executive and legislative branches of Government to assist them in their consideration of the Model Law for enactment, but also secondarily to users of the Model Law. It was also agreed that the draft Guide to Enactment should not attempt to provide transactional advice to parties of secured transactions, which would fit better in any future work on a contractual guide on secured transactions.

13. With respect to paragraphs 1-7, it was agreed that the discussion of the purpose of the draft Guide to Enactment should be shortened and avoid repetition (e.g. para. 6 should be deleted as it repeated a point made in para. 3).

14. With respect to paragraphs 8-20, it was agreed that: (a) the discussion of the purpose of the Model Law should be shortened; (b) the discussion of the earlier project of UNCITRAL on secured transactions should be briefly referred to in a footnote; (c) the preparatory work should be shortened and set out in a preface; and (d) the Commission's decision and the General Assembly resolution with respect to the Model Law should be set out as separate annexes.

15. With respect to paragraphs 26-28, it was agreed that they should be revised to discuss the relationship between the Assignment Convention and the Model Law and the reasons why States that enacted one of those texts should also enact the other. With respect to paragraph 29, it was agreed that it should be revised to discuss: (a) the functional, integrated and comprehensive approach of the Model Law; and (b) coordination with other law in a separate section.

16. Subject to the above-mentioned changes (see paras. 12-15), the Working Group approved the substance of paragraphs 1 to 33 of document A/CN.9/WG.VI/WP.71.

B. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.71/Add.1, paras. 1-49)

17. With respect to paragraph 2, it was agreed that: (a) reference should be made to an example of an outright transfer of receivables by agreement (e.g. non-recourse factoring); (b) the need to have the same third-party effectiveness and priority rules apply to both outright transfers of receivables by agreement and security rights in receivables should be added to the reasons why the Model Law applied to outright transfers of receivables by agreement; and (c) the possible exclusion of outright transfers of receivables by agreement for collection purposes could be explained by reference to the fact that they were not financing transactions (whether the transferor's interest was transferred or not, which was a matter of other law).

18. With respect to paragraph 9, it was agreed that the last sentence referred to lenders, rather than to consumer grantors or consumer debtors of receivables, and should thus be deleted, unless the indirect benefit to consumer grantors under article 24 of the Model Law could be briefly explained.

19. With respect to paragraph 11, it was agreed that it should be deleted, while the fact that negative pledge agreements did not bind third parties and thus a security right created despite such an agreement might be effective could be discussed in the context of article 3 on party autonomy (see para. 38 below).

20. With respect to paragraph 12, it was agreed that it should be revised to clarify that: (a) the Model Law applied to security rights in attachments (as defined in the Secured Transactions Guide) that were movable assets, but it did not include specific provisions on attachments; (b) the general provisions on security rights in movable assets applied to attachments; and (c) enacting States should be encouraged to implement the relevant recommendations of the Secured Transactions Guide dealing with security rights in attachments.

21. With respect to paragraph 13, it was agreed that it should be revised to clarify that not all terms defined in the Model Law were explained in the draft Guide to Enactment, as they were either self-explanatory or sufficiently explained in the Secured Transactions Guide, and thus cross-references to the relevant sections of the Secured Transactions Guide, if any, would be sufficient.

22. With respect to paragraph 15, it was agreed that it should be revised to clarify that the term that might replace the term "authorized deposit-taking institution" in a particular enacting State might not be a term of the national financial regulatory framework of that State but rather a generic term broad enough to include any

institution authorized to receive deposits in the State whose law might be applicable under article 97 of the Model Law.

23. With respect to paragraph 17, it was agreed that it should be revised to clarify that the term "competing claimant": (a) was principally used in the context of a potential dispute between a secured creditor with a security right in an asset and another person with rights in that asset; and (b) included another creditor of the grantor (secured or not) that had a right in the asset, a buyer or lessee of the asset and the grantor's insolvency representative.

24. With respect to paragraph 18, it was agreed that it should be revised to: (a) briefly refer to the primary purpose for which consumer goods were used or intended to be used (same point in para. 20 of document A/CN.9/WG.VI/WP.71/Add.1 on "equipment"); (b) clarify that, depending on its use or intended use, a tangible asset, might be "consumer goods", "equipment" or "inventory"; and (c) clarify that the terms "consumer goods", "equipment" or "inventory" were relevant mainly for those provisions of the Model Law that dealt with acquisition security rights.

25. With respect to paragraph 19, it was agreed that the last sentence, stating that the term "writing" included electronic communications, should be deleted as that point was already made in the explanation of the definition of the term "writing" (see A/CN.9/WG.VI/WP.71/Add.1, para. 41).

26. In that connection, it was agreed that the draft Guide to Enactment should also include an explanation of the reference to outright transfers of receivables by agreement in the terms "encumbered asset", "grantor", "secured creditor", "security agreement" and "security right". With respect to the commentary on the definitions of the last two terms, it was also agreed that reference should be made to the functional, integrated and comprehensive approach of the Model Law.

27. With respect to paragraph 21, it was agreed that: (a) it need not refer to leases or licences; (b) the point that a lease might be a secured transaction might be addressed in the explanation of the term "security agreement"; and (c) the point that a lessee or licensee might create a security right in its rights under the lease or licence agreement might be made in the part of the draft Guide to Enactment dealing with article 6, paragraph 1 (see A/CN.9/WG.VI/WP.71/Add.1, para. 52).

28. With respect to paragraph 22, it was agreed that it should be revised to refer to the administration or supervision of the administration of the insolvency estate in insolvency proceedings or to use other wording referred to in the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"; see part two, chap. III, paras. 11-18 and 25, which referred to the administration of insolvency proceedings or the supervision of the debtor or the activities of the debtor).

29. With respect to paragraph 24, it was agreed that it should be revised to explain that the term "inventory" included tangible assets held by the grantor for lease or licence in the ordinary course of the grantor's business.

30. With respect to paragraph 26, it was agreed that the reference to "banknotes and coins, as well as virtual currency, such as bitcoin" should be deleted, as it was sufficiently clear that banknotes and coins were national currency, while virtual currency was not. It was also explained that, as money was a tangible asset under the Model Law, the provisions of the Model Law on security rights in money would not be appropriate for virtual (i.e. intangible) currency.

31. With respect to paragraph 27, it was agreed that it should be revised to explain that, depending on its legal tradition, an enacting State might use the term "personal property" in the place of the term "movable asset".

32. With respect to paragraph 30, it was agreed that it should be revised to: (a) explain first that the definition of the term "possession" was sufficiently broad to cover situations in which a person held an asset through another person; and (b) refer to the issuer of a negotiable document holding through various persons as a particular example of possession of an asset by a person through another person.

33. With respect to paragraph 31, it was agreed that it should be revised to better explain the differences between the meaning of the term "priority" in the Model Law, the Assignment Convention and the Secured Transactions Guide.

34. With respect to paragraphs 32-35, it was agreed that they should be simplified and clarified, while the issue of the protection of third parties should be discussed in the part of the draft Guide to Enactment dealing with the third-party effectiveness of security rights in proceeds (see A/CN.9/WG.VI/WP.71/Add.1, paras. 86-89). It was also agreed that the term "proceeds of proceeds" should be explained by reference to examples so as to avoid giving the impression that the security right might extend to an excessively broad range of assets.

35. With respect to paragraph 37, it was agreed that it should be revised to explain that the term "secured obligation" included obligations arising from credit extended "by lenders, sellers or lessors", rather than "to finance the operation of a business or the purchase of goods". It was also agreed that the last two sentences of paragraph 37 should be deleted as they repeated a rule of interpretation referred to in paragraph 13.

36. With respect to paragraph 38, it was agreed that it should be revised to explain that a broad definition of the term "securities" could result in an overlap with the terms "money", "receivable" and "negotiable instrument" and thus in uncertainty as to the regime applicable to security rights in those types of asset. It was also agreed that reference should be made to the need to coordinate the definition of the term "securities" in secured transactions law and "law governing the transfer of securities", as a State might not have a "securities transfer law" as such.

37. With respect to paragraph 40, it was agreed that it should be revised to clarify that the term "tangible asset" included money, negotiable instruments, negotiable documents and certificated non-intermediated securities (some of them being intangible assets embodied in a document), except for the purposes of certain articles that contained rules that were not appropriate for those types of asset.

38. With respect to paragraphs 43-45, it was agreed that they should be revised to explain: (a) that a negative pledge agreement could not bind persons that were not parties to that agreement and thus a security right created despite such an agreement would be effective; (b) the reasons why the articles listed in article 3, paragraph 1, were not subject to party autonomy; (c) that article 3, paragraph 3, applied to alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution, referring to the discussion of those matters by the Commission at its forty-ninth session.[7]

39. With respect to paragraph 47, it was agreed that it should be revised to explain the term "commercial reasonableness" by reference to a range of steps that might be taken by a reasonable person in circumstances that were similar to those encountered by the grantor or the secured creditor in a particular case.

40. With respect to paragraph 48, it was agreed that reference should also be made to the interpretation of the provisions of the Model Law by courts and arbitral tribunals in States other than the enacting State.

41. Subject to the above-mentioned changes (see paras. 17-40), the Working Group approved the substance of paragraphs 1 to 49 of document A/CN.9/WG.VI/WP.71/Add.1.

C. Chapter II. Creation of a security right (A/CN.9/WG.VI/WP.71/Add.1, paras. 50-83)

42. With respect to paragraph 50, it was agreed that it should be revised to: (a) avoid giving the impression that an enacting State might leave out all asset-specific rules, which included rules that were absolutely necessary for a modern secured transactions law, such as the rules dealing with security rights in receivables; and (b) clarify that

[7] Ibid., paras. 96-98.

an enacting State might wish to include in the general rules cross-references to the relevant asset specific rules or a provision that would state that the general rules would be subject to the asset-specific rules (see Model Law, footnote 4).

43. With respect to paragraph 52, it was agreed that it should be revised to clarify that: (a) the grantor needed to have a right in an asset or the power to encumber it at the time of the conclusion of the security agreement or later; (b) the grantor needed to be in possession of an asset on the basis of an agreement with the owner (such as a lease); and (c) in line with article 13, paragraph 1, the owner/grantor of a receivable had a right in the receivable or the power encumber it despite an anti-assignment agreement with the debtor of the receivable. It was also agreed that paragraph 52 should be revised to clarify that: (a) the transferor in an outright transfer of a receivable continued to have the power to encumber the receivable; (b) that power was implicit in the fact that the third-party effectiveness and priority rules of the Model Law applied to outright transfers of receivables by agreement; and (c) as a practical matter, if the transferee had made its right effective against third parties before a subsequent competing transferee or secured creditor, there would be no value left in the receivable for subsequent transferees or secured creditors.

44. With respect to paragraph 53, it was agreed that: (a) the second sentence should be deleted as it repeated a point already made in the last sentence of paragraph 51; (b) an enacting State should choose in the chapeau of paragraph 3 of article 6 the wording that best fit, not only its contract law, but also its law of evidence. With respect to paragraphs 54 and 55, it was agreed that they should include cross-references to the relevant discussion in the Secured Transactions Guide and the Registry Guide.

45. With respect to paragraph 56, it was agreed that the last sentence that dealt with assets that might be encumbered, rather than with obligations that might be secured, was out of place and should thus be deleted.

46. With respect to paragraph 60, it was agreed that the second sentence should be revised to clarify the reason why the description of encumbered assets in the security agreement was addressed in a separate article of the Model Law, while in the Secured Transactions Guide it had been addressed in paragraph (d) of recommendation 14 that dealt with the minimum content of the security agreement (a matter addressed in art. 6, para. 3, of the Model Law).

47. With respect to paragraph 61, it was agreed that a sentence should be added to clarify that: (a) article 10 did not imply that the secured creditor could only claim a right to proceeds where it could not enforce its security right in the original encumbered asset; and (b) the secured creditor could pursue both alternatives, except where assets were transferred to a person that acquired its rights in the assets free of the security right, which would be a very limited exception (mainly in the case of ordinary course-of-business transactions).

48. With respect to paragraphs 64, 66, 68-74, 81 and 82, a number of drafting suggestions were made. In that connection, the Working Group gave a mandate to the Secretariat to make any necessary drafting or other consequential change to the draft Guide to Enactment as a whole.

49. With respect to paragraph 83, it was agreed that it should be revised to clarify that, for the secured creditor to obtain a security right in both a tangible asset with respect to which intellectual property was used and the intellectual property, the security agreement would need to expressly provide for it (see Model Law, art. 60 and IP Supplement, rec. 243).

50. Subject to the above-mentioned changes (see paras. 42-49), the Working Group approved the substance of paragraphs 50 to 83 of document A/CN.9/WG.VI/WP.71/Add.1.

D. Chapter III. Third-party effectiveness of a security right (A/CN.9/WG.VI/WP.71/Add.1, paras. 84-101)

51. With respect to paragraph 85, it was agreed that it should be revised to refer to the coordination of registries, not only by linking those registries, but also by way of appropriate priority rules dealing with the priority of security rights notices of which were registered in one Registry over security rights notices of which were registered in another Registry.

52. With respect to paragraph 89, it was agreed that it should be revised to clarify that, if a security right in an asset was effective against third parties, the security right in its proceeds should be effective for 20 to 25 days after the proceeds arose (for other suggestions as to time periods, see paras. 53, 68, 76, 88, 90, 97 and 104 below).

53. With respect to paragraph 93, it was agreed that a security right that was effective against third parties should continue to be effective for 45 to 60 days after a change in the applicable law (for other suggestions as to time periods, see para. 52 above, as well as paras. 68, 76, 88, 90, 97 and 104 below).

54. With respect to paragraph 94, it was agreed that it should be revised to elaborate on the criteria to be used for determining what would be a reasonably high price for the exemption from registration of low-value consumer transactions to be meaningful.

55. With respect to paragraph 95, it was agreed that it should be deleted, because the Model Law did not deal with specialized registration or title notation, and dealing with such matters required an analysis of various scenarios and issues, which would be beyond the scope of the draft Guide to Enactment.

56. With respect to paragraphs 100 and 101, it was agreed that they should: (a) be set out in a separate section as they did not deal with certificated non-intermediated securities; (b) refer only to negotiable instruments and certificated non-intermediated securities; and (c) clarify that States parties to the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930) might wish to consider providing in their enactment of the Model Law for the creation/third-party effectiveness of a security right in negotiable instruments or certificated non-intermediated securities by an endorsement with the statement "value in security", "value in pledge" or any other similar statement and also for the comparative priority of that security right over security rights in those assets made effective against third parties by another method.

57. Subject to the above-mentioned changes (see paras. 51-56), the Working Group approved the substance of paragraphs 84 to 101 of document A/CN.9/WG.VI/WP.71/Add.1.

E. Chapter IV. The registry system (A/CN.9/WG.VI/WP.71/Add.2, paras. 1-5)

58. With respect to paragraph 4, it was agreed that the words "as an alternative to the submission of paper notices and search requests" should be deleted in order to avoid giving the impression that registries, in which notices could be submitted both electronically and in paper, were recommended. With respect to paragraph 5, it was agreed that it should be revised to refer to the fact that the secured transactions laws of some States provided for the registration of notices with respect to non-consensual security rights or preferential claims created by operation of law, rights of judgement creditors and ownership rights of consignors and lessors under commercial consignments of inventory and long-term operating leases of goods. Subject to those changes, the Working Group approved the substance of paragraphs 1 to 5 of document A/CN.9/WG.VI/WP.71/Add.2.

F. Model Registry Provisions

1. A/CN.9/WG.VI/WP.71/Add.2, paras. 6-55

59. With respect to paragraph 7, it was agreed that it should be revised to clarify that: (a) the Registry should not require evidence of authorization of the registration by the grantor since registration did not create the security right; and (b) the grantor's authorization could be given after registration. With respect to paragraphs 7-14, it was agreed that the discussion of the grantor's authorization for registration should be shortened.

60. With respect to paragraphs 15 and 16, it was agreed that examples should be given of situations in which one notice would be sufficient for multiple security rights.

61. With respect to paragraph 18, it was agreed that it should be revised to clarify that advanced registration had priority consequences, referring to the discussion of the relevant priority provisions of the Model Law, rather than discussing priority issues in detail. With respect to paragraph 19, it was agreed that it should be revised to clarify that, to protect the person identified in a registered notice as the grantor where a security agreement was never concluded or was concluded but covered a narrower range of assets than those described in the registered notice, article 20 of the Model Registry Provisions provided a procedure to enable the grantor to obtain the compulsory amendment or cancellation of the registered notice, as the case might be.

62. With respect to paragraph 21, it was agreed that it should be revised to: (a) refer to the "prescribed registry notice form" to avoid giving the impression that the forms would be prescribed by the Registry rather than the rules of law or regulations dealing with registration issues; (b) the discussion of the registrant's identification should be set out in a separate paragraph; and (c) include in the evidence of the registrant's identity its contact details. With respect to paragraph 23, it was agreed that it should be revised to encourage electronic payments without precluding businesses, in particular of the informal sector, from making use of other modes of payment, as long as controls were in place to avoid the risk of staff embezzlement.

63. With respect to paragraph 25, it was agreed that it should be revised to clarify that, where a registry system required the entry of an identity number, entries that did not provide the required number of digits would be rejected as incomplete under article 6, paragraph 1 (a), of the Model Registry Provisions.

64. With respect to paragraph 34, it was agreed that it should be revised to explain that the secured transactions laws of some States provided for a State-issued identity or other official number as the grantor's identifier (same point for legal entities discussed in para. 37 of document A/CN.9/WG.VI/WP.71/Add.1).

65. With respect to paragraph 42, it was agreed that it should be revised to clarify that: (a) an enacting State that would provide for the description of the encumbered assets by serial number would need to revise the priority rules of the Model Law to specify the priority consequences of a registrant's failure to enter the relevant serial number, as well as the registry design and the registry-related provisions to accommodate serial-number-based registration and searching; and (b) using the specific serial number as the description might be risky since any error might render the description insufficient whereas a more generic description (e.g. a description of the grantor's automobile by make and model) might reduce the risk of error.

66. With respect to paragraph 46, it was agreed that it should be revised to further clarify that, where the names and addresses of the grantor and the secured creditor or its representative were expressed in a language that used a different character set than that prescribed by the Registry, they would need to be adjusted or transliterated to conform to the prescribed character set.

67. With respect to paragraph 47, it was agreed that it should clarify that the meaning of the words "without delay" would depend on the particular circumstances and would mean little or no delay in the case of an electronic Registry, and as soon as practically feasible in the case of a Registry that permitted the submission of notices

in paper form. It was also agreed that no specific time limit should be set, as, if the Registry did not comply with it, it could be liable to damages.

68. With respect to paragraphs 50 to 52, it was agreed that they should be revised to clarify that: (a) in option A of article 14, paragraph 1, of the Model Registry Provisions reference should be made to 5 years (to accommodate typical transactions); (b) in options A and C of article 14, paragraph 2, of the Model Registry Provisions reference should be made to 4 to 6 months (to give enough time to the secured creditor to extend the period of effectiveness of a notice); and (c) in option C of article 14, paragraph 1, of the Model Registry Provisions reference should be made to 10 years (which would be enough for most transactions) (for other suggestions as to time periods, see paras. 52 and 53 above, as well as paras. 76, 88, 90, 97 and 104 below).

69. With respect to paragraphs 53 and 54, it was agreed that they should be revised to explain that placing on the secured creditor, rather than on the Registry, the obligation to send a copy of the registered notice to the grantor was the result of a cost-benefit analysis and was also due to the fact the registration did not create any right. With respect to paragraph 55, it was agreed that it should be revised to clarify that: (a) article 15, paragraph 4, of the Model Registry Provisions provided that the secured creditor's liability for failure to send a copy of the notice to the grantor was limited to actual loss or damage resulting from that failure; and (b) how actual loss or damage would be measured was left to the relevant law of the enacting State.

70. Subject to the above-mentioned changes (see paras. 59-69), the Working Group approved the substance of paragraphs 6 to 55 of document A/CN.9/WG.VI/WP.71/Add.2.

2. A/CN.9/WG.VI/WP.71/Add.3, paras. 1-81

71. With respect to paragraphs 1 and 2, it was agreed that they should be revised to clarify that: (a) if a new secured creditor (e.g. an assignee of the secured obligation), or a law firm or other service provider acting on behalf of the new secured creditor, had the secure access code of the person identified in a registered initial notice as the secured creditor, it could register an amendment or cancellation notice; and (b) a new secured creditor would have an interest in registering an amendment notice changing the secured creditor identifier so as to obtain a new access code, thereby ensuring that the person identified in the initial registered notice as the secured creditor would no longer be able to register an amendment or cancellation notice.

72. With respect to paragraph 7, it was agreed that it should be revised to clarify that the "secure access requirements" referred to were those referred to in article 5 of the Model Registry Provisions.

73. With respect to paragraphs 11-18, it was agreed that they should be revised to explain that, in the exceptional case where there was no actual secured creditor or the secured creditor was no longer contactable, the grantor could request the registration of an amendment or cancellation notice from the person identified in the registered notice as the secured creditor.

74. With respect to paragraph 34, it was agreed that it should be revised to clarify that the Model Law did not require the indication of a "currency date" in the search results, as the laws of some States did, because registration under the Model Law was only effective once it was publicly searchable and thus a reference to a "currency date" was not necessary.

75. With respect to paragraph 39, it was agreed that the last sentence should be revised to clarify: (a) the difference between paragraphs 1 and 2 of article 24 of the Model Registry Provisions; and (b) the relationship between the burden created for a searcher by an error made by the registrant in the notice with respect to the grantor's identifier and the seriously misleading test in paragraph 2 of article 24 of the Model Registry Provisions, with appropriate examples, if possible. With respect to paragraph 40, it was agreed that it should be revised to clarify that the person challenging the effectiveness of the registration would be a competing claimant in the context of a

priority conflict with the secured creditor that would have to be resolved by a court, not the Registry.

76. The Working Group considered the various time periods which the Model Law left to each enacting State and agreed that the following time periods should be suggested in the draft Guide to Enactment: (a) for article 15, paragraph 2, of the Model Registry Provisions: 14 days (see A/CN.9/WG.VI/WP.71/Add.2, para. 54); (b) for article 20, paragraph 6, of the Model Registry Provisions: 14 days (A/CN.9/WG.VI/WP.71/Add.3, para. 18); (c) for article 25, paragraph 2 (a): 60-90 days (A/CN.9/WG.VI/WP.71/Add.3, para. 45); (d) for option A of article 26, paragraph 2 (a), of the Model Registry Provisions: 60-90 days (A/CN.9/WG.VI/WP.71/Add.3, para. 49); and (e) for option B of article 26, paragraph 2 (a), of the Model Registry Provisions: 15-30 days (A/CN.9/WG.VI/WP.71/Add.3, para. 50). It was also agreed that the draft Guide to Enactment should explain the reasons for each suggested time period, as well as the reasons why an enacting State should choose one or the other option suggested in the Model Law and the Model Registry Provisions (for other suggested time period, see paras. 52, 53 and 68 above, as well as paras. 88, 90, 97 and 104 below).

77. With respect to paragraph 54, it was agreed that it should be revised to clarify that the duties of the registrar would be determined by the relevant supervising authority in a law, regulation or other act implementing the Model Registry Provisions.[8] With respect to paragraph 55, it was agreed that it should be revised to refer to authorities that typically supervise security rights registries in various States, such as a ministry responsible for secured transactions law, another authority in charge of registries or a central bank.

78. With respect to paragraph 63, it was agreed that it should be revised to clarify how option B of article 30 of the Model Registry Provisions could be enacted by States that adopted option C or D of article 21 of the Model Registry Provisions. With regard to paragraph 64, it was agreed that, together with article 30, paragraph 3, it provided sufficient clarity as to the time period during which the archives of the Registry should be preserved. It was also agreed that paragraph 64 should be revised to clarify that a searcher of the registry archives should follow the procedures for searching archives in the enacting State.

79. With respect to paragraph 66, it was agreed that it should be further aligned with the wording of footnote 31 of the Model Law (which did not use the word “only” and referred to direct entry, rather than transmission, of information). With respect to paragraph 68, it was agreed that it should be revised to explain the relationship between the options of article 21 and those of article 31 of the Model Registry Provisions.

80. With respect to paragraphs 69-73, it was agreed that they should be revised to clarify: (a) the policy underlying the limitation of liability of the Registry (including appropriate references to the Secured Transactions Guide and the Registry Guide); (b) the need for the enacting State to coordinate article 32 of the Model Registry Provisions with its law on liability; (c) the relationship between paragraphs 1 and 2 of article 32 of the Model Registry Provisions; (d) the fact that only the first part of article 32, paragraph 1 (b) was in square brackets; and (e) that the limit of the Registry’s liability should be a maximum monetary amount not related the maximum value of the encumbered assets.

81. With respect to paragraph 74, it was agreed that it should be revised to further clarify that the registry fees under option A of article 33 of the Model Registry Provisions related to all fees for registry services at a cost-recovery level thus avoiding any hidden fees.

82. Subject to the above-mentioned changes (see paras. 71 to 81), the Working Group approved the substance of paragraphs 1 to 81 of document A/CN.9/WG.VI/WP.71/Add.3.

[8] Ibid., para. 49.

G. Chapter V. Priority of a security right (A/CN.9/WG.VI/WP.71/Add.4, paras. 1-73)

83. With respect to paragraph 15, it was agreed that it should be revised to explain further article 33 and its relationship with article 11 with appropriate examples.

84. With respect to paragraphs 16-20, it was agreed that they should be revised to clarify that: (a) they referred to security rights created by a seller, lessor or licensor as opposed to a person who had acquired its rights from the seller, lessor or licensor; (b) the fact that a lessee or licensee acquired its rights free of a security right did not mean that it became an owner, but rather that it could enjoy its rights under the lease or licence agreement; and (c) the "shelter principle" in article 34, paragraphs 7 and 8, according to which subsequent buyers, lessees or licensees would also acquire their rights free of the security right.

85. With respect to paragraph 21, it was agreed that it should be revised to clarify that article 34, paragraph 9, provided that a buyer or lessee of consumer goods acquired its rights free of an acquisition security right if the security right was only effective against third parties by virtue of the operation of the automatic effectiveness rule in article 24, but that the buyer or lessee would take subject to the security right, if it was made effective against third parties in some other way before the buyer or lessee acquired its rights.

86. With respect to paragraph 22, it was agreed that, as the Model Law did not provide for specialized registration, the discussion of issues relating to specialized registries (in that paragraph, as well as in A/CN.9/WG.VI/WP.71/Add.1, para. 85 and A/CN.9/WG.VI/WP.71/Add.6, para. 10) should be moved to the part of the draft Guide to Enactment dealing with article 1, paragraph 3 (e), which addressed security rights in assets that would be subject to specialized registration.

87. With respect to paragraph 25, it was agreed that it should be revised to list typical examples of preferential claims in various legal systems (e.g. tax claims and employee claims), but without recommending their adoption. With respect to paragraph 26, it was agreed that it should be deleted as it was not directly related to article 36.

88. With respect to paragraph 29, it was agreed that it should be revised to clarify that, in article 37, paragraph 2 (a), reference should be made to 15 days (to provide the secured creditor with sufficient time to plan for the cut-off of the credit without excessively disadvantaging the judgment creditor) (for other suggested time periods, see paras. 52, 53, 68 and 76 above, as well as paras. 90, 97 and 104 below).

89. With respect to paragraph 31, it was agreed that it should be revised to clarify (perhaps in a separate paragraph) that: (a) the priority under article 38 could be obtained only if the acquisition secured creditor retained possession of the encumbered assets before delivery of the goods to the grantor; and (b) if the secured creditor gave up possession of the encumbered assets, it would need to register, and it could not obtain the benefit of the priority rule in article 38 by obtaining possession in the context of the enforcement of its security right.

90. With respect to paragraphs 33 and 36, it was agreed that they should be revised to clarify that, in article 38, paragraphs 1 (b) and 4 (b), reference should be made to 15-20 days (for the grantor to be able to obtain credit from another financier without an undue delay) (for other suggested time period, see paras. 52, 53, 68, 76 and 88 above, as well as paras. 97 and 104 below). With respect to paragraphs 34 and 35, it was agreed that they should be revised to: (a) refer to "different" rather than "additional" requirements for an acquisition security right in inventory and its intellectual property equivalent to have super-priority; and (b) explain those different requirements.

91. With respect to paragraph 39, it was agreed that it should be revised to: (a) explain the reasons why lessors and licensors were given the same protection (i.e. priority over general acquisition secured creditors) as suppliers of goods on credit; and (b) clarify that financial lessors were meant and not lessors in true leases.

92. With respect to paragraph 44, it was agreed that it should be revised to: (a) refer to the part of the draft Guide to Enactment where the term "inventory equivalent intellectual property" and similar terms were explained in (see A/CN.9/WP.71/Add.4, para. 32); and (b) delete the last sentence. With respect to paragraph 47, it was agreed that it should be deleted as the third-party effectiveness and priority of security rights (including acquisition security rights) in insolvency were already covered by article 35 (see A/CN.9/WP.71/Add.4, para. 23).

93. With respect to paragraphs 49 to 51, it was agreed that they should be revised to clarify that subordination did not necessarily require an agreement.

94. With respect to paragraph 53, it was agreed that it should be revised to explain that: (a) paragraph 1 of article 44 was subject to article 37; (b) if a State included in its enactment of the Model Law article 6, paragraph 3 (d) (and art. 8, subpara. (e) of the Model Registry Provisions), the secured creditor could enforce its security right only up to the maximum amount set in the security agreement (and the notice); and (c) paragraph 2 of article 44 provided that, whatever priority a security right had under the priority rules in chapter V, it covered both present and future assets described in a registered notice.

95. With respect to paragraph 59, it was agreed that it should be revised to reflect more accurately the rationale for the priority rules in article 47 in line with the discussion in the Secured Transactions Guide (see chap. V, paras. 157-163). With respect to paragraph 61, it was agreed that its last sentence should be revised to clarify that, under article 47, paragraph 5: (a) the rights of set-off of the deposit-taking institution had priority over a secured creditor that had made its security right effective against third parties by a control agreement or registration; and (b) whether the deposit-taking institution had a right of set-off was a matter for other law.

96. With respect to paragraph 64, it was agreed that it should be revised to further explain: (a) the rationale for the rule in article 48, paragraph 1 (i.e. the negotiability of money as explained in the Secured Transactions Guide; see chap. V, para. 164); (b) the notion of "knowledge" in article 48, paragraph 1, and in particular that mere registration of a security right did not necessarily mean that the person in possession of money had knowledge that its possession violated the rights of the secured creditor under the security agreement; and (c) that article 48, paragraph 2, referred to other laws that might provide protection to persons in possession of money beyond that afforded under article 48, paragraph 1.

97. Once again, the Working Group considered the various time periods which the Model Law left to each enacting State and agreed that, for the time period referred to in article 49, paragraph 2, 7 days should be suggested in the draft Guide to Enactment. It was also agreed that: (a) these were suggestions, rather than recommendations, that an enacting State could use for its consideration of what would be appropriate for its own circumstances; and (b) issues relating to the measurement of time (e.g. whether only work days would count) would be left to the relevant law of the enacting State (for other suggestions as to time periods, see paras. 52, 53, 68, 76, 88 and 90 above, as well as para. 104 below).

98. With respect to paragraph 67, it was agreed that it should be revised to clarify that, while the rights of a secured creditor as an owner or licensor under intellectual property law were preserved by article 50, the rights of a secured creditor as a secured creditor under intellectual property law were preserved by article 1, paragraph 3 (b).

99. With respect to paragraph 69, it was agreed that it should be revised to refer to rules in States that had a special regime with respect to security rights in non-intermediated securities, rather than to "customs and practices". With respect to paragraph 71, it was agreed that it should be revised to clarify that: (a) the two methods set out in article 51, paragraph 2, were alternatives for enacting States to choose the one that best fit its law on securities transfer; and (b) if the law of a State provided for both alternatives, both of them could be retained in that State's enactment of article 51, paragraph 2 (and other articles that included a reference to those two alternatives, such as art. 27).

100. With respect to paragraph 73, it was agreed that it should be revised to clarify that, unlike articles 46, paragraph 2, and 49, paragraph 3, article 51, paragraph 5, did not include a rule, but rather deferred to law relating to the transfer of securities because: (a) the requirements of that law for the protection of transferees could be very different from the requirements of the law relating to negotiable instruments and negotiable documents; and (b) national laws diverged widely and the protection of transferees of non-intermediated securities did not lend itself to uniformity at the international level. In addition, it was agreed that paragraph 73 should clarify that, if a State neither had nor was prepared to introduce a law relating to the transfer of securities, it might not need to implement article 51, paragraph 5.

101. Subject to the above-mentioned changes (see paras. 83-100), the Working Group approved the substance of paragraphs 1 to 73 of document A/CN.9/WP.71/Add.4.

H. Chapter VI. Rights and obligations of the parties and third-party obligors (A/CN.9/WG.VI/WP.71/Add.5, paras. 1-47)

102. With respect to paragraphs 1-5 and other paragraphs in chapter VI, it was agreed that they should be revised to clarify whether they were subject to party autonomy or not. With respect to paragraph 4, it was agreed that it should be revised to set out examples of steps that a secured creditor could take to preserve the value of tangible assets, such as precious metals, raw materials and certificated non-intermediated securities. With respect to paragraph 5, it was agreed that it should: (a) refer to other law without specifically identifying it; (b) emphasize that it dealt with the secured creditor's right to use encumbered assets in its possession; and (c) be placed in the commentary to article 55, which dealt with the secured creditor's right to use encumbered assets in its possession.

103. With respect to paragraph 6, it was agreed that it should be revised to clarify that: (a) the grantor was obliged to exercise its right to designate another person to whom the secured creditor should return the encumbered assets, in line with article 4, in good faith and in a commercially reasonable manner (e.g. by avoiding to place on the secured creditor an undue burden); (b) the secured creditor would have a choice as to whether to return the encumbered assets to the grantor or deliver them to a person designated by the grantor but would also be obliged to exercise that option in line with the same standard of conduct; and (c) the same standard of conduct should apply to the additional cost to be borne by the grantor if the grantor requested the secured creditor to deliver the encumbered assets to a person designated by the grantor. With respect to paragraph 7, it was agreed that it should be clarified and avoid references to any specifically identified law.

104. With respect to paragraph 10, it was agreed that it should be revised to explain: (a) the reasons why it did not apply to an outright transfer of receivables by agreement (e.g. the transferor would know what the receivable was and there would not be a secured obligation); (b) the last sentence should be formulated as a question, rather than as a suggestion; (c) leave other matters, such as the legal consequences of the secured creditor's failure to comply or to give accurate information, to other law (A/CN.9/871, para. 71); and (d) suggest 7-14 days for article 56, paragraph 1 and 1 year for article 56, paragraph 2 (for other suggestions as to time periods, see paras. 52, 53, 68, 76, 88, 90 and 97 above).

105. With respect to paragraph 11, it was agreed that its last sentence should be revised to clarify: (a) that article 57 was subject to party autonomy; (b) delete the wording that suggested that the reason for the grantor's representation that the debtor of the receivable would be able to pay was that it was beyond the grantor's control, rather than a balanced risk allocation between the parties; and (c) that, if given, such a representation could refer to the grantor's solvency at the time of the conclusion of the security agreement or at the time the receivable would become payable. With respect to paragraph 12, it was agreed that its last sentence should be revised to clarify that it covered a case where an anti-assignment clause would be included in the terms of the receivable (i.e., in the case of a contractual receivable, in the terms of the

agreement giving rise to the receivable or other agreement between the grantor and the debtor of the receivable).

106. With respect to paragraph 14, it was agreed that subparagraph (b) should be revised to refer to situations in which the parties might have agreed that no notification would be given. With respect to paragraph 15, it was agreed that it should be revised to refer to article 63 and to the commentary on article 63 (see A/CN.9/WG.VI/WP.71/Add.5, paras. 26-33), rather than article 64.

107. With respect to paragraph 16, it was agreed that it should be revised to refer to the fact that article 59 reiterated the right of the secured creditor in the proceeds of an encumbered asset, which was established in article 10. With respect to paragraph 17, it was agreed that it should refer to the secured creditor's right to retain the proceeds of any payment made to the secured creditor and to the payment of any proceeds paid to the grantor or to another person. With respect to paragraph 18, it was agreed that it should be revised to refer to the rule in article 79, paragraph 2, rather than to "normal practice in secured transactions relating to receivables".

108. With respect to paragraph 19, it was agreed that it should be revised to: (a) emphasize that the secured creditor would have the right to take the steps necessary to preserve the encumbered intellectual property "if so agreed with the grantor"; and (b) explain that the result of those steps to preserve the encumbered intellectual property would be the preservation of its value. With respect to paragraph 20, it was agreed that it should be revised to refer to the fact that article 53 did not apply to intangible assets (including intellectual property).

109. With respect to paragraph 21, it was agreed that it should be revised to clarify that the Model Law included in article 90 a rule on the location of a person that was based on article 5, subparagraph (h), of the Assignment Convention, but that rule applied only in the context of chapter VIII on conflict of laws. With respect to paragraph 22, it was agreed that it should be revised to explain the reasons why a payment instruction might change, for example, the person or the address of the debtor of the receivable, but not the currency of payment.

110. With respect to paragraph 30, it was agreed that it should be revised to: (a) explain that both security rights in, and outright transfers of, receivables were covered; and (b) avoid giving the impression that the discharge of the debtor of the receivable was conditional on that debtor making payment to the secured creditor with priority.

111. With respect to paragraph 37, it was agreed that it should be revised to clarify that: (a) the debtor of the receivable might agree not to raise "against the secured creditor" the defences and rights of set-off "that it could otherwise raise against a secured creditor under article 64"; and (b) the rule in paragraph 3 of article 65 was derived, in part, from the defences that might be raised even against a protected holder under article 30 of the United Nations Convention on International Bills of Exchange and International Promissory Notes (the "Bills and Notes Convention").

112. With respect to paragraph 39, it was agreed that its last sentence should be revised to clarify that rights of the grantor or the secured creditor for breach of an agreement between them could arise under other law or under the agreement.

113. With respect to paragraph 41, it was agreed that it should be revised to refer: (a) in its second sentence, to the law of the enacting State relating to negotiable instruments; and (b) in its third sentence, to the Bills and Notes Convention.

114. With respect to paragraph 43, it was agreed that it should be revised to refer to "other laws, such as sanction laws". With respect to paragraph 45, it was agreed that it should be revised to clarify that: (a) the fact that the deposit-taking institution might have a security right in a right to payment of funds credited to a bank account held with the deposit-taking institution would not affect its rights of set-off; and (b) rights of set-off might arise under other law or under an agreement between the deposit-taking institution and the grantor.

115. Subject to the above-mentioned changes (see paras. 102-114), the Working Group approved the substance of paragraphs 1 to 47 of document A/CN.9/WG.VI/WP.71/Add.5.

I. Chapter VII. Enforcement of a security right (A/CN.9/WG.VI/WP.71/Add.5, paras. 48-59)

116. With respect to paragraph 49, it was agreed that it should be revised to: (a) follow more closely the formulation of the definition of the term "default" (see art. 2, subpara. (j)); and (b) clarify that the only relevant example of situations in which rights under article 72 could be exercised before default was the collection of a receivable by the secured creditor before default with the agreement of the grantor (see art. 82, para. 2). With respect to paragraph 51, it was agreed that it should be revised to avoid any reference to outright transferors, while the point should be made in a separate paragraph that articles 72 to 82 did not apply to outright transfers of receivables by agreement.

117. With respect to paragraphs 52-56, the Working Group noted that, at its forty-ninth session in 2016, the Commission had decided to include in article 3, a new paragraph 3, dealing with alternative dispute resolution (ADR) and in the draft Guide to Enactment appropriate explanations that that new provision would not interfere with the way legal systems dealt with arbitrability, the protection of the rights of third parties or access to justice.[9] In addition, the Working Group noted that, while at its twenty-ninth session (New York, 8-12 February 2016) there was general agreement as to the value of ADR, it was agreed that, in view of the complexity of the matter and the need to coordinate with Working Group II (Dispute Settlement) and to discuss the matter on the basis of a detailed proposal, no reference to ADR should be made in article 67 (now art. 73) or other part of the draft Model Law (see A/CN.9/871, para. 85). Moreover, the Working Group noted that the matters addressed in paragraph 55 of document A/CN.9/WG.VI/WP.71/Add.5 had already been addressed in paragraph 45 of document A/CN.9/WG.VI/WP.71/Add.1, which the Working Group at its present session had agreed to revise (see para. 38 above).

118. Differing views were expressed with respect to whether paragraph 52 should refer to arbitration in particular. One view was that paragraph 52 should clarify that the words "other authority" in article 73 covered a court, arbitral tribunal, chamber of commerce or notary public. It was stated that the use of arbitration in particular in the context of enforcement was crucial for many businesses in States where enforcement proceedings were inefficient to be able to obtain credit. It was also observed that the first two sentences of paragraph 58 should be moved to paragraph 53. Another view was that, as a consensual method of dispute resolution, by definition arbitration could not bind third parties. In that connection, it was stated that the rights of the third parties with rights in the encumbered assets were bound to be affected by the enforcement of security right in those assets. The view was also expressed that proceedings before a court and a notary public were of a very different nature and should thus not be presented together as if they were similar.

119. The prevailing view was that paragraph 52 should not refer to an arbitral tribunal as if it were an authority with adjudicating powers to resolve disputes and bind parties other than the parties to the relevant arbitration agreement. It was stated that arbitration was a consensual dispute resolution mechanism and arbitral awards could not bind third parties. It was also observed that article 3, paragraph 3, was sufficient in stating, in the appropriate place in the Model Law (i.e. in article 3 that dealt with party autonomy), the principle that nothing in the Model Law affected any agreement of the parties to use alternative dispute resolution.

120. After discussion, it was agreed that paragraph 52 should be revised to: (a) avoid any reference to arbitral tribunals; (b) distinguish, as it was done in the commentary of the Secured Transactions Guide (see chap. VIII, paras. 29-33), between

[9] Ibid., para. 98.

enforcement by application to a court or other authority vested by the State with adjudicating powers and enforcement without an application to a court or other authority with such powers; (c) give examples of other entities in which some States have vested with adjudicating powers to resolve disputes and issue decisions binding on all parties; and (d) clarify that public notaries, bailiffs, sheriffs or other court enforcement officers might assist in enforcement by a court or other authority or not, but not resolve disputes or issue decisions binding on all parties.

121. With respect to paragraph 53, it was agreed that it should be revised to refer to enforcement without application to a court or other authority, rather than to enforcement "with minimal supervision by a court or other authority". With respect to paragraph 55, it was agreed that it should be deleted, as its substance was already covered in paragraph 45 of document A/CN.9/WG.VI/WP.71/Add.1, as revised at the present session (see para. 38 above). With respect to paragraph 56, it was agreed that it should be revised to explain the rationale for the reference to expeditious proceedings.

122. With respect to paragraph 57, it was agreed that it should be revised to refer to the considerations to be taken into account by enacting States in deciding which of the options offered in article 74 to choose. With respect to paragraph 58, it was agreed that it should be deleted in view of the decision of the Working Group to avoid any reference to arbitral tribunals in paragraph 52 (see para. 120 above). With respect to paragraph 59, it was agreed that it should be revised to elaborate on the types of expeditious proceedings envisaged in article 74.

123. Subject to the above-mentioned changes (see paras. 116-122), the Working Group approved the substance of paragraphs 48 to 59 of document A/CN.9/WG.VI/WP.71/Add.5.

V. Future work

124. At the close of its session, the Working Group noted that, at its forty-ninth session in 2016, the Commission, had placed a number of topics on its future work programme to be discussed 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.[10] In that connection, the Working Group noted with appreciation the work of the Secretariat in organizing the Fourth International Colloquium on Secured Transactions, which was scheduled to take place in Vienna from 15 to 17 March 2017. The Working Group also noted that the Commission's Fiftieth Anniversary Congress would take place in Vienna from 4 to 6 July 2017 (in the context of the Fiftieth Commission session, which was scheduled to take place in Vienna from 3 to 21 July 2017) and that the Congress would discuss issues for the long-term work programme of the Commission. Finally, the Working Group noted that its thirty-first session was scheduled to take place in New York from 13 to 17 February 2017.

[10] Ibid., para. 125.

B. Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

(A/CN.9/WG.VI/WP.71 and Add.1-6)

[Original: English]

Contents

I. Purpose of the Guide to Enactment

1. In preparing and adopting the UNCITRAL Model Law on Secured Transactions (the "Model Law"), the United Nations Commission on International Trade Law ("UNCITRAL" or the "Commission") was mindful of the fact that the Model Law would be a more effective tool for States modernizing and harmonizing their legislation, as well as organizations assisting States, if background and explanatory information were provided to executive and legislative branches of Government to assist in their consideration of the Model Law for enactment (the "Guide to Enactment").[1]

2. In addition, the Commission was aware that in the preparation of the Model Law it was assumed that the Model Law would be accompanied by such a Guide to Enactment. For example, it was decided in respect of a number of issues not to settle them in the Model Law but to address them in the Guide to Enactment so as to provide guidance to States enacting the Model Law (see, for example, A/CN.9/WG.VI/WP.71/Add.1, paras. 42 and 101). Thus, the Guide to Enactment also addresses or clarifies matters that were not settled in the Model Law but were referred to in the Guide to Enactment.[2]

3. Moreover, when it referred the task of the preparation of the Guide to Enactment to the Working Group, the Commission agreed that the Guide to Enactment should: (a) be as short as possible; (b) include cross references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide")[3] and the other texts of the Commission on secured transactions (see para. 6 below); (c) focus on giving guidance to legislators rather than users of the text; (d) explain the thrust of each provision of the Model Law and any difference with the corresponding recommendations of the Secured Transactions Guide or the provisions of another

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 215.
[2] Ibid.
[3] United Nations publication, Sales No. E.09.V.12.

UNCITRAL text on secured transactions; and (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.[4]

4. Mindful of the fact that the Secured Transactions Guide contains extensive commentary, the Commission decided that the Guide to Enactment should nevertheless be prepared. The reason was that the commentary of the Secured Transactions Guide had a different structure and did not contain a straightforward discussion of each recommendation but rather a discussion of the comparative advantages and disadvantages of various workable approaches with the recommendation being set out as a conclusion of that discussion. At the same time, to avoid repetition, the Commission agreed that the Guide to Enactment should not repeat, but should rather incorporate by reference, those comments contained in the Secured Transactions Guide that could assist in explaining a provision of the Model Law.

5. The Commission was also aware of the likelihood that the Model Law would be used in a number of States with limited familiarity with the type of secured transaction covered in the Model Law. So, the Guide to Enactment, much of which is drawn from the *travaux préparatoires* of the Model Law, is also intended to be helpful to other users of the text, such as judges, arbitrators, practitioners and academics.

6. In view of the above, the information presented in the Guide to Enactment is intended to briefly explain the thrust of each provision of the Model Law and its relationship with the corresponding recommendation(s) of the Secured Transactions Guide or other UNCITRAL texts on secured transactions, including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"),[5] the Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement"),[6] and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[7]

7. The Guide to Enactment was prepared by the Secretariat and is based on the considerations of the Working Group and the Commission. [It was considered and approved in principle by the Working Group at its [thirtieth] and [thirty-first] sessions (see […] respectively) and by the Commission at its [fiftieth] session (see […]).[8]]

II. Purpose and origin of the Model Law

A. Purpose of the Model Law

8. The Model Law is designed to assist States in implementing the recommendations of the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide with respect to security rights in movable assets. The overall objective of those texts and the Model Law is to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide, rec. 1 (a)). Like all those texts, the Model Law is intended to be useful to States that do not currently have efficient and effective secured transactions laws, as well as to States that already have workable laws but wish to modernize their laws and harmonize them with the laws of other States whose secured transactions laws are generally consistent with the recommendations of those texts (see Secured Transactions Guide, Introduction, para. 1).

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[4] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 216.

[5] General Assembly resolution 56/81, annex (United Nations publication, Sales No. E.04.V.14).

[6] United Nations publication, Sales No. E.11.V.6.

[7] United Nations publication, Sales No. E.14.V.6.

[8] Ibid., [*Seventy-second Session, Supplement No. 17* (A/72/17), para. […].]

9. Thus, the provisions of the Model Law are based on the recommendations of the Secured Transactions Guide, including the Intellectual Property Supplement. The Model Registry Provisions are also based on the Registry Guide. The provisions of the Model Law on security rights in receivables are substantially based on the recommendations of the Secured Transactions Guide, which in turn are based on the Assignment Convention.

B. Background

10. At its first session, in 1968, the Commission included the topic of security interests in goods in its future work programme.[9] From its third session, in 1970, to its thirteenth session, in 1980, the Commission discussed the topic[10] and, at its thirteenth session, in 1980, decided that no further work should be carried out and the subject should no longer be accorded priority as "the worldwide unification of the law of security interests in goods, for the reasons brought out in the discussions, was in all likelihood unattainable".[11]

C. Preparatory work and adoption

11. At its forty-third session, in 2010, the Commission had before it a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The Commission agreed that four issues related to secured transactions law listed in document A/CN.9/702, paragraph 2 (a)-(d), were interesting (non-intermediated securities, registration of security rights, a model law and a contractual guide on secured transactions) and should be retained on its future work agenda.[12] At the same time, in view of the limited resources available to it, the Commission agreed that it could not undertake work on all four issues at the same time and that, as a result, it should set priorities. In that regard, there was general agreement that priority should be given to work on registration of security rights in movable assets.

12. At that session, the Commission decided that Working Group VI should be entrusted with the preparation of a text on registration of security rights in movable assets as a matter of priority. It was also agreed that other topics, such as security rights in non-intermediated securities, a model law based on the recommendations of the Guide and a text dealing with the rights and obligations of the parties should be retained in the future programme of Working Group VI for further consideration by the Commission at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources.[13]

13. At its forty-fifth session, in 2012, the Commission decided that, upon its completion of the Registry Guide, Working Group VI should undertake work to prepare a simple, short and concise model law on secured transactions based on the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions.[14] At that session, the Commission noted that the Working Group, at its twenty-first session, had agreed to propose to the Commission that the Working Group should develop a model law on secured transactions based on the general recommendations of the Secured Transactions Guide and consistent with all the texts prepared by UNCITRAL on secured transactions. It was also noted that the Working Group had agreed to propose to the Commission that the topic of security

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[9] Ibid., *Twenty-third Session, Supplement No. 16* (A/72/16), paras. 40-48.
[10] For this project, see www.uncitral.org/uncitral/uncitral_texts/security_past.html.
[11] *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), para. 28.
[12] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 264.
[13] Ibid., para. 268.
[14] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 105.

rights in non-intermediated securities should be retained on its work agenda and be considered at a future session (A/CN.9/743, para. 76).[15]

14. Recalling that, at its forty-third session, in 2010, the Commission had agreed that the above-mentioned topics (see para. 11 above) should be retained on the programme of the Working Group for further consideration, the Commission considered the proposals of the Working Group. It was widely felt that a simple, short and concise model law on secured transactions could usefully complement the Secured Transactions Guide and would be extremely useful in addressing the needs of States and in promoting implementation of the Secured Transactions Guide. While a concern was expressed that a model law might limit the flexibility of States to address the local needs of their legal traditions, it was generally viewed that a model law could be drafted in a sufficiently flexible manner to adapt to various legal traditions. Moreover, there was support for the idea that a model law could greatly assist States in addressing urgent issues relating to access to credit and financial inclusion, in particular for small and medium-sized enterprises.[16]

15. As to the topic of security rights in non-intermediated securities, it was widely felt that the topic merited further consideration. The Commission noted that non-intermediated securities, in the sense of securities other than those credited to a securities account, that were used as security for credit in commercial finance transactions were excluded from the scope of the Secured Transactions Guide (see rec. 4, (c)-(e) of the Guide), the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Unidroit Securities Convention") and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2006; the "Hague Securities Convention").[17]

16. At its twenty-third session, in 2013, Working Group VI 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).[18] The Working Group developed the Model Law in six one-week sessions,[19] the final taking place in February 2016.

17. At its forty-seventh session, in 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.

18. At its forty-eighth session, in 2015, the Commission considered and approved the substance of article 26 of chapter IV of the Model Law and articles 1-29 of the draft Registry Act.[20] At that session, the Commission also agreed that a guide to enactment of the Model Law should be prepared and referred that task to the Working Group.[21]

19. In preparation for the forty-ninth session of the Commission, the text of the Model Law as approved by Working Group VI was circulated to all Governments and to interested international organizations for comment. At that session, the Commission had before it the reports of the Working Group on its twenty-eighth and twenty-ninth sessions (A/CN.9/865 and A/CN.9/871), the Model Law (A/CN.9/884

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[15] Ibid., para. 101.
[16] Ibid., paras. 102 and 103.
[17] Ibid., para. 104.
[18] See A/CN.9/767, paras. 63 and 64.
[19] The reports of the Working Group on its work during these six sessions are contained in documents A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871. During these sessions, the Working Group considered documents A/CN.9/WG.VI/WP.57 and Add.1 to 4, A/CN.9/WG.VI/WP.59 and Add.1, A/CN.9/WG.VI/WP.61 and Add.1 to 3, A/CN.9/WG.VI/WP.63 and Add.1 to 4, A/CN.9/WG.VI/WP.65 and Add.1 to 4, and A/CN.9/WG.VI/WP.68 and Add.1 and 2.
[20] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.
[21] Ibid., para. 216.

and Add.1-4), the Guide to Enactment prepared by the Secretariat (A/CN.9/885 and Add.1-4) and the comments received from Governments (A/CN.9/886 and A/CN.9/887). At that session, the Commission considered and adopted the Model Law.[22] The Commission noted that the Guide to Enactment was already at an advanced stage and was an extremely important text for the implementation and interpretation of the Model Law, and gave Working Group VI up to two sessions to complete its work and submit the Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session in 2017.[23]

20. After consideration of the Model Law, the Commission adopted the following decision:

The United Nations Commission on International Trade Law,

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

Recalling also General Assembly resolutions 56/81 of 12 December 2001, 63/121 of 11 December 2008, 65/23 of 6 December 2010 and 68/108 of 16 December 2013 in which the General Assembly recommended that States consider or continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001) and giving favourable consideration to the UNCITRAL Legislative Guide on Secured Transactions (2007), the Supplement on Security Rights in Intellectual Property and the UNCITRAL Guide on the Implementation of a Security Rights Registry, respectively,

Further recalling that, at its forty-sixth session in 2013, it entrusted Working Group VI (Security Interests) with the preparation of a model law on secured transactions based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions (2007) and consistent with all texts prepared by UNCITRAL on secured transactions,[24]

Noting that the Working Group devoted six sessions, from 2013 to 2016, to the preparation of the draft model law on secured transactions (the 'draft Model Law'),[25]

Further noting that, at its forty-eighth session, in 2015, the Commission approved the substance of the registry-related provisions of the draft Model Law,[26]

Further noting with satisfaction that the draft Model Law is based on the recommendations of the UNCITRAL Legislative Guide on Secured Transactions and consistent with all texts prepared by UNCITRAL on secured transactions, and with those texts thus provides comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

Recognizing that an efficient secured transactions regime with a publicly accessible security rights registry of the kind provided for in the draft Model Law is likely to increase access to affordable secured credit and thus promote economic growth, sustainable development, the rule of law and financial inclusion, as well as assist in combating poverty,

Recognizing also that the harmonization of national secured transactions regimes and registries on the basis of the draft Model Law is likely to increase the availability of secured credit across national borders and thus facilitate the

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[22] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 17-118.
[23] Ibid., paras. 121 and 122.
[24] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 194 and 332.
[25] For the reports of those sessions of the Working Group, see A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871.
[26] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214.

development of international trade, which, if achieved on the basis of equality and mutual benefit to all States, is an important element in promoting friendly relations among States,

Recognizing further that secured transactions law reform could not be effectively implemented without the establishment of an efficient, publicly accessible security rights registry where information about the potential existence of a security right in movable assets may be registered, and that States urgently need guidance with respect to the establishment and operation of such registries,

Expressing its appreciation to international intergovernmental and non-governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the draft Model Law,

Having considered the draft Model Law at its forty-ninth session, in 2016,

Drawing attention to the fact that the text of the draft Model Law was circulated for comment before the forty-ninth session of the Commission to all Governments invited to attend sessions of the Commission and the Working Group as members and observers and that the comments received were before the Commission at its forty-ninth session,[27]

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

1. *Adopts* the UNCITRAL Model Law on Secured Transactions, consisting of the text contained in documents A/CN.9/884 and addenda 1-4, with amendments adopted by the Commission at its forty-ninth session, and authorizes the Secretariat to edit and finalize the text of the UNCITRAL Model Law on Secured Transactions pursuant to the deliberations of the Commission at that session;

2. *Requests* the Secretary-General to publish the UNCITRAL Model Law on Secured Transactions, including electronically and in the six official languages of the United Nations, and to disseminate it broadly to Governments and other interested bodies;

3. *Recommends* that all States give favourable consideration to the UNCITRAL Model Law on Secured Transactions when revising or adopting legislation relevant to secured transactions, and invites States that have used the Model Law to advise the Commission accordingly;

4. *Also recommends* that, where necessary, States continue giving favourable consideration to the UNCITRAL Guide on the Implementation of a Security Rights Registry when revising relevant legislation, administrative regulations or guidelines, and to the UNCITRAL Legislative Guide on Secured Transactions and the Supplement on Security Rights in Intellectual Property when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

5. *Also recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade, the principles of which are also reflected in the UNCITRAL Model Law on Secured Transactions, and the optional annex of which refers to the registration of notices with regard to assignments.[28]

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[27] A/CN.9/886, A/CN.9/887 and A/CN.9/887/Add.1.

[28] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 119.

III. The Model Law as a tool for modernizing and harmonizing laws

21. The Model Law is in the form of a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. However, States are strongly encouraged to inform the UNCITRAL secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL). This information may be made available on the UNCITRAL website to send the message that the enacting State has adopted an international standard and, in any case, assist other States in their consideration of the Model Law.

22. In incorporating the text of model legislation into its legal system, a State may wish to consider modifying or leaving out some of its non-fundamental provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "declarations") is much more restricted; trade law conventions in particular usually either totally prohibit declarations or allow only very few, specific ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected, in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of harmonization achieved through model legislation is likely to be lower than that achieved by a convention.

23. However, this relative disadvantage of model legislation may be balanced by the fact that the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of modernization, harmonization and certainty, it is recommended that States make as few changes as possible in incorporating the new Model Law into their legal systems and that they take due regard of its basic principles, including the unitary, functional and comprehensive approach to secured transactions, notice registration, party autonomy and the international origin of the Model Law. In general, in enacting the Model Law, it is advisable to adhere as much as possible to the uniform text in order to make the national law as efficient as possible for all users and as transparent and familiar as possible for foreign users. This does not deprive enacting States of the necessary flexibility as the Model Law provides options and leaves a number of matters to enacting States (see, for example, arts. 1, para. 3 (e), 2, subparas. (hh) (ii), 6, para. 3, 19, para. 2 (a), 23, para. 1 (b), and 27, subpara. (a)). In particular with respect to terminology, on a number of occasions, the Model Law draws the attention of the enacting State to the need to ensure that the terminology used in its enactment of the Model Law is meaningful in the context of local law (see, for example, A/CN.9/WG.VI/WP.71/Add.1, paras. 15 and 38).

24. While it is recommended that the Model Law should be implemented in one law, depending on its legal tradition and drafting conventions, the enacting State may implement the Model Registry Provisions in its secured transactions law, in a separate statute or other type of legal instrument, such as rules, regulations, orders, by-laws, proclamations or the like adopted by a legislative or executive body, or some of these Provisions in its secured transactions law and the rest in a separate statute or other type of legal instrument. Similarly, the conflict-of-laws provisions may be incorporated in the secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

25. The enacting State may wish to consider producing an explanatory guide to their version of the Model Law, in a form that its legal practitioners and courts can officially use to interpret the law. Such a guide could flesh out the intent behind particular provisions, and in some cases provide examples. Even more importantly, the guide could explain the unspoken concepts that underlie the Model Law, such as the effect of the functional ("substance over form") approach to the characterization of security rights, and the fact that the Model Law treats the grantor of a security right

as if it were the owner of the encumbered asset, even if it is not the owner for the purposes of the enacting State's other laws (e.g. where the grantor is the lessee under a finance lease, a buyer of goods on a retention-of-title basis or the transferor of a receivable). As the Secured Transactions Guide discusses all these and other relevant issues, the enacting State's guide could refer to the Secured Transactions Guide to allow its courts to look behind their secured transactions law to the international source from which it was derived. Alternatively, a formal statement may be adopted by the enacting State's legislature that the objective of their secured transactions law was to produce the same outcomes as the Model Law (see para. 30 below).

IV. Main features of the Model Law

A. Relationship of the Model Law with the secured transactions texts of UNCITRAL

26. The Secured Transactions Guide, including the Intellectual Property Supplement, and the Registry Guide contain detailed commentary and recommendations on all issues to be addressed in a modern law on secured transactions. However, they are long texts and States will need assistance in implementing their recommendations. Thus, the Model Law was prepared to complement those texts and to assist States in implementing their recommendations.

27. The Model Law reflects the policies embodied in the recommendations of those texts. The difference in the formulation between a provision of the Model Law and the relevant recommendation is generally due to the legislative nature of the Model Law and is briefly explained in the remarks to the relevant provision of the Model Law below.

28. For reasons explained below, the Model Law also addresses matters that were not addressed in a recommendation or even discussed in the Secured Transactions Guide, including the Intellectual Property Supplement, or in the Registry Guide (e.g. security rights in non-intermediated securities and the effectiveness of the registration of an amendment or cancellation notice that has not been authorized by the secured creditor). At the same time, the Model Law does not address certain matters that were addressed in the Secured Transactions Guide (e.g. security rights in the right to receive the proceeds under an independent undertaking and security rights in attachments).

B. Key objectives and fundamental policies of the Model Law

29. The overall objective of the Model Law is the same as that of the Secured Transactions Guide, that is, to promote low-cost credit by enhancing the availability of secured credit (see Secured Transactions Guide rec. 1 and Introduction, paras. 43-59). The fundamental policies of the Model Law are the same as those of the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 60-72). In enacting the Model Law, States may wish to consider issues of harmonization with existing law, legislative method, drafting technique and post-enactment acculturation (see Secured Transactions Guide, Introduction, paras. 73-89).

30. Depending on its drafting method and technique, the enacting State may wish to consider including the key objectives of the Model Law in a preamble or other statement of objectives of the law. That statement could be used for the purpose of the interpretation of, and the filling of gaps in, the Model Law (see A/CN.9/WG.VI/WP.71/Add.1, para. 49).

V. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

31. In the context of its training and assistance activities, the UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (e.g. the UNCITRAL Model Law on Cross-Border Insolvency),[29] or considering adhesion to one of the international trade law conventions prepared by UNCITRAL (e.g. the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[30] and the Assignment Convention).

32. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the UNCITRAL secretariat at the address below:

International Trade Law Division, Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 or 4061
Telecopy: (+43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: www.uncitral.org

B. Information on the interpretation of legislation based on the Model Law

33. The UNCITRAL secretariat welcomes comments concerning the Model Law and the Guide to Enactment, as well as information concerning enactment of legislation based on the Model Law. Once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The UNCITRAL secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and arbitral awards. In addition, upon individual request and subject to any copyright and confidentiality restrictions, the UNCITRAL secretariat makes available to the public all decisions and arbitral awards on the basis of which the abstracts were prepared. The system is explained in a user's guide that is available from the UNCITRAL secretariat in hard copy (A/CN.9/SER.C/GUIDE/1/Rev.2) and on the above-mentioned Internet home page of UNCITRAL.

[29] United Nations publication, Sales No. V.13-86394.
[30] United Nations publication, Sales No. V.96-87187.

(A/CN.9/WG.VI/WP.71/Add.1) (Original: English)

Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

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Paragraphs

VI. Article-by-article remarks

Chapter I. Scope of application and general provisions

Article 1. Scope of application

1. Article 1 is based on recommendations 1-7 of the Secured Transactions Guide (see chap. I, paras. 1-4). It is intended to set out the various types of transaction and asset covered by the Model Law (see art. 1, paras. 1-4), as well as to clarify the relationship between the Model Law and other law (see art. 1, paras. 5 and 6). Generally, the Model Law has the same comprehensive scope of application as the Secured Transactions Guide and applies to any property right in any type of movable asset, such as equipment, inventory and receivables, provided that the property right is created by an agreement and secures payment or other performance of an obligation (see art. 1, para. 1, and the definition of the term "security right" in art. 2, subpara. (kk)). However, there are a few differences between the scope of the Model Law and the scope of the Secured Transactions Guide.

2. Like the Secured Transactions Guide (see rec. 3) and the Assignment Convention (see art. 1, para. 1, and art. 2, subpara. (a)), the Model Law also applies to outright transfers of receivables by agreement (see art. 1, para. 2). The main reasons for this approach are that: (a) outright transfers of receivables often take place in the context of financing transactions; and (b) it is often difficult to determine at the outset of a transaction whether an assignment will be held to be an outright or a security assignment (see Secured Transactions Guide, chap. I, paras. 25-31). The enacting State, however, may wish to consider excluding from the scope of the Model Law certain types of outright transfers of receivables that are clearly not financing transactions (e.g. outright transfers of receivables for collection purposes only or as part of a sale of the business out of which they arose; see para. 7 below).

3. In addition, unlike the Secured Transactions Guide which covered security rights in the right to receive payment under an independent undertaking (see rec. 2 (a)), the Model Law excludes from its scope security rights in both the right to receive and the right to request payment under an independent guarantee or letter of credit, whether commercial or standby (see art. 1, para. 3 (a)). The reason is that there are various specialized financing practices in those areas and dealing with them in the Model Law would be unduly complex. States interested in addressing those practices in their general secured transactions law can always implement the relevant recommendations of the Secured Transactions Guide (recs. 27, 50, 107, 127, 176 and 212).

4. Moreover, like the Secured Transactions Guide (see rec. 4 (b)), to the extent that its provisions are inconsistent with law relating to intellectual property, the Model Law defers to law relating to intellectual property (see art. 1, para. 3 (b)). However, this limitation may not be necessary if the enacting State has already coordinated or otherwise addressed the relationship between the Model Law and its law relating to intellectual property.

5. Also, unlike the Secured Transactions Guide (see rec. 4 (c)), the Model Law does not exclude from its scope security rights in non-intermediated securities (see art. 1, para. 3 (c)). The reasons for this approach are that: (a) such securities often are part of commercial finance transactions (in which, for example, it is common for the

lender's security to include in the assets to be encumbered shares of the borrower's wholly-owned subsidiaries or the shares of the borrower itself); (b) there are wide divergences among national regimes in this regard; and (c) such securities are not addressed in any other uniform law text. To the contrary, security rights in intermediated securities are excluded as such securities are typically part of financial market transactions and are addressed in other uniform law texts (see Secured Transactions Guide, chap. 1, paras. 37 and 38).[1]

6. Finally, the Model Law excludes payment rights under or from financial contracts governed by netting agreements (see art. 1, para. 3 (d)), including foreign exchange transactions, because they raise complex issues that require special rules (see Secured Transactions Guide, chap. I, para. 39).

7. Combining the policy of recommendations 4 (a) and 7 of the Secured Transactions Guide, the Model Law permits the enacting State to exclude further types of asset (or transaction), provided that other law governs the matters that are addressed in the Model Law (see art. 1, para. 3 (e)). The reason for this approach is to avoid inadvertently creating gaps (where other law does not govern an issue addressed in the Model Law) or overlaps (where other law governs an issue addressed in the Model Law). In addition, the Model Law provides guidance to States as to possible exclusions, referring to types of asset that are subject to specialized secured transactions and asset-based registration regimes, such as ships and aircraft.

8. Similarly, with respect to the application of the Model Law to proceeds, while the relevant provision of the Model Law (see art. 1, para. 4), is formulated somewhat differently from recommendation 6 of the Secured Transactions Guide, there is no policy difference between the two rules. The policy may be explained as follows. In the case of a security right in an asset covered by the Model Law (e.g. receivables), the security right extends to its identifiable proceeds (see art. 10, para. 1); this rule applies even if the proceeds are of a type of asset that is outside the scope of the Model Law (e.g. intermediated securities), except to the extent that other law applies and governs the matters addressed in the Model Law.

9. With respect to the relationship with consumer-protection law, the Model Law is intended to preserve the application of consumer-protection law that protects a grantor or a debtor of an encumbered receivable (see art. 1, para. 5, of the Model Law, rec. 2 (b), of the Secured Transactions Guide and art. 4, para. 4, of the Assignment Convention). For example, under consumer-protection law, it may not be possible to create a security right in all present and future assets, employment benefits, at least up to a certain amount, or necessary household items of a consumer. Enacting States that do not have a developed consumer-protection law may need to consider whether enactment of the Model Law should be accompanied by the enactment of such special protections for consumers. It should also be noted that the Model Law already includes certain consumer-specific rules. For example, under article 24, an acquisition security right in consumer goods is effective against third parties upon its creation (see para. 94 below).

10. Following the approach of the Secured Transactions Guide (see rec. 18), the Model Law, is intended to preserve limitations on the creation or the enforceability of a security right in certain types of asset (e.g. employment benefits) that are based on any other statutory or case law (see art. 1, para. 6). At the same time, it is intended to ensure that such limitations based on the sole ground that an asset is a future asset, or a part of an asset or an undivided interest in an asset are overridden (see art. 8, subparas. (a) and (b)). However, paragraph 6 does not apply to contractual limitations (also known as negative pledge agreements). The Model Law overrides explicitly contractual limitations on the creation of a security right in receivables (see art. 13) or rights to payment of funds credited to a bank account (see art. 15).

11. With respect to other types of asset, contractual limitations on the creation of a security right are overridden implicitly to the extent that the Model Law allows the owner of an asset to create a security right in that asset, even if the security or other

[1] Such as the Unidroit Securities Convention and the Hague Securities Convention.

agreement expressly restricts that right. That is because the Model Law states that a grantor may encumber an asset if it has rights in the asset (art. 6, para. 1; see para. 52 below), and a person who has rights in an asset does not cease to have those rights merely because it agreed contractually not to dispose of the asset. It should be noted that the position of third-party obligors, such as the debtor of a receivable or a deposit-taking institution is protected by other provisions of the Model Law (see arts. 61-71).

12. Finally, unlike the Secured Transactions Guide, the Model Law does not apply to attachments to movable or immovable property. Thus, the Model Law does not include a provision along the lines of recommendation 5, which provides that, while the law recommended in the Secured Transactions Guide does not apply to immovable property, it does apply to attachments to immovable property. Enacting States are encouraged to consider including in their enactments of the Model Law provisions based on the relevant recommendations of the Secured Transactions Guide (see recs. 21, 25, 43, 48, 87, 88, 164, 165, 184, 195 and 196).

Article 2. Definitions and rules of interpretation

13. Article 2 contains definitions and rules of interpretation with respect to most key terms used in the Model Law. Other terms are defined or explained in various articles of the Model Law. For example, the term "judgment creditor" is defined in article 37, paragraph 1, of the Model Law.[2] Article 2 is based on the terminology and rules of interpretation of the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 15-20). Rules of interpretation include 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).

Acquisition security right

14. An acquisition security right is a security right in a tangible asset that secures the grantor's obligation with respect to credit provided to enable the grantor to acquire that tangible asset (other than reified intangible assets; see art. 2, subparas. (b) and (ll)), intellectual property and the rights of a licensee in intellectual property. This definition, in conjunction with the definition of "security right", results in retention-of-title transactions, conditional sales and financial leases being treated in the Model Law as "acquisition security rights". For a security right to be an acquisition security right, the credit it secures has to be used for that purpose. 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.

Bank account

15. To underline the distinction between a "bank account" and a "securities account", the Model Law defines: (a) the former term as "an account maintained by an authorized deposit-taking institution to which funds may be credited or debited"; (b) the latter term as "an account maintained by an intermediary to which securities may be credited or debited"; and (c) the term "securities" in a manner that clearly excludes funds (see art. 2, subparas. (c), (hh) and (ii) respectively). The term "bank account", therefore, includes any current or checking and savings account. The term does not include a right against the bank to payment evidenced by a negotiable instrument. The enacting State may wish to consider replacing the term "authorized deposit-taking institution" with the corresponding term from its own financial regulatory framework.

[2] Based on the assumption that the Model Registry Provisions may be enacted in a separate statute or other type of legal instrument, the term "registry" is defined both in article 2, subparagraph (ee) of the Model Law and article 1, subparagraph (k), of the Model Registry Provisions. If they are enacted as part of the Model Law, the latter provision will not be necessary.

Certificated non-intermediated securities

16. The term "represented" used in the definition of the term "certificated non-intermediated securities" (see art. 2, subpara. (d)) is intended to be broad enough to cover the approaches taken in different jurisdictions (e.g. "covered" or "embodied"). The term "certificate" means only a tangible document subject to physical possession. Thus, securities represented by an electronic certificate are considered to be uncertificated securities under the Model Law.

Competing claimant

17. A competing claimant may have a security right in the same encumbered asset as an original encumbered asset or as proceeds (see art. 2, subpara. (e)). Other creditors of the grantor with a right in the same encumbered asset include judgment creditors.

Consumer goods

18. Unlike the definition of the term "consumer goods" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law (see art. 2, subpara. (f)) includes the word "primarily" to ensure that: (a) goods primarily used or intended to be used for personal family or household purposes and only incidentally for business purposes would be treated as consumer goods; and (b) goods primarily used or intended to be used for business purposes and only incidentally for personal, family or household purposes would not be treated as consumer goods.

Control agreement

19. A control agreement can achieve three purposes: (a) render a security right effective against third parties (see arts. 25 and 27); (b) ensure the cooperation of the deposit-taking institution or the issuer of securities in the enforcement of a security right; and (c) establish the priority of the secured creditor that has control. Unlike the definition of this term in the Secured Transactions Guide, on which it is based, the definition of the term in the Model Law does not refer to a "signed writing" (see art. 2, subpara. (g)). This difference does not reflect a policy change but rather a decision that this matter should be left to the authorization requirements of the enacting State. In any case, a control agreement does not need to be in a single writing. It should also be noted that, on the assumption that other law would address this matter, the Model Law does not include a provision implementing the recommendations of the Secured Transactions Guide with respect to electronic communications (see Secured Transactions Guide, recs. 11 and 12).

Equipment

20. Unlike the definition of the term "equipment" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law includes the word "primarily" to ensure that: (a) goods used or intended to be used by a person primarily in the operation of its business and only incidentally for other purposes would be treated as equipment; and (b) goods used or intended to be used by a person primarily for other purposes and only incidentally in the operation of its business would not be treated as equipment (see art. 2, subpara. (l)). This definition also includes the words "other than inventory or consumer goods" as, depending on their use or intended use, the same tangible assets may be "equipment", "consumer goods" or "inventory" (see art. 2, subparas. (f), (l) and (q)).

Grantor

21. This definition makes clear that a grantor of a security right may be the debtor of the secured obligation or another person (e.g. the parent company of the debtor-subsidiary). A lessee or licensee of an asset may be regarded as a grantor if: (a) it creates a security right in whatever right it has in that asset (see subpara. (i)); or

(b) the effect of the lease or licence is to transfer the encumbered asset to the lessee or licensee (see subpara. (ii)).

Insolvency representative

22. As the term "insolvency representative" is only used in the definition of the term "competing claimant" it is not defined in the Model Law. It is defined though in the Secured Transactions Guide (see Introduction, para. 20) and the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"; see Introduction, para. 12 (v)) in a sufficiently broad manner to include the person responsible for administering or supervising insolvency proceedings (see the Insolvency Guide, part two, chap. III, paras. 11-18 and 35). The Secured Transactions Guide and the Insolvency Guide contain definitions of other insolvency-related terms, such as the term "insolvency proceedings" (which is referred to in arts. 2, subpara. (e) (iii), 35 and 94), and the term "insolvency estate".

Intangible asset

23. The term "intangible asset" includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account and uncertificated non-intermediated securities, as well as any asset that is not a tangible asset (see art. 2, subpara. (p)).

Inventory

24. The term "work in process" includes "semi-processed materials". In States in which a licence of tangible assets is possible, the term "lease of tangible assets" in this definition includes the licence of tangible assets (see art. 2, subpara. (q)).

Mass and product

25. The Model Law distinguishes between a "mass" and a "product". A "mass" is the combination that arises when two or more tangible assets of the same type are commingled in such a way that they lose their separate identity. This could happen, for example, when a shipload of oil is pumped into a storage tanker that already contains some oil from another source, or when a truckload of one farmer's wheat is tipped into a grain silo that already contains wheat from another farmer. In contrast, a "product" arises when one or more tangible assets are transformed into something different, through a production or manufacturing process; for example, when gold is used to make a ring, or when flour is used to make bread. The distinction is relevant to articles 11 and 33 (see paras. 67-70 below and commentary on art. 33 in A/CN.9/WG.VI/WP.71/Add.4).

Money

26. 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 (i.e. banknotes and coins, as well as virtual currency, such as bitcoin) of the enacting State but also the currency of another State (see art. 2, subpara. (t)). No reference is made to currency "currently" authorized as a legal tender, because if currency is not "currently" authorized as a legal tender, it would not qualify as a legal tender. Rights to payment of funds credited to a bank account and negotiable instruments are distinct concepts in the Model Law. They are not included in the term "money".

Movable asset

27. The enacting State may wish to ensure that this definition captures anything that its laws consider to be an asset other than immovable property (see art. 2, subpara. (u)). It may also wish to consider replacing the term "immovable property" with a term that has more meaning in the relevant jurisdiction (e.g. "land").

Non-intermediated securities

28. The term "non-intermediated securities" refers to securities (i.e. shares and bonds) that are not held in a securities account (see art. 2, subpara. (w)). The term does not include the rights of an intermediary or a competing claimant in securities held by the intermediary directly against the issuer where equivalent securities are credited by the intermediary to a securities account in the name of the grantor. This definition is structured around the definition of the term "intermediated securities" in the Unidroit Securities Convention (see art. 1(b)). It refers only to "rights", in contrast to the language used in the Unidroit Securities Convention which refers to "rights or interests", for reasons of consistency with the terminology of the Model Law in which rights is a broad term that covers any right or interest.

Notification of a security right in a receivable

29. The definition of the term "notification of a security right in a receivable" is based on the definition of the term "notification of the assignment" in article 5, subparagraph (d) of the Assignment Convention and recommendation 118 of the Secured Transactions Guide (see art. 2, subpara. (y)). The requirement for the identification of the encumbered receivable and the secured creditor was moved to article 62, 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 that article.

Possession

30. The definition of the term "possession" is based on the definition in the Secured Transactions Guide. The words "directly or indirectly" that were included in recommendation 28 of the Secured Transactions Guide were not included in this definition or article 16 (which is based on rec. 28), because the definition is sufficiently broad to cover situations in which the issuer of a negotiable document holds it through various persons responsible to perform parts of a multimodal transport contract.

Priority

31. The definition of the term "priority" is based on the definition in article 5, subparagraph (g), of the Assignment Convention (see art. 2, subpara. (aa)). The difference in its formulation from the formulation of the definition of the term in the Secured Transactions Guide is due to the need to clarify that the person with priority may be a person with a security right or another competing claimant.

Proceeds

32. The term "proceeds" in the Model Law has the same meaning as in the Secured Transactions Guide (see art. 2, subpara. (bb)). It is important to note that it covers: (a) proceeds of the sale or other disposition, lease or licence of an encumbered asset (broadly understood); (b) proceeds of proceeds; and (c) natural or civil fruits. The terms revenues, dividends and distributions, which were included in the definition of this term in the Secured Transactions Guide, have been deleted on the understanding that they are covered by the term "civil fruits".

33. The term is not limited to proceeds received by the grantor but includes proceeds received by a transferee of an encumbered asset (i.e. where A creates a security right in its assets in favour of X and then transfers the assets to B who then creates a security right in them in favour of Y and then transfers the assets to C). The reason for this approach is that, if such a limitation were imposed, a transferee of an encumbered asset that acquired the asset subject to the security right could sell the asset further and keep the proceeds free of the security right. This result would limit the extent to which the first grantor's secured creditor would be actually secured, in particular if the value of the encumbered asset diminished or the proceeds disappeared or were difficult to trace. This does not mean that a transferee would be unprotected in any event (i.e. in the sense that C would search the registry under the name of B and would not be able to find the security right created by A). For example, a buyer or other

transferee may acquire its rights free of a security right (see art. 34, para. 2) and a security right in certain types of proceeds may not be automatically effective against third parties (see. art. 19, para. 2).

34. However, it should be noted that, as a result of the approach of the Model Law, in certain circumstances, third-party transferees would have no way of finding out that the assets were proceeds of another asset in which somebody else had a security right. This would be the case at least where the proceeds would be cash proceeds and a security right in such proceeds would be effective against third parties without the registration of an amendment notice (see art. 19, para. 1, of the Model Law and art. 26, option C, of the Model Registry Provisions). Thus, the enacting State may wish to consider limiting the term "proceeds" to proceeds received by the grantor or consider other ways to avoid a prejudice to third-party financiers (e.g. requiring the registration of an amendment notice in the case of a transfer of an encumbered asset; see art. 26, option A or B, of the Model Registry Provisions or protecting good faith transferees).

35. The term "proceeds" covers situations where funds in a bank account are moved to another bank account, even at the instigation of the deposit-taking institution, and thus art. 10, para. 2, applies to such a situation, as the funds in the second bank account are "proceeds".

Receivable

36. Like the Secured Transactions Guide, the Model Law defines the term "receivable" in a broad way to cover even non-contractual receivables, such as tort receivables (see art. 2, subpara. (dd)). However, the term "receivable" does not include rights to payment evidenced by a negotiable instrument, rights to payment of funds credited to a bank account and rights to payment under a non-intermediated security, as they are treated as distinct types of asset that are subject to different asset-specific rules.

Secured obligation

37. The term "secured obligation" includes any obligation secured by a security right, including obligations arising from credit extended to finance the operation of a business or the purchase of goods (see art. 2, subpara. (gg)). It covers both monetary and non-monetary obligations; obligations already incurred at the time of the extension of the credit, as well as obligations incurred thereafter, if the security agreement so provides. As there is no secured obligation in an outright transfer of a receivable, the provisions that refer to a "secured obligation" do not apply to an outright transfer of a receivable. As in other UNCITRAL texts, in the Model Law also the singular includes the plural and vice versa (see para. 13 above). So, for example, a reference to the secured obligation would be sufficient to cover more than one obligation, including all present and future secured obligations.

Securities

38. The definition of the term "securities" in the Model Law is narrower than the definition of the term in article 1, subparagraph (a), of the Unidroit Securities Convention (see art. 2, subpara. (hh)). The reason is that, while a broad definition is appropriate for the purposes of that Convention, it is overly broad for the purposes of the Model Law and could result in subjecting security rights in receivables, negotiable instruments, money and other generic intangible assets to the special rules applicable to security rights in non-intermediated securities. In any case, the enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of the term in its securities transfer law.

Securities account

39. The definition of the term "securities account" in the Model Law is derived from article 1, subparagraph (c), of the Unidroit Securities Convention (see art. 2, subpara. (ii)).

Tangible asset

40. The term "tangible asset" in the Model Law includes consumer goods, equipment and inventory (see art. 2, subpara. (ll)). These terms do not refer to particular types of tangible asset but rather to the way in which particular tangible assets are used by the grantor (see art. 2, subparas. (f), (l) and (q)). Thus, the same cars could qualify: (a) as "consumer goods", if they are primarily used or intended to be used by the grantor for personal, family or household purposes; (b) as "equipment", if they are primarily used or intended to be used by the grantor in the operation of its business; or (c) as "inventory", if the grantor is a car dealer or manufacturer. The term also includes the reified intangible assets listed in the definition except for the purposes of certain articles that contain rules that are not appropriate for reified intangible assets. For example, the term "tangible asset' in the definition of the term "mass" (see in art. 2, subpara. (s)) does not include negotiable instruments or negotiable documents. The reason for this approach is that this does not raise an issue with respect to negotiable documents and having, for example, two separate sets of bearer bonds merged into one fungible pile is an exceptional situation that did not need to be addressed.

Writing

41. The definition of the term "writing" is intended to ensure that where the term is referred to in the Model Law (e.g. art. 6, para. 3), this reference will include electronic communication (see art. 2, subpara. (nn)). The definition is based on recommendation 11 of the Secured Transactions Guide, which in turn is based on article 9, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts.

International obligations of the enacting State

42. The Model Law leaves to the enacting State the issue whether international treaties (such as the Assignment Convention) prevail over domestic law. For example, in the case of a conflict between a provision of the Model Law and a provision of any treaty or other form of agreement to which an enacting State is a party with one or more other States, the requirements of the treaty or agreement may prevail (see art. 3 of the UNCITRAL Model Law on Cross-Border Insolvency). Such an approach may need to be limited to international treaties that directly address matters governed by the Model Law. In other States, in which international treaties are not self-executing but require internal legislation in order to become enforceable law, such an approach might be inappropriate or unnecessary (see Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, paras. 91-93).

Article 3. Party autonomy

43. Article 3 is based on article 6 of the Assignment Convention (the first sentence of which is based on art. 6 of the United Nations Convention on Contracts for the International Sale of Goods ("CISG")) and recommendation 10 of the Secured Transactions Guide. Paragraph 1 is intended to reflect the principle that, with the exception of the provisions listed in article 3, parties are free to vary by agreement the effect of the provisions of the Model Law as between them. An agreement referred to in paragraph 1 may be not only between the secured creditor and the grantor but also between the secured creditor or the grantor and other parties whose rights may be affected by the Model Law, such as the debtor of an encumbered receivable, or between the secured creditor and a competing claimant.

44. Paragraph 2 reiterates the general principle that an agreement between two parties cannot affect the rights of a third party. The reason for stating a general principle of contract law is that the Model Law deals with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might have or inadvertently appear to have an impact on the rights of third parties (e.g. the debtor of a receivable).

45. Paragraph 3 is intended to ensure that, if other law allows the grantor and the secured creditor to agree to resolve any dispute that may arise between them by arbitration, conciliation or negotiation, nothing in the Model Law is considered as preventing, invalidating or otherwise affecting that agreement. Depending on the efficiency of court proceedings in a particular State, these alternative dispute resolution mechanisms may provide a viable alternative to court proceedings, provided that certain issues are addressed by the relevant law, in particular with respect to arbitration, such as the arbitrability of disputes arising under a security agreement, protection of rights of third parties and the confidentiality of arbitral proceedings (see A/CN.9/WG.VI/WP.71/Add.5, para. 58).

Article 4. General standards of conduct

46. Article 4 is based on recommendation 131 of the Secured Transactions Guide (see chap. VII, para. 15). It is included in chapter I on the scope of application and general provisions, rather than in chapter VII on enforcement, as it states a standard of conduct with which parties should comply when they exercise their rights and perform their obligations under the Model Law, even outside the context of enforcement. Under article 4, any person must exercise all its rights and perform all its obligations under the Model Law in good faith and in a commercially reasonable manner. The violation of this obligation may result in liability in damages and other consequences that are left to the relevant law of the enacting State.

47. The concept of "commercial reasonableness" refers to the commercial transaction context and best practices. Meeting the specific standards referred to in other provisions of the Model Law (e.g. art. 78, para. 4, according to which notice is to be given within a short period of time) should generally be construed as meeting the general standards of conduct referred to in this article. It should be noted that, article 4 is listed in article 3 as a mandatory law rule. As a result, the duty to act in good faith and in a commercially reasonable manner cannot be waived or varied by agreement.

Article 5. International origin and general principles

48. Article 5 is inspired by article 7 of the CISG and based on article 3 of the UNCITRAL Model Law on Electronic Commerce, article 4 of the UNCITRAL Model Law on Electronic Signatures and article 2A of the UNCITRAL Model Law on International Commercial Arbitration. It is intended to limit the extent to which a national law implementing the Model Law would be interpreted only by reference to concepts of national law.

49. The Model Law is a tool not only for modernizing but also for harmonizing secured transactions laws (see A/CN.9/WG.VI/WP.71, paras. 21-25). To promote harmonization, paragraph 1 provides that the provisions of a national law implementing the Model Law should be interpreted with reference to its international origin and the observance of good faith. The term "good faith" is also used in article 4 as an obligation of persons who have rights and obligations under the Model Law. By contrast, in this article, the term identifies a consideration to be taken into account in the interpretation of the Model Law. Paragraph 2 is intended to provide guidance with respect to the filling of gaps in a law implementing the Model Law by reference to the general principles on which the Model Law is based (see A/CN.9/WG.VI/WP.71, para. 30).

Chapter II. Creation of a security right

A. General rules

50. This chapter and several other chapters contain a section A with general rules and a section B with asset-specific rules. This approach is followed to avoid overloading the general rules with asset-specific details. It is also followed to make it easier for States that do not need some of the asset-specific rules to leave them out

of its law, notwithstanding the fact that the Model Law follows the functional, integrated and comprehensive approach to secured transactions. The result of this approach is that general rules apply to all assets, but, in relation to certain types of asset, subject to the asset-specific rules. The enacting State may wish to consider whether the general and the asset-specific rules should be merged. If, however, the enacting State decides to keep those rules in separate sections of the relevant chapters, it may wish to include in its law a provision that addresses their interrelationship along the lines explained above.

Article 6. Creation of a security right and requirements for a security agreement

51. Article 6 is based on recommendations 13-15 of the Secured Transactions Guide (see chap. II, paras. 12-37). Its purpose is to deal with the creation of a security right, as well as the form and the minimum content of a security agreement, so as to enable parties to obtain a security right in a simple and efficient manner (see Secured Transactions Guide, rec. 1, subpara. (c)). A security right is created by agreement, for the content of which there are no requirements other than those listed in paragraphs 3 and 4, and for the conclusion of which no terms of art need be used.

52. Under paragraph 1, an agreement is sufficient to create a security right, provided that at the time of the conclusion of the security agreement the grantor has either a right in the asset to be encumbered or the power to encumber it. This is the case, for example, where: (a) the grantor is the owner of the asset; and (b) the grantor is in possession of the asset on the basis of a security agreement with the owner. In addition, it should be noted that a transferor of a receivable can continue to have a right in or the power to encumber the receivable, even if it has already transferred the receivable. Moreover, it should be noted that, in the case of an anti-assignment agreement between the owner/grantor and the debtor of a receivable, the owner/grantor may not have the right as against the debtor of the receivable to transfer or encumber the receivable, but does have a right in the receivable, and also the power to encumber it. Paragraph 2 clarifies that, in the case of future assets (i.e. assets produced or acquired by the grantor after the conclusion of the security agreement; see definition in art. 2, subpara. (n)), the security right is created when the grantor acquires rights in them or the power to encumber them.

53. Paragraph 3 sets out the requirements that a written security agreement has to meet. Whether written or oral, a security agreement creates a security right but need not use any special words to achieve that result (see art. 2, subpara. (jj)). From the two alternative wordings set out in paragraph 3 within square brackets, the enacting State may wish to select the one that is most fitting to its contract law. If the enacting State retains the words “concluded in”, a security agreement that is not in written form is not effective. If the enacting State retains the words “evidenced by”, a security agreement that is not in written form may still be effective if its terms are evidenced by a writing that is signed by the grantor (e.g. in a written offer by the grantor that the secured creditor accepts by way of its conduct).

54. Depending on what it considers as most efficient financing practices and reasonable assumptions of market participants, the enacting State may wish to consider whether to retain paragraph 3 (d). One approach is to retain paragraph 3 (d) to facilitate the grantor’s access to secured financing from other creditors in situations where the value of the assets encumbered by the prior security right exceeds the maximum amount indicated in the notice registered with respect to that right. Another approach is to leave out paragraph 3 (d) to facilitate the grantor’s access to credit by the first secured creditor (for the comparative advantages and disadvantages of the two approaches, see Secured Transactions Guide, chap. IV, paras. 92-97).

55. Under paragraph 4, there is no need for a written security agreement where the secured creditor is in possession of the encumbered asset. The fact that the secured creditor is in possession of the encumbered asset is itself sufficient evidence of the existence of the security agreement.

Article 7. Obligations that may be secured

56. Article 7 is based on recommendation 16 of the Secured Transactions Guide (see chap. II, paras. 38-48). It is primarily intended to ensure that future, conditional and fluctuating obligations may be secured. The main reason for this approach is to facilitate modern financing transactions, in the context of which financing may be provided at different times depending on the needs of the grantor (e.g. revolving credit facilities for the grantor to buy inventory). This approach does not preclude the introduction of special protections for grantors (e.g. setting a maximum amount for which the security right may be enforced; see art. 6, para. 3 (d); or limiting the creation of a security right in or the transferability of specific types of movable asset, such as employment benefits in general or up to a specific amount; see art. 1, para. 6).

Article 8. Assets that may be encumbered

57. Article 8 is based on recommendation 17 of the Secured Transactions Guide (see chap. II, paras. 49-57 and 61-70). It is primarily intended to ensure that future movable assets, parts of movable assets and undivided rights in movable assets, generic categories of movable assets, as well as all movable assets of a person, may become the subject of a security right.

58. It should be noted that the fact that future movable assets may be subject to a security right does not mean that statutory limitations to the creation or enforcement of a security right in specific types of movable asset (e.g. employment benefits in general or up to a specific amount) are overridden (see art. 1, para. 6).

59. It should also be noted that the fact that all movable assets of a grantor may be subject to a security right so as to maximize the credit that may be available and improve the terms of the credit agreement does not mean that other creditors of the grantor are necessarily unprotected. The protection of other creditors (within and outside insolvency proceedings) is a matter of other law and is foreseen in articles 35 and 36 of the Model Law.

Article 9. Description of encumbered assets and secured obligations

60. Article 9 is based on recommendation 14 (d), of the Secured Transactions Guide (see chap. II, paras. 58-60). In view of their importance, the requirements for the description of encumbered assets in a security agreement are presented in a separate article. Paragraph 1 sets out the general standard that must be met in the description of encumbered assets and the secured obligations for a security agreement to be effective. Paragraph 2 is intended to ensure that a security right may be created in an asset or class of assets even if the description in the security agreement is generic, such as “all inventory” or “all receivables” (see Secured Transactions Guide, chap. II, paras. 58-60). Paragraph 3 sets out the same rule for secured obligations.

Article 10. Rights to proceeds and commingled funds

61. Article 10 is based on recommendations 19 and 20 of the Secured Transactions Guide (see chap. II, paras. 72-89). Paragraph 1 is intended to ensure that, unless otherwise agreed by the parties (as this article is not listed in article 3 as a mandatory law rule), a security right in an asset automatically extends to its identifiable proceeds. The rationale for this rule is that it reflects the normal expectations of the parties and ensures that the secured creditor is sufficiently secured. Otherwise, a grantor could effectively deprive a secured creditor of its security either by disposing of the encumbered assets to a person who would take free of the security right or to a person from whom those assets could not easily be recovered.

62. By way of example, where the original encumbered asset is inventory, the cash or receivables generated from the sale of the inventory are proceeds. If upon payment of the receivables the funds received are deposited in a bank account, the right to payment of the funds credited to the bank account are also proceeds of the inventory.

So is a cheque issued by the holder of that bank account to buy new inventory and a warehouse receipt issued by the warehouse in which new inventory may be stored.

63. Paragraph 2 introduces an exception to the identifiability requirement in paragraph 1. A security right in an asset extends to its proceeds in the form of funds that are commingled with other funds even though the funds that are proceeds cannot be identified separately from the funds that are not proceeds (see para. 2 (a)). Paragraph 2 (b) limits that security right to the value of the proceeds immediately before they were commingled. So, if a sum of €1,000 is deposited in a bank account and at the time of enforcement the bank account has a balance of €2,500, the security right extends only to the sum of €1,000.

64. Paragraph 2 (c) deals with situations in which the balance in the bank account fluctuates and, at some point of time, is less than the value of the proceeds deposited (e.g. less than €1,000). In such a case, the security right extends only to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed. So, if in the example given, the balance in the account when the proceeds were deposited was €1,500, then it went down to €500 and at the time of enforcement was €750, the security right extends only to €500 (i.e. the lowest intermediate balance).

65. Where funds in a bank account are original encumbered assets, and the funds are transferred into another bank account and mixed with other funds in that other account, then the funds as transferred into that other account will be "proceeds" of the original funds, and thus the rules in article 10 will apply.

Article 11. Tangible assets commingled in a mass or transformed into a product

66. Article 11 is based on recommendations 22 and 91 of the Secured Transactions Guide (see chap. II, paras. 90-95 and 100-102, and chap. V, paras. 117-123). It accomplishes two related objectives. First, it transforms a security right in a tangible asset commingled in a mass or transformed into a product into a security right in the mass or product. Second, it limits the value of that security right by reference to the tangible asset commingled in the mass or product. Article 33 then addresses situations in which more than one secured creditor has a claim to a mass or product as a result of a security right in its components (see commentary on article 33 in A/CN.9/WG.VI/WP.71/Add.4). Paragraph 1 is intended to ensure that a security right in a tangible asset that is commingled in a mass or transformed into product will continue in the mass or product.

67. Paragraph 2 provides that a security right in a tangible asset that extends to a mass is limited to the same proportion of the mass that the asset bore to the quantity of the entire mass immediately after it was commingled in the mass. So, if a secured creditor has a security right in €100,000 worth of oil (100,000 litres at €1 per litre) that is commingled with €50,000 worth of oil in the same tank and thus the mass has €150,000 worth of oil, the security right is limited to two-thirds of the oil in the tank. This is initially worth €100,000. If the value of the oil in the tank decreases (e.g. because the value of the oil drops or because some of the oil leaks out and cannot be recovered), however, the secured creditor will still have security in two-thirds of the oil in the tank, but the value of that two thirds will be reduced. For example, if one half of the oil leaks out so that only 75,000 litres remain, then the secured creditor will have a security right in two thirds of that 75,000 litres, i.e. over 50,000 litres only. The value of the security right will correspondingly increase, however, if the value of the oil in the tank goes up. This reflects commercial expectations, as it puts the secured creditor in the same position that the secured creditor would have been in, if the oil had not been commingled in the tank with other oil in the first place.

68. Paragraph 3 applies a slightly different rule to products, consistent with the Secured Transactions Guide (see chap. II, para. 94). If the rule in paragraph 2 were to apply to security rights in assets that are transformed into a product, then this might provide the secured creditor with a windfall gain, if the value of the finished product is greater than the value of its components (e.g. because of value that is added by the

debtor's production efforts). For this reason, paragraph 3 provides instead that a security right in an asset that is transformed into a product is limited to the value of the asset immediately before it became part of the product. So, if encumbered flour worth €100 is used to make bread worth €500, the security right is limited to €100.

Article 12. Extinguishment of security rights

69. Article 12 deals with the extinguishment of security rights, which triggers the obligation of a secured creditor to return an encumbered asset or to register an amendment or cancellation notice (see art. 54 of the Model Law and art. 20, para. 3 (c), of the Model Registry Provisions). Under article 12, a security right is extinguished only where there is full payment or other satisfaction of all secured obligations and there is no longer any commitment of the secured creditor to extend further credit secured by the security right. As a result, the security right is not extinguished where temporarily there is a zero balance but there is a contingent secured exposure or an existing commitment of the secured creditor to extend further credit (e.g. on the basis of revolving credit arrangement).

B. Asset-specific rules

Article 13. Contractual limitations on the creation of security rights in receivables

70. Article 13 is based on recommendation 24 of the Secured Transactions Guide (see chap. II, paras. 106-110 and 113), which in turn is based on article 9 of the Assignment Convention. Paragraph 1 provides that an agreement limiting the grantor's right to create a security right in the receivables listed in paragraph 4 (often referred to as "trade receivables") does not prevent the creation of a security right where such an agreement exists. The rationale underlying this approach is to facilitate the use of receivables as security for credit, which is in the interest of the economy as a whole, without unduly interfering with party autonomy. This rule does not affect statutory limitations to the creation or enforcement of a security right in certain types of receivable (e.g. consumer or sovereign receivables; see art. 1, paras. 5 and 6).

71. The agreement referred to in paragraph 1 may be entered into between the initial grantor or, where the initial grantor transfers the asset to a person and that person creates a security right, that person, and the debtor of the receivable or any secured creditor who obtained a security right from the initial grantor or a subsequent grantor.

72. Paragraph 2 makes it clear that, while under paragraph 1 a security right is effective notwithstanding an agreement to the contrary, the grantor is not excused from any liability to its counter-party for damages caused by breach of that contractual provision, if such liability exists under other law. Thus, under paragraph 2, if the debtor of the receivable has sufficient negotiating power to force the creditor/grantor to accept the inclusion of an "anti-assignment clause" in their agreement and a breach of that agreement by the grantor results in a loss to the debtor of the receivable, the grantor is liable to the debtor of the receivable for damages under contract law. However, the debtor of the receivable may not avoid the contract because of that breach or raise against the secured creditor (assignee) any claim it may have against the grantor for that breach; in addition, under paragraph 3, a secured creditor that accepts a receivable as security for credit is not liable to the debtor of the receivable for the grantor's breach just because it had knowledge of the "anti-assignment clause". Otherwise, the anti-assignment agreement would in effect prevent a secured creditor from obtaining a security right in a receivable covered by the anti-assignment agreement.

73. As a result of the rules in paragraphs 1 and 2, a secured creditor does not have to examine each contract from which a receivable might arise to determine whether it contains an anti-assignment clause. This facilitates transactions relating to pools of receivables that are not specifically identified (with respect to which a search of the underlying transactions is possible but not necessarily time- or cost-efficient), as well

as transactions relating to future receivables (with respect to which such a search would not be possible at the time of the conclusion of the security agreement).

74. Paragraph 3 limits the scope of the rule in paragraph 1 to what could broadly be described as trade receivables. It does not apply to so-called "financial receivables", because, where the debtor of the receivable is a financial institution, even partial invalidation of an anti-assignment clause could affect obligations undertaken by the financial institution towards third parties (see Secured Transactions Guide, para. 108).

75. Article 13 (read together with art. 14) is intended to apply also to anti-assignment agreements limiting the creation of a security right in any personal or property rights securing or supporting payment or other performance of an encumbered intangible asset other than a receivable or an encumbered negotiable instrument.

Article 14. Personal or property rights securing or supporting payment or other performance of encumbered receivables or other intangible assets, or negotiable instruments

76. The first sentence of article 14 reflects the thrust of recommendation 25 of the Secured Transactions Guide (see chap. II, paras. 111-122). It is intended to ensure that a secured creditor with a security right in a receivable or another of the assets described therein automatically has the benefit of any personal right that supports payment or other performance of the receivable (e.g. a guarantee) and any property right that secures such payment or other performance (e.g. a security right in another asset). For example, if a receivable is secured by a guarantee or mortgage, the secured creditor with a security right in that receivable obtains the benefit of that guarantee or mortgage. This means that, if the receivable is not paid, the secured creditor may seek payment from the guarantor or enforce the mortgage (which may require that the secured creditor is registered as a mortgagee; see para. 77 below).

77. The first sentence of article 14 does not include recommendation 25 (h), of the Secured Transactions Guide (which was based on art. 10, para. 6, of the Assignment Convention). This is because it should be self-evident that the article does not apply to matters not addressed in it. Thus, to the extent that the automatic effects of the first sentence of article 14 are not impaired, 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 the Model Law (e.g. registration of a mortgage in the relevant immovable property registry) are not affected.

78. Under the second sentence of article 14, which reflects the thrust of article 10 of the Assignment Convention, where the rights securing or supporting payment of a receivable are independent rights under the law governing them (i.e. they are transferable only with a new act of transfer), the grantor is obliged to transfer the benefit of that right to the secured creditor (e.g. an independent guarantee or stand-by letter of credit). The reference in that sentence to the law governing the security or other supporting rights, is intended to ensure, for example, that, where an independent mortgage secures payment of an encumbered receivable, the mortgage is not automatically transferred to the secured creditor with the security right in the receivable.

79. In addition, as this matter is addressed in articles 57-68, article 14 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.

Article 15. Rights to payment of funds credited to a bank account

80. Article 15 is based on recommendation 26 of the Secured Transactions Guide (see chap. II, paras. 123-125). It is intended to implement the principles underlying article 13 with respect to rights to payment of funds credited to a bank account. As a result of article 15, a security right may be created in a right to payment of funds credited to a bank account without the consent of the deposit-taking institution. However, as a result of article 69, the creation of such a security right does not affect

the rights and obligations of the deposit-taking institution or obligate the deposit-taking institution to provide any information about the bank account to third parties (see commentary on art. 69 in A/CN.9/WG.VI/WP.71/Add.5).

Article 16. Negotiable documents and tangible assets covered by negotiable documents

81. Article 16 is based on recommendation 28 of the Secured Transactions Guide (see chap. II, para. 128). Its purpose is to follow existing law in which a negotiable document is treated as a reified right in the tangible assets it covers. As a result, there is no need separately to create a security right in those tangible assets if there is a security right in the document (e.g. inventory or crops deposited in a warehouse for which the warehouse operator issued a negotiable warehouse receipt).

82. In view of the definition of the term "possession" in article 2, subparagraph (z), possession by the issuer of a negotiable document includes possession by its representative or a person acting on behalf of the issuer (including in the context of multi-modal transport contracts). A security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist (subject to the terms of the security agreement) 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 and lapses once they are released by the issuer (see art. 26, para. 2, and para. 99 below).

Article 17. Tangible assets with respect to which intellectual property is used

83. Article 17 is based on recommendation 243 of the Intellectual Property Supplement (see paras. 108-112). It is intended to ensure that: (a) unless otherwise agreed (as art. 17 is not listed in art. 3 among the mandatory law provisions of the Model Law), a security right in a tangible asset does not automatically extend to the intellectual property right contained therein; and (b) that a security right in an intellectual property right does not automatically extend to the tangible asset with respect to which the intellectual property right is used (e.g. the copyrighted software included in a personal computer or the trademark on an inventory of clothes).

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

84. Article 18 is based on recommendation 32 of the Secured Transactions Guide (see chap. III, paras. 19-86). It is intended to set out the primary methods for achieving third-party effectiveness (i.e. registration in the general security rights registry and possession of a tangible asset by the secured creditor). Other methods (e.g. control and registration in the books of an issuer of securities) are set out in the asset-specific provisions of this chapter (see paras. 97-101 below).

85. States that have specialized registries with respect to assets covered by the Model Law (e.g. patent or trademark registries) or title notation systems (e.g. with respect to motor vehicles) may wish to consider whether registration with respect to security rights in those types of asset should take place in the security rights registry, in the specialized registry system or both. If registration may take place in both (or, if a security right may also be noted on a title certificate), the enacting State may wish to ensure coordination (with national or international specialized registries), including by way of linking the relevant registries so that information entered in one will also become available in the other and by way of appropriate priority rules (see Secured Transactions Guide, chap. IV, para. 117, and Registry Guide, paras. 64-66). With respect to security rights in attachments to immovable property and receivables

arising from sale or lease of, or secured by, immovable property, the enacting State may wish to consider issues of coordination with immovable property registries (see Registry Guide, paras. 67-69). Finally, the enacting State may wish to consider issues of international coordination among national security rights registries (Registry Guide, para. 70).

Article 19. Proceeds

86. Article 19 is based on recommendations 39 and 40 of the Secured Transactions Guide (see chap. III, paras. 87-96). It is intended to determine the circumstances in which the security right in proceeds that is provided for in article 10 is effective against third parties.

87. Under paragraph 1, a security right in proceeds in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account is automatically effective against third parties, that is, without the need for any further act. For example, upon the sale of inventory that is subject to a security right that is effective against third parties, the security right in any receivable, cash, bank deposit, or negotiable instrument generated by the sale that are proceeds of the originally encumbered inventory is effective against third parties without any further act.

88. Unlike recommendation 39, on which this article is based, paragraph 1 does not refer to the description of the proceeds in the notice. This change is a drafting change and does not constitute a change of policy. The reason for this change is that, if the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, and article 18 is sufficient in dealing with the third-party effectiveness of a security right in those assets.

89. For proceeds other than those covered in paragraph 1, paragraph 2 provides that, if a security right in an asset was effective against third parties, the security right in its proceeds is effective against third parties for a short period of time; thereafter, the security right in the proceeds continues to be effective against third parties only if it is made effective against third parties before the expiry of that short period by one of the methods set out in article 18 or the asset-specific provisions of this chapter. Both paragraphs 1 and 2 refer to “a security right in any proceeds arising under article 10” to ensure that they apply to “identifiable proceeds” according to article 10.

Article 20. Tangible assets commingled in a mass or transformed into a product

90. Article 20 is based on recommendation 44 of the Secured Transactions Guide. Its purpose is to ensure that a security right created in tangible assets commingled in a mass or transformed into a product under article 11 is automatically effective against third parties (for the priority of this security right, see article 42).

Article 21. Changes in the method for achieving third-party effectiveness

91. Article 21 is based on recommendation 46 of the Secured Transactions Guide (see chap. III, paras. 120 and 121). It is intended to ensure that a security right made effective by one method may later be made effective by another method, and that third-party effectiveness is continuous as long as there is no time gap between the two methods.

Article 22. Lapses in third-party effectiveness

92. Article 22 is based on recommendation 47 of the Secured Transactions Guide (see chap. III, paras. 122-127). It is intended to ensure that, if third-party effectiveness lapses, it may be re-established. In such a case, third-party effectiveness dates only from the time it is re-established.

Article 23. Continuity in third-party effectiveness upon a change of the applicable law to this Law

93. Article 23 is based on recommendation 45 of the Secured Transactions Guide (see chap. III, paras. 117-119). Under paragraph 1, if the law enacting the Model Law becomes applicable as a result, for example, of a change in the location of the encumbered asset or the grantor, a security right that was effective against third parties under the previously applicable law continues to be effective against third parties under the law enacting the Model Law for a short period of time, unless its third-party effectiveness under the initially applicable law has already lapsed. Thereafter, the security right is effective against third parties only if, before the expiry of that period, it is made effective against third parties under the relevant provisions of the law enacting the Model Law. Under paragraph 2, if the third-party effectiveness of a security right does not lapse, it dates back to the time it was first achieved under the previously applicable law.

Article 24. Acquisition security rights in consumer goods

94. Article 24 is based on recommendation 179 of the Secured Transactions Guide (see chap. IX, paras. 125-128). An acquisition security right in consumer goods is automatically effective against third parties if the price of the consumer goods is below a value to be specified by the enacting State. While this limitation is intended to exempt from registration only low-value consumer transactions, for it to be meaningful, it must be set at a reasonably high price (for the question whether a buyer acquires its rights free of an acquisition security right, see art. 34, para. 9).

95. If registration in a specialized registry or notation in a title certificate is also possible, such an acquisition security right in consumer goods should not have the special priority of an acquisition security right over a security right registered in a specialized registry. This approach would be necessary to avoid any interference with any specialized registration system (see Secured Transactions Guide, recs. 179 and 181).

B. Asset-specific rules

Article 25. Rights to payment of funds credited to a bank account

96. Article 25 is based on recommendation 49 of the Secured Transactions Guide (see chap. III, paras. 138-148). It adds to the primary methods of article 18 three asset-specific methods of achieving third-party effectiveness of a security right in a right to payment of funds credited to a bank account. First, if the secured creditor is the deposit-taking institution, no additional action is required for a security right to become effective against third parties. Second, the security right is effective against third parties upon conclusion of a control agreement (see art. 2, para. (g) (ii)) among the grantor, the secured creditor and the deposit-taking institution. Third, the security right is effective against third parties if the secured creditor becomes the account holder. The exact action required for the secured creditor to become the account holder depends on the relevant law and practice of the enacting State.

Article 26. Negotiable documents and tangible assets covered by negotiable documents

97. Article 26 is based on recommendations 51-53 of the Secured Transactions Guide (see chap. III, paras. 154-158). It addresses the relationship between the third-party effectiveness of a security right in a negotiable document and the third-party effectiveness of a security right in the tangible assets covered by the document.

98. Under paragraph 1, if a security right in a negotiable document (which extends to the assets covered by the document under article 16) is effective against third parties, the security right in the assets covered by the document is also effective against third parties for as long as the assets are covered by the document. Under paragraph 2, possession of the document is sufficient to make the security right in the

assets covered by the document effective against third parties. Under paragraph 3, the security right referred to in paragraph 2 remains effective against third parties for a short period of time after the secured creditor relinquishes the possession of the document or the assets covered by the document for the purpose of enabling the grantor to deal with the assets covered by it. In paragraph 3, the words "or the asset covered by the document", which did not appear in recommendation 53, were added to reflect actual practices and the words "physical actions like loading and unloading", which appeared in that recommendation, were deleted on the understanding that the words "dealing with the asset" are sufficiently broad to cover not only transactions like sale and exchange but also physical actions like loading and unloading.

Article 27. Uncertificated non-intermediated securities

99. Article 27 is a new provision that does not correspond to any of the recommendations of the Secured Transactions Guide, which did not apply to any type of securities (see rec. 4 (c)). It addresses the methods, other than registration of a notice, by which a security right in uncertificated non-intermediated securities may be made effective against third parties. First, the security right may be made effective against third parties by notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained by the issuer or another person on behalf of the issuer for that purpose (the enacting State should choose the method that best suits its legal system). Second, as in the case of a security right in a right to payment of funds credited to a bank account, the conclusion of a control agreement with respect to the encumbered securities will result in the security right in those securities being effective against third parties.

100. Under article 19 of the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930; the "Geneva Uniform Law"), "when an endorsement contains the statements 'value in security' ('valeur en garantie'), 'value in pledge' ('valeur en gage'), or any other statement implying a pledge, the holder may exercise all the rights arising out of the bill of exchange, but an endorsement by him has the effects only of an endorsement by an agent" (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, according to which such a holder "may endorse the instrument only for purposes of collection").

101. An enacting State that has enacted the Geneva Uniform Law (or the Bills and Notes Convention) may wish to include: (a) this rule in its enactment of the Model Law (as a rule of creation and/or third-party effectiveness of a security right in negotiable instruments, negotiable documents and non-intermediated securities); and (b) a rule dealing with the comparative priority of such a security right. Another option would be to leave the matter to articles 46, paragraph 2, 49, paragraph 3, and 51, paragraph 5, under which such a holder of a negotiable instrument, negotiable document or non-intermediated security would take its rights free of, or unaffected by, any security right. A further option would be to leave the matter to the relevant domestic law rule dealing with the hierarchy between domestic law and an international convention (see para. 42 above).

(A/CN.9/WG.VI/WP.71/Add.2) (Original: English)

Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Chapter IV. The registry system

Article 28. Establishment of the Registry

1. Article 28 is based on recommendations 1 (f), of the Secured Transactions Guide and 1 of the Registry Guide. It provides for the establishment by the enacting State of a public registry to give effect to the provisions of the Model Law relating to the registration of notices with respect to security rights (the "Registry"). In particular, under article 18 of the Model Law, a non-possessory security right in an encumbered asset is effective against third parties, as a general rule, only if a notice with respect to the security right is registered in the Registry (see Secured Transactions Guide, chap. III, paras. 29-46 and the Registry Guide, paras. 20-25). Under article 29 of the Model Law, the time of registration is also, again as a general rule, the basis for determining the order of priority between a security right and the right of a competing claimant (see Secured Transactions Guide, chap. V, paras. 42-50, and the Registry Guide, paras. 36-46).

2. Depending on its drafting conventions, an enacting State may decide to incorporate the provisions relating to the registry system in its secured transactions law implementing the Model Law, in a separate law or other legal instrument, or in a combination thereof. To preserve flexibility for enacting States, all the relevant registry-related provisions are collected in a set of rules presented after article 28 of the Model Law and called the "Model Registry Provisions".[1]

3. These Provisions have been drafted to accommodate flexibility in registry design. The Secured Transactions Guide recommends that, if possible, the Registry should be electronic in the sense of permitting information in registered notices to be stored in electronic form in a single computer database (see Secured Transactions Guide, rec. 54 (j)(i), and chap. IV, paras. 38-41 and 43). An electronic registry record is the most efficient and practical means of enabling enacting States to implement the recommendation of the Secured Transactions Guide that the registry record should be centralized and consolidated (see rec. 54 (e), and chap. IV, paras. 21-24).

4. If possible, access to registry services should also be electronic in the sense of permitting users to directly submit notices and search requests over the Internet or via direct networking systems as an alternative to the submission of paper notices and search requests (see Secured Transactions Guide, rec. 54 (j)(ii), and chap. IV, paras. 23-26 and 43). This approach eliminates the risk of registry staff error in entering the information contained in a paper notice into the registry record, facilitates speedier and more efficient access to registry services by users, and greatly reduces the operational costs of the Registry (for a discussion of these advantages and guidance on implementation, see Registry Guide, paras. 82-89).

5. The scope of application of the Model Law is limited to consensual security rights and outright transfers of receivables (see arts. 1 and 2, subpara. (kk)). Some States provide for the registration of notices of rights in movable assets created by law, such as preferential claims and the rights acquired by creditors who obtain judgments and take steps to have the judgment enforced (see art. 37 of the Model Law), the rights of holders of non-consensual non-possessory security rights, or the non-possessory ownership rights of commercial consignors or long-term lessors (see Registry Guide, paras. 40, 46, 50 and 51). If the enacting State follows this approach, it will need to specify whether registration is necessary for the creation or third-party effectiveness of these other rights and the priority effect of registration, including priority as against rights within the scope of the Model Law.

[1] A reference to an article in this chapter is a reference to an article of the Model Registry Provisions, unless otherwise indicated.

Model Registry Provisions

Section A. General rules

Article 1. Definitions and rules of interpretation

6. Article 1 contains definitions of key terms used in the Model Registry Provisions. These terms are derived in part from the Registry Guide (see Registry Guide, paras. 8 and 9). If the enacting State decides to incorporate the Model Registry Provisions in its enactment of the Model Law, these definitions should be included in the provision implementing article 2 of the Model Law. In general, the definitions are self-explanatory. Where elaboration is needed, it is provided in the commentary on the relevant articles below.

Article 2. Grantor's authorization for registration

7. Article 2 is based on recommendations 71 of the Secured Transactions Guide (see chap. IV, para. 106) and 7 (b), of the Registry Guide (see para. 101). Paragraph 1 provides that the registration of an initial notice is ineffective unless authorized by the grantor in writing (the rule is formulated in the negative, as the effectiveness of a registration is also subject to other requirements). To ensure that this rule does not interfere with the efficiency of the registration process, paragraph 6 confirms that the authorization is to be given off-record; and that the Registry is not entitled to require evidence of the existence of the grantor's authorization as part of the registration process.

8. Paragraphs 4 and 5 confirm that: (a) the grantor's authorization need not be obtained before registration; and (b) the conclusion of a written security agreement with the grantor automatically constitutes authorization without the need to include an express authorization clause. Thus, the post-registration conclusion of a security agreement will constitute retrospective "ratification" of an initially unauthorized registration to the extent of the assets described in the security agreement. If the initial security agreement between the parties covers a narrower range of encumbered assets than that described in the registered notice, the registration would still be unauthorized to the extent of those additional assets. However, if the parties were to later conclude a new security agreement covering the additional assets, this would constitute retroactive authorization.

9. Paragraph 2 requires the grantor's authorization for the registration of an amendment notice that adds encumbered assets to those described in the initial registered notice or any amendment notice. The grantor's authorization is not needed if the amendment notice adds assets that are covered by a security agreement between the parties, since, as already explained (see para. 8 above), under paragraph 5, the conclusion of a security agreement automatically constitutes authorization. Moreover, as also explained (see para. 8 above), authorization may be given under paragraph 4 before the registration of a notice. Consequently, the subsequent conclusion of a security agreement covering the additional assets would constitute retroactive authorization for the registration of the amendment notice.

10. It should be noted that there is no need to register an amendment notice (and thus no need to obtain the authorization of the grantor) with respect to "additional assets" that are proceeds of encumbered assets described in a prior registered notice if the proceeds are: (a) of a type that fall within the existing description (for example, the description covers "all tangible assets" and the grantor exchanges one type of tangible asset for another (see Secured Transactions Guide, rec. 39)); or (b) "cash proceeds", that is, money, receivables, negotiable instruments or funds credited to a bank account (see art. 19, para. 1, of the Model Law).

11. Paragraph 2 contains language within square brackets, which will be necessary if the enacting State implements article 6, paragraph 3 (d) of the Model Law. Under that bracketed language, the grantor's written authorization must also be obtained for the registration of an amendment notice to increase the maximum amount set out in a registered notice for which the security right to which the registration relates may be

enforced. This provision is only needed in systems that require this information to be set out in the security agreement and in the registered notice (see art. 8, subpara. (e), of the Model Registry Provisions and art. 6, para. 3 (d) of the Model Law). In States that adopt this approach, a separate authorization from the grantor is not needed if the grantor has agreed to the new amount in a security agreement, since the conclusion of a security agreement automatically constitutes retrospective authorization under paragraph 5, even if the agreement is concluded after the registration of the amendment notice (see para. 8 above).

12. Where an amendment notice seeks to add a new grantor, paragraph 3 generally requires the additional grantor's written authorization to be obtained in conformity with the general rule in paragraph 1 and in the same manner. The exception expressed in the bracketed wording in paragraph 3 is intended for enacting States that decide to implement option A or option B of article 26. It creates an exception to the requirement to obtain the grantor's written authorization where the new grantor is a buyer of an encumbered asset from the grantor and the purpose of the amendment is to enable the secured creditor to protect its priority status as against secured creditors and buyers that acquire rights in the encumbered asset from that buyer in accordance with these options. It should be noted that, if the identifier of a grantor changes after the registration of a notice, the grantor's authorization is likewise not required for the registration of an amendment notice to disclose its new identifier for the purposes of protecting the priority of the related security right against secured creditors and buyers who deal with the grantor after its identifier has changed pursuant to article 25. In this latter scenario, the purpose of registering the amendment notice is not to add a new grantor in the strict sense contemplated by paragraph 3 but rather to update the registry record in relation to the identifier of the grantor of record.

13. The registration of a notice, whether or not authorized by the grantor, is effective against third parties only to the extent that the assets described in the registered notice are actually covered by a security agreement between the parties. However, third parties have no means of obtaining this information with a search of the public registry record. Consequently, the grantor's ability to sell, or create a security right in, the assets described in a registered notice will be impaired, even if those assets are not subject to a security right, because of the priority risk for subsequent secured creditors and buyers posed by the potential existence of a security right. If the grantor did not authorize the registration of the notice, or only authorized the registration of a notice covering a narrower range of encumbered assets, or has withdrawn an initial authorization, article 20 provides a procedure by which the grantor can compel the secured creditor to register a cancellation or amendment notice, as the case may be, to reflect the terms of the actual security agreement, if any, between the parties.

14. While this point is not directly relevant to the issue of the grantor's authorization in article 2, it should be noted that registration of an amendment notice may affect intervening competing claimants, if it: (a) adds encumbered assets; (b) increases the maximum amount; or (c) adds a new grantor. Thus, it takes effect only from the time when the registration of the amendment notice (not the initial notice) becomes effective (see art. 13, para. 1).

Article 3. One notice sufficient for multiple security rights

15. Article 3 is based on recommendations 68 of the Secured Transactions Guide (see chap. IV, para. 101) and 14 of the Registry Guide (see paras. 125 and 126). It confirms that a single registered notice is sufficient to achieve the third-party effectiveness of security rights arising under one or more security agreements between the parties identified in the notice. This rule applies regardless of whether the agreements are related to one another or are separate and distinct, and regardless of whether the notice relates to security rights in the grantor's current assets or assets in which the grantor acquires rights only after the registration. This is consistent with the notice registration system contemplated by the Model Law, under which a registrant need only submit a standardized notice containing basic information about the parties and the encumbered assets rather than having to register the underlying

security agreements giving rise to the security rights to which the registration relates (see arts. 8 and 17-19).

16. A single registration is effective for security rights arising under one or more security agreements between the parties identified in the notice only to the extent that the information in the registered notice corresponds to the content of the off-record agreements between those parties (see Registry Guide, para. 126). If, for example, the parties enter into a security agreement that extends to assets not covered by the description of the encumbered assets in the registered notice, a new initial notice (or an amendment to the existing notice) will have to be registered for the security right in the additional assets to be effective against third parties, and that notice will take effect against third parties only from the time of its registration (see art. 13, para. 1).

Article 4. Advance registration

17. Article 4 is based on recommendations 67 of the Secured Transactions Guide (see chap. IV, paras. 98-101) and 13 of the Registry Guide (see paras. 122-124). It confirms that a registration may be made before the conclusion of a security agreement to which the notice relates, or the creation of any security right contemplated by any such agreement.

18. Registration in advance of the conclusion of any security agreement between the parties is practically possible under the notice registration system contemplated by the Model Law because, as noted in relation to article 3 (see para. 15 above), the underlying security agreement does not have to be deposited with the Registry or tendered for scrutiny. Where priority among competing secured creditors is determined by the general order of registration or third-party effectiveness rule in article 29 of the Model Law, advance registration is useful because it enables a secured creditor to be sure of its priority ranking even before the security agreement with the grantor is formally concluded. However, for a security right to be effective against other classes of competing claimants, the security right must also have been created (see Registry Guide, paras. 20 and 123). Accordingly, advance registration does not protect a secured creditor against a competing claimant, other than a competing secured creditor that acquires rights in the encumbered assets before the security agreement is actually entered into and the other requirements for creation are satisfied.

19. If a security agreement is never concluded between the parties, or only covers a narrower range of assets than those described in the registered notice, advance registration may have a negative impact on the ability of the person identified in the notice as the grantor to sell or create a security right in the assets described in the notice. As noted in relation to article 2 (see para. 13 above), article 20 provides for a procedure to enable the grantor to obtain the compulsory amendment or cancellation of a registered notice in this scenario.

Section B. Access to registry services

Article 5. Conditions for access to registry services

20. Article 5 is based on recommendations 54, subparagraph (c), (f) and (g), and 55 (b), of the Secured Transactions Guide (see chap. IV, paras. 25-228) and 4, 6 and 9 of the Registry Guide (see paras. 95-97 and 103-105).

21. Paragraphs 1 and 3 confirm that the Registry is public in the sense that any person is entitled to register a notice of a security right or search the registry record subject only to meeting the conditions governing access. For both types of service, the user must submit the (paper or electronic) form of notice or search request prescribed by the registry and pay or make any arrangements to pay the prescribed fees, if any (see art. 33). Under paragraph 1 (b), a registrant, as opposed to a searcher, must identify itself to the Registry in the prescribed manner. This requirement is aimed at assisting the person identified in a registered notice as the grantor to determine the identity of the registrant in the event that the grantor did not authorize

the registration (see Registry Guide, para. 96). This consideration must be balanced against the need to ensure efficiency and speed in the registration process. Accordingly, the evidence of identity required of a registrant should be that which is generally accepted as sufficient in day-to-day commercial transactions in the enacting State (for example, an identity card, driver's licence or other state-issued official document).

22. If access to registry services is refused, paragraph 4 requires the Registry to communicate the specific reason (for example, the user failed to use the prescribed form or to pay the prescribed fee). The reasons must be communicated without delay. What this means in practice depends on the mode by which the notice or search request is submitted to the Registry. If the system is designed to enable users to submit notices and search requests through electronic means of communication directly to the Registry, the system can and should be programmed to automatically communicate the reason during the registration process and display the reason on the registrant's screen. In the case of notices and search requests submitted in paper form, the registry staff will need a reasonable period of time to examine the notice or search request and prepare and communicate a formal response.

23. In order to facilitate access to registry services and avoid unnecessary refusals, the Registry should be organized to accept all modes of payment in common commercial use in the enacting State. However, controls will need to be introduced to avoid the risk of staff embezzlement of cash payments and to ensure the confidentiality of financial information submitted by users (see Registry Guide, para. 138). To facilitate efficient access by frequent users (such as financial institutions, automobile dealers or other suppliers of goods on credit, lawyers and other intermediaries), users should be given the option of setting up a pre-payment account that enables them to deposit funds on an ongoing basis to pay for their ongoing requests for services.

24. To limit the risk of the registration of amendment and cancellation notices not authorized by the person identified as the secured creditor, paragraph 2 requires persons who submit an amendment or cancellation notice to satisfy the secure access requirements specified by the Registry. For example, the Registry might require registrants to set up a password-protected account when submitting an initial notice, and then require all amendment and cancellation notices to be submitted through that account. Alternatively, the system might be designed to assign a unique user code to registrants upon registration of an initial notice and then require entry of that code on all amendment and cancellation notices submitted for registration. Secured access measures of this kind ensure that only the initial registrant and those to whom the registrant chooses to disclose the password or code are able to register an amendment or cancellation notice (with respect to the effectiveness of the registration of unauthorized amendment or cancellation notices, see art. 21).

Article 6. Rejection of the registration of a notice or a search request

25. Article 6 is based on recommendations 8 and 10 of the Registry Guide (see paras. 97-99 and 106). Paragraph 1 obligates the Registry to reject the registration of a notice submitted for registration if no information, or only illegible information, has been entered in one or more of the mandatory designated fields in the notice. As all mandatory fields must be completed for a registered notice to be effective, this provision ensures that the information in submitted notices that clearly do not satisfy the minimum requirements for effectiveness are never entered into the registry record. On the other hand, even if all the mandatory fields in a submitted notice contain legible information and the notice is therefore accepted for registration, it does not follow that the registration is effective if the information that is entered, while being legible, is erroneous or incomplete (with respect to whether and to what extent an error or omission in the information contained in a registered notice renders the registration ineffective, see art. 24; with respect to whether and to what extent a secured creditor is obligated to update the record where the information in a registered notice becomes inaccurate as a result of post-registration events, see arts. 25 and 26).

26. Paragraph 2 obligates the Registry to reject a search request if no information, or only illegible information, has been entered in one of the designated fields for entering a search criterion. Since searchers are entitled to search by either the identifier of the grantor or the registration number assigned to the initial notice (see art. 22), it is sufficient if legible information is entered into at least one of the search criterion fields. The fact that at least one of these fields contains legible information does not necessarily mean that a search result will be accurate since the criterion entered by the searcher may be erroneous or incomplete. To avoid any arbitrary decisions on the part of the Registry, paragraph 3 confirms that the Registry may not reject the registration of a notice or search request where the registrant or searcher satisfies the access conditions set out in paragraphs 1 and 2 respectively.

27. Paragraph 4 obligates the Registry to provide the reason for rejecting the registration of a notice or a search request without delay. What this means in practice depends on the mode by which the notice or search request was submitted to the Registry. If the system is designed to enable users to submit notices and search requests through electronic means of communication directly to the Registry, the system can and should be designed to automatically reject the submission of incomplete or illegible notices during the registration process and display the reasons on the registrant's screen. In the case of notices and search requests submitted in paper form, there will necessarily be some delay between the time of receipt by registry staff and the communication of the refusal and reason to the user; the registry staff will need a reasonable period of time to examine the notice or search request and then prepare and communicate a formal response.

Article 7. Information about the registrant's identity and scrutiny of the form or contents of a notice by the Registry

28. Article 7 is based on recommendations 54 (d), and 55 (b), of the Secured Transactions Guide (see chap. IV, paras. 15-17 and 48) and 7 of the Registry Guide (see paras. 100 and 102). Paragraph 1 obligates the Registry to maintain the identity information submitted by registrants in compliance with article 5, paragraph 1 (b), and to provide that information upon request to the person identified in the registered notice as the grantor. While this information does not form part of the public or archived registry record, it nonetheless must be preserved by the Registry in a manner that enables it to be retrieved in association with the registered notice to which it relates. This is consistent with the rationale for obtaining and preserving this information which is to assist the grantor in identifying the registrant in cases where the registration of the notice was not authorized by the grantor (see para. 21 above). In order to ensure that this objective is balanced against the need to facilitate efficiency of the registration process, paragraph 2 provides that the Registry may not require further verification of the identity information provided by a registrant under article 5, paragraph 1 (b). With the same objective in mind, paragraph 3 generally prohibits the Registry from scrutinizing the form or content of notices and search requests submitted to it except to the extent needed to give effect to articles 5 and 6.

Section C. Registration of a notice

Article 8. Information required in an initial notice

29. Article 8 is based on recommendations 57 of the Secured Transactions Guide (see chap. IV, para. 65) and 23 of the Registry Guide (see paras. 157-160). It sets out the items of information required to be entered in the appropriate designated fields in an initial notice submitted to the Registry for registration. The items of information specified in subparagraphs (a), (b) and (c) are the subject of articles 9, 10 and 11, and the reader is generally referred to the commentary on those articles. It should be noted that where a notice relates to more than one grantor or secured creditor, the required information should be entered separately for each grantor or secured creditor.

30. Subject to its privacy laws, the enacting State may decide to require "additional information" (such as the birth date of the grantor or an identification number issued

by the enacting State) to be entered to assist in uniquely identifying a grantor where there is a risk that many persons may have the same name (see bracketed text in art. 8, subpara. (a)). If this approach is adopted, the form of notice prescribed by the enacting State should provide a separate designated field for entering the "additional information". The enacting State should also specify the type of additional information to be included and make its inclusion mandatory in the sense that it must be entered in the relevant field for a notice to be accepted by the Registry. It will also be necessary to address cases in which the grantor is not a citizen or resident of the enacting State, or for any other reason has not been issued an identification number. Subject to privacy considerations, the enacting State might, for example, provide that the number of the grantor's foreign passport or some other foreign official document is a sufficient substitute (on all these points, see Registry Guide, rec. 23 (a)(i), and paras. 167-169, 171, 181-183, 226, as well Annex II, Examples of registry forms).

31. Subparagraph (d) appears within square brackets, as an indication of the duration of registration on an initial notice is required only if the enacting State adopts options B or C of article 14 (see paras. 50-52 below; see also Registry Guide, paras. 199-204). Subparagraph (e) also appears within square brackets, as an indication of the maximum amount for which the security right may be enforced is required only if the enacting State implements the approach set out in article 6, paragraph 3 (d), of the Model Law, which also appears within square brackets (see para. A/CN.9/WG.VI/WP.71/Add.1, para. 54).

Article 9. Grantor identifier

32. Article 9 is based on recommendations 59 and 60 of the Secured Transactions Guide (see chap. IV, paras. 68-74), as well as recommendations 24 and 25 of the Registry Guide (see paras. 161-183). It provides that the identifier of the grantor is its name. It then sets out separate rules for determining the name of the grantor depending on whether the grantor is a natural person or a legal person or other entity.

33. If the grantor is a natural person, paragraph 1 provides that the grantor's name is the name that appears in the official document specified by the enacting State as the authoritative source. Since not all grantors may possess a common official document (e.g., an identity card or driver's licence), the enacting State will need to specify alternative official documents as authoritative sources and specify the hierarchy of authoritativeness among them (for examples of possible approaches, see Registry Guide, paras. 163-168).

34. As already noted (see para. 30 above), the enacting State may require the entry of a State-issued identity or other official number as additional information to assist in uniquely identifying a grantor. It may also decide to make this number an alternative grantor identifier. Since the grantor identifier is the criterion used to search the registry record, this approach is only feasible if there is a reliable record or other objective source that third-party searchers can consult to determine a person's official number, If this approach is adopted, it will also be necessary for the enacting State to address cases in which the grantor is not a citizen or resident of the enacting State, or for any other reason has not been issued an identification number. The enacting State might, for example, provide that the number in some other foreign official document is a sufficient substitute provided again that the relevant number is accessible to third-party searchers. Otherwise, the name of the foreign grantor will have to be used as the grantor identifier (see Registry Guide, paras. 168 and 169).

35. Paragraph 2 requires the enacting State to indicate which components of the name of a grantor who is a natural person must be entered in the registered notice. The enacting State will need to specify, for example, whether only the given and family name of the grantor is required or whether a middle name or initial must also be included. It will also need to address the scenario where the grantor's name consists of a single word, for example, by providing that that word should be entered in the family name field and by ensuring that the registry system is designed so as not to reject notices that have nothing entered in the other name fields (see Registry Guide, para. 165).

36. Paragraph 3 requires the enacting State to address how the grantor's name is to be determined where the grantor's name has legally changed under applicable law after the issuance of the official document designated in paragraph 1 as the authoritative source of the grantor's name (for example, by reason of marriage or as a result of a formal application for a name change under change of name legislation; see Registry Guide, para. 164 (f)).

37. Paragraph 4 provides that where the grantor is a legal person the name of the grantor is the name that appears in the relevant document, law or decree to be specified by the enacting State constituting the legal person (see Registry Guide, paras. 170-173).

38. Paragraph 5, which appears in square brackets, provides for the possibility that an enacting State may wish to require additional information pertaining to the grantor's status to be entered in a registered notice in special cases, such as where the grantor is subject to insolvency proceedings (see Registry Guide, paras. 174-179).

Article 10. Secured creditor identifier

39. Article 10 is based on recommendations 57 (a) of the Secured Transactions Guide (see chap. IV, para. 81) and 27 of the Registry Guide (see paras. 184-189). It largely replicates the rules in article 9 for determining the identifier of the grantor. Unlike under article 9 (read together with art. 8, subpara. (a)), however, under article 10 (read together with art. 8, subpara. (b)), the registrant may enter the name of a representative of the secured creditor (e.g. a service provider or an agent of a syndicate of lenders). This approach is intended to protect the privacy of the actual secured creditor and facilitate the efficiency of arrangements such as syndicated loans where there are multiple secured lenders whose identity may change over time. This approach does not have a negative impact on the grantor, who would typically know the identity of the actual secured creditor from their dealings, or third parties, as long as the representative is authorized to act on behalf of the actual secured creditor (see Registry Guide, paras. 186 and 187). It should also be noted that, as the security right is created by an off-record security agreement, the entry of the name of a representative as the secured creditor on a registered notice does not make the representative the actual secured creditor.

Article 11. Description of encumbered assets

40. Article 11 is based on recommendations 63 of the Secured Transactions Guide (see chap. IV, paras. 82-86) and 28 of the Registry Guide (see paras. 190-192). The test for the adequacy of a description of the encumbered assets in a registered notice in paragraph 1 parallels the test for the adequacy of a description of the encumbered assets in a security agreement (see art. 9 of the Model Law). The description in a registered notice need not be identical to the description in any related security agreement so long as it reasonably allows identification of the relevant encumbered assets in accordance with the test in paragraph 1. On the other hand, a description in a registered notice that satisfies this test will not make a security right effective against third parties to the extent that the description includes assets that are not covered by any related security agreement, since the requirements for the effective creation of a security right will not have been satisfied.

41. Paragraph 2 confirms that a description in a registered notice that refers to all of the grantor's movable assets or to all of the grantor's assets within a specified generic category (for example, all receivables owing to the grantor) satisfies the test in paragraph 1 that the description reasonably allow identification of the encumbered assets. It follows that a generic description will be sufficient even if any related security agreement only covers a specific asset within that broad generic category (for example, the description in the registered notice refers to all "tangible assets of the grantor", whereas the security agreement only covers a specific tangible asset). However, the effectiveness of the registration in this scenario is dependent on the authorization of the grantor pursuant to article 2; if the grantor only authorized a registration covering a specific asset, the registration will only be effective with

respect to that asset. Moreover, the grantor is entitled, pursuant to article 20, paragraph 1, to compel the secured creditor to register an amendment notice that narrows the description of the assets in the registered notice to correspond to the encumbered assets actually covered by the security agreement between them unless the grantor separately authorized the secured creditor to register a broader description (see para. 8 above) and has not withdrawn that authorization.

42. The secured transactions laws of some States adopt special alphanumerical ("serial number") rules for describing specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of the serial number in its own designated field is required in the sense of being necessary to preserve the priority of the security right as against specified classes of third parties that acquire rights in the asset. Enacting States that are interested in adopting this approach are referred to the discussion in the Registry Guide (for the rationale for, and the advantages and disadvantages of this, approach, see Registry Guide, paras. 131-134; for the consequences of a failure of entering the serial number or an error in entering the serial number, see Registry Guide, paras. 193 and 213; and for the registry design and registry provisions needed to implement this approach, see Registry Guide, para. 266). It should be noted that even in legal systems that do not adopt this approach, a registrant may wish to include the serial number in the description it enters in the notice as a convenient method of describing the encumbered asset in a manner that reasonably allows its identification (see Registry Guide, paras. 194 and 212).

43. If proceeds of an encumbered asset are not in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account or are not already covered by the description of the encumbered assets in a registered notice, the secured creditor must register an amendment notice to add a description of the proceeds within a short period of time after the proceeds arise in order to preserve the third-party effectiveness and priority of its security right in the proceeds from the date of the initial registration (see art. 19, para. 2, of the Model Law). An amendment is necessary because otherwise a search result would not disclose the potential existence of a security right in the assets constituting the proceeds (see Registry Guide, paras. 195-197).

44. It should be noted that the inclusion of a description of an encumbered asset in a registered notice does not imply or represent that the grantor has or will have rights in that asset (see art. 6, para. 1, of the Model Law). That is to say, the Registry only provides for the disclosure of potential security rights in assets, not ownership or other rights. Whether the grantor owns or has rights in the relevant asset is determined by other law.

Article 12. Language of information in a notice

45. Article 12 is based on recommendation 22 of the Registry Guide (see paras. 153-156; the Secured Transactions Guide includes a discussion of this matter in chapter IV, paras. 44-46, but does not include a recommendation). Paragraph 1 requires the information contained in a notice to be expressed in the language or languages to be specified by the enacting State with the exception of the names and addresses of the grantor and the secured creditor or its representative. Typically, the enacting State will require registrants to use its officially recognized language or languages. As the names and addresses of the grantor and the secured creditor or its representative generally need not be translated (see para. 46 below), registrants will only need to translate the description of the encumbered assets (as the other items of information required to be entered in a notice may be expressed by numbers). Where the description of the encumbered assets is not expressed in the required language or languages, the registration of the notice would likely seriously mislead a reasonable searcher and thus would be ineffective (see art. 24, para. 4).

46. Paragraph 2 requires all information in a notice to be in the character set prescribed and publicized by the Registry. Where the names and addresses of the grantor and secured creditor or its representative are expressed in a character set

different from the character set used in the language or languages recognized by the enacting State, guidance will need to be given on how the characters are to be adjusted or transliterated to conform to the language of the Registry (see Registry Guide, para. 155). If the information in a notice submitted to the Registry is not in the character set prescribed and publicized by the Registry, the notice will be rejected as illegible under article 6, paragraph 1 (a) (for the same rule with respect to search requests, see art. 6, para. 2).

Article 13. Time of effectiveness of the registration of a notice

47. Article 13 is based on recommendations 70 of the Secured Transactions Guide (see paras. 102-105) and 11 of the Registry Guide (see paras. 107-112). Paragraph 1 provides that the registration of an initial or amendment notice submitted to the Registry becomes effective only once the information in the notice is entered into the public registry record so that it is accessible to searchers (see the definition of the term "registry record" in art. 1, subpara. (l)). If the registry system is designed to enable users to submit information in a notice to the Registry through electronic means of communication directly without the intervention of registry staff, there will be little or no delay between the time when the information in a notice is submitted to the Registry and the time when it becomes available to searchers. But in systems that permit or require the use of paper notice forms, there will inevitably be some time lag since the registry staff must enter the information on the paper notice form into the registry record on behalf of registrants. In view of the importance of the timing and order of registration to the third-party effectiveness and priority of a security right, paragraph 2 obligates the Registry to enter the information into the registry record without delay after the initial or amendment notice is submitted and in the order in which it was submitted. For the same reason, paragraph 3 requires the Registry to record the date and time when the information in the initial or amendment notice was entered in the public registry record so as to be accessible to searchers and to make this information available to searchers of the public registry record.

48. Paragraph 4 deals with the time of effectiveness of the registration of a cancellation notice. Option A provides that the registration of a cancellation notice is effective once the information in the registered notices to which the cancellation notice relates is no longer publicly searchable. Option A should be adopted by enacting States that adopt option A or B of article 21, since in States that adopt one of these options the Registry is obligated to remove information in a registered notice from the public registry record and archive it upon registration of a cancellation notice pursuant to option A of article 30. Option B provides that the registration of a cancellation notice becomes effective once the information in the registered notices to which the cancellation notice is entered into the registry record so as to be accessible to searchers. Accordingly, option B should be adopted by enacting States that adopt option C or D of article 21, since in States that adopt this approach the Registry is obligated to retain the information in all registered notices, including cancellation notices, on the public registry record until the registration lapses pursuant to option B of article 30.

49. Option A and option B of paragraph 5 require the Registry to record the date and time of effectiveness of the registration of a cancellation notice as determined by option A and option B of paragraph 4 respectively. Accordingly, enacting States that adopt option A of paragraph 4 should adopt option A of paragraph 5, while enacting States that adopt option B of paragraph 4 should adopt option B of paragraph 5.

Article 14. Period of effectiveness of the registration of a notice

50. Article 14 is based on recommendations 69 of the Secured Transactions Guide (see chap. IV, paras. 87-91) and 12 of the Registry Guide (see paras. 113-121, 240 and 241). It offers enacting States a choice of three different approaches to the determination of the initial period of effectiveness (or duration) of the registration of a notice. If option A is enacted, an initial notice (and any associated amendment notice) is effective for the period stipulated by the enacting State. If option B is enacted, registrants are permitted to choose the desired period of effectiveness. If

option C is enacted, registrants are likewise permitted to choose the period of effectiveness but only up to the maximum number of years stipulated by the enacting State.

51. All options permit registrants to extend (and re-extend) the period of effectiveness of a notice before its expiry by the registration of an amendment notice. Under option A, the duration of the registration would be extended for an equivalent period. Under option B or option C the registrant is permitted to choose the further period of effectiveness, but only up to the maximum number of years stipulated by the enacting State in the case of option C.

52. If option B or option C is enacted, the period of effectiveness of a registered notice is a mandatory component of the information required to be included in a notice submitted to the registry (see art. 8, subpara. (d)). States that adopt either of these options will also need to indicate on the prescribed notice form how registrants must enter the desired period of effectiveness. The notice form might be designed to enable registrants to simply enter the desired number of whole years. Alternatively, the notice form might permit registrants to enter the specific day, month and year on which the registration is to expire unless renewed.

Article 15. Obligation to send a copy of a registered notice

53. Article 15 is based on recommendations 55 subparagraphs (c), (d) and (e) of the Secured Transactions Guide (see chap. IV, paras. 49-53) and 18 of the Registry Guide (see paras. 145-149). Paragraph 1 obligates the Registry to send a copy of the information in a registered notice to the person identified in the notice as the secured creditor without delay after the registration becomes effective. This enables that person to verify whether the registration was correct and authorized (for the effectiveness of unauthorized registrations, see art. 21; see also Registry Guide, paras. 249-259; for the liability of the Registry for failure to send a copy of a notice, see art. 32).

54. In order to enable the person identified as the grantor in a registered notice to take the steps necessary correct the registry record if the registration was wholly or partially unauthorized (see art. 20), paragraph 2 obligates the person identified as the secured creditor in the copy of the registered notice sent to it by the Registry pursuant to paragraph 1 to forward it to the person identified in the notice as the grantor. The secured creditor has to comply with this obligation before the expiry of the period specified by the enacting State after it receives the notice. The copy must be sent to the grantor at its address set forth in the registered notice or at the grantor's new address, if the secured creditor knows that the grantor has changed its address and knows or could reasonably discover that address.

55. Paragraphs 3 and 4 confirm that non-compliance by the secured creditor with its obligation under paragraph 2 does not by itself affect the effectiveness of its registration but only exposes the secured creditor to liability to the grantor for a nominal amount (to be specified by the enacting State) and any actual loss or damage caused by the non-compliance.

(A/CN.9/WG.VI/WP.71/Add.3) (Original: English)

Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Section D. Registration of an amendment or cancellation notice

Article 16. Right to register an amendment or cancellation notice

1. Article 16 is based on recommendations 73 of the Secured Transactions Guide (see chap. IV, paras. 110-116) and 19 (a), of the Registry Guide (see paras. 150 and 225-244). Paragraph 1 gives the person identified in an initial notice as the secured creditor the right to register a related amendment or cancellation notice at any time. In order to limit the risk of the registration of notices not authorized by that person, the registrant must satisfy the secure access requirements that were assigned by the Registry under article 5, paragraph 2, at the time of registration of the initial notice (see A/CN.9/WG.VI/WP.71/Add.2, para. 24) (this right is given to the registrant as the Registry cannot know or have to determine the identity of the actual secured creditor).

2. Paragraph 2 provides that, after an amendment notice changing the secured creditor identifier in an initial or amendment notice has been registered, only the current secured creditor of record is entitled to register an amendment or cancellation notice. The registry system should be designed to assign a new unique secure access code to the new secured creditor where an amendment notice changes the secured creditor of record so as to prevent the previous secured creditor from registering an amendment or cancellation notice (see A/CN.9/WG.VI/WP.71/Add.2, para. 24).

Article 17. Information required in an amendment notice

3. Article 17 is based on recommendation 30 of the Registry Guide (see paras. 221-224; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 provides that an amendment notice must contain in the designated field the registration number assigned by the Registry to the initial notice to which the amendment relates (see art. 28, para. 1, and para. 56 below). The reason for this requirement is to ensure that the amendment will be associated in the registry record with the initial notice so as to be retrieved and included in a search result (see the definition of the term “registration number” in art. 1, subpara. (j), and art. 22, subpara. (b)).

4. Paragraph 1 (b) requires the amendment notice to set out the information to be “added or changed”. The term “change” should be understood as including an amendment notice that releases an item or kind of encumbered asset or one of several grantors. Although this type of change amounts in effect to a cancellation of the registration as it relates to the relevant asset or grantor, it should be effected by registering an amendment notice and not a cancellation notice. A cancellation notice is to be used only when the purpose is to cancel the effectiveness of the registration of an initial notice and all related notices in their entirety (see the definitions of “amendment notice” and “cancellation notice” in art. 1, subparas. (b) and (c)).

5. Paragraph 2 makes it clear that an amendment notice may relate to more than one item of information in a registered notice. That is to say, a registrant need register only one amendment notice even if it wishes, for example, to add both a description of new encumbered assets and a new grantor. It follows that the form of amendment notice prescribed by the Registry must be designed to enable a registrant to change any and all items of information in an initial notice using a single form (see Registry Guide, Annex II, Examples of registry forms, II. Amendment notice).

Article 18. Global amendment of secured creditor information

6. Article 18 is based on recommendation 31 of the Registry Guide (see para. 242; the Secured Transactions Guide does not contain an equivalent recommendation). It addresses the scenario where there is a change in the identifier or address, or both, of the person identified in multiple registered notices as the secured creditor as a result, for example, of its relocation, its merger with another company or its assignment of all obligations owing to it by its customers to a new secured creditor. Its purpose is to make it possible for the secured creditor of record (option A) or the Registry on the application of that person (option B) to amend the

relevant information in all the notices in which it is contained by the registration of a single global amendment notice.

7. In order to effectuate the amendment of secured creditor information in multiple notices through the registration of a single global amendment notice, the registry record must be organized in a manner that enables the retrieval of all registered notices in which a particular person is identified as the secured creditor. To avoid the risk of the registration of unauthorized global amendment notices, the Registry should institute secure access requirements to ensure that the person requesting or effecting a global amendment is in fact the secured creditor of record (see A/CN.9/WG.VI/WP.71/Add.2, para. 24).

Article 19. Information required in a cancellation notice

8. Article 19 is based on recommendation 32 of the Registry Guide (see paras. 243 and 244; the Secured Transactions Guide does not contain an equivalent recommendation). It requires a cancellation notice to contain in the designated field the registration number assigned by the Registry under article 28, paragraph 1, to the initial notice to which the cancellation notice relates. The registration number is the only item of information required to be included in a cancellation notice form (see Registry Guide, Annex II, Examples of registry forms, III. Cancellation notice).

9. The purpose of assigning a registration number to an initial notice is to ensure that all related amendment and cancellation notices are associated in the registry record with the initial notice (see the definition of the term “registration number” in art. 1, subpara. (j)). The inclusion of the registration number in a cancellation notice ensures that the cancellation notice extends to the information in all registered notices containing that number. To minimize the risk of the inadvertent registration of cancellation notices, the prescribed cancellation notice form should include a note alerting the secured creditor to the effect of a cancellation (see Registry Guide, Annex II, Examples of registry forms, III. Cancellation notice; with respect to the effectiveness of a cancellation notice not authorized by the secured creditor, see paras. 19-27 below).

Article 20. Compulsory registration of an amendment or cancellation notice

10. Article 20 is based on recommendations 72 of the Secured Transactions Guide (see chap. IV, paras. 107 and 108) and 33 of the Registry Guide (see paras. 260-263). It should be read in conjunction with article 2 which requires the person identified as the grantor in a registered notice to authorize its registration.

11. Paragraph 1 (a) obligates the secured creditor identified in a registered notice to register an amendment notice deleting encumbered assets from the description in the notice if the grantor identified in the notice did not authorize the registration of a notice in relation to those assets and informed the secured creditor that it will not do so. For example, the secured creditor may have registered an initial notice covering “all assets” of the grantor but the security agreement between the parties ultimately covers only a specific tangible asset and the grantor informs the secured creditor that it does not contemplate entering into any further security agreement. Even if the grantor separately authorized the registration of a notice covering the relevant assets, paragraph 1 (c) obligates the secured creditor to amend the description in its registered notice if the grantor subsequently withdraws its authorization, provided that no security agreement covering those assets is concluded thereafter (since this would automatically constitute a new authorization under art. 2).

12. Paragraph 1 (b) addresses the scenario where the security agreement to which a registered notice relates is revised to release some of the initially encumbered assets from the security right. In this scenario, the secured creditor is obligated to register an amendment notice to delete the released assets from the description in the registered notice provided that the grantor did not authorize the registration of a notice covering the released assets otherwise than by entering into the initial security agreement. Even if the grantor executed a separate agreement authorizing the secured creditor to make a registration, paragraph 1 (c) obligates the secured creditor to

register an amendment notice deleting the released assets if the grantor subsequently withdraws that authorization, provided that the parties have not entered into a new security agreement covering the released assets.

13. Enacting States that implement article 8, subparagraph (e), will need to adopt paragraph 2 which requires a secured creditor to register an amendment notice reducing the maximum amount specified in a registered notice if: (a) the grantor only authorized the registration of a notice in the reduced amount; or (b) the security agreement to which the notice relates has been revised to reduce the maximum amount.

14. Paragraphs 3 (a) and 3 (b) obligate the secured creditor of record to register a cancellation notice where the grantor identified in a registered notice either did not authorize the registration and informed the secured creditor that it will not do so, or subsequently withdrew its authorization and the parties did not enter thereafter into a security agreement. A cancellation notice must also be registered if the obligation secured by the security right to which the registered notice relates has been extinguished (see para. 3 (c)). It should be noted that, under article 12 of the Model Law, a security right is extinguished upon full payment or other satisfaction of the secured obligation, provided that there is no further commitment by the secured creditor to extend any further secured credit.

15. Paragraph 4 prohibits the secured creditor from charging any fee for complying with its obligations under paragraphs 1 (a), 1 (c), 2 (a), 3 (a) and 3 (b). These provisions require a secured creditor to amend or cancel a registration either because it was never authorized by the grantor or because the grantor's initial authorization was withdrawn owing to the failure of the parties to subsequently conclude a security agreement. In these circumstances, it is appropriate to impose the cost on the secured creditor.

16. To protect grantors against the risk of non-compliance by a secured creditor with its obligation under paragraphs 1, 2 and 3, paragraph 5 gives the grantor the right to send a formal written request to the secured creditor to register the appropriate amendment or cancellation notice. If the secured creditor does not comply with the request before the expiry of the period specified by the enacting State, paragraph 6 entitles the grantor to apply for an order compelling registration of the appropriate notice.

17. Paragraph 6 contemplates that the enacting State will establish a summary judicial or administrative procedure and identify the relevant court or other authority to enable the grantor to exercise this right. Depending on local considerations, the enacting State may decide to use an existing administrative or judicial summary procedure or it may decide to set up a new procedure administered, for example, by the Registrar or registry staff. As noted in the Registry Guide (see para. 262), the process should be speedy and inexpensive while also incorporating appropriate safeguards to protect the secured creditor against an unwarranted demand by the grantor (for example, by requiring the relevant authority to notify the secured creditor of a demand submitted to it and give the secured creditor a reasonable opportunity to respond).

18. Once an order for registration has been issued pursuant to the procedure established by the enacting State under paragraph 6, paragraph 7 requires the Registry to register the appropriate notice "upon receipt of a request with a copy of the relevant order" (if the enacting State decides under para. 6 to designate a court or other external body to administer the procedure) or "upon the issuance of the relevant order" (if the enacting State decides under para. 6 to vest the Registry with the authority to administer the procedure).

Article 21. Effectiveness of the registration of an amendment or cancellation notice not authorized by the secured creditor

19. Article 21 addresses the effectiveness of the registration of an amendment or cancellation notice where the registration was not authorized by the secured creditor

of record. The options set out in article 21 are based on the discussion of the matter in the Registry Guide (see paras. 249-259).

20. An unauthorized registration may occur as a result of the fraud or error of the grantor or a third party, or even a member of the registry staff (for corrections of errors by the Registry, see art. 31). The issue is whether and to what extent conclusive effect should be given to a registered amendment or cancellation notice for the purposes of determining the third-party effectiveness and priority of the related security right as against a competing claimant. It should be noted that the risk of the registration of unauthorized amendment or cancellation notices, regardless of which option is chosen, is greatly reduced by the requirement for the enacting State to put in place secure access procedures for registering amendment and cancellation notices (see art. 5 and A/CN.9/WG.VI/WP.71/Add.2, para. 24).

21. Under option A, the registration of an amendment or cancellation notice is effective whether or not it was authorized by the person identified as the secured creditor in the registered notice to which the amendment or cancellation notice relates.

22. Option B is a variation of option A. While recognizing the general effectiveness of an unauthorized amendment or cancellation notice, it preserves the priority of the security right to which the unauthorized registration relates as against the right of a competing claimant over whom the secured creditor of record had priority prior to the unauthorized registration. This option is predicated on the rationale that such a claimant by definition could not have been prejudiced by relying on the unauthorized registration.

23. If an enacting State decides to adopt option A or option B, it will need to also implement option B of article 30 which obligates the Registry to remove information in a registered notice from the public registry record and archive it upon registration of a cancellation notice. It will also need to implement option A of article 13, paragraphs 4 and 5, dealing with the time of effectiveness of the registration of a cancellation notice.

24. Option C is at the opposite end of the spectrum from option A. It provides that the registration of an amendment or cancellation notice is ineffective, unless authorized by the secured creditor of record. Under this approach, a searcher will need to conduct off-record inquiries to verify whether the registration was in fact authorized by the secured creditor.

25. Option D is a variation of option C. It preserves the effectiveness of an unauthorized registration of an amendment or cancellation notice as against a competing claimant whose right was acquired in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, and who did not have knowledge that the registration was unauthorized when it acquired its right. This qualification differs from the qualification in option B above insofar as it requires the competing claimant to provide factual evidence that it actually searched and relied on the registry record prior to acquiring its right in order to prevail over the secured creditor whose registration was amended or cancelled without authority.

26. If an enacting State decides to adopt option C or option D, it will need to implement option B of article 30, which obligates the Registry to remove information in registered notices from the public registry record and archive it only upon the expiry of the period of effectiveness of the initial notice. Under option C or D, all amendment or cancellation notices need to remain in the public registry record in order for searchers to discover the security right and know whom to contact to verify whether the amendment or cancellation was authorized. If all the relevant notices were instead removed from the public record upon registration of a cancellation notice, searchers would be bound by a security right of whose existence they would be entirely ignorant.

27. Searchers may not necessarily appreciate that registered amendment and cancellation notices may not be legally effective. Accordingly, enacting States that implement options C or D may wish to include a note on search results advising

searchers of the need to conduct off-record inquiries to verify whether the registration of an amendment or cancellation notice was authorized by the secured creditor.

Section E. Searches

Article 22. Search criteria

28. Article 22 is based on recommendation 54 (h) of the Secured Transactions Guide (see chap. IV, paras. 31-36) and 34 of the Registry Guide (see paras. 264-265). It sets out the two criteria according to which any person may conduct a search of the public registry record.

29. Under subparagraph (a), the first and principal search criterion is the identifier of the grantor. The identifier of the grantor is its name, determined according to the rules set out in article 9. If an enacting State decides to require "additional information" to be entered in a separate field to assist in uniquely identifying a grantor, this additional information does not constitute an alternative search criterion (see art. 8, subpara. (a)). Rather it will simply appear as additional information in a search result.

30. Under subparagraph (b), the registration number assigned to an initial notice under article 28, paragraph 1, constitutes an alternative search criterion. A search by registration number gives secured creditors an efficient means of identifying and retrieving a registered notice for the purposes of registering an amendment or cancellation notice. Searches by registration number generally will not be conducted by third parties as they typically will not know the relevant registration number.

31. If the enacting State provides for the entry of the serial number of an asset in a separate designated field, entry of this serial number in its own designated field in the initial or amendment notice is required in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against the classes of competing claimants specified in its secured transactions law. If an enacting State decides to adopt this approach, it will need to list the serial number of the asset as an additional search criterion in this article. It will also need to provide rules for determining what constitutes the correct serial number, design the registry system so that registered notices can be searched and retrieved by serial number, and specify what categories of subsequent claimants are entitled to priority if the secured creditor fails to include the serial number in its registered notice (see Registry Guide, para. 266, and A/CN.9/WG.VI/WP.71/Add.2, para. 42).

32. To allow the registration of global amendment notices, as provided in article 18, the registry record must be organized to permit registered notices to be identified and retrieved by reference to the relevant secured creditor. For public policy reasons relating to privacy and confidentiality, the name or other identifier of the secured creditor should not be an available criterion for general public searching (see Secured Transactions Guide, chap. IV, para. 81 and Registry Guide, para. 267).

Article 23. Search results

33. Article 23 is based on recommendation 35 of the Registry Guide (see paras. 268-273; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 sets out the required content of search results provided by the Registry in response to a search request. The search result must first indicate the date and time when the search was performed.

34. Paragraph 1 does not require search results to include a "currency date" indicating that the search result includes only information contained in notices that were registered as of that date (as opposed to the actual date on which the search result was issued). The reason is that registration becomes effective only when the information in a notice submitted to the Registry has been entered into the registry record so as to be accessible to searchers (see art. 13, para. 1). Thus, the "currency date" is always the actual date of the search (see Registry Guide, para. 273).

35. With respect to the substantive content of the search result, paragraph 1 contemplates that an enacting State may adopt one of two options. Option A should be adopted if the enacting State's registry system is designed to only retrieve notices that exactly match the identifier of the grantor entered by the searcher on its search request. Option B should be adopted if the enacting State's registry system is designed to also retrieve notices that closely match the identifier of the grantor entered by the searcher. Which identifiers are considered to constitute a "close match" in States that adopt option B depends on the specific close-match search programme or logic used by the Registry.

36. Option A should be read in conjunction with article 24, paragraph 1, which provides that an error by a registrant in entering the grantor identifier in a notice does not render the registration of the notice ineffective if the information in the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion. Option B should be read in conjunction with article 24, paragraph 2, under which the registration of a notice that contains an error in the grantor's identifier might still be effective if the name that was entered by the registrant is a sufficiently close match to result in the notice being retrieved on a search using the grantor's correct identifier.

37. Paragraph 2 obligates the Registry to issue an official search certificate setting out a search result upon the request of a searcher. Paragraph 3 minimizes the administrative burden on the Registry in this respect by providing that a printed search result that purports to have been issued by the Registry is proof of its contents in the absence of evidence to the contrary.

Section F. Errors and post-registration changes

Article 24. Registrant errors in required information

38. Article 24 is based on recommendations 58 and 64-66 of the Secured Transactions Guide (see chap. IV, paras. 66-74, and 82-97) and 29 of the Registry Guide (see paras. 205-220). Its overall aim is to provide guidance on when the effectiveness of a registration may be challenged owing to errors or omissions committed by registrants in entering the information in notices submitted to the Registry.

39. Paragraphs 1 and 2 address alleged errors on the part of a registrant in entering the grantor identifier set out in a registered notice. Paragraph 1 provides that the effectiveness of the registration cannot be challenged if the information in the registered notice would be retrieved by a search of the public registry record using the grantor's correct identifier (determined under art. 9) as the search criterion (see option A of art. 23, and para. 36 above). Paragraph 2, which appears in square brackets, should be adopted by enacting States that implement option B of article 23 under which search requests will also retrieve registered notices in which the grantor identifiers closely match the identifier entered by a searcher (see para. 36 above). In enacting States that adopt this option, paragraph 2 provides that an alleged error on the part of a registrant in entering the grantor identifier does not render the registration ineffective if the information in the notice would still be retrieved as a "close match" by a search using the grantor's correct identifier "unless the error would seriously mislead a reasonable searcher." The latter caveat addresses situations where, for example, the list of close matches set out in a search result is so lengthy as to make it unreasonable to expect searchers to determine whether it might include the relevant grantor.

40. Paragraph 4 deals with the impact of errors or omissions committed by registrants in entering the other items of information required to be set out in registered notices under article 8, notably errors in the description of the encumbered assets. It provides that an alleged error does not make the registration ineffective unless it "would seriously mislead a reasonable searcher." This language incorporates an objective test in the sense that a person challenging the effectiveness of the

registration need not show that it was personally misled by the error. It is sufficient to show that a hypothetical reasonable searcher would have been misled.

41. Paragraphs 3 and 5 incorporate the general principle of severability. Thus, an error in entering the identifier of a particular grantor or the description of a particular encumbered asset that would render the registration ineffective under paragraph 1, 2 or 4 does not make the registration of the notice ineffective with respect to other grantors correctly identified or other encumbered assets correctly described in the registered notice.

42. Paragraphs 6 and 7, which appear within square brackets, provide special rules for determining the impact of errors made by a registrant on the effectiveness of a registration in two scenarios. Paragraph 6 addresses the scenario where the enacting State allows a registrant to self-select the period of effectiveness of the registration of a notice pursuant to options B or C of article 14 (and art. 8, subpara. (d)). In this scenario, an error in the entry of the relevant information does not render the registration ineffective even if the error would be seriously misleading from the perspective of a hypothetical reasonable searcher. Rather, the registration will be treated as ineffective only as against a competing claimant who can establish factually that it was personally misled by the error (see Registry Guide, paras. 215 and 217-220). Paragraph 7 addresses the scenario where an enacting State chooses to require a registrant to indicate the maximum amount for which a security right may be enforced pursuant to article 8, subparagraph (e). It provides that while an error in the maximum amount stated in an initial or amendment notice does not render the registration ineffective, the priority of the security right is limited to the maximum amount stated in the notice or in the security agreement, whichever is lower. This rule is consistent with the rationale for requiring the maximum amount to be stated in the security agreement and disclosed in any related registered notice (see A/CN.9/WG.VI/WP.71/Add.2, para. 31).

43. As already observed (see A/CN.9/WG.VI/WP.71/Add.2, para. 42, and para. 31 above), some States provide for the entry of an alphanumerical asset identifier for specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of this identifier in its own designated field in the initial notice is required in the sense of being necessary to achieve the third-party effectiveness and priority of the security right as against specified classes of competing third-party claimants. Enacting States that decide to adopt this approach will need to deal with the impact of errors in the serial number on the effectiveness of a registration.

Article 25. Post-registration change of grantor identifier

44. Article 25 is based on recommendation 61 of the Secured Transactions Guide (see chap. IV, paras. 75-77; see also Registry Guide, paras. 226-228). It addresses the impact of a post-registration change in the identifier of the grantor (i.e. its name under art. 9) on the effectiveness of the registration of a notice. Since the grantor's identifier is the principal search criterion (see art. 22, subpara. (a)), a search under the new identifier will not retrieve registered notices in which the grantor is identified by its old identifier. This poses a risk for third-party searchers that acquire rights in the grantor's encumbered assets after the change of the grantor's identifier.

45. To address this risk, paragraphs 2 and 3 give the secured creditor a grace period (the duration of which is to be specified by the enacting State) after the change of identifier occurs to either register an amendment notice adding the new identifier of the grantor or make its security right effective against third parties by a method other than registration (on other methods, see arts. 18 and 25-27 of the Model Law). If neither step is taken before the expiry of the grace period, the security right is subordinated to a competing security right that was made effective against third parties after the change (see para. 2 (a)), and a buyer who acquired its rights in the encumbered asset after the change will acquire them free of the security right (see para. 3 (a)).

46. Under paragraphs 2 and 3, the secured creditor may still register an amendment notice or otherwise make its security right effective against third parties even after the expiry of the grace period. However, it loses the benefit of the grace period with the result that its security right will be subordinated to a competing security right that was made effective against third parties after the change but before the relevant step was taken, even if the competing security right was made effective against third parties before the expiry of the grace period (see para. 2 (b)). A buyer to whom the encumbered assets is sold after the change but before the relevant step was taken likewise acquires its rights free of the security right even if the sale took place before the expiry of the grace period (see para. 3 (b)). Under paragraph 4, paragraphs 2 and 3 do not apply if the information in the notice referred to in paragraph 1 would be retrieved by a search using the new identifier of the grantor as a search criterion (which would be necessary if the enacting State implements option B of article 23, paragraph 1.

47. As against competing claimants other than a competing secured creditor and a buyer whose rights are specifically protected by paragraphs 2 and 3, paragraph 1 confirms that the third-party effectiveness and priority of a security right that was made effective against third parties by registration is not affected by a post-registration change in the identifier of a grantor. Thus, even if the secured creditor does not register an amendment notice or make its security right effective against third parties by a method other than registration, it will still retain whatever priority it has under the Model Law against competing secured creditors and buyers whose rights arose before the change in the identifier of the grantor and as against other classes of competing claimants whether their rights arose before or after the change of the grantor's identifier (for example, the grantor's judgment creditors and insolvency representative).

Article 26. Post-registration transfer of an encumbered asset

48. Article 26 is based on recommendation 62 of the Secured Transactions Guide (see chap. IV, paras. 78-80; see also Registry Guide, paras. 229-232). It addresses the impact of a post-registration sale of an encumbered asset on the effectiveness of the registration of a notice in relation to a security right in that asset where the buyer acquires the asset subject to the security right under article 34, paragraph 1, of the Model Law. This creates a risk for third parties that acquire rights in the encumbered asset from the buyer since a search of the public registry record under the identifier of the buyer will not retrieve registered notices in which the grantor identifier is the name of the seller/grantor. This risk is analogous to that addressed in article 25 in relation to post-registration changes in the grantor identifier. Unlike article 25, article 26 does not provide a uniform rule. Rather, it gives enacting States the option to enact any one of three approaches.

49. The approach in option A is identical to that set out in article 25 for post-registration changes in the grantor identifier. Paragraphs 2 and 3 give the secured creditor a grace period (the duration of which is to be specified by the enacting State) to either register an amendment notice adding the buyer as a new grantor or otherwise make its security right effective against third parties in order to preserve its priority against secured creditors and subsequent buyers who acquire their rights in the encumbered assets from the grantor's buyer (see paras. 2 (a) and 3 (a)). As under paragraph 1 of article 25, paragraph 1 of article 26 confirms that the secured creditor's failure to take either of these steps before the expiry of the grace period, or at all, does not generally prejudice the third-party effectiveness and priority status of its security right. However, its security right will be subordinated to competing security rights created by the buyer from the grantor and made effective against third parties after the sale, and before the relevant step is taken (see para. 2 (b)). A buyer to whom the buyer from the grantor sells the encumbered asset during this same period also acquires its rights free of the security right (see para. 3 (b)).

50. The approach in paragraphs 1-3 of option B is similar to the approach in paragraphs 1-3 of option A, with the important qualification that the grace period under paragraphs 2 and 3 to register the amendment notice or make the security right

effective against third parties by a method other than registration begins only when the secured creditor acquires knowledge that the grantor has sold the encumbered asset and the identity of the buyer, and not simply when the sale takes place, as under paragraphs 2 and 3 of option A.

51. If there are successive sales of an encumbered asset before the secured creditor acquires knowledge of the sale and the identity of the buyer, paragraph 4 of option B confirms that it is sufficient, to protect its rights under paragraphs 2 and 3 against intervening secured creditors and buyers, if the secured creditor registers an amendment notice adding the identifier of the most recent buyer of which it has knowledge.

52. Paragraphs 4 of option A and 5 of option B implement recommendation 244 of the Intellectual Property Supplement. They provide that a security right in intellectual property made effective against third parties by registration retains its third-party effectiveness and priority status notwithstanding a post-registration sale by the grantor even as against subsequent secured creditors and buyers who acquire their rights from the grantor's buyer. The reason for this different approach in the intellectual property context is that, the risks posed for third-party searchers by the grantor's sale of encumbered assets were outweighed by the burden and costs that would be imposed on intellectual property financing if secured creditors were required to register an amendment notice each time intellectual property was sold or licensed to the extent that an exclusive licence is treated as a transfer under intellectual property law (see Intellectual Property Supplement, paras. 158-166).

53. Under option C, the third-party effectiveness and priority of a security right that is made effective against third parties by registration of a notice is not affected by a post-registration sale of an encumbered asset covered by the registered notice. The secured creditor retains whatever priority it otherwise has under the Model Law against all competing claimants, whether their rights arise before or after the sale. This option extends the approach to the impact of post-registration sales of encumbered intellectual property in paragraphs 4 of option A and 5 of option B to all types of encumbered asset.

Section G. Organization of the Registry and the registry record

Article 27. The registrar

54. Article 27 is based on recommendation 2 of the Registry Guide (see para. 74; the Secured Transactions Guide does not contain an equivalent recommendation). Recognizing that these matters may be dealt with differently in each State, article 27 leaves it to the enacting State to specify the authority responsible for the appointment and dismissal of the registrar, and for determining the registrar's duties and monitoring their performance.

55. While an enacting State may decide to have the day-to-day operations of the Registry carried out by either a private or public entity, the Registry and the registrar should always be subject to the ultimate direction of and accountable to the enacting State. Accordingly, the authority specified by the enacting State under this article should be a governmental ministry or other public agency, such as a central bank (see Registry Guide, para. 77).

Article 28. Organization of information in the registry record

56. Article 28 is based on recommendations 15 and 16 of the Registry Guide (see paras. 127-130; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 requires the Registry to assign a unique registration number to an initial notice and associate all registered amendment or cancellation notices that contain that number with the initial notice in the registry record. The reason for these requirements is to ensure that amendment and cancellation notices are linked to the related initial notice in the registry record so as to be retrievable on

a search (see the definition of the term "registration number" in art. 1, subpara. (j), as well as arts. 17, 19 and 22, subpara. (b)).

57. Option A of paragraph 2 should be adopted by enacting States in which the registry system is designed so that search results will only retrieve information in registered notices that exactly match the grantor identifier entered by the searcher (see option A of art. 23, para. 1). Option B of paragraph 2 should be adopted by enacting States in which the registry system is designed to also retrieve information in registered notices in which the grantor's identifier closely match the identifier entered by the searcher (see option B of art. 23, para. 1). Option A of paragraph 3 is intended for enacting States that permit the secured creditor of record to register a global amendment notice changing its identifier or address or both in all registered notices in which it is identified as the secured creditor (see option A of art. 18). Option B of paragraph 3 is intended for enacting States in which the global amendment must be effected by the Registry at the request of the secured creditor (see option B of art. 18).

58. Paragraph 4 is intended to ensure that the entire registration record relating to an initial notice remains intact. It provides that the registry record must be organized in a manner that preserves the information in all registered notices, notwithstanding the registration of amendment or cancellation notices that purport to change the information contained in previously registered notices.

59. As noted earlier, article 5, paragraph 2 requires a person who submits an amendment or cancellation notice to satisfy the secure access requirements specified by the Registry. It follows that an enacting State may also need to organize the registry record in a manner that facilitates the application of this requirement (see A/CN.9/WG.VI/WP.71/Add.2, para. 24, and para. 2 above). The enacting State may also need to impose additional organizational obligations on the Registry should it decide to provide for: (a) registration and searching according to serial number (see A/CN.9/WG.VI/WP.71/Add.2, para. 42, and para. 31 above); or (b) registration and searching according to a grantor identifier other than the name of the grantor (see A/CN.9/WG.VI/WP.71/Add.2, para. 30).

Article 29. Integrity of information in the registry record

60. Article 29, paragraph 1, is based on recommendation 17 (a), of the Registry Guide (see para. 136; the Secured Transactions Guide does not contain an equivalent recommendation). It prohibits the Registry from unilaterally amending or removing information in the registry record except as authorized in articles 30 and 31.

61. Article 29, paragraph 2, is based on recommendations 55 (f), of the Secured Transactions Guide (see chap. IV, para. 54), and 17 (b), of the Registry Guide (see para. 137). It obligates the Registry to ensure that the information in the registry record is preserved and may be reconstructed in the event of loss or damage. In practice, this obligation requires the Registry to create and maintain a backup copy of the registry record.

Article 30. Removal of information from the public registry record and archival

62. Option A of article 30 is based on recommendations 74 of the Secured Transactions Guide (see chap. IV, para. 109), as well as recommendations 20 and 21 of the Registry Guide (see paras. 151-152). It requires the Registry to remove information in registered notices from the public registry record once the period of effectiveness of the notice expires or a cancellation notice is registered. If the information in cancelled or expired notices remained publicly searchable, this might create legal uncertainty for third-party searchers, potentially impeding the ability of the grantor to grant a new security right in or deal with the assets described in the notice (see Registry Guide, para. 151). Option A should be enacted by States that adopt option A or B of article 21.

63. Option B of article 30 should be enacted by States that adopt options C or D of article 21. Like paragraph 1 of option A, paragraph 1 of option B requires the Registry

to remove information in registered notices from the public registry record once the period of effectiveness of the notice expires. Unlike option A, option B, paragraph 2 requires the Registry to preserve all information in registered notices on the public registry record notwithstanding the registration of a cancellation notice. This is necessary since the registration of an amendment or cancellation notice is wholly or partially ineffective under option C or D of article 21 if it was not authorized by the secured creditor. Since the factual question of whether the secured creditor of record authorized the registration of a cancellation notice can only be answered by conducting off-record inquiries, it is necessary to preserve the information contained in cancellation notices on the public registry record so that searchers have the information needed to conduct those inquiries.

64. Paragraph 3 requires the Registry to archive the information in registered notices removed from the public registry record under paragraph 1 in a manner that enables the information to be retrieved in accordance with the search criteria set out in article 22. This is necessary since the information in notices removed from the public registry record may need to be retrieved in the future, for example, in order to determine the time of registration or the scope of the encumbered assets described in the notice for the purposes of a subsequent priority dispute between the secured creditor and a competing claimant (see Registry Guide, para. 151).

65. As to the duration of the Registry's archival obligation, paragraph 3 leaves this decision to the enacting State (while cautioning that it should minimally be coextensive with the prescription period under local law for disputes arising in relation to a security agreement).

Article 31. Correction of errors made by the Registry

66. Article 31 addresses the effect of errors made by the Registry in two scenarios. The first is where the Registry makes an error or omission in entering into the public registry record information contained in a notice submitted for registration. The need to address this scenario arises only if the registry system implemented by a State allows the submission of notices in paper form as opposed to requiring all registrants to transmit the information in notices directly to the Registry via electronic means of communication. The second scenario addressed by article 31 is where the Registry erroneously removes from the registry record information contained in a registered notice. The need to address this second scenario arises even in systems in which notices may only be submitted directly to the Registry via electronic means of communication.

67. Paragraph 1 of article 31 requires the Registry to takes steps to correct the error or restore the erroneously removed information without delay after discovering the error. Under option A, the Registry is itself entitled to take the necessary corrective action and must then send to the secured creditor of record a copy of the notice it registered to correct the record. Under option B, the Registry is instead required to inform the secured creditor of record of the error so as to enable it to directly register the notice needed to correct the record.

68. Paragraph 2 addresses the impact of the Registry's error on the third-party effectiveness and priority status of the security right in the event of a competition with the right of a competing claimant which arose prior to the registration of the notice correcting the record referred to in paragraph 1. It offers four options which parallel the four options in article 21 with respect to the effectiveness of the unauthorized registration of an amendment or cancellation notice. The enacting State should adopt the option in article 31 that corresponds to the option it selects in article 21. Accordingly, a State that adopts option A, B, C or D of article 21 should adopt the corresponding option of article 31 (i.e. option A, B, C or D, respectively).

Article 32. Limitation of liability of the Registry

69. Article 32 is based on recommendation 56 of the Secured Transactions Guide (see chap. IV, paras. 55-64; see also Registry Guide, paras. 141-144). It offers three options to an enacting State in dealing with the potential liability of the Registry for

loss or damage allegedly caused by errors or omissions allegedly committed by the Registry.

70. Option A leaves the issue of the liability of the Registry to other law of the enacting State. However, if liability is foreseen by that other law, option A restricts any right of recovery to the types of errors or omissions listed in paragraph 1. Thus, any potential liability is limited to: (a) errors or omissions in a search result issued to a searcher (para. 1 (a)); (b) errors or omissions in a copy of information in a registered notice sent to a secured creditor under article 15 or the failure of the Registry to send a copy of a registered notice as required by that article or article 31 (para. 1 (a) and (c)); and (c) the provision of false or misleading information to a registrant or searcher (para. 1 (d)).

71. Paragraph 1 (b) of option A appears within square brackets as it limits any liability that the Registry may have under other law for errors or omissions in registered notices to the scenario where the Registry is responsible for entering into the registry record information submitted by a registrant in a paper notice. Accordingly, paragraph 1 (b) should only be adopted by an enacting State if its registry system permits the submission of notices to the Registry using paper forms.

72. Like option A, option B of article 32 leaves to other law any liability that the Registry may have for loss or damage caused by an error or omission in the administration or operation of the Registry. Unlike option A, option B does not restrict any right of recovery that a person may have under other law to particular types of errors or omissions. But like paragraph 2 of option A, it limits the Registry's liability to the maximum amount specified by the enacting State. As with option A, the enacting State should make it clear whether the maximum monetary limit is based on the specified maximum value of the relevant encumbered asset or is an absolute limit.

73. Option C of article 32 simply excludes any liability of the Registry for an error or omission in the administration or operation of the Registry.

Article 33. Registry fees

74. Article 33 is based on recommendations 54 (i) of the Secured Transactions Guide (see chap. IV, para. 37) and 36 of the Registry Guide (see paras. 274-280). The Secured Transactions Guide recommends, in particular, that registry fees, if any, should be set at cost-recovery level. If the Registry were instead used as an opportunity for the enacting State to generate profit, registrants and searchers might be discouraged from using the registry services.

75. Thus, article 33 presents two options, option A and option B. Under paragraphs 1 and 3 of option A, fees may be charged for the provision of registry services in the amounts specified by the enacting State and the fee schedule must be publicized by the Registry. To ensure that these fees are based on cost recovery, paragraph 2 of option A entitles the authority responsible for the appointment of the registrar under article 27 to modify the fee schedule on an ongoing basis.

76. In setting the fee schedule under paragraph 2 of option A, an enacting State might decide to charge a lower fee for the registration of notices and the execution of search requests transmitted directly to the registry via electronic means of communication given that electronic registration or searching does not require the intercession of registry staff and therefore is less costly. This approach might also encourage users to shift to this more efficient method in preference to continuing to use paper forms.

77. To enhance the efficiency of the payment process for frequent users of registry services, paragraph 4 of option A authorizes the Registry to enter into an agreement with any person to establish a Registry user account for any purpose, including the payment of registry fees. This approach has the additional advantage of facilitating the identification of the registrant for the purposes of article 5 (see A/CN.9/WG.VI/WP.71/Add.2, para. 21).

78. A variant of option A would be to limit the charging of fees to registration services and allow searches to be made free of charge. This variant would encourage and facilitate due diligence by potential secured creditors and buyers and thereby reduce risk and future disputes.

79. Another variant of option A would be for the Registry to not charge any fee for the registration of the types of amendment and cancellation notices contemplated by article 20. This variant would encourage the secured creditor of record to voluntarily register amendment and cancellation notices in the circumstances contemplated by article 20 and relieve grantors from the time and expense of having to initiate formal proceedings to force cancellations or amendments under that article.

80. For enacting States that enact option B or C of article 14 (allowing a registrant to select the duration of a notice), yet another variant of option A would be to charge fees on a sliding scale depending on the period selected by the registrant. This approach would have the advantage of discouraging registrants from selecting an inflated period out of an excess of caution (see Registry Guide, para. 277).

81. Option B provides that the Registry may not charge any fees for its services. Under this approach, the cost of establishing and operating the Registry will be borne by general State revenues. Option B may be attractive for enacting States that seek to encourage secured financing in general and the use of the Registry in particular. Like option A, option B could have several variants. For example, the enacting State may wish to offer free registration services for a limited start-up period in order to facilitate acclimatization to and use of the registry system. Another variant would be for the enacting State to provide that certain types of services should be provided free of charge (e.g., the registration of amendment and cancellation notices in the circumstances contemplated in article 20, and the registration of notices aimed at preserving the third-party effectiveness of a security right arising under prior law during the transition period to the new registry system).

(A/CN.9/WG.VI/WP.71/Add.4) (Original: English)

Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Chapter V. Priority of a security right

A. General rules

Article 29. Competing security rights created by the same grantor

1. Article 29 is based on recommendation 76 of the Secured Transactions Guide (see chap. V, paras. 45-54). It addresses priority as between security rights created by the same grantor. Article 29 divides the priority competitions it addresses into three categories. First, it addresses priority as between competing security rights made effective against third parties by registration of a notice in the Registry. Second, it addresses priority as between competing security rights made effective against third parties by a method other than registration of a notice in the Registry. Third, it addresses priority as between competing security rights, one (or more) of which was made effective against third parties by registration of a notice in the Registry and the other one (or more) was made effective against third parties by a method other than registration of a notice in the Registry.

2. The first category, set out in paragraph 1 (a), addresses the most common situation, that is, priority competitions between security rights made effective against third parties by registration of a notice in the Registry. In that situation, priority is determined by the order of registration. This provides a simple and easy-to-apply rule, in which all of the information necessary for the priority determination is maintained by the Registry and is easily determinable by the parties and competing claimants.

3. It should be noted that the priority rule in paragraph 1 (a) applies even if one or more of the competing security rights had not been created at the time of registration (registration of a notice may precede creation of a security right; see art. 4 of the Model Registry Provisions) and, thus, were not effective against third parties at the time of registration (inasmuch as a security right that has not yet been created cannot be effective against third parties).

4. To illustrate this aspect of the rule in paragraph 1 (a), assume that: (a) on Day 1, Grantor authorized SC 1 to register a notice listing Grantor as the grantor and describing the encumbered assets as all present and future equipment of Grantor, and SC 1 registered the notice; (b) on Day 2, Grantor borrowed money from SC 2 and created in favour of SC 2 a security right in all of Grantor's present and future equipment and SC 2 registered a notice with respect to that security right; and (c) on Day 3, Grantor borrowed money from SC 1 and created in favour of SC 1 a security right in all of Grantor's present and future equipment. In this case, the security right of SC 2 became effective against third parties before the security right of SC 1 (because SC 1's security right did not become effective against third parties until it was created). Yet, as a result of the rule in paragraph 1 (a), in determining the priority between the security rights of SC 1 and SC 2, the time of registration of SC 1's notice, rather than the later time on which SC 1's security right became effective against third parties, is used. Thus, the security right of SC 1 has priority over the security right of SC 2 because the notice with respect to the security right of SC 1 was registered on Day 1 before the security right of SC 2 became effective against third parties on Day 2.

5. The rule in paragraph 1 (a) is beneficial for two reasons. First, as a result of this rule, the priority of security rights that are made effective against third parties by the registration of a notice will always be determined according to the time of registration. The time of registration is maintained by the Registry and is, therefore, easy to demonstrate and easy to search. By way of contrast, the creation of a security right is a private event between the grantor and the secured creditor; the time of creation is not maintained by the Registry and is not publicly available and may be difficult to establish.

6. Second, the results that follow from the application of the rule in paragraph 1 (a) are consistent with the behaviour of prudent secured creditors. For example, assume that SC 2 is considering extending credit to Grantor, secured by a security right in an item of Grantor's equipment. If SC 2 searches the records of the Registry and

discovers that a notice has been registered listing Grantor as the grantor and SC 1 as the secured creditor and indicating that the encumbered asset is the same item of equipment, SC 2 will not know whether SC 1 has a security right or, rather, has registered a notice before creation of the security right. In such a situation, SC 2 would likely make the conservative assumption that the registered notice reflects an existing security right and, accordingly, if SC 2 decides to go forward with the transaction, it will be with the understanding that its rights are subordinate to that of SC 1. The rule in paragraph 1 (a) is consistent with the behaviour of SC 2.

7. The second category of priority competitions is addressed in paragraph 1 (b). In cases in that category, neither security right has been made effective against third parties by registration of a notice in the Registry. In that situation (which is not very common inasmuch as situations in which two different secured creditors are both able to make their security rights effective against third parties by a method other than registration are not common), priority is determined by the order of third-party effectiveness.

8. In the third category of priority competitions, one (or more) security right has been made effective against third parties by registration of a notice in the Registry and the other one (or more) security right has been made effective against third parties by another method (such as by possession of the encumbered asset). In this category, the time of registration of a security right made effective against third parties by registration is compared to the time of third-party effectiveness of a security right made effective against third parties other than by registration, and the security right with the earlier time of registration or third-party effectiveness has priority.

9. The result of the rules in paragraphs 1 (a) and 1 (c) is that the priority of a security right made effective against third parties by registration of a notice in the Registry will be determined by the time of registration (without regard to the time at which the security right was created), whether the competing security right was made effective against third parties by registration or by another method. This means that, once a secured creditor has registered a notice with respect to a security right, that secured creditor will be able to determine its priority with respect to all competing security rights whose priority is determined by the rules in this article.

10. In cases in which a secured creditor has taken steps to make its security right effective against third parties by more than one method (such as when a secured creditor, who has possession of an encumbered asset, subsequently registers a notice with respect to that security right in the Registry, or vice versa), the time of the earlier event should be used in applying the rule in article 29, unless there is a subsequent "gap" during which the security right is neither effective against third parties nor the subject of a notice registered in the Registry (see art. 31).

Article 30. Competing security rights created by different grantors

11. Article 30 addresses priority as between security rights in the same encumbered asset that were created by different grantors. This situation can occur, for example, if a grantor creates a security right in its equipment in favour of a secured creditor and then transfers the equipment to a transferee who creates a security right in it in favour of a different secured creditor. In this situation, article 30 provides that the same rules apply as those that apply when the same grantor has granted both of the competing security rights (see art. 29), except as provided in article 26 of the Model Registry Provisions, which provides three alternatives to States (see A/CN.9/WG.VI/WP.71/Add.3, paras. 48-53).

Article 31. Competing security rights in the case of a change in the method of third-party effectiveness

12. Article 31 addresses situations in which there has been a change in the method of third-party effectiveness. This may happen, for example where a secured creditor in possession of the encumbered asset returns possession of it to the grantor after registering a notice with respect to it in the Registry. In such a case, the priority of the security right is determined by the time at which the security right initially became

effective against third parties so long as there was no time thereafter during which the security right was not effective against third parties.

Article 32. Competing security rights in proceeds

13. Article 32, which is based on recommendation 100 of the Secured Transactions Guide (see chap. V, paras. 144-150), is important because, in many cases in which two secured creditors have a security right in the same asset, one or both of those security rights exist because that asset constitutes proceeds of a different encumbered asset in which the secured creditor had a security right and which the grantor has sold. Situations in which a secured creditor has a security right in proceeds are quite common when the original encumbered asset was inventory or a receivable inasmuch as a grantor will frequently sell the inventory or collect a receivable before satisfaction of the obligation secured by that asset. In such a case, the security right continues in the proceeds as provided in article 10 and the security right in the proceeds is effective against third parties if the conditions in article 19 are satisfied. This article determines the priority of that security right in an encumbered asset as proceeds as against another secured creditor with a security right in the same encumbered asset, whether as original encumbered asset or as proceeds. Under this article, the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset.

14. Thus, for example, assume that: (a) on Day 1, Grantor creates in favour of SC 1 a security right in all of Grantor's present and future inventory and SC 1 registers a notice with respect to that security right; (b) on Day 2, Grantor creates in favour of SC 2 a security right in all of Grantor's present and future receivables and SC 2 registers a notice with respect to that security right; and (c) on Day 3, Grantor sells some of its inventory on credit, generating a receivable. SC 2 has a security right in that receivable because of its security right in present and future receivables, while SC 1 has a security right in that receivable because it is proceeds of the inventory in which SC 1 had a security right. SC 1's security right in the receivable has priority over SC 2's security right because the priority of SC 1's security right in the receivable as proceeds is determined utilizing the time of third-party effectiveness or registration of notice with respect to the security right in the inventory, whichever came first (see art. 29). Thus SC 1's priority in the receivable dates from Day 1, while SC 2's priority in the receivable dates from Day 2 (for security rights in proceeds of acquisition security rights, however, see art. 41).

Article 33. Competing security rights in tangible assets commingled in a mass or transformed into a product

15. Article 33 addresses two priority issues resulting from situations in which one or both of the competing security rights is a security right that continued in (or extended to) a mass or product because the original encumbered asset was commingled in that mass or transformed into that product (see Secured Transactions Guide, chap. V, paras. 117-124 and recs. 90 and 91). First, paragraph 1 addresses situations in which the competing security rights were in the same encumbered asset and that asset became part of a mass or product. In that case, the order of priority of the security rights in the mass or product is the same as the order of priority of the security rights in the original encumbered asset. Second, paragraphs 2 and 3 address situations in which the competing security rights were originally in different encumbered assets and all of those encumbered assets became part of the same mass or product. In such a case, if the value of the two security rights in the mass or product, as determined in article 11 (see A/CN.9/WG.VI/WP.71/Add.1, paras. 66-68), is insufficient to satisfy the secured obligations, the secured parties share the aggregate maximum value of their security rights in same proportion as the ratio of the value of the security rights in the mass or product.

Article 34. Security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset

16. Article 34 is based on recommendations 79-82 of the Secured Transactions Guide (see chap. V, paras. 60-89). It determines the rights of a buyer or other transferee, lessee or licensee of an encumbered asset vis-à-vis the security right. The general rule, which is stated in paragraph 1 and is subject to important exceptions stated in paragraphs 2-6, is that a security right in an encumbered asset that is effective against third parties continues to encumber the asset notwithstanding the sale or other transfer, lease or licence of the encumbered asset. The article provides two types of exceptions to the general principle stated in paragraph 1. Paragraphs 2 and 3 provide exceptions based on the actions of the secured creditor, while paragraphs 4-6 provide exceptions based on the nature of the sale, lease or licence and the knowledge of the buyer, lessee or licensee.

17. Paragraph 2 provides that, if the secured creditor authorizes the sale or other transfer of the encumbered asset free of the security right, the buyer or other transferee acquires its rights in the asset free of that security right. The rule in this paragraph fulfils the intention of the parties inasmuch as the secured creditor has, by its authorization, evidenced intent for the general rule in paragraph 1 not to apply. Such an authorization may be given in the security agreement or separately. It may be given when, for example, a sale or other transfer of an encumbered asset free of the security right would generate proceeds that the grantor can use to satisfy the secured obligation, but a sale or other transfer subject to the security right would generate a smaller amount of proceeds and thus result in the satisfaction of a smaller part of the secured obligation. Paragraph 3 brings about the same result in the case of a lease or licence of the encumbered asset. It is stated differently than the rule in paragraph 2 because some, but not all, States do not characterize the rights of a lessee or licensee as property rights.

18. Paragraphs 4-6 provide that a buyer (not a transferee without consideration), lessee, or licensee of a tangible encumbered asset (but not reified intangibles, such as money, negotiable instruments, negotiable documents and certificated non-intermediated securities; see art. 2, subpara. (ll)) in a transaction in the ordinary course of business of the seller, lessor or licensor acquires its rights in that asset free of the security right that encumbered it while in the hands of the seller, lessor, or licensor. Under paragraph 4, a buyer of a tangible encumbered asset (not a transferee without consideration) acquires its rights free of the security right if two conditions are satisfied. First, the sale must have been in the ordinary course of the seller's business. Thus, for example, the sale of some of a seller's inventory in accordance with the typical business practices of the seller would satisfy this condition, but an atypical sale by that seller of a used item of the seller's equipment would not satisfy this condition. The second condition is that the buyer must have acquired the encumbered asset without knowledge (as of the time of the conclusion of the agreement with the seller pursuant to which the buyer acquired the asset) that the sale violated the rights of the secured creditor under the security agreement.

19. "Knowledge" is defined in article 2, subparagraph (r), as actual knowledge. Therefore, "constructive knowledge" that the sale violated the rights of the secured creditor does not disqualify the buyer from the protection of this provision. It is also important to note that knowledge of the existence of the security right, as opposed to knowledge that the sale violated the secured creditor's rights, is insufficient to disqualify the buyer from the benefits of paragraph 4. If, for example, a buyer knows that the seller has encumbered its inventory, but does not know whether the secured creditor has authorized sales of that inventory free of the security right, the buyer has knowledge of the security right but does not have knowledge of whether the sale violated the rights of the secured creditor.

20. Paragraphs 5 and 6 bring about similar results to those in paragraph 4 in the case of leases of tangible encumbered assets and non-exclusive licences of intellectual property. As with paragraph 3, the formulation of paragraphs 5 and 6 differs from the formulation of paragraph 4, because some, but not all, States do not characterize the

rights of a lessee or licensee as property rights. Paragraphs 7 and 8 state what is often referred to as a "shelter principle". Accordingly, once a buyer or other transferee, lessee, or licensee obtains rights in the encumbered asset free of (or unaffected by) a security right, those that acquire their rights in the encumbered assets from or through the buyer, lessee, or licensee are similarly free of (or unaffected by) that security right.

21. Paragraph 9 protects a buyer or lessee who acquired its rights in consumer goods that are subject to a security right before the security right was made effective against third parties by one of the methods provided in article 18. If the security right was made effective against third parties automatically as provided in article 24, a buyer or lessee of consumer goods acquire its rights subject to or affected by the security right in the goods. It should be noted that article 24 applies to consumer goods with an acquisition price below an amount to be specified by the enacting State (see A/CN.9/WG.VI/WP.71/Add.1, paras. 94 and 95).

Rights of buyers or other transferees, lessees or licensees of an encumbered asset in the case of specialized registration

22. States that provide a specialized registry or title certificate system for achieving third-party effectiveness of a security right in particular types of asset (see A/CN.9/WG.VI/WP.71/Add.1, para. 85, and A/CN.9/WG.VI/WP.71/Add.6, para. 10) may wish to consider whether, in order to enable competing claimants that utilize the specialized registry or title certificate system to determine their rights solely by a search of the specialized registry system or examination of the title certificate, rights of such parties should be superior to the rights of a secured creditor that achieved third-party effectiveness by other means (see Secured Transactions Guide, chap. V, paras. 56 and 57, and rec. 77; for the coordination with specialized movable property registries, see Registry Guide, paras. 64-70).

Article 35. Impact of the grantor's insolvency on the priority of a security right

23. Under article 35, a security right that is effective against third parties remains effective against third parties notwithstanding the commencement of insolvency proceedings against the grantor. Moreover, nothing in the secured transactions law changes the priority of that security right as against the rights of competing claimants merely because insolvency proceedings have been commenced. Thus, unless the applicable insolvency law provides to the contrary, a security right retains the priority it had as against the rights of competing claimants before the commencement of the insolvency proceedings.

Article 36. Security rights competing with preferential claims

24. Article 36 is based on recommendations 83, 85 and 86 of the Secured Transactions Guide (see chap. V, paras. 90-93 and 103-109). It provides a framework by which the enacting State can implement the policy of these recommendations by: (a) listing in a clear and specific way any claims that will have priority over security rights; and (b) indicating a cap on the amount of the claim given priority. Once a State lists any preferential claims and their amounts in article 36, secured creditors will be positively informed and thus can take the preferential claims and their amounts into account before lending (for example, by deducting the amount of the preferential claims from the net worth of a potential grantor that can be used as security for credit). It should be noted that article 36 provides a framework for the enacting State to list claims that will have priority over security rights whether or not insolvency proceedings have been commenced with respect to the grantor. However, it does not address the issue of whether certain preferential claims have a special priority status triggered by the commencement of insolvency (see Secured Transactions Guide, rec. 239).

25. Examples of claims that some States have determined that should have priority over a competing security right and, thus, should be listed in this article, if the enacting State makes the same determination, include: (a) claims of unpaid sellers or suppliers of goods, or those who have rendered services such as repair services with

respect to goods, but only to the extent that they have retained possession of the goods; and (b) claims of employees for employment benefits.

26. It should be noted that secured creditors typically obtain representations from grantors about preferential claims. However, if a grantor does not disclose the existence of a preferential claim, the secured creditor has only an unsecured claim against the grantor for breach of contract. In any case, whether or not the grantor discloses the existence of that claim, a claim listed by the enacting State in this article has priority to the extent stated in this article.

27. It should also be noted that, in some States, preferential claims are subject to the registration of a notice in the Registry. In some of those States, the priority of preferential claims is subject to the general first-to-register priority rule. This approach is useful only if the notice registered states a maximum amount which every secured creditor may take into account before extending credit. In other States, registered preferential claims have priority even over prior registered security rights. Such registration serves only information purposes. This approach is of limited value to secured creditors (see Registry Guide, paras. 46 and 51).

Article 37. Security rights competing with rights of judgment creditors

28. Article 37 is based on recommendation 84 of the Secured Transactions Guide (see chap. V, paras. 94-102). It determines the priority as between a security right in an encumbered asset and the right of a judgment creditor that has acquired a right in the encumbered asset by taking whatever steps are necessary in order to do so under applicable law. Paragraph 1 gives priority to the right of the judgment creditor if the steps necessary for it to acquire rights in the encumbered asset occur before the security right becomes effective against third parties. The enacting State should complete paragraph 1 by inserting the relevant steps, or a reference to those steps, necessary for a judgment creditor to acquire rights in the encumbered asset. These steps may include actions such as registration of a notice in the security rights registry, seizure of assets or service of a garnishment order.

29. Paragraph 2 provides that, in cases in which the judgment creditor does not acquire its rights in the encumbered asset before the security right becomes effective against third parties, the security right has priority over the right of the judgment creditor. This rule protects a secured creditor against the possibility of having its security right be subordinate to the right of a judgment creditor that did not exist at the time the secured creditor took the steps necessary to make its security right effective against third parties. However, paragraph 2 limits the extent of that priority by providing that the priority of the security right does not extend to: (a) credit extended by the secured creditor more than a short period of time (to be specified by the enacting State) after the judgment creditor notifies the secured creditor that it has taken the steps necessary to acquire its right; or (b) credit extended thereafter pursuant to an irrevocable commitment made before that notification. This rule prevents the secured creditor from exploiting its priority status to increase the secured obligation even after the secured creditor acquires actual knowledge about the rights of the judgment creditor and has had a short period of time to adjust to the existence of those rights. Paragraph 2 also deals with the rare situation in which the judgment creditor acquired its rights in the encumbered asset "at the same time" when the security right became effective against third parties, which may occur where the encumbered assets are future assets.

Article 38. Acquisition security rights competing with non-acquisition security rights

30. Article 38 is based on recommendation 180 of the Secured Transactions Guide (see chap. IX, paras. 131, 136, 137, 143 and 146) and recommendation 247 of the Intellectual Property Supplement (see paras. 259-263). Two alternative options are provided for the enacting State. Both options provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 29 the non-acquisition security right would have priority over the acquisition security

right. When those circumstances are present, it is often said that the acquisition security right has "super-priority" over the competing non-acquisition security right.

31. "Super-priority" for acquisition security rights is a feature of the law of most States, whether phrased in terms of a higher priority for security rights securing obligations incurred in order to acquire the encumbered asset or, in many legal systems, as a necessary implication of title to the encumbered asset being retained by the seller (under art. 2, subpara. (kk), a seller's retention-of-title right is a security right). Article 38 continues this advantageous treatment of acquisition finance, providing a variety of "super-priority" rules depending on the nature of the asset that is subject to the acquisition security right. The reference to possession by the secured creditor in paragraphs 1 (a) and 2 (a) of option A and paragraph 1 (a) of option B means possession as a method of third-party effectiveness, and not possession acquired in the context of enforcement. Thus, an acquisition secured creditor who failed to register on time cannot obtain this super-priority by taking possession of the encumbered asset in the context of enforcement or otherwise if the security agreement allowed the acquisition secured creditor to do so. In other words, third-party effectiveness and priority cannot be changed upon commencement of enforcement. Otherwise, each secured creditor could change its priority by commencing enforcement, a result that would introduce great uncertainty.

32. Option A contains three "super-priority" rules. Which of the three rules is applicable in a particular case depends on the nature of the encumbered assets. If the encumbered assets are equipment or its intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property that is primarily used or intended to be used by the grantor in the operation of its business; see art. 2, subpara. (l)), the rule in paragraph 1 applies. If the encumbered assets are either inventory or its intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property held by the grantor for sale or licence in the ordinary course of the grantor's business; see art. 2, subpara. (q)), the rule in paragraph 2 applies. If the encumbered assets are consumer goods or their intellectual property equivalent (that is, 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; see art. 2, subpara. (f)), the rule in paragraph 3 applies.

33. Under the "super-priority" rule in paragraph 1 of option A, an acquisition security right in equipment or its intellectual property equivalent has priority over a competing non-acquisition security right created by the grantor, if either the acquisition secured creditor is in possession of the asset (unlikely inasmuch as most acquisition security rights are not made effective against third parties by the acquisition secured creditor maintaining possession of the asset) or a notice with respect to the acquisition security right is registered in the Registry within a short period of time to be specified by the enacting State after the grantor obtains possession of the asset (so that registration would not delay the delivery of the assets). Thus, so long as the acquisition secured creditor registers a notice with respect to the acquisition security right within the specified period, that security right will have super-priority over a competing non-acquisition security right that was made effective against third parties even before the acquisition security right was made effective against third parties.

34. Under the super-priority rule in paragraph 2 of option A, additional requirements must be satisfied for an acquisition security right in inventory or its intellectual property equivalent to have "super-priority" over a competing non-acquisition security right. In addition to the requirements set out in paragraph 1, if the non-acquisition secured creditor has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind as the asset that is subject to the acquisition security right, the acquisition security right will have super-priority only if the non-acquisition secured creditor received a notice from the acquisition secured creditor. The notice must: (a) state that the acquisition secured creditor has or intends to acquire an acquisition security right; and (b) describe the

asset sufficiently to enable the non-acquisition secured creditor to identify the asset that is the object of the acquisition security right.

35. There are two reasons for the additional requirements for super-priority in the case of inventory or its intellectual property equivalent. First, because inventory may "turn over" quickly and depreciate quickly, it would be economically inefficient for a potential financier considering extending credit to be secured by a non-acquisition security right in present and future inventory to need to wait for the passage of the period of time stated in paragraph 1 before being certain that the grantor's inventory is not subject to an acquisition security right that will have super-priority. The requirement that the actions required for super-priority in paragraph 2 take place before the grantor obtains possession of the encumbered asset addresses this concern. Second, inasmuch as new inventory can often be difficult to distinguish from old inventory, even a secured creditor with a security right in future inventory that monitors the assets of the grantor will not always be able to easily detect the presence of new inventory that has replaced similar older inventory. Thus, such a secured creditor may not be able to determine that some items of inventory are recently acquired and thus potentially subject to an acquisition security right. The additional notice requirement addresses this concern.

36. Paragraph 4 of option A contains two important rules about the additional notice required in paragraph 2 (b)(ii). First, such a notice may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction. Thus, for example, a seller that is planning to engage in a series of transactions with the same grantor, under which the seller will sell inventory to the grantor subject to an acquisition security right, may send a single notice to the competing non-acquisition secured creditor generally describing the set of transactions. Second, the additional notice suffices to bring about super-priority if the grantor acquires the assets subject to the acquisition security right not later than a time period to be specified by the enacting State, such as five years, after that notice is received. As a result, a seller that provides a notice for a series of transactions in which acquisition security rights are created will not need to send another notice with respect to assets acquired within that time period after the first notice is received.

37. Under the super-priority rule in paragraph 3 of option A, an acquisition security right in consumer goods or their intellectual property equivalent automatically has priority over a non-acquisition security right in the same encumbered asset. No additional actions are required in order for the acquisition security right to enjoy super-priority.

38. Option B contains only two "super-priority" rules. The first rule, found in paragraph 1, is identical to paragraph 1 of option A (which applies only to equipment) except that it also applies to inventory and the intellectual property equivalent of inventory. The second rule, found in paragraph 2, is identical to paragraph 3 of option A. Thus, the only difference between option A and option B is that, in the former, additional steps must be taken in order for an acquisition security right in inventory or in the intellectual property equivalent of inventory to have priority over a competing non-acquisition security right.

Article 39. Competing acquisition security rights

39. Article 39 is based on recommendation 182 of the Secured Transactions Guide (see chap. IX, paras. 173-178). It addresses the priority of competing security rights when all of them are acquisition security rights. Unlike article 38 (which gives priority to acquisition security rights that satisfy certain criteria as against non-acquisition security rights), this article addresses priority as between security rights that would otherwise be entitled to "super-priority". The rule in article 39 reflects two policy decisions. First, under paragraph 1, except in the case addressed in paragraph 2, inasmuch as competing acquisition security rights are entitled to super-priority and super-priority gives no reason to prefer one over the other, priority should be determined on the basis of the general rules applicable. Second, under paragraph 2, an acquisition security right of a seller or lessor, or a licensor of intellectual property,

has priority over an acquisition security right of another person such as a lender. Thus, paragraph 2 protects the supplier of goods on credit over the lender of money because the supplier is often a small- or medium-size enterprise and the kind of credit it provides is extremely important for the economy as a whole (see para. 40 below).

Article 40. Acquisition security rights competing with the rights of judgment creditors

40. Article 40 is based on recommendation 183 of the Secured Transactions Guide (see chap. IX, paras. 145-148). Without the rule in this article, the period provided in article 38 would not be useful. The reason for this is that a secured creditor taking an acquisition security right typically would not want to have a period in which it would be vulnerable to the rights of a judgment creditor. In such a case, a secured creditor would likely register a notice before, or as soon as possible after, the security right was created. Accordingly, a secured creditor would not benefit from the longer period to register and achieve "super-priority" under article 38. Article 40 is another provision protecting the supplier of goods on credit because of the importance of this kind of credit for the economy as a whole (see para. 39 above).

41. By way of illustration, assume that Grantor acquires an item of equipment from Seller on credit on Day 1 and creates in favour of Seller an acquisition security right in the item of equipment to secure its obligation to pay the remainder of the purchase price. On Day 5 Seller registers a notice that has the effect of making its acquisition security right effective against third parties. Between those two dates, on Day 3, Judgment Creditor obtains a judgment against Grantor and takes the steps specified in article 37, paragraph 1, to acquire rights in the item of equipment. Under the rule in article 37, paragraph 1, Judgment Creditor's rights would have priority over Seller's security right because Judgment Creditor obtained its rights before Seller's security right was effective against third parties. As a result of the operation of article 40, however, Seller's security right has priority over the rights of Judgment Creditor.

Article 41. Competing security rights in proceeds of an asset subject to an acquisition security right

42. Article 41 is based on recommendation 185 of the Secured Transactions Guide (see chap. IX, paras. 158-172). Both option A and option B of article 38 provide that, under certain circumstances, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if, under the general priority rule in article 29, the non-acquisition security right would have priority. This article determines whether that "super-priority" over non-acquisition security rights carries over to proceeds of the encumbered assets that are subject to the acquisition security right so that the security right in proceeds of the asset subject to an acquisition security right also has super-priority.

43. Under the general principles of article 10, a secured creditor with a security right in an asset obtains a security right in the identifiable proceeds of that asset and, under the circumstances described in article 19, that security right is effective against third parties. This is equally true of assets subject to non-acquisition security rights and those subject to acquisition security rights. Under the rule in article 32, the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset. Under that rule, the security right in proceeds of assets subject to an acquisition security right would have the same "super-priority" as the security right in the original encumbered asset. Article 41, however, limits the reach of article 32 by extending "super-priority" to proceeds only of certain types of asset subject to an acquisition security right (option A) or by not extending the "super-priority" to proceeds at all (option B).

44. Under option A, the "super-priority" with respect to the assets subject to the acquisition security right always carries over to the proceeds of those assets, except when the assets subject to the acquisition security right consist of inventory, consumer goods or their intellectual property equivalent. When the asset subject to the acquisition security right is inventory or its intellectual property equivalent, whether

the "super-priority" carries over to proceeds depends on the nature of the proceeds. If the proceeds are receivables, negotiable instruments or rights to payment of funds credited to a bank account, the "super-priority" does not carry over to those proceeds. If, on the other hand, the proceeds take another form, the "super-priority" does carry over to the proceeds. When the assets subject to the acquisition security right are consumer goods or 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, however, the "super-priority" does not carry over to the proceeds.

45. The primary reason for the decision not to provide "super-priority" for certain types of proceeds in option A relates to the difficulty that would be faced by competing secured creditors with security rights in payment rights in determining which of those payment rights are proceeds of assets subject to acquisition security rights and which are not. As a result, if there were "super-priority" treatment for those types of proceeds, competing secured creditors with security rights in payment rights might simply assume that all of those payment rights are proceeds and, as a result, extend less credit on the basis of them.

46. Option B provides that the "super-priority" with respect to assets subject to an acquisition security right does not carry over to proceeds of those assets under any circumstances, with the result that the priority of the security right in the proceeds will be determined under the general principle in article 29. This option is provided as an option for States that do not wish to make the sort of distinctions between types of proceeds made in option A.

47. As the Model Law does not deal with insolvency-related matters, with the exception of article 35 (see para. 23 above), no article has been included in the Model Law along the lines of recommendation 186 of the Secured Transactions Guide to deal with the application of the special priority rules for acquisition security rights. 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 42. Acquisition security rights extending to a mass or product competing with non-acquisition security rights in the mass or product

48. Article 42 deals with situations in which a grantor has created an acquisition security right in an asset that later becomes part of a mass or product and has also created a security right in the mass or product. Under article 11, when the original asset becomes part of the mass or product, the secured creditor has a security right in that mass or product, subject to the limits set forth in that article. Article 42 provides that the security right in the mass or product that results from the acquisition security right in the separate asset has priority over the security right in the mass or product as an original encumbered asset, even if the latter security right would otherwise have had priority under the rules in article 29.

Article 43. Subordination

49. Article 43 is based on recommendation 94 of the Secured Transactions Guide (see chap. V, paras. 128-131). Paragraph 1 allows a person to agree to lower priority of its security right as against a competing claimant than would otherwise result from application of the priority rules in this chapter.

50. Such an agreement, usually referred to as a subordination agreement, may be in the form of a bilateral agreement between the party agreeing to lower priority and the competing claimant that will benefit from that agreement; it may also be a unilateral commitment (usually made to the grantor) by the party agreeing to lower priority that its priority will be lower than that of the beneficiaries described in the commitment. Such an agreement is governed by this article so long as it is 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 judgment creditor or an insolvency representative).

51. Paragraph 2 makes it clear that, as an agreement, a subordination agreement binds only the parties to it and does not subordinate the claims of any other parties. For example, assume that three secured creditor, SC 1, SC 2 and SC 3, have security rights in the same encumbered assets, securing claims of € 50.00, € 10.00 and € 70.00, respectively. Assume further that the order of priority is SC 1, SC 2 and SC 3, and that SC 1 subordinates its claim to that of SC 3. Under the rule in paragraph 2, the effect of subordination is that SC 3 will succeed to SC 1's priority status up to € 50.00 and that SC 2's claim to the next € 10.00 will not be affected.

Article 44. Future advances and future encumbered assets

52. Article 44 is based on recommendations 97-99 of the Secured Transactions Guide (see chap. V, paras. 135-143). Inasmuch as a security right can secure obligations arising after the conclusion of the security agreement (see art. 7) and a secured obligation can be secured by assets created or acquired after the conclusion of the security agreement (see art. 8), this article clarifies the priority of a security right in such circumstances.

53. Paragraph 1 provides that the priority of a security right extends to all obligations it secures, regardless of when those obligations were incurred. Thus, a security right has the same priority over the right of a competing claimant whether the entire secured obligation was incurred at or before the creation of the security right or whether the security right secures obligations incurred thereafter. Paragraph 2 similarly provides that when a security right has been made effective against third parties by the registration of a notice, the priority resulting from the time of that notice under article 29 is the same whether the encumbered assets were owned by the grantor at the time of registration or acquired thereafter.

Article 45. Irrelevance of knowledge of the existence of a security right

54. Article 45 is based on recommendation 93 of the Secured Transactions Guide (see chap. V, paras. 125-127). A secured creditor's knowledge or lack of knowledge of a competing security right is not relevant to a determination of priority as between the secured creditor's security right and the competing security right under either the general priority rule in article 29 or any of the special priority rules. The point is made explicit in this article to emphasize that priority is determined only on the basis of the facts referred to in those priority rules and not on the basis of difficult-to-prove subjective states of knowledge. Article 45 applies only to the knowledge of the existence of a competing security right. Under the Model Law, knowledge of other facts may be relevant to priority. For example, a buyer of a tangible encumbered asset that has knowledge that the sale violates the rights of a secured creditor with a security right in that asset under the security agreement does not take free of the security right (see art. 34, para. 4).

B. Asset-specific rules

Article 46. Negotiable instruments

55. Article 46 is based on recommendations 101 and 102 of the Secured Transactions Guide (see chap. V, paras. 154-156). Differences between article 46 and recommendations 101 and 102 are of a drafting nature and are intended to ensure that paragraph 1 deals only with the relative priority of competing security rights in the same negotiable instrument, while paragraph 2 addresses the rights of a secured creditor with a security right in a negotiable instrument as against a buyer or other consensual transferee of the negotiable instrument.

56. Under paragraph 1, a security right in a negotiable instrument that is made effective against third parties by the secured creditor's possession of the negotiable instrument has priority over a security right in the same negotiable instrument that is made effective against third parties by registration of a notice, without regard to the order in which the security rights became effective against third parties. This is

consistent with the important role that possession plays in the law of negotiable instruments.

57. Under paragraph 2, certain buyers or other transferees that obtain possession of a negotiable instrument acquire their rights in the instrument free of a security right that is effective against third parties by registration of a notice. More specifically, under paragraph 2, a buyer or other consensual transferee of a negotiable instrument can acquire its rights free of a security right in that instrument in either of two ways. First, under paragraph 2 (a), a person who becomes a protected holder or the like (the enacting State should insert the appropriate term in para. 2 (a)) of the negotiable instrument under the law of the enacting State acquires its right in the instrument free of an existing security right in it. Second, under paragraph 2 (b), a buyer or other transferee that takes possession of the instrument and gives value for it without knowledge that the sale or other transfer is in violation of the rights of the secured creditor also acquires its right in the instrument free of that security right. As with the rule in paragraph 1, this rule preserves the important role of possession in the law of negotiable instruments.

58. Knowledge of the existence of a security right does not prevent a buyer or other consensual transferee of a negotiable instrument from acquiring its rights in the instrument free of the security right under paragraph 2 (b) (although such knowledge may prevent the buyer from qualifying as a protected purchaser or the like and, thus, may prevent the buyer from taking free of the security right under paragraph 2 (a)). Rather, only knowledge that the transfer violates the rights of the secured creditor under the security agreement prevents the transferee from acquiring its rights in the instrument free of the security right under paragraph 2 (b). “Knowledge”, as defined in article 2, subparagraph (r), means “actual knowledge”. The reference to “good faith” that was included in recommendation 102 (b) has been deleted on the understanding that the absence of knowledge amounts essentially to good faith and the concept of good faith is used in the Model Law only to reflect an objective standard of conduct.

Article 47. Rights to payment of funds credited to a bank account

59. Article 47 is based on recommendations 103-105 of the Secured Transactions Guide (see chap. V, paras. 157-163). It determines the priority between competing security rights in a right to payment of funds credited to a bank account whether those rights to payment are original encumbered assets or proceeds of a security right in other property (according to art. 19, para. 1, a security right in proceeds in the form of a right to payment of funds credited to a bank account is automatically effective against third parties, if the security right in the original encumbered asset is effective against third parties). The rationale underlying the rules in article 47 is to avoid bringing the deposit-taking institution into violation of its obligations under other law.

60. Paragraphs 1-3, taken together, result in the conclusion that a security right in a right to payment of funds credited to a bank account made effective against third parties by any of the methods provided for in article 25 has priority over a security right made effective against third parties by registration of a notice in the Registry. Under paragraph 1, a security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over all competing security rights in the same asset. Next in priority order, paragraphs 2 and 3 give priority to: (a) a security right in a right to payment of funds credited to a bank account with respect to which the secured creditor is the deposit-taking institution; and (b) a security right made effective against third parties by a control agreement. Under paragraph 4, if there are multiple control agreements, priority is determined on the basis of the order of conclusion of the control agreements.

61. Under paragraph 5, except when the secured creditor has become the account holder, a security right in a right to payment of funds credited to a bank account is subordinate to the deposit-taking institution’s rights under other law to set off claims against the grantor against its obligations to the grantor with respect to the grantor’s

right to payment of funds from the bank account. This rule protects deposit-taking institutions from losing their rights of set-off without their knowledge or consent.

62. Under paragraph 6, 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 so long as the transferee does not have knowledge that the transfer violates the rights of the secured creditor under the security agreement. A "transfer of funds" includes transfers by a variety of mechanisms, including by cheque and electronic means. The purpose of paragraph 6 is to preserve the free negotiability of funds.

63. Knowledge of the existence of a security right does not prevent a transferee of funds from the bank account from taking free of the security right. Rather, it is only knowledge that the transfer violates the rights of the secured creditor under the security agreement that prevents the transferee from taking free. "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". Paragraph 7 is intended to preserve the rights of transferees of funds credited to a bank account under other law to be specified by the enacting State.

Article 48. Money

64. Article 48 is based on recommendation 106 of the Secured Transactions Guide (see chap. V, para. 164). Its purpose is to preserve negotiability of money. Thus, under paragraph 1, a transferee of encumbered money acquires its rights in it free of the security right, unless it has knowledge that the transfer violates the rights of the secured creditor under the security agreement. "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". Under paragraph 2, to preserve the negotiability of money, the rule of paragraph 1 should not adversely affect the rights of persons in possession of money under the relevant law to be specified by the enacting State.

Article 49. Negotiable documents and tangible assets covered by negotiable documents

65. Article 49 is based on recommendations 108 and 109 of the Secured Transactions Guide (see chap. V, paras. 167-169). It is designed to preserve current practices under which rights to the tangible assets covered (or represented) by a negotiable document are subsumed in the negotiable document with the result that parties that deal with the document generally need not concern themselves separately with claims to the assets not reflected in the document. Accordingly, under paragraph 1, a security right in a tangible asset made effective against third parties by possession of the negotiable document covering that asset is given priority over a competing security right made effective against third parties by any other means.

66. Paragraph 2 states an exception to that general rule. Except when the encumbered asset is inventory, it provides that the rule in paragraph 1 does not apply to a security right in an encumbered asset made effective against third parties before the asset became covered by the negotiable document or the time of conclusion of an agreement between the grantor and the secured creditor in possession of the negotiable document. The agreement must provide that the asset was to be covered by a negotiable document so long as the asset actually became covered by such a negotiable document within the time to be specified by the enacting State.

Article 50. Intellectual property

67. Article 50 is based on recommendation 245 of the Intellectual Property Supplement (see paras. 193-212). Its purpose is to clarify that the rule in article 34, paragraph 6, does not obviate other rights of the secured creditor in its capacity as an owner or licensor of the intellectual property that is the subject of the licence. This clarification is of particular importance because the concept of "ordinary course of business", used in article 34, paragraph 6, is a concept of commercial law and is not drawn from law relating to intellectual property and thus may create confusion in an intellectual property context. Typically, law relating to intellectual property does not

distinguish in this respect between exclusive and non-exclusive licences and focuses rather on the issue whether a licence has been authorized or not.

68. As a result, unless the secured creditor authorized the grantor to grant licences unaffected by the security right (which will typically be the case as the grantor will rely on its royalty income to pay the secured obligation), the licensee would take the licence subject to the security right. Thus, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or license it free of the licence. In addition, a person obtaining a security right from the licensee will not obtain an effective security right as the licensee would not have received an authorized licence and would have no right in which to create a security right.

Article 51. Non-intermediated securities

69. Article 51 covers a topic not addressed in the Secured Transactions Guide, which excluded from its scope security rights in all types of securities (see rec. 4 (c)). So as not to interfere with existing customs and practices with respect to non-intermediated securities, this article adjusts the general priority rule of article 29 in a manner similar to the special priority rules for security rights in negotiable instruments and rights to payment of funds credited to a bank account.

70. For certificated non-intermediated securities, paragraph 1 provides that a security right made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right created by the same grantor that is made effective against third parties by registration of a notice in the Registry. This is parallel to the rule for negotiable instruments in article 46, paragraph 1.

71. For uncertificated non-intermediated securities, paragraph 2 provides that a security right made effective against third parties by registration 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. Such registration may take the form of a notation of the security right or an entry of the name of the secured creditor as the holder of the securities in the issuer's books. The enacting State may choose the method that best suits its legal system. This rule is similar to the rule for rights to payment of funds credited to a bank account in article 47, paragraph 1. The rationale for this rule is that such notation or registration in the books of the issuer fulfils a similar function to the secured creditor becoming the account holder of a bank account.

72. Paragraphs 3 and 4 are also applicable only to uncertificated non-intermediated securities. They parallel the similar rules for rights to payment of funds credited to a bank account in article 47, paragraphs 3 and 4. Paragraph 3 gives priority to a security right made effective against third parties by conclusion of a control agreement over other security rights in the same securities. As between security rights made effective against third parties by conclusion of a control agreement, paragraph 4 awards priority in the order in which those control agreements were concluded.

73. Paragraph 5 is intended to preserve the rights of transferees of non-intermediated securities under other law to be specified by the enacting State. It parallels article 47, paragraph 7. Paragraph 5 recognizes that enacting States may have complex regimes that protect certain holders of non-intermediated securities under their law relating to the transfer of securities and that these regimes may diverge more widely than with respect to negotiable instruments and negotiable documents. Accordingly, unlike articles 46, paragraph 2, 47, paragraph 6, and 49, paragraph 3, that protect transferees of encumbered negotiable instruments, funds from bank accounts and negotiable documents, paragraph 5 of article 51 simply defers to those regimes.

(A/CN.9/WG.VI/WP.71/Add.5) (Original: English)

Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Paragraphs

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Mutual rights and obligations of the parties to a security agreement

A. General rules

Article 52. Sources of mutual rights and obligations of the parties

1. Article 52 is based on recommendation 110 of the Secured Transactions Guide (see chap. VI, paras. 14 and 15), which in turn is based on article 11 of the Assignment Convention. Paragraph 1 is intended to reiterate the principle of party autonomy enshrined in article 3. Paragraph 2 is intended to give legislative strength to trade usages and practices, which may not be generally recognized in all States.

2. With the exception of certain mandatory rules included in chapter VI (see arts. 3, para. 1, 53, 54 and 72, para. 3), the parties are given wide latitude to tailor their security agreement and their usage and practices to the transaction at hand in order to most effectively and efficiently facilitate their respective commercial goals. The other articles of chapter VI are non-mandatory rules and apply where the parties have not provided otherwise in the security agreement. For this reason, a reference to contrary agreement of the parties, which was included in the recommendations of the Secured Transactions Guide and the provisions of the Assignment Convention on which the provisions of this chapter are based, has been deleted (see, for example, article 57, recommendation 114 of the Secured Transactions Guide and article 12 of the Assignment Convention).

Article 53. Obligation of the party in possession to exercise reasonable care

3. Article 53 is based on recommendation 111 of the Secured Transactions Guide (see chap. VI, paras. 24-31). It sets forth the rule that a grantor or secured creditor in possession of a tangible asset (which under the definition in art. 2, subpara. (ll), includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities) must exercise reasonable care to preserve the asset. Any other person in possession of an encumbered asset may also be obliged to take reasonable care to preserve the encumbered assets under other law.

4. What constitutes "reasonable care" in a given case depends upon the nature of the encumbered asset. Thus, reasonable care may mean something different with respect to equipment, inventory, crops or live animals. Preservation of the asset normally includes preservation of its value. The obligation to preserve the value of the asset may also arise under article 4, according to which a party should act in good faith and in a commercially reasonable manner. Although physical preservation of a tangible asset would, in most cases, have the effect of preserving the asset's value, preservation of the asset's value may go beyond the physical preservation of the asset. For example, if a secured creditor has possession of certificated non-intermediated shares of a company, the secured creditor may be required in particular circumstances to exercise certain rights attached to the shares to preserve their value. However, preservation of the value of the encumbered assets may only include measures that are within the control of the person in possession.

5. Article 53 and a rule of law relating to securities along the lines of article 5(1) of the Financial Collateral Directive ("FCD"), which gives a secured creditor the right to use securities in its possession, should be read together and their relationship would be a matter of interpretation under the rules of the applicable law (under the FCD, "financial collateral" may consist of "cash", "credit claims" and "financial instruments", and "financial instruments" may be either intermediated or non-intermediated securities, as long as they are "negotiable on the capital market" or "normally dealt in").

Article 54. Obligation of the secured creditor to return an encumbered asset

6. Article 54 is based on recommendations 112 and 72 of the Secured Transactions Guide (see chap. VI, paras. 35-39). It provides that, once a security right in an encumbered asset is extinguished, a secured creditor in possession of the asset must return it to the grantor or, if the secured creditor so agrees, deliver it to a person designated by the grantor. In some States, delivery to a person designated by the grantor may be viewed as a means of returning the asset to the grantor. In any case, the additional cost then incurred by the secured creditor should be borne by the grantor in the same way as performance costs are normally payable by the grantor (for the secured creditor's obligation to register an amendment or cancellation notice, see art. 20, paras. 1, 2 and 3 of the Model Registry Provisions). A security right generally will be deemed to have been extinguished once the secured obligation has been paid in full or otherwise satisfied in full, and all further commitments to extend credit to the debtor have terminated.

7. Article 54 deals with a situation in which the secured creditor is in possession of an asset and therefore does not address the obligation of a secured creditor to withdraw any notification that it has given to the debtor of the receivable. However, the grantor is protected in this regard by article 59, paragraph 2, and article 79, paragraph 2 (b), which require the secured creditor to return to the grantor any surplus proceeds it receives. It should also be noted that: (a) article 54 does not apply to receivables or other intangible assets, because they cannot be the subject of physical possession (see art. 2, subpara. (z)); and (b) the question of whether a secured creditor should return securities equivalent to those received is a matter for the parties and other law (see, for example, art. 5(2) FCD).

Article 55. Right of the secured creditor to use and inspect an encumbered asset, and to be reimbursed for expenses

8. Article 55 is based on recommendation 113 of the Secured Transactions Guide (see chap. VI, paras. 50-65). It provides that a secured creditor not only has certain obligations (described in arts. 53 and 54), but also certain rights (in addition to its enforcement rights). Under paragraph 1 (a), a secured creditor in possession has the right to be reimbursed for the reasonable expenses incurred to preserve an encumbered asset in accordance with article 53. Under paragraph 1 (b), a secured creditor in possession may make reasonable use of an encumbered asset, so long as it

applies any revenues generated from the use to the payment of the obligation secured by the asset.

9. Finally, under paragraph 2, where an encumbered asset is in the possession of the grantor, the secured creditor has the right to inspect the asset. As this article is subject to the general standard of commercial reasonableness and good faith set forth in article 4, the right to inspect may only be exercised at reasonable times and in a commercially reasonable manner. The application of this standard depends upon the circumstances. For example, in extreme cases, such as where the debtor is in default or the secured creditor has reason to believe that the physical condition of the collateral is in jeopardy or has been, or is about to be, removed from the State of its location, the secured creditor may be justified to demand an immediate inspection.

Article 56. Right of the grantor to obtain information

10. Article 56 is a new provision intended to provide the grantor (other than the transferor in an outright transfer of a receivable) with the right to obtain information from a secured creditor (other than a transferee under an outright transfer of a receivable) as to the amount of the secured obligation or the assets encumbered at a certain point of time. This information may be necessary where the grantor is interested in obtaining credit against the security of assets that are already encumbered and the potential third-party creditor requests that information (this does not apply to a transferor of a receivable, as such a transferor retains no right in the receivable and thus may not create a security right in it under art. 6, para. 1). The enacting State may wish to extend that right to third-party creditors (e.g. judgment creditors). Other matters, such as the legal consequences of the secured creditor's failure to comply with a request for information or to give accurate information are left to other law.

B. Asset-specific rules

Article 57. Representations of the grantor of a security right in a receivable

11. Article 57 is based on recommendation 114 of the Secured Transactions Guide (see chap. VI, para. 73), which in turn is based on article 12 of the Assignment Convention. It provides that, when a grantor grants a security right in a receivable, the grantor is deemed to make various representations to the secured creditor at the time the security agreement is concluded. In particular, under paragraph 1, the grantor represents that it has not previously created a security right in the receivable in favour of another secured creditor, and that the debtor of the receivable will not have any defences or rights of set-off with respect to the receivable (e.g. that the grantor will fully perform the contract giving rise to the receivable and any other contract it has entered into with the debtor of the receivable). Under paragraph 2, the grantor does not represent that the debtor of the receivable has, or will have, the ability to pay the receivable (as this is beyond the grantor's control). As already noted (see para. 2 above), article 57 is not a mandatory law rule and, as it often happens in a factoring transaction, the grantor may warrant the solvency of the debtor of the receivable on the date the receivable is sold to the factor.

12. The representation that the grantor has the right to create a security right was not carried over from recommendation 114 of the Secured Transactions Guide into article 57, to avoid giving the impression that it applies to security rights created only in receivables. As a result, the matter is left to general contract law. It should be noted, however, that even in the case of an anti-assignment agreement between a grantor and a secured creditor, the grantor still has rights in the receivable and the power to encumber it, and thus may create a security right in the receivable (see art. 6, para. 1, and A/CN.9/WG.VI/WP.71/Add.1, para. 52).

Article 58. Right of the grantor or the secured creditor to notify the debtor of the receivable

13. Article 58 is based on recommendation 115 of the Secured Transactions Guide (see chap. VI, paras. 74 and 75), which is based on article 13 of the Assignment Convention. Paragraph 1 provides that, when a security right has been created in a receivable, either the grantor or the secured creditor has the right to notify the debtor of the receivable of the existence of the security right and send a payment instruction; however, once notification of the security right has been received by the debtor of the receivable, only the secured creditor may send a payment instruction (under art. 62, a notification or a payment instruction is effective only when received by the debtor of the receivable).

14. It should be noted that a payment instruction is treated as a notion distinct from notification, because: (a) a notification may not contain a payment instruction (for example, because the secured creditor may have obtained control of the grantor's bank account to which debtors of receivables have been instructed by the grantor to pay); (b) no notification may be given (for example, because the transaction involved is a non-notification factoring or undisclosed invoice discounting transaction); and (c) the secured creditor may need to change its payment instructions and thus there may be more than one payment instruction.

15. Paragraph 2 provides that a notification sent in breach of an agreement between the grantor of the security right and the secured creditor is nevertheless effective for the purposes of article 64, which precludes the grantor from raising, after receiving notice of the security right, certain rights of set-off with respect to the receivable that became available to the grantor after it received notice of the security right (see para. 35 below).

Article 59. Right of the secured creditor to payment of a receivable

16. Article 59 is based upon recommendation 116 of the Secured Transactions Guide (see chap. VI, paras. 76-80), which in turn is based on article 14 of the Assignment Convention. Any changes made are intended to clarify the text, but not to change its policy. The article establishes the right of the secured creditor to receive the proceeds of a receivable in which it holds a security right as against the grantor of the security right.

17. Paragraph 1 provides that, regardless of whether notification of the security right has been sent to the debtor of the receivable, the secured creditor is entitled to retain: (a) the proceeds of any full or partial payment of the receivable made to the secured creditor, as well as any tangible assets (such as inventory) returned to the secured creditor in respect of the receivable; (b) the proceeds of any full or partial payment of any receivable made to the grantor (as well as any tangible assets returned to the grantor); and (c) the proceeds of any full or partial payment of any receivable made to another person (as well as any tangible assets returned to that person) if the right of the secured creditor has priority over the right of that person.

18. Paragraph 2 reflects normal practice in secured transactions relating to receivables in which the secured creditor may have the right to collect the full amount of the receivable owed, plus any interest payable under contract or by law, but has to account for and return to the grantor any balance remaining after payment of the secured obligation (see also art. 79, para. 2). Of course, in the case of an outright transfer of a receivable by agreement, the transferee may retain the amount collected as it has become the owner of the receivable.

Article 60. Right of the secured creditor to preserve encumbered intellectual property

19. Article 60 is based on recommendation 246 of the Intellectual Property Supplement (paras. 223-226). It recognizes the effectiveness of an agreement between the grantor of a security right in intellectual property and the secured creditor that the

secured creditor may take the necessary steps to preserve the value of the intellectual property, such as making any necessary registration (such as a patent registration) and initiating actions to prevent infringement by third parties.

20. Although articles 3 (party autonomy) and 53 (obligation to preserve an encumbered asset) may be generally sufficient to ensure that the secured creditor may take these steps, article 60 has been included in the Model Law, because, in an intellectual property right context, these rights are normally rights of the intellectual property owner.

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 61. Protection of the debtor of the receivable

21. Article 61 is derived from recommendation 117 of the Secured Transactions Guide (see chap. VII, para. 12), which in turn is based on article 15 of the Assignment Convention. Paragraph 1 sets forth the general principle that the creation of a security right in a receivable does not affect the rights or obligations of the debtor of the receivable, unless the debtor of the receivable consents. So, for example, the creation of a security right cannot change the payment terms of a contract giving rise to a receivable (e.g. the amount or the time of payment).

22. To implement the general principle of paragraph 1, paragraph 2 provides that, to enable the secured creditor to exercise its security right, a payment instruction (which is treated as a notion distinct from notification; see para. 14 above) may change the person, address or account to which the debtor of the receivable is required to make payment, but it may not change: (a) the currency in which the receivable is to be paid, as specified in the contract giving rise to the receivable; or (b) the State in which the payment is to be made, as specified in the contract giving rise to the receivable, to a State other than that in which the debtor of the receivable is located.

Article 62. Notification of a security right in a receivable

23. Article 62 is based on recommendation 118 of the Secured Transactions Guide (see chap. VII, paras. 13-16), which in turn is based on article 16 of the Assignment Convention. It describes the requirements for an effective: (a) notification of a security right in a receivable; or (b) payment instruction (a payment instruction is treated as a notion distinct from notification, see para. 14 above).

24. Under paragraph 1, for the effectiveness of a notification or a payment instruction, it must be “received” by the debtor of the receivable. In addition, a notification or payment instruction must reasonably identify the receivable and the secured creditor, and be in a language reasonably expected to inform the debtor of its contents. On this latter point, paragraph 2 makes it clear that the language of the contract giving rise to the receivable is always sufficient. Under paragraph 3, a notification or payment instruction may relate not only to receivables in existence at the time the notification or payment instruction is given, but also may relate to receivables arising thereafter.

25. Paragraph 4 addresses a scenario where a receivable is the subject of subsequent security rights (e.g., subsequent security assignments or outright transfers). For example, where A creates a security right in its receivables and then transfers the obligation secured by them to B, who also creates a security right in the receivables and then transfers the secured obligation to C, who also creates a security right in the receivables in favour of D, notification of the debtor of the receivables relating to the security right created by C in favour of D constitutes notification of all prior security rights created by A and B.

Article 63. Discharge of the debtor of the receivable by payment

26. Article 63 is based on recommendation 119 of the Secured Transactions Guide (see chap. VII, paras. 17-20), which in turn is based on article 17 of the Assignment Convention. It sets forth the rules affecting when and how a receivable is discharged by payment.

27. Paragraph 1 embodies the basic principle that, until the debtor of the receivable receives notification of a security right in a receivable, it may be discharged by payment in accordance with the contract giving rise to the receivable. Where the contract is a sales contract, this means payment to the seller. However, under paragraph 2, once the debtor receives notification of a security right, it can only be discharged by paying either the secured creditor or another party, as instructed by the secured creditor in the notification or as subsequently instructed by the secured creditor in a written payment instruction received by the debtor. However, the rule in paragraph 2 is subject to a number of qualifications that are set forth in paragraphs 3-8.

28. First, under paragraph 3, if the debtor of the receivable receives more than one payment instruction relating to a single security right in 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, as the last payment instruction will be the most recent (a payment instruction is treated as a notion distinct from notification, see para. 14 above).

29. Second, under paragraph 4, if the debtor 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, on the theory that the security right covered by the first notification will probably have priority over the subsequent security right under the Model Law's priority rules. It should be noted that the debtor of the receivable is discharged even if the first notification does not relate to the security right with priority, since the debtor cannot be required to determine which security right has priority. In such a case, the secured creditor with a security right that has priority will have to claim the proceeds of payment from the creditor to whom the debtor paid.

30. Third, under paragraph 5, if the debtor 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 (i.e. where A creates a security right in favour of B, and B creates a security right in favour of C). The reason is that the last in such a series of successive secured creditors will be the actual holder of the security right.

31. Fourth, under paragraph 6, where the debtor receives notification of a security right in a part of, or an undivided interest in, one or more receivables, the debtor has a choice. It may be discharged by paying either in accordance with the notification or in accordance with paragraph 1 as if the debtor has not received the notification. However, if the debtor chooses the first of these alternatives, under paragraph 7, it is discharged only to the extent of the part or undivided interest paid.

32. Finally, under paragraph 8, if the debtor receives notification from a person other than the initial creditor of the receivable and wants to make sure that that person is a secured creditor entitled to payment, the debtor may request from the person that sent the notification to provide, within a reasonable time, adequate proof of the creation of the security right (including a security right granted by the initial or a subsequent secured creditor). If the secured creditor fails to provide such proof, the debtor may pay as if it had not received such notification. For this purpose, under paragraph 9, adequate proof includes any writing from the grantor that indicates that a security right has been created (e.g. a security agreement).

33. Paragraph 10 is intended to preserve any other ground for discharge based on payment to the person entitled to payment under other law (e.g. payment to a competent judicial or other authority, or to a public fund).

Article 64. Defences and rights of set-off of the debtor of the receivable

34. Article 64 is based on recommendation 120 of the Secured Transactions Guide (see chap. VII, para. 21), which in turn is based on article 18 of the Assignment Convention.

35. Paragraph 1 (a) preserves for the debtor all defences and rights of set-off arising from the contract giving rise to the receivable, including any other contract that was part of the same transaction, as if the security right had never been created and the claim were made by the grantor. Paragraph 1 (b) ensures that the debtor of the receivable can assert against the secured creditor any other right of set-off that was available to the debtor at the time it received notification of the security right. This means, however, that the debtor may not assert a right of set-off that arises subsequent to such notification. Under article 65, the debtor may waive its defences and rights of set-off.

36. Paragraph 2 provides that paragraph 1 does not give the right to the debtor of the receivable to raise against the secured creditor as a defence or right of set-off the breach of an agreement by the grantor limiting the grantor's right to create a security right. Otherwise, the validation of a security right under article 13 notwithstanding such an agreement would be meaningless.

Article 65. Agreement not to raise defences or rights of set-off

37. Article 65 is based on recommendation 121 of the Secured Transactions Guide (see chap. VII, para. 22), which in turn is based on article 19 of the Assignment Convention. Paragraph 1 provides that the debtor of the receivable may agree, in a writing signed by it, not to raise the defences and rights of set-off permitted by article 64. The secured creditor is entitled to invoke the benefit of such an agreement even though it was not a party to it. Under paragraph 2, any modification to such an agreement must also be in a writing signed by the debtor of the receivable and is effective as against the secured creditor only if the secured creditor consents or, in the case of a receivable that has not been earned yet by performance, a reasonable secured creditor would consent (see art. 66, para. 2). To avoid abuses, paragraph 3 provides that the debtor may not waive defences based on fraud committed by the secured creditor or the debtor's incapacity.

Article 66. Modification of the contract giving rise to a receivable

38. Article 66 is based on recommendation 122 of the Secured Transactions Guide (see chap. VII, paras. 23 and 24), which in turn is based on article 20 of the Assignment Convention. It addresses the impact of an agreement between the grantor of a security right in a receivable and the debtor of the receivable that modifies the terms of the receivable. The result depends on when the agreement is made. Under paragraph 1, if the agreement is concluded before the debtor receives notification of a security right in the receivable, it is effective against the secured creditor, but the secured creditor also enjoys any benefits derived from the agreement.

39. Under paragraph 2, even if the agreement is concluded after notification, it is also effective, even if it affects the secured creditor's rights provided that: (a) the secured creditor consents to it; or (b) the receivable has not been fully earned by performance and the modification was provided for in the contract giving rise to the receivable or a reasonable secured creditor would consent to the modification. Paragraph 3 provides that paragraphs 1 and 2 do not affect any right of the grantor or secured creditor arising under other law for breach of an agreement between them (such as an agreement that the grantor would not agree to any modifications of the terms of the receivable).

Article 67. Recovery of payments

40. Article 67 is based on recommendation 123 of the Secured Transactions Guide (see chap. VII, paras. 25 and 26), which in turn is based on article 21 of the

Assignment Convention. It addresses the situation in which the grantor of a security right in a receivable (or the transferor in an outright transfer of the receivable by agreement) fails to perform its obligations under the contract giving rise to the receivable. The article insulates the secured creditor from liability in this circumstance, by providing that the debtor of the receivable may not look to the secured creditor to recover any amount that it has paid to either the grantor or the secured creditor. As a result, the debtor of the receivable bears the risk of the insolvency of the other party to the contract giving rise to the receivable (i.e. the grantor).

B. Negotiable instruments

Article 68. Rights as against the obligor under a negotiable instrument

41. Article 68 is based on recommendation 124 of the Secured Transactions Guide (see chap. VII, paras. 27-31). It is intended to preserve the rights of parties under the relevant law relating to negotiable instruments (to be specified by the enacting State). For example, under that law: (a) a secured creditor with a security right in a negotiable instrument may collect from the obligor under the instrument only in accordance with its terms; (b) even if the grantor defaults, the secured creditor may collect from the obligor only when payment becomes due under the instrument and the law relating to such instruments; (c) a secured creditor with a security right in a negotiable instrument may have greater rights against the issuer of the instrument than the payee, since the issuer may not be able to raise against the secured creditor defences based on the contract between the issuer and the payee of the instrument. It should be noted that the reference in article 68 (as well as arts. 70 and 71) to another law of the enacting State will only apply if the enacting State's law is the applicable law under the conflict-of-laws rules of chapter VIII.

C. Rights to payment of funds credited to a bank account

Article 69. Rights as against the deposit-taking institution

42. Article 69 is based on recommendations 125 and 126 of the Secured Transactions Guide (see chap. VII, paras. 32-37). It addresses the situation in which a security right is created in a right to payment of funds credited to a bank account.

43. Paragraph 1 (a) provides that the rights and obligations of the deposit-taking institution are unaffected by the security right, unless the institution consents. The rationale for protecting deposit-taking institutions in this manner is that imposing duties on an institution or changing the rights and duties of the institution without its consent may subject that institution to risks that it is not in a position to manage appropriately unless it knows in advance what those risks might be and to the risk of having to violate obligations imposed by regulatory or other law (see Secured Transactions Guide, chap. VII, para. 33).

44. To safeguard the confidentiality of the relationship of a deposit-taking institution and its client that is imposed by regulatory or other law, paragraph 1 (b) also provides that the deposit-taking institution has no obligation to respond to requests for information (e.g. about the balance in the account, whether a control agreement exists or whether the account holder retains the right to dispose of funds credited to its bank account).

45. Finally, paragraph 2 provides that, even where the deposit-taking institution consents to the creation of a security right in a right to payment of funds credited in a bank account held by a grantor with that institution, any right of set-off that the institution may have under regulatory or other law also remains unaffected. The rationale for this rule is the need to avoid any interference with the way

deposit-taking institutions manage risks, given the nature of the transaction and the business of their customer.

D. Negotiable documents and tangible assets covered by negotiable documents

Article 70. Rights as against the issuer of a negotiable document

46. Article 70 is based on recommendation 130 of the Secured Transactions Guide (see chap. VII, paras. 43-45). It provides that, when a secured creditor has a security right in a negotiable document, the rights of the secured creditor as against the issuer of the document or any person obligated on the document are determined by the law relating to negotiable documents (to be specified by the enacting State). This means that, for a secured creditor with a security right in the document to enforce it against the assets covered by the document: (a) at the time of enforcement, the assets covered by the document must still be in the possession of the issuer or other obligor under the document; and (b) the issuer or other obligor will have no obligation to deliver the assets to the secured creditor, unless the negotiable document was transferred to the secured creditor in accordance with the law governing negotiable documents (e.g. with any necessary endorsement).

E. Non-intermediated securities

Article 71. Rights as against the issuer of a non-intermediated security

47. As already mentioned, the Secured Transactions Guide does not address security rights in any types of securities (see rec. 4 (c)). Thus, article 71 is a new rule. In line with articles 68-70, it provides that the rights of a secured creditor holding a security right in non-intermediated securities as against the issuer of the securities are determined by other law of the enacting State. For example, registration on the books of a corporation or special enforcement procedures may be required for a security right in the shares of a corporation to be effective against the issuer.

Chapter VII. Enforcement of a security right

A. General rules

Article 72. Post-default rights

48. Article 72 is based on recommendations 133, 139, 141, 143, and 144 of the Secured Transactions Guide (see chap. VIII, paras. 10-12, 15-17, and 34 and 35). Paragraph 1 clarifies that, following the grantor's default, the grantor and the secured creditor may exercise any right they may have under the provisions of chapter VII, other law or the security agreement (provided that, in the last two cases, that right is not inconsistent with the provisions of the Model Law).

49. For the purposes of the Model Law, "default" includes both events described in the relevant law as a "default" and events agreed to by the parties as a "default" (see art. 2, subpara. (j)). It should also be noted that some of the rights under this article may be available even before default. Thus, for example, even before default: (a) the grantor may exercise its right of redemption where permitted under contract law; (b) with the agreement of the grantor, the secured creditor may collect a receivable (see art. 82, para. 2); and (c) any party may apply to a court or other authority for relief under general procedural or other law (see also art. 74).

50. Paragraph 2 indicates that the exercise of one right generally does not prevent the exercise of another right, except if the exercise of one right makes impossible the

exercise of another right (e.g. if the secured creditor decides to obtain possession and sell the encumbered asset, and sells or enters into an agreement to sell the asset, it cannot propose to acquire it in satisfaction of the secured obligation).

51. Paragraph 3 provides that the debtor (generally defined to include the grantor and any other person that owes payment or other performance of a secured obligation but not a transferor in an outright transfer of a receivable (see arts. 1, para. 2, and 2, subpara. (h)) may not waive unilaterally or vary by agreement their rights under this chapter before default. Otherwise, the secured creditor could put pressure on the debtor to waive or vary its rights before default in return for concessions in the security agreement (see Secured Transactions Guide, chap. VIII, paras. 16 and 17).

Article 73. Methods of exercising post-default rights

52. Article 73 is based on recommendation 142 of the Secured Transactions Guide (see chap. VIII, paras. 18-20 and 29-33). Paragraph 1 clarifies that the secured creditor may exercise its post-default rights by applying to a court or other authority to be specified by the enacting State (e.g. a chamber of commerce, arbitral tribunal or notary public). There are many reasons why a secured creditor may decide to follow this approach. For example, judicial or similar proceedings may be sufficiently efficient, the secured creditor may wish to avoid having its self-help actions subsequently challenged, anticipate that it will have to apply to a court or other authority anyway to recover an anticipated deficiency or may fear and wish to avoid a breach of public order (see Secured Transactions Guide, chap. VIII, paras. 32 and 33).

53. Where judicial or other similar proceedings are likely to be slow and costly, and less likely to produce the highest possible amount upon the disposition of the encumbered assets, the secured creditor may decide to enforce its security right with minimal or no supervision by a court or other authority (see Secured Transactions Guide, chap. VIII, paras. 29 and 31). In such a case, the Model Law introduces a number of safeguards for the grantor, the debtor and other persons the rights of whom may be affected. For example, under article 4, the secured creditor has to proceed in good faith and in a commercially reasonable manner and, under article 77, paragraph 2, ensure that the grantor has consented in writing, the grantor and any person in possession have been notified of the secured creditor's intent and at the time of repossession the person in possession does not object (see para. 67 below).

54. In any case, the Model Law does not introduce any limitation to the ability of the parties to avail themselves of the assistance of a court or other authority at any time to resolve a dispute arising in relation to a security agreement or the exercise of a post-default right. Quite to the contrary, under article 74, the grantor, any person with a right in the encumbered asset or the debtor (option A), or any person affected by the non-compliance of the secured creditor with the provisions of this chapter (option B) is entitled to relief from a court or other authority.

55. It should also be noted that there is nothing in the Model Law that precludes the grantor and the secured creditor from agreeing to resolve any dispute that may arise between them by arbitration, conciliation or negotiation. Depending on the efficiency of court proceedings in a particular State, these alternative dispute resolution mechanisms may provide a viable alternative to court proceedings, provided that certain issues are addressed by the relevant law, in particular with respect to arbitration, such as the arbitrability of disputes arising under a security agreement or associated with a security right, protection of rights of third parties and the confidentiality of arbitral proceedings (see also para. 58 below).

56. Under paragraph 2, the exercise of post-default rights by application to a court or other authority is subject not only to the provisions of this chapter but also to the relevant provisions, including provisions on expeditious proceedings, to be specified by the enacting State (typically, procedural in nature). Under paragraph 3, the exercise of those rights without application to a court or other authority is subject only to the provisions of this chapter.

Article 74. Relief for non-compliance

57. Article 74, which is based on recommendation 137 of the Secured Transactions Guide (see chap. VII, para. 31), addresses the availability of relief by a court or other authority in the case of a person's non-compliance with its obligations under the provisions of this chapter. Two options are provided for the enacting State to choose the option that best fits its legal system. The first option addresses non-compliance only by the secured creditor, and provides that the grantor, any other person with a right in the encumbered asset or the debtor affected by that non-compliance (e.g. co-owners of the encumbered assets) may seek relief. The second option is broader, addressing non-compliance by any person, and giving any person affected by that non-compliance the right to seek relief. It should be noted that: (a) a violation of the secured creditor's obligations includes a violation by the secured creditor's agents, employees or service providers; and (b) persons that may be affected include 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.

58. The enacting State may wish to specify the court or other authority to which the party seeking relief should apply and the type of expeditious proceeding that would be available. That authority may include an arbitral tribunal, chamber of commerce or notary public. The resolution of a dispute arising generally from a security agreement or specifically in the context of enforcement of a security right by arbitration would be possible if: (a) the matter may be submitted to arbitration under the law of the enacting State; and (b) there is an arbitration agreement between the grantor and the secured creditor that is enforceable under the law of the enacting State. In such a case: (a) the arbitration agreement (and arbitral award) would bind only the parties thereto; and (b) if the winning party attempts to seize an encumbered asset, the law of the enacting State must provide adequate protection for the rights of persons, who are not party to the arbitration agreement, in the encumbered assets. For example, persons who are not parties to the arbitration agreement who have a right in the encumbered assets or might be affected by the enforcement of an arbitral award should be notified before an extrajudicial sale takes place (see art. 78, para. 4) and be given an opportunity to assert their rights, such as their right to take over enforcement (see art. 76), or their right to be paid from the proceeds of a sale according to their priority rank (see art. 79, para. 2).

59. As the length of time that it takes to obtain relief for non-compliance may bring about injustice or inefficiency, this article provides for the possibility of expeditious relief, the exact form of which is to be specified by the enacting State (e.g. proceedings for interim measures of protection and preliminary orders). [Explain the word "affected". See Commission report, para. 72.]

Article 75. Right of affected persons to terminate enforcement

60. Article 75 is based on recommendation 140 of the Secured Transactions Guide (see chap. VIII, paras. 22-24). Paragraph 1 enables any person whose rights in the encumbered assets are affected by the enforcement process to terminate it by paying or otherwise performing the secured obligation in full. This is sometimes known as "redeeming" the encumbered asset. A person that is affected by the enforcement of a security right is most likely to exercise this right when there will be a residual value because the value of the asset is higher than the outstanding part of the secured obligation. It should be noted that the extinguishment of a security right, which was also addressed in recommendation 140 of the Secured Transactions Guide, is addressed in article 12.

61. Full payment, for the purposes of paragraph 1, includes the reasonable cost of enforcement. Thus, in the case of enforcement before a court or other authority, the court or other authority will determine the reasonable cost of enforcement. In the case of enforcement without an application to a court or other authority, if the grantor or other interested person disputes the secured creditor's assertion as to the reasonable

cost of enforcement, the grantor or other interested person could seek the assistance of a court or other authority to resolve the dispute.

62. Under paragraph 2, the right to terminate enforcement may be exercised until the secured creditor has disposed of, acquired or collected the encumbered asset, or entered into an agreement for that purpose. Otherwise, the finality of acquired rights would be undermined (see paras. 79-81). Under paragraph 3, the rule in paragraph 2 does not apply in the case of a lease or licence of an encumbered asset. This means that a person affected by the enforcement may still terminate the enforcement process, if there is sufficient residual value left in the encumbered asset. However, there is one limitation, the rights of a lessee or licensee must be respected.

Article 76. Right of a higher-ranking secured creditor to take over enforcement

63. Article 76 is based on recommendation 145 of the Secured Transactions Guide (see chap VIII, para. 36). Paragraph 1 provides that a secured creditor whose security right has priority over that of the enforcing secured creditor or judgment creditor ("higher-ranking secured creditor") has the right to take over enforcement. Inasmuch as the higher-ranking secured creditor is entitled to be paid out of the proceeds of any disposition before the other secured creditor or judgment creditor, paragraph 1 recognizes that this greater stake in the results of enforcement justifies giving the higher-ranking secured creditor the right to control the enforcement process if it so desires. The higher-ranking secured creditor may take over the enforcement process at any time before the asset is sold or otherwise disposed of, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

64. Under paragraph 2, the right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any of the methods foreseen in this chapter. This means that the higher-ranking secured creditor may change the method of enforcement, for example to follow a different strategy than that followed by the original enforcing creditor (or terminate enforcement if the higher-ranking secured creditor is an outright transferee). It should be noted, however, that the exercise of this right is subject to the standard of article 4, that is, the secured creditor would be obliged to act in good faith and in a commercially reasonable manner, for example, to avoid unreasonable enforcement costs.

Article 77. Right of the secured creditor to obtain possession of an encumbered asset

65. Article 77 is based on recommendations 146 and 147 of the Secured Transactions Guide (see chap. VIII, paras. 37-48 and 51-56). Taken as a whole, this article provides a secured creditor with an important pair of options about enforcing its security right. The secured creditor may obtain possession of a tangible encumbered asset either through a judicial process or an analogous process with another authority or, in certain circumstances, the secured creditor can utilize "self-help remedies" and obtain possession of the encumbered asset without resort to a court or other authority. The rules governing each of these options are set out separately, with paragraphs 1 and 2 setting the parameters for obtaining possession by application to a court or other authority and paragraph 3 setting the parameters for the exercise of a self-help remedy by the secured creditor.

66. Paragraph 1 states that, after default, the secured creditor is entitled to obtain possession of an encumbered asset by applying to a court or other authority, or without such an application. The opening words of paragraph 1 however, subordinate this right to the right of another person who has a superior right to possession of the asset (e.g. a lessee or licensee; see art. 34).

67. Under paragraph 2, the secured creditor is also entitled to obtain possession of an encumbered asset without applying to a court or other authority if all the conditions set out therein are met. The conditions are designed to ensure that such a self-help remedy is available only in appropriate circumstances. First, the self-help remedy is

available only if the grantor has consented in writing to the secured creditor obtaining possession without resort to a court or other authority. Typically, the secured creditor will obtain the grantor's consent in the security agreement. Second, the secured creditor cannot utilize this self-help remedy unless it has given the grantor and any person in possession of the encumbered asset notice of default and of the secured creditor's intent to obtain possession without resort to a court or other authority (the enacting State may wish to specify how long before seeking possession the secured creditor must give notice that would be in line with the good faith and commercial reasonableness standard set forth in art. 4). Third, and perhaps most important, the secured creditor may not obtain possession without resorting to a court or other authority if the person in possession of the encumbered asset objects to the secured creditor's attempt to utilize this self-help remedy. Thus, the grantor or other person in possession of the encumbered asset will always have the ability to require the secured creditor to utilize the judicial or similar process by objecting to the creditor's attempt to act without the assistance of a court or other authority, even if the grantor has already agreed to the secured creditor's self-help remedies in the security agreement.

68. Paragraph 3 recognizes that even relatively short delays associated with giving the notice required in paragraph 2 can be economically wasteful if the encumbered assets are perishable or otherwise likely to decline speedily in value. Accordingly, paragraph 3 dispenses with the requirement of notice in those cases.

69. Under paragraph 4, a lower-ranking secured creditor may not obtain possession of an encumbered asset from a higher-ranking secured creditor. The purpose of this provision is to ensure that: (a) the security right of the higher-ranking secured creditor does not cease to be effective against third parties through the relinquishment of possession to the lower-ranking secured creditor and thus lose its priority status; (b) the value of the encumbered asset does not diminish through its disposition by the lower-ranking secured creditor. It should be noted, however, that the lower-ranking secured creditor will be able to enforce its security right without obtaining possession and the buyer of the encumbered asset would acquire its rights in the asset subject to the right of the higher-ranking secured creditor (see art. 81).

Article 78. Right of the secured creditor to dispose of an encumbered asset

70. Article 78 is based on recommendations 148-151 of the Secured Transactions Guide (see chap. VIII, paras. 48 and 57-60). Paragraph 1 provides that the secured creditor may sell or otherwise dispose of, lease, or license an encumbered asset by applying to a court or other authority (to be specified by the enacting State) or may take those actions without making such an application. Paragraph 2 provides that, if the secured creditor decides to exercise its right by applying to a court or other authority, the enacting State may specify the rules that will determine the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

71. Paragraphs 3-8 deal with dispositions by the secured creditor without an application to a court or other authority. Under paragraph 3, the secured creditor may determine the aspects of the sale or other disposition, lease or licence (including whether to sell or otherwise dispose, lease or license encumbered assets individually, in groups or altogether). Under paragraph 4, the secured creditor must give to the grantor, the debtor, any person with a right in the encumbered asset that notifies in writing the secured creditor of those rights and any other secured creditor that registered a notice in the Registry or was in possession of the encumbered asset a notice that contains all the elements set out in paragraphs 5-7. The enacting State should specify a very short period of time within which the secured creditor must give the notice. Under paragraph 8, 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. "Recognized market" in this context means a market in which prices were set by the market and not by individual sellers. It should be noted this rule does not mean that a notice was not required for an out-of-court sale of a controlling stake in a company.

72. Subject to its obligation to act in good faith and in a commercially reasonable manner (see art. 4), the secured creditor may: (a) dispose of the encumbered assets by public or private sale, and if by public sale, through auction or tender; and (b) decide whether to dispose of the encumbered assets individually, in groups or as a whole (see art. 78, para. 3, and Secured Transactions Guide, chap. VIII, paras. 71-73).

Article 79. Distribution of the proceeds of a disposition of an encumbered asset and debtor's liability for any deficiency

73. Article 79 is based on recommendations 152-155 of the Secured Transactions Guide (see chap. VIII, paras. 60-64). Paragraph 1 provides that, in the case of a sale or other disposition, lease or licence supervised by a court or other authority, the distribution of the proceeds is determined by the rules to be specified by the enacting State. However, such distribution should follow the order of priority according to the priority rules of the Model Law.

74. Under paragraph 2, the distribution of the proceeds of a sale or other disposition, lease or licence that occurs without an application to a court or other authority must follow the rules set forth in paragraph 2 that determine the order in which the proceeds are to be applied. Paragraph 2 (b) requires payment to a subordinate competing claimant. This is so because, under article 81, paragraphs 3 and 4, the security right of a higher-ranking secured creditor is preserved even after enforcement by a lower-ranking secured creditor.

75. Under paragraph 3, if the net proceeds of disposition are insufficient to satisfy the secured obligation, leaving a shortfall, the debtor remains obligated to pay the remainder. It should be noted that damages for non-compliance with enforcement obligations are a matter for other law, in particular in relation to consumer transactions. Thus, if a sale of an encumbered asset is not commercially reasonable and the debtor has a counter-claim, the debtor may be liable only for a reduced shortfall. It should also be noted that this article, as well as articles 72, paragraph 1-3, to 81, does not apply to outright transfers of receivables (see art. 1, para. 2). It should be noted that: (a) the distribution of proceeds would require that the secured creditor report and provide an account to the grantor, the debtor and any subordinate competing claimant; and (b) any amount owing to the secured creditor after application of the net proceeds to the secured obligation would be an amount owing after deduction of any amount owing to the grantor by the secured creditor.

Article 80. Right to propose the acquisition of an encumbered asset by the secured creditor

76. Article 78 is based on recommendations 156-159 of the Secured Transactions Guide (see chap. VIII, paras. 65-70). Paragraph 1 states the right of the secured creditor to propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation. Paragraph 2 indicates to whom other than the grantor the proposal must be sent. Paragraph 3 governs the content of the proposal.

77. Paragraphs 4 and 5 provide rules that determine the outcome of the secured creditor's proposal. Paragraph 4 provides that, in the case of a proposal for the acquisition of an encumbered asset in full satisfaction of the secured obligation, the secured creditor acquires the encumbered asset in accordance with the proposal so long as none of the persons to whom the proposal must be sent objects within a short period of time after the proposal is received by those persons (to be specified by the enacting State); if any of those parties object, however, the secured creditor may not proceed. Paragraph 5 provides that, in the case of a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation, the secured creditor acquires the encumbered asset only if all of the addressees consent within a short period of time after the proposal is received by those persons (to be specified by the enacting State). This approach is intended to safeguard the rights of all addressees of the notice, since they will remain liable for part of the secured obligation or they may otherwise be affected by the enforcement of a security right.

78. Paragraph 6 provides a mechanism whereby the grantor can initiate this process rather than the secured creditor, by requesting a proposal from the secured creditor. If the secured creditor makes a proposal in response to the grantor's request, and the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5.

Article 81. Rights acquired in an encumbered asset

79. Article 81 is based on recommendations 160-163 of the Secured Transactions Guide (see chap. VIII, paras. 74-81). It is intended to deal with the finality of rights acquired in an encumbered asset pursuant to the enforcement of a security right (e.g. whether a transferee acquires its rights free or subject to the security right). Paragraph 1 deals with sales or other dispositions under the supervision of a court or other authority and refers the finality of rights to the law to be specified by the enacting State. Paragraph 2 deals with leases and licences of encumbered assets under the supervision of a court or other authority and provides that the enacting State should specify whether the lessee or licensee acquires its rights to use the leased or licensed encumbered asset unaffected by the security right.

80. Under paragraphs 3 and 4, in the case of a sale or other disposition, lease or licence of an encumbered asset without application to a court or other authority, the buyer or other transferee acquires its rights subject only to rights that have priority over the security right of the secured creditor, and the lessee or licensee is entitled to the benefit of the lease or licence except as against creditors with rights that have priority over the rights of the secured creditor.

81. Under paragraph 5, if the sale or other disposition, lease or licence of an encumbered asset takes place in violation of the provisions of chapter VII, the buyer or other transferee, lessee or licensee does not acquire any rights or benefits[, if it had knowledge of the violation and that the violation materially prejudiced the rights of the grantor or another person].

B. Asset-specific rules

Article 82. Collection of payment

82. Article 82 is based on recommendations 169-171, 173 and 175 of the Secured Transactions Guide (see chap. VIII, paras. 93-98, 102-108, 111 and 112). Under paragraph 1, where the encumbered asset is a right to receive payment, the secured creditor is entitled to collect payment from the obligor after default (without having to sell or otherwise dispose that right). Under paragraph 2, with the agreement of the grantor, the secured creditor may also exercise the right to collect before default. Under paragraph 3, a secured creditor that collects under paragraph 1 or 2 also has the benefit of any personal or property right that secures or supports payment of the encumbered asset.

83. Under paragraph 4, notwithstanding the general rule of this article, a deposit-taking institution need not pay a secured creditor with a security right in a right to payment of funds credited to a bank account held with that deposit-taking institution against its consent without a decision by a court or other authority. However, the secured creditor may collect the balance credited in a bank account without applying to a court or other authority if the security right in the right to payment of the funds has been made effective against third parties by the security right being created in favour of the deposit-taking institution, the conclusion of a control agreement or the secured creditor becoming the account holder (see art. 25).

Article 83. Collection of payment by an outright transferee of a receivable

84. Article 83 is based on recommendations 167-168 of the Secured Transactions Guide (see chap. VIII, paras. 99-101). It provides that, in the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable either before

or after default, provided that payment is due. It should be noted that the standards of good faith and commercial reasonableness do not apply to an outright transfer of a receivable without recourse to the transferor, as the grantor (transferor) has 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.

(A/CN.9/WG.VI/WP.71/Add.6) (Original: English)

Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws

Introduction

1. Chapter VIII of the Model Law states the rules for determining the substantive law applicable to the issues dealt with in the other chapters. These rules are generally referred to as the conflict-of-laws rules. In a State that has enacted the Model Law, a court or other authority will use the conflict-of-laws rules of chapter VIII to determine which State's substantive law will govern issues such as the creation, effectiveness against third parties, priority and enforcement of a security right, as well as the mutual rights and obligations of the grantor and the secured creditor and the rights and obligations between third-party obligors and secured creditors. The substantive law indicated by the conflict-of-laws rules may be that of the enacting State or the law of another State. It must be noted that in the event of litigation in a State, a court or other authority in that State should apply: (a) the substantive law of its own legal system to characterize an issue for the purpose of selecting the appropriate conflict-of-laws rule; and (b) the conflict-of-laws rules of its own legal system to determine which State's law is applicable to the substance of the dispute (for a more elaborate discussion of the role of conflict-of-laws rules, see Secured Transactions Guide, chap. X, paras. 1-13).

2. The application of the conflict-of-laws rules relating to security rights in a particular case should not be conditional on a prior determination that the case presents an international element. Whenever a conflict-of-laws rule refers to the law of a State, that reference should not be refused on the ground of the absence of true "internationality" in the situation. Otherwise, courts might disregard a conflict-of-laws rule of a State by deciding that the case is not sufficiently international on the basis of discretionary criteria that are not part of the conflict-of-laws rules of that State. In other words, if in a given situation the rule of State A points to the law of State B, it must be presumed that the legislator of State A has considered that the situation of itself is presenting an international element. In the particular circumstances where additional criteria would be a prerequisite for the application of a conflict-of-laws rule of a State, these criteria should be spelled out in the conflict-of-laws rules of that State.

3. The conflict-of-laws rule dealing with the law applicable to the mutual rights and obligations of the parties points to the law governing the security agreement (see art. 84). It is not, however, a mandatory law rule (as it is not listed in art. 3, para. 1, as a mandatory law rule). The parties may choose the law applicable to their contractual rights and obligations and this is recognized by article 84. However, the conflict-of-laws rules dealing with the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right, as well as with the effect of a security right on a third-party obligor, are mandatory (see art. 3, para. 1). Therefore, with respect to those matters, the parties cannot be permitted by a choice-of-law clause to avoid the substantive law provisions of the legal system to which a conflict-of-laws rule refers. This is because security rights are property (*in rem*) rights and thus affect third parties. Allowing the parties to a security agreement to select the applicable conflict-of-laws rule where the selection has third-party effects would also defeat one of the main purposes of the conflict-of-laws rules, which is to identify the State whose substantive law will apply in the event of a priority dispute among competing claimants. For example, if there is a priority dispute between secured creditor X and secured creditor Y, it would be impossible for third parties to ascertain the law applicable to the resolution of the dispute if each of X and Y were permitted to choose in their security agreement a different governing law for the ranking of their respective security right.

A. General rules

Article 84. Mutual rights and obligations of the grantor and the secured creditor

4. Article 84 is based on recommendation 216 of the Secured Transactions Guide (see chap. X, para. 61). It states that the parties to a security agreement are free to choose the law applicable to their contractual relationship. Article 84 follows the approach recommended by international texts on this matter, including the Hague Principles on Choice of Law in International Contracts (the "Hague Principles"). The question of whether there should be constraints to party autonomy with respect to the law applicable to contractual relationships is not addressed in the Model Law and is left to other conflict-of-laws rules of the enacting State. These other rules will also determine the law governing the contractual relationship between the parties in the absence of a choice of law in the security agreement; these rules will often point to the law of the State most closely connected to the security agreement. It should be noted that the rule of article 84 is confined to the contractual aspects of the security agreement. As already mentioned (see para. 3 above), matters relating to the property aspects of secured transactions (e.g. the priority of a security right) are outside the scope of freedom of contract; the parties cannot select a law other than that indicated by the conflict-of-laws rules on such matters.

Article 85. Security rights in tangible assets

5. Article 85 is based on recommendations 203-207 of the Secured Transactions Guide (see chap. X, paras. 28-38). It deals with the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset. The term "tangible asset" is defined to refer generally to all types of tangible movable asset, including money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see art. 2, subpara. (ll); see also Secured Transactions Guide, chap. X, para. 26).

6. Paragraph 1 states the general rule that the law applicable to these issues is the law of the State in which the encumbered asset is located (the "*lex situs*" or the "*lex rei sitae*"). Article 91 deals with the scenario where the location of the asset changes to another State after the security right has been created. The *lex situs* rule for tangible assets is subject to five exceptions that are set out in articles 85, paragraphs 2 to 4, 98 and 100.

7. The first exception provides that, if a tangible asset located in a State is covered by a negotiable document in the possession of a secured creditor in another State, the priority of the security right over the asset will be determined by the law of the State in which the document is located, and not by the law of the State in which the asset covered by that document is located (see art. 85, para. 2). Unlike recommendation 206, on which paragraph 2 is based, which referred to priority as against "a competing security right", to cover all priority conflicts (e.g. as against a judgment creditor), paragraph 2 refers to priority "as against the right of a competing claimant". The second exception points to the law of the State in which the grantor is located for an asset of a type which may be ordinarily used in more than one State in the course of its normal use, that is, a "mobile asset" (see art. 85, para. 3; for the meaning of "location", see art. 90; for the relevant time for determining location, see art. 91). The test is an objective one and does not refer to actual use. The most obvious example is an aircraft, which may fly from a State to many other States. The rule will apply even if a particular aircraft is actually operated only in one single State.

8. The third exception deals with a tangible asset (other than a mobile asset) in transit or to be exported (see art. 85, para. 4). A security right in a tangible asset located in a State which is in transit or destined to be moved to another State may be created and made effective against third parties under the law of the State of its ultimate destination, if the asset reaches that destination within the period of time to be specified by the enacting State. It should be noted that: (a) if the asset does not reach the intended destination in a timely fashion, the rule in paragraph 4 will not

apply; and (b) under the rule in paragraph 1, a secured creditor may also take the necessary steps to create and make the security right effective against third parties under the law of the State in which the asset is actually located at the time such steps are taken. It should also be noted that paragraph 4 is a conflict-of-laws rule of the enacting State only and whether the security right will be treated as validly created and made effective against third parties in the State of the ultimate destination of the asset depends on the law applicable under the conflict-of-laws rules of that State.

9. The fourth exception is contained in article 100, which refers to laws other than the law of the State in which the certificate is located for a security right in certificated non-intermediated securities. The fifth exception is contained in article 98, which refers to the law of the State in which the grantor is located for third-party effectiveness by registration with respect to certain types of tangible asset where that law recognizes registration as a method for achieving third-party effectiveness for these types of asset.

10. Another possible exception was contemplated in the Secured Transactions Guide for assets, in respect of which a notice of a security right may be registered in a specialized title registry or noted on a title certificate. In the case of a security right in such an asset, the law applicable to the security right was proposed to be the law of the State under whose authority the registry is maintained or the certificate is located (see Secured Transactions Guide, chap. X, paras. 37 and 38, as well as rec. 205; see also A/CN.9/WG.VI/WP.71/Add.1, para. 85). This exception was not retained in chapter VIII.

Article 86. Security rights in intangible assets

11. Article 86 is based on recommendation 208 of the Secured Transactions Guide (see chap. X, paras. 39-47). It states the general conflict-of-laws rule for the creation, effectiveness against third parties and priority of a security right in an intangible asset (including a receivable). The applicable law is that of the State in which the grantor is located (for the meaning of "location", see art. 90; for the relevant time for determining location, see art. 91). This rule is subject to several exceptions.

12. The first exception relates to the priority of a security right in a receivable arising from a sale or lease of, or secured by, immovable property (see art. 87). The other exceptions relate to a security right in rights to payment of funds credited to a bank account (see art. 97), intellectual property (see art. 99, which refers both to the *lex protectionis* and to the law of the State of the grantor's location) and non-intermediated securities (see art. 100).

Article 87. Security rights in receivables relating to immovable property

13. Article 87 is based on recommendation 209 of the Secured Transactions Guide (see chap. X, para. 54). It deals with the priority of a security right in a receivable arising from a sale or lease of, or secured by, immovable property as against the rights of competing claimants. Article 87 is an exception to the general rule of article 86 and refers that matter to the law of the State under whose authority the immovable property registry is maintained. For article 87 to apply, the right of a competing claimant must be registrable (but not necessarily registered) in the relevant immovable property registry. It should be noted that, for a secured creditor to be able to determine the law applicable to the priority of its security right in these circumstances, it must be able to find out whether the receivable arises from a sale or lease of or is secured by immovable property.

Article 88. Enforcement of security rights

14. Article 88 is based on recommendation 218 of the Secured Transactions Guide (see chap. X, paras. 64-72). Subparagraph (a) deals with the law applicable to the enforcement of a security right in a tangible asset, as defined in article 2, subparagraph (ll). It refers to the law of the State in which the asset is located at the time of commencement of enforcement (*lex fori*). Subparagraph (a) is subject to an exception for certificated non-intermediated securities (see art. 100).

15. It should be noted that enforcement may involve several distinct actions (e.g. notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) that may take place in different States. For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State. A similar issue arises if a security right is created in several tangible assets that are located in different States or in a less frequent case where enforcement takes place in different States because the asset has been moved to another State after commencement of enforcement. In each case, the applicable law will be the law of the State of the location of the relevant asset at the time the first enforcement action is taken.

16. Under, subparagraph (b), the law applicable to the enforcement of a security right in an intangible asset (with the exception of a right to payment of funds credited to a bank account, intellectual property and uncertificated non-intermediated securities; see arts. 97, 99 and 100)) is the law governing priority. The main advantage of this approach is that the creation, third-party effectiveness, priority and enforcement of a security right in an intangible asset (but not the rights and obligations between the debtor of the receivable and the secured creditor; see art. 96) are referred to one and the same law (see Secured Transactions Guide, chap. X, para. 69).

Article 89. Security rights in proceeds

17. Article 89 is based on recommendation 215 of the Secured Transactions Guide (see chap. X, paras. 55-60). The following example illustrates how article 89 operates. Assume that the original encumbered asset is inventory, which is subsequently sold, and the purchase price is paid by a funds transfer to a bank account. Under paragraph 1, the law applicable to the question of whether the secured creditor automatically acquires a security right in the right to payment of the funds credited to the bank account as proceeds of the original encumbered inventory will be the law of the location of the inventory at the time of the putative creation of the security right (see art. 91, para. 1 (a)). Under paragraph 2, the law applicable to the third-party effectiveness and priority of the security right in the proceeds will be the law that would be applicable to a security right in the right to payment of the funds credited to the bank account as an original encumbered asset (see art. 97).

18. It should be noted that this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad-based automatic proceeds rule whereas the law governing third-party effectiveness and priority recognizes no or only a very limited automatic proceeds right. It should also be noted that article 89 is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to enforcement. Article 88 deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.

Article 90. Meaning of "location" of the grantor

19. Article 90 is based on recommendation 219 of the Secured Transactions Guide (see chap. X, paras. 73 and 74). It should be noted that the State in which a grantor that is a legal person has its central administration is not necessarily the State in which that legal person has its statutory seat (or registered office). If the grantor is a legal person formed under the law of State A with its statutory seat in that State but has in State B a place of business where its senior management is based, then the grantor is located in State B. As a result of this approach, for example, the creation, third-party effectiveness, priority and enforcement of a security right in a receivable is referred to a single law that is generally easy to determine and is most likely to be the law of the State in which the main insolvency proceeding with respect to the grantor would take place, if the grantor were to become insolvent (in which case a secured creditor would most likely need to enforce its security right). Thus, this approach minimizes the risks of inconsistencies between the law governing the insolvency proceeding *(lex*

fori concursus) and the substantive law applicable to a security right, as the two laws will be the law of one and the same State.

Article 91. Relevant time for determining location

20. Article 91 is based on recommendation 220 of the Secured Transactions Guide (see chap. X, paras. 75-78). It deals with the situation where the location of the asset or the location of the grantor changes from one State (State A) to another (State B) in circumstances where the applicable law is determined by reference to that location.

21. Paragraph 1 establishes that the creation of a security right remains governed by the law of the location of the asset or of the grantor at the time of the putative creation of the security right even if there is subsequently a change of location. State B will recognize the existence of the security right if the latter was validly created under the law of State A at the time the asset or the grantor was located in State A. However, for third-party effectiveness and priority issues, the applicable law will be that of the actual location of the asset or the grantor "at the time the issue arises". This is the time of the occurrence of the event which triggers the inquiry as to what law would be applicable to third-party effectiveness or priority. For example, if an insolvency proceeding commences in State B in respect of the grantor of a security right in a receivable, the law applicable to the effectiveness of the security right will be the law of State B if the location of the grantor is then in State B (see art. 86).

22. As a result, for the security right to be treated as being effective against the insolvency representative either in State A or in State B, the third-party effectiveness requirements of the law of State B must have been fulfilled prior to the commencement of the insolvency proceeding. Another example is where a tangible asset is seized by a judgment creditor. The respective priorities of the secured creditor and the judgment creditor will be determined under the law of the location of the asset at the time of the seizure (which will be "the time the issue arises"). This is so in each example even if the security right had been made effective against third parties under the law of State A at the time the asset or the grantor was located in State A.

23. Paragraph 2 constitutes an exception to the general rules of paragraph 1. In the event of a priority dispute between two security rights that have been made effective against third parties in the State of the initial location, the priority dispute will be resolved under the law of that State (State A in the example).

Article 92. Exclusion of *renvoi*

24. Article 92 is based on recommendation 221 of the Secured Transactions Guide (see chap. X, para. 14). Its purpose is to reject the doctrine of *renvoi* and provide greater certainty with respect to the applicable law by avoiding the complications arising from this doctrine. Under the doctrine of *renvoi*, when the conflict-of-laws rules of a State (State A) refer an issue to the law of a another State (State B), that law would include the conflict-of-laws rules of State B. If that were the case and the conflict-of-laws rules of State A refer the priority of a security right to the law of State B, the conflict-of-laws rules of State B may refer that issue to the law of yet another State (State C). In that case, a court in State A would need to resolve the priority dispute using the law of State C (and not the law of State B). This result, however, would create uncertainty as to the applicable law and be contrary to the expectations of the parties. For those reasons, article 92 excludes *renvoi* (for an exception, see art. 95).

Article 93. Overriding mandatory rules and public policy (*ordre public*)

25. Article 93, which is based on recommendation 222 of the Secured Transactions Guide (see chap. X, para. 79) and article 11 of the Hague Principles, states generally recognized principles of private international law.

26. To illustrate how the rules in paragraphs 1 and 3 will operate, assume that the law of the forum (State A) prohibits dealings in certain types of asset (such as an asset which is the proceeds of criminal activities or is the subject of international sanctions)

and that the law of the State whose law is applicable under the provisions of this chapter (State B) does not contain such a prohibition. In such a case, a court in State A may refuse to recognize a security right created in such an asset under the law of State B even though the law of State B does not contain the same prohibition. However, to do so, the forum court (in State A) must conclude that the application of the foreign law (of State B) would be manifestly contrary to the public policy of State A.

27. Under paragraphs 2 and 4, the forum court (if it is allowed to do so under its law) may refuse to recognize a security right that has been validly created under the applicable law (even if the applicable law is the law of the forum itself), if the creation of the security right would be manifestly contrary to public policy of another State (e.g. a State that has a close connection with the situation). For example, a law firm located in the forum State (State A) may wish to assign receivables arising from its legal services and the law of State A allows this assignment. However, the client is located in another State (State B) and, for reasons of public policy (confidentiality of lawyer-client relationship), the law of State B prohibits the transfers by a law firm of its receivables arising from legal services. In this case, the law of State A may allow a court in State A to take the public policy of State B into account in determining whether the assignment is valid.

28. Paragraph 5 is intended to make clear that the rules in paragraphs 1-4 may also be relied upon by an arbitral tribunal, although, unlike a court, it does not operate as part of the judicial infrastructure of a specific legal system. Under paragraph 5, an arbitral tribunal may take into account the overriding mandatory provisions and policies, for example, of the place of arbitration, however identified, or of the place where enforcement of any award would be likely to take place. Paragraph 5 requires an arbitral tribunal to determine whether it is required or entitled to take into account public policy or overriding mandatory provisions of another law, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation (see commentary to article 11(5) of the Hague Principles).

29. Under paragraph 6, the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority of a security right and apply its own third-party effectiveness and priority provisions or those provisions of another State. This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in article 23, paragraph 2, article 30, paragraph 2, and article 31 of the Assignment Convention, as well as in article 11, paragraph 3, of the Hague Securities Convention.

Article 94. Impact of commencement of insolvency proceedings on the law applicable to a security right

30. Article 94 is based on recommendation 223 of the Secured Transactions Guide (see chap. X, paras. 80-82). Its purpose is to establish that an insolvency court in the enacting State must in principle respect the law applicable to security rights under its conflict-of-laws rules. However, nothing in article 94 restricts the application of the law of the State in which insolvency proceedings are commenced (*lex fori concursus*) to matters such as the avoidance of fraudulent or preferential transactions, a stay of enforcement rights of secured creditors, the ranking of claims and the distribution of proceeds in the grantor's insolvency.

Article 95. Multi-unit States

31. Article 95 is based on recommendations 224-227 of the Secured Transactions Guide (see chap. X, paras. 83-87) and partly on article 37, first sentence, of the Assignment Convention. Its purpose is to deal with the law applicable where the State whose law is applicable to an issue under the provisions of this chapter has two or more territorial units, each of which has its own substantive law, and possibly its own

conflict-of-laws rules. In such a case, subparagraph (a) provides that a reference to the law of a multi-unit State is in principle a reference to the law applicable in the relevant unit to be determined under the provisions of this chapter. For example, in the case of a security right in a receivable created by a grantor located (in the sense of having its central administration) in territorial unit A, the law applicable to that security right is the law of territorial unit A (see arts. 86 and 90).

32. However, under subparagraph (b), if the internal conflict-of-law rules of the multi-unit State or, in the absence of such rules, of the territorial unit to which subparagraph (a) points, refer security rights to the law in force in another territorial unit of that State, the substantive law of that other unit will apply. In the above mentioned example, if territorial unit A has a conflict-of-laws rule under which the law applicable is the law of the grantor's location defined as the place of the grantor's statutory seat and that place is in territorial unit B, the substantive law of territorial unit B will apply, It should be noted that subparagraphs (a) and (b) are interpretative provisions and also apply where the forum State is the State whose law is applicable under the provisions of this chapter.

33. Thus, subparagraph (b) is indirectly an exception to the exclusion of the doctrine of *renvoi* (see art. 92) as it introduces internal "*renvoi*". The purpose of the exception is to ensure that, where the applicable law is that of a unit of a multi-unit State, a forum court outside that multi-unit State will apply the substantive law of the same unit as a forum court in that multi-unit State would do under its internal conflict-of-laws rules.

34. As a result, for example, where the conflict-of-laws rules of this chapter refer to the law of the location of the asset or the grantor, the forum court is required to examine the internal conflict-of-laws rules in effect in the territorial unit of the location of the grantor or the encumbered asset (under the provisions of this chapter). 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 (see art. 37 of the Assignment Convention), but in this article there would be no declaration and the forum court would have to determine the applicable law under the conflict-of-laws rules in effect in the multi-unit State or, in the absence of such rules, in the territorial unit to which subparagraph (a) will point.

B. Asset-specific rules

Article 96. Rights and obligations between third-party obligors and secured creditors

35. Article 96 is based on recommendation 217 of the Secured Transactions Guide (see chap. X, paras. 62 and 63) and article 29 of the Assignment Convention. Its purpose is twofold. First, the conflict-of-laws rules on the third-party effectiveness or enforcement of a security right do not apply to the effectiveness or enforcement of a security right against a debtor of a receivable, an obligor under a negotiable instrument or an issuer of a negotiable document; they are not considered "third parties" for the purposes of the rules on third-party effectiveness and priority of a security right, as they are not competing claimants. Second, the law applicable to these issues is the law governing the legal relationship between the grantor and the relevant debtor of the receivable, or the relevant obligor under the instrument or the issuer of the document; the same law also applies to the question of whether any of the latter may invoke that their agreement with the grantor prohibits or limits the grantor's right to create a security right in the relevant receivable, instrument or document. For example, in the case of a receivable arising from a sales contract, the law chosen by the seller/grantor and the debtor of the receivable will apply to the matters covered by article 96.

Article 97. Security rights in rights to payment of funds credited to a bank account

36. Article 97 is based on recommendation 210 of the Secured Transactions Guide (see chap. X, paras. 49-51). While a right to payment of funds credited to a bank account is in the generic sense a receivable of the customer against the deposit-taking institution, to avoid interfering with banking law and practices, article 97 departs from the general conflict-of-laws rule on the law applicable to intangible assets (see art. 86). Two options are offered to the enacting State for the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the deposit-taking institution and the secured creditor.

37. Under option A, the applicable law is that of the State of the location of the branch (or office) of the deposit-taking institution with which the account is maintained. It should be noted that a branch (or office) of a deposit-taking institution may be considered as being located in a particular jurisdiction irrespective of whether the institution offers its services through physical offices or only through an online connection accessible electronically by customers. In this regard, it should be noted that a deposit-taking institution must generally have a physical presence or legal address in a jurisdiction in order to be allowed by the relevant regulatory authorities to receive deposits and maintain bank accounts in that jurisdiction.

38. Under option B, the applicable law is the law designated in the account agreement as governing the issues that are the subject of article 97 or, in the absence of a designation of a law for these issues, the law designated by the parties to the account agreement as the law governing that agreement. To be effective for conflict-of-laws purposes, a designation must refer to the law of a State in which the deposit-taking institution is regularly engaged in the business of receiving deposits and maintaining bank accounts. It should be noted that the State whose law is so designated may be different than the State in which the grantor's bank account is maintained.

39. If the applicable law cannot be determined as described in the preceding paragraph, option B provides for a series of rules along the lines of the default rules contained in article 5 of the Hague Securities Convention, which the enacting State may wish to insert in this article, if it decides to adopt option B of article 97.

Article 98. Third-party effectiveness of a security right in certain types of asset by registration

40. Article 98 is based on recommendation 211 of the Secured Transactions Guide (see chap. X, para. 34). This article is an exception to the conflict-of-laws rules on the third-party effectiveness of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security. Under articles 85, 97 and 100, the effectiveness against third parties of a security right in any of these assets is governed by the law of a State which may be different from the State of the location of the grantor. However, under article 98, if the State of the location of the grantor recognizes registration of a notice as a method of third-party effectiveness for a security right in the types of asset coved in article 98, then the law applicable to third-party effectiveness by registration is the law of the State in which the grantor is located.

41. Therefore, with respect to these types of asset, a secured creditor may rely on the law of the location of the grantor to make its security right effective against third parties by registration, even if for these types of asset the applicable law might be different under the other conflict-of-laws rules of this chapter. However, if the priority rules of the applicable law are based on the priority rules of the Model Law, achieving third-party effectiveness by registration would only yield a lower-ranking priority in the case of a priority conflict with a competing secured creditor who achieved third-party effectiveness, for example, by possession in the case of a negotiable instrument (see art. 46, para. 1), by the secured creditor becoming the account holder in the case of a right to payment of funds credited to a bank account (see art. 47, para. 1) or by

possession in the case of a negotiable document or a certificated non-intermediated security (see arts. 49, para. 1, and 51, para. 1 respectively). However, the security right would have priority over the right of: (a) the grantor's insolvency representative or the mass of creditors; and (b) judgment creditors, if registration took place before a judgment creditor, for example, seized the encumbered assets.

Article 99. Security rights in intellectual property

42. Article 99 is based on recommendation 248 of the Intellectual Property Supplement (see paras. 284-337). The effect of paragraph 1 is the following. If intellectual property is protected in a particular State, the law of that State will apply to the requirements to be met for the security right in that intellectual property to be considered as having been created, made effective against third parties and enjoying priority in that State. It should be noted that a security right in intellectual property may be granted by any person that has a right in the related intellectual property under the relevant intellectual property law. Therefore, the grantor may be an owner, a licensor or a licensee of the intellectual property to be encumbered.

43. Paragraph 2 provides for an alternative way to create and make effective against certain third parties a security right in intellectual property. Under paragraph 2, the secured creditor may also rely for these purposes on the law of the State in which the grantor is located. The principal benefit of paragraph 2 is that, if the security right has been made effective against the grantor's insolvency representative under the law of the State in which the grantor is located, an insolvency court in the enacting State will recognize the security right even if the third-party effectiveness requirements of all States in which the intellectual property is protected have not been fulfilled.

44. Paragraph 3 refers enforcement issues to the law of the State in which the grantor is located. This rule allows for the same law to be applied to all enforcement steps, even if they take place in different States, because it is unlikely that the grantor's location (in particular the place of its central administration) would change between any of those steps. In the rare case where there would be such a change, it is assumed that a court would refer to the law of the State in which the grantor is located at the time of commencement of the enforcement (see art. 88). It should be noted that the effectiveness of the security right against persons other than the grantor (e.g. the licensor of the intellectual property, if the grantor is a licensee) is outside the scope of this article.

Article 100. Security rights in non-intermediated securities

45. Article 100 introduces one general rule for equity securities and another for debt securities. It should be noted that none of these general rules draws a distinction between certificated and uncertificated, or between traded and non-traded, securities. For equity securities, paragraph 1 designates the law of the constitution of the issuer as the law applicable to all issues (i.e. the creation, third-party effectiveness, priority, enforcement and effectiveness against the issuer of a security right in these securities). This approach provides greater certainty in the determination of the applicable law as referring to one single law for all such issues avoids the difficulties that can arise in circumstances where there could be an overlap between some issues (e.g., enforcement and effectiveness against the issuer) that could result in the referring them to different laws.

46. The term "equity" is not defined in the Model Law but it should be understood as referring to participation rights in the capital of the issuer. For a corporation or a similar legal person, equity securities consist of the shares in its capital. Similarly, for an entity which is not a legal person under its constitutive law (such as a general or limited partnership in many States), equity securities should refer to the rights of the persons (e.g. the partners) who are entitled to receive upon the liquidation of the entity the residual value of its assets after payment of its liabilities.

47. The test of the distinction between equity and debt securities should be based on their characterization for the purposes of corporate law, and not accounting or other law. Thus, preferred shares should be considered as equity securities even if under

accounting or other rules they are classified as liabilities. Likewise, subordinated debt securities (e.g. debt payable in insolvency only after satisfaction of obligations owing to certain creditors, such as lenders) should be treated as debt securities even if subordinated debt may be viewed as equity from the perspective of lenders extending other credit to the issuer.

48. The law of the constitution of the issuer is the law under which it has been formed. For a corporation, this is easy to ascertain; it is the law under which it has been incorporated. For a partnership, it should be the law under which the partnership has been created. In federal States where the issuer may be constituted either under a federal law or a law of one of its territorial units, the Model Law does not provide specific criteria on the determination of the territorial unit which will be considered as the issuer's law where the issuer's law is a federal law and the law on secured transactions is that of a territorial unit. However, under article 95, the internal conflict-of-laws rules of the federal State (or of the territorial unit which is the forum) should determine the territorial unit's law to be applicable to the issues falling under article 100 where all or some of these issues are not dealt with by the federal law of the constitution of the issuer.

49. For non-intermediated debt securities, paragraph 2 applies the law governing the securities to all issues (i.e. the creation, third-party effectiveness, priority, enforcement and effectiveness against the issuer of a security right in these securities). As already noted (see para. 45 above), greater certainty is achieved by designating one single applicable law for all such issues. The law governing the debt securities is the law selected by the parties as the law governing their contractual rights and obligations arising from the issuance of these securities. In the absence of such a choice of law (which would be extremely rare for debt securities), the forum will determine the applicable law under its own conflict-of-laws rules. The Model Law does not deal with the question of whether the parties may select a governing law which has no connection with the issuance of the securities. This matter is left to the conflict-of-law rules on contractual obligations of the forum State.

50. The term "debt securities" is not defined in the Model Law. The notion of debt is however well understood in most legal systems and denotes a payment obligation. In the context of debt securities, the obligation is generally to make payment of a sum of money. Bonds, debentures and promissory notes are debt securities, to the extent they come under the definition of securities in article 2, subparagraph (hh). The obligation of a borrower to a lender under a credit facility would not qualify as a debt security as it is not captured by that definition. Such an obligation is rather a receivable and is subject to the conflict-of-laws rules on receivables.

51. The concept of "debt securities" raises the following two questions: (a) the characterization of convertible debt securities; and (b) the effect of that characterization on the law applicable to a security right in that type of security. Convertible debt securities are debt securities that are convertible into equity securities at the option of their holder or issuer or upon the occurrence of a specified event.

52. Convertible debt securities should be characterized as debt securities because they constitute payment obligations as long as they are not converted into equity. This means that upon their issuance and until conversion, the law governing these securities will be the law applicable to the creation, third-party effectiveness, priority, enforcement and effectiveness against the issuer of a security right in such securities. The characterization of convertible debt securities for the purposes of article 100 may, however, change if and once they are converted into equity. The connecting factor then becomes the law of the constitution of the issuer. Therefore, upon being converted into equity, the law applicable to a security right in convertible debt securities will be the law of the State under which the issuer has been constituted.

53. A consequence of the change from the law governing the securities to the issuer's law is that a security right in debt securities made effective against third parties under the law governing the securities might become ineffective against third parties after the change. Article 23 addresses the impact of a change in the applicable law and

article 91 addresses a change in the connecting factor. However, strictly speaking, article 23 is not applicable to a change in the nature of non-intermediated securities; and article 91 only deals with the situation where the connecting factor is the location of the asset or the grantor. The enacting State may thus wish to draw from articles 23 and 91 and adopt rules dealing with the change on the basis of principles similar to those underlying articles 23 and 91.

54. Article 98 introduces an exception to the general conflict-of-laws rules of article 100. If the law of the State in which the grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in certificated non-intermediated securities, the law of that State is also the law applicable to the third-party effectiveness of the security right in this type of asset by registration (see paras. 40 and 41 above). It should be noted that uncertificated non-intermediated securities are not mentioned in article 98 and, therefore, the issuer's law (and not the grantor's location law) is the law applicable to the third-party effectiveness by registration (if permitted by the issuer's law) of a security right in uncertificated securities.

Chapter IX. Transition

Introduction

55. This chapter accomplishes three tasks. First, it provides that the law formerly governing security rights (the "prior law") is repealed (see art. 101). Second, it provides rules governing the treatment of security rights that were created while the prior law was in force but continue to exist, perhaps for extensive periods of time, after the new secured transactions law (the "new law") enters into force (see arts. 102-106). Third, it sets a date on which the new law goes into effect (see art. 107). Thus, this chapter provides rules by which the law governing such security rights moves in a fair and efficient manner from the prior law to the new law (see Secured Transactions Guide, chap. XI, paras. 1-3).

Article 101. Amendment and repeal of other laws

56. The Model Law is intended as a complete system of secured transactions law, replacing in its entirety the prior law, rather than as a supplement to existing law. Accordingly, the enacting State should list in paragraph 1 and thus repeal the body of laws that comprise its secured transactions law. The way in which the repeal is effectuated will depend on the form of the prior law. Where the prior law is a free-standing code or the like, that code can be repealed in its entirety. Where the prior law is derived from statutes that also address other topics, though, the enacting State must determine how to excise the rules formerly governing security rights from the rules that apply to other topics. Where part of the prior law is based on judicial opinions (as may be the case, for example, in some common law systems), the method of repeal of the prior law must be determined by the enacting State.

57. Many other bodies of law interact with secured transactions law. In some cases, provisions of those other bodies of law may be based on the assumption that prior secured transactions law is in effect. Paragraph 2 provides the enacting State an opportunity to amend those provisions so as to mesh with the new law. It should be noted that, like any other article of the Model Law, article 101 can have effects only when the new law enacting the Model Law enters into force according to article 107. Thus, the existing laws are amended or repealed only as of the date the new law enters into force (in other words, there is no time in which neither set of rules governs secured transactions).

Article 102. General applicability of this Law

58. Paragraph 1 of this article defines two terms used in this chapter. According to paragraph 1 (a), "prior law" means the rules that applied to security rights under the law of the enacting State before the entry into force of the new law because, under

the conflict-of-laws rules of the enacting State (as those rules existed before the entry into force of the new law), the applicable law may be the law of the enacting State or of another State, article 102 refers to the law formerly applicable under the conflict-of-laws rules of the enacting State. As a different law may be applicable to the various security right issues (e.g. the contractual rights and obligations between the grantor and the secured creditor, the creation, third-party effectiveness, priority and enforcement of a security right, as well as the effectiveness of the security right against a third-party obligor) prior law means the law formerly applicable to the relevant issue.

59. According to paragraph 1 (b), "prior security right" is a right created by an agreement entered into before the entry into force of the new law that the new law would treat as a security right within the scope of the new law. This is the case even if the agreement covers future assets (see art. 2, subpara. (n)). The transition provisions of the Model Law determine the extent to which, even after the entry into force of the new law, the rules of prior law continue to apply to a prior security right.

60. Paragraph 2, which is based on recommendation 228 (second sentence) of the Secured Transactions Guide (see chap. XI, paras. 7-12), states the general rule of the applicability of the new law. It provides that, when it enters into force under article 105, the new law will apply to all security rights within its scope, including prior security rights, except as otherwise provided in this chapter (e.g. arts. 103 and 104). Much of the remainder of the chapter is devoted to providing exceptions to this general rule. Read together, the rule in paragraph 2 and the exceptions in the remainder of the chapter result in a transition period during which the new law will apply to all new transactions while some aspects of the rules of the prior law will continue to apply to some issues related to prior security rights.

61. As a result of paragraph 2, prior security rights may be governed, at least in part, by the new law. This is beneficial because, inasmuch as many secured transactions endure for several years, if the new law applied only to security rights created by agreements entered into after the effective date of the new law, the prior law would persist for a lengthy period during which lenders, borrowers, attorneys, and judges would need to be able to apply both the new law and the prior law (depending on the particular transaction) and during which searches for competing claimants would need to be done both under the rules of the new law and the prior law. Thus, a rule that the new law applied only to transactions entered into after its effective date would entail additional cost and delay the economic benefits of the new law.

Article 103. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

62. Article 103 is based on recommendation 229 of the Secured Transactions Guide (see chap. XI, paras. 13-16). It introduces an exception to the rule in article 102, paragraph 2, that the new law applies to all security rights within its scope, including prior security rights. In particular, paragraph 1 provides that, if a matter with respect to a prior security right is the subject of litigation or arbitral proceedings commenced before the new law enters into force, the substantive (not procedural) law governing the dispute will remain the prior law (a forum may apply its own current rules of procedure when not inconsistent with those of the prior law). This paragraph applies to all disputes arising with respect to a prior security right, whether between the secured creditor and the grantor, the secured creditor and a competing claimant, or the secured creditor and a person liable, for example, on a receivable or negotiable instrument. It should be noted that the commencement of litigation before the new law enters into force with respect to one matter does not preclude the application of the rules of the new law to a separate matter arising under the same security agreement which is not the subject of litigation.

63. Paragraph 2 provides a substantive rule about the enforcement of security rights created under prior law. Under the rule in this paragraph, if enforcement is commenced under prior law (what constitutes "enforcement" and whether it was "commenced" are matters of prior law), the secured creditor may continue

enforcement under the rules of the prior law even after the new law enters into force or, rather may choose to utilize the enforcement mechanisms of the new law (what constitutes "enforcement" under the new law enacting the Model Law is addressed in chapter VII). This rule applies even if the commencement of enforcement under prior law occurs without application to a court or other authority. Thus, for example, if before the entry into force of the new law the secured creditor takes actions authorized under prior law to obtain possession of an encumbered asset without applying to a court or other authority, the secured creditor may, after the entry into force of the new law, choose to dispose of the encumbered asset and distribute its proceeds under the prior law or proceed as to those matters under the new law.

Article 104. Applicability of prior law to the creation of a prior security right

64. Article 104 is based on recommendation 230 of the Secured Transactions Guide (see chap. XI, paras. 17-19). This article contains two rules. First, paragraph 1 provides that prior law determines whether a security right putatively created before the new law enters into force was indeed created effectively. Second, under paragraph 2, a prior security right that was effectively created under prior law will remain effective between the parties under the new law even if the requirements for creation under the new law have not been satisfied. This rule avoids the invalidation of prior security rights and the creation of a situation in which the secured creditor would need to obtain cooperation from the grantor to take the additional steps necessary to continue the existence of the security right under the new law. Such cooperation may not be forthcoming from a grantor that has already received an extension of credit secured by the security right in the encumbered asset.

65. For example, assume that before the new law entered into force: (a) prior law allowed the creation of a security right by means of an oral security agreement even in the absence of possession of the encumbered asset by the secured creditor; and (b) a secured creditor extended credit to a grantor and the grantor secured its repayment obligation by creating a security right in an intangible asset in favour of the secured creditor by means of an oral security agreement. In the absence of the rule in paragraph 2, the security right would not be effective between the parties under the new law and the secured creditor would need to obtain the cooperation of the grantor in order to have an effective security right because the new law requires a written security agreement signed by the grantor (see art. 6, para. 3).

Article 105. Transitional rules for determining the third-party effectiveness of a prior security right

66. Article 105 is based on recommendation 231 of the Secured Transactions Guide (see chap. XI, paras. 20-22). Under this article, a security right created and made effective against third parties under prior law before the effective date of the new law remains effective against third parties for a period of time under the new law, even if the conditions for third-party effectiveness under the new law have not been satisfied. The period expires at the earlier of the time when the third-party effectiveness of the security right would have ceased under prior law (see para. 1 (a)) or at the time specified in paragraph 1 (b).

67. Illustration: Under the prior secured transactions law of State X, a security right in a receivable could be made effective against third parties by notifying the debtor of the receivable, but the third-party effectiveness of the security right would cease after five years, unless the secured creditor sent a renewal notice to the debtor of the receivable (which would extend the third-party effectiveness of the security right for another five years. State X's enactment of the Model Law specifies three years as the time period for that rule in paragraph 1 (b)). One year before the new law entered into force, the grantor created in favour of the secured creditor a security right in a receivable owed to the grantor by the debtor, and the secured creditor notified the debtor of the security right. Under paragraph 1 (a), the security right would cease to be effective against third parties five years after the security agreement was entered into and notice was given to the debtor of the receivable under prior law (which, under these facts, would result in the security right ceasing to be effective against third

parties four years after the new law entered into force). Under paragraph 1 (b), the security right would cease to be effective against third parties three years after the new law entered into force. Thus, because the date in paragraph 1 (b) is earlier than the date in paragraph 1 (a), the security right will cease being effective against third parties under the new law three years after it enters into force (subject to the rules in paragraphs 2 and 3).

68. A security right that would cease to be effective against third-parties under the rule in paragraph 1 may continue to be effective against third parties if the secured creditor takes the appropriate steps under the new law to achieve third-party effectiveness. Most often, this result will be accomplished by registering a notice with the Registry. The secured creditor's ability to do so is aided by paragraph 4, which provides that the prior written agreement creating the security right constitutes sufficient authorization for registration of the notice.

69. Paragraphs 2 and 3 address the continuity of third-party effectiveness of a prior security right in situations in which: (a) a security right was effective against third parties under the prior law; and (b) the requirements for third-party effectiveness under the new law are satisfied. Paragraph 2 provides that, if the requirements for third-party effectiveness under the new law are satisfied before the expiration of the period specified in paragraph 1, the prior security right is continuously effective against third parties from the time when it was made effective against third parties; thus, the priority of that security right, for the purposes of the rules that determine priority by reference to the time of third-party effectiveness, will date from that time.

70. If, however, the requirements of the new law for third-party effectiveness of the prior security right are satisfied only after the expiration of the period specified in paragraph 1, there will be a gap between the expiration of third-party effectiveness under paragraph 1 and the achievement of third-party effectiveness under the new law. In that case, paragraph 3 provides that the security right is effective against third parties only from the time it is made effective against third parties under the new law; thus, the priority of that security right, for the purposes of the rules that determine priority by reference to the time of third-party effectiveness, will date only from that time.

71. The rule in paragraph 5 makes explicit a point that is implicit in paragraph 2. Paragraph 2 provides that, in cases in which the requirements for third-party effectiveness of a prior security right under the new law are satisfied before the expiration of the period specified in paragraph 1, the prior security right is continuously effective against third parties from the time when it was made effective against third parties under prior law. Paragraph 5 states that, in cases in which the security right was made effective against third parties by registration under prior law and the security right remains continuously effective against third parties under paragraph 2, priority rules that depend on the time of registration are to be applied using the time of registration under prior law.

Article 106. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

72. Article 106 provides an exception to the general rule in article 102, paragraph 2, that the new law applies to all security rights, including prior security rights. Under the circumstance described in article 106, the priority of a prior security right as against competing claimants is determined by application of prior law.

73. In particular, under the rule stated in paragraph 1, the prior law, rather than the new law, determines the priority of a prior security right against competing claimants if that security right and the rights of all competing claimants arose before the entry into force of the new law and the "priority status" of competing claimants has not changed.

74. Paragraph 2 provides that the priority status of a security right has changed if either of the two events has occurred. First, the priority status has changed if: (a) the prior security right was effective against third parties under the new law only because

of the rule in article 105, paragraph 1; and (b) third-party effectiveness ceased because the time period set out in article 105, paragraph 1 expired before the necessary actions occurred to make the security right effective against third parties under the new law. Second, the priority status of a security right has changed if it was not effective against third parties under the prior law at the time the new law entered into force but became effective against third parties when the new law entered into force or thereafter. The purpose of this rule is to preserve priority among completing claimants that was established under the prior law when no change has occurred other than the new law becoming effective.

Article 107. Entry into force of this Law

75. Article 107, which is based on recommendation 228 of the Secured Transactions Guide (see chap. XI, paras. 4-6), provides the date when or the mechanism according to which the new law will enter into force. The Model Law does not recommend a particular date or mechanism, and leaves that matter to the enacting State. The enacting State may wish to determine whether this article should be placed at the beginning or at the end of the new law.

76. In selecting a date or mechanism according to which the new law will enter into force, careful consideration should be given both to obtaining the economic benefits of the new law as soon as possible and to minimizing dislocations that may be caused by significant changes in secured transactions practice resulting from the new law. Inasmuch as the new law will have been chosen because it is an improvement over the prior law, the new law should come into force as soon as is practical. However, some lead time is necessary in order to, inter alia: (a) publicize the existence of the new law; (b) enable establishment of the Registry (or adaptation of an existing registry to the registry system required by the new law); and (c) educate participants in the secured transactions system, particularly present and future secured creditors, about the effect of the new law and the transition from the prior to the new law and enable them to prepare, for example, for compliance with new rules and use of new forms. For example, the new law may enter into force on a specific date or a few months after a specific date, or on the date to be specified by a decree once the Registry becomes operational.

C. Report of the Working Group on Security Interests on the work of its thirty-first session (New York, 13-17 February 2017)

(A/CN.9/904)

[Original: English]

Contents

I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a draft guide to enactment (the "draft Guide to Enactment") of the UNCITRAL Model Law on Secured Transactions (the "Model Law"), pursuant to a decision taken by the Commission at its forty-eighth session (Vienna, 29 June-16 July 2015).[1] At that session, the Commission had noted that the Working Group, in preparing a draft model law, was mindful of the fact that it would be a more effective tool for States modernizing their legislation if background and explanatory information were provided to assist States in considering it for enactment. In addition, the Commission noted that, in the preparation of a draft model law, the Working Group had assumed that it would be accompanied by such a guide and referred several matters to that guide for clarification.[2]

2. The Commission also agreed that the draft Guide to Enactment should: (a) be as short as possible; (b) include cross-references to the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide") and the other texts of the Commission 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"); (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

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 215.
[2] Ibid.

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.[3]

3. At its forty-ninth session (New York, 27 June-15 July 2016), the Commission adopted the Model Law.[4] At that session, the Commission had before it the draft Guide to Enactment (A/CN.9/885 and Add.1-4). The Commission noted that the draft Guide to Enactment provided background and explanatory information that could assist States in considering the Model Law for adoption. In addition, the Commission noted with appreciation that the draft Guide to Enactment was already at an advanced stage. Moreover, the Commission noted that several issues were referred to the draft Guide to Enactment even at its present session, and thus the draft Guide to Enactment was an extremely important text for the implementation and interpretation of the Model Law. After discussion, the Commission agreed to give the Working Group up to two sessions to complete its work and submit the draft Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session in 2017.[5]

4. In addition, the Commission agreed that, if the Working Group completed its work in less than two sessions it should use any time remaining to discuss its future work in a session or in a colloquium to be organized by the Secretariat. Moreover, the Commission agreed that, subject to further discussion of the overall future work of the Commission, a colloquium to discuss future work on security interests should be held even if the Working Group used the full time of the two sessions to complete its work on the draft Guide to Enactment.[6]

5. At its thirtieth session (Vienna, 5-9 December 2016), the Working Group commenced its work on the draft Guide to Enactment of the Model Law based on a note by the Secretariat entitled "Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.71 and Add.1-4 and part of Add.5) and requested the Secretariat to revise the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group (A/CN.9/899, para. 11).

II. Organization of the session

6. The Working Group, which was composed of all States members of the Commission, held its thirty-first session in New York from 13 to 17 February 2017. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Belarus, Brazil, Burundi, Canada, China, Colombia, Czechia, El Salvador, France, Germany, India, Israel, Italy, Japan, Kenya, Kuwait, Libya, Mexico, Namibia, Philippines, Republic of Korea, Romania, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America.

7. The session was attended by observers from the following States: Afghanistan, Algeria, Belgium, Bolivia (Plurinational State of), Croatia, Cyprus, Iraq, Saudi Arabia and Syrian Arab Republic. The session was also attended by observers from the Holy See and the European Union.

8. 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*: Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), American Bar Association (ABA), Centro de Estudios de Derecho, Economía y Política (CEDEP), Commercial Finance Association (CFA), European Banking

[3] Ibid., para. 216.
[4] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), para. 119.
[5] Ibid., paras. 120-122.
[6] Ibid., paras. 122 and 356.

Federation (EBF), European Investment Bank (EIB), European Law Students' Association (ELSA), Factors Chain International (FCI), Forum for International Conciliation and Arbitration (FICA), International Insolvency Institute (III), National Law Centre for Inter-American Free Trade (NLCIFT), New York State Bar Association (NYSBA), The Law Association for Asia and the Pacific (LAWASIA) and Union Internationale du Notariat (UINL).

9. The Working Group elected the following officers:

Chairperson: Ms. Kathryn SABO (Canada)

Rapporteur: Ms. Diana MUÑOZ FLOR (Mexico)

10. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.72 (Annotated Provisional Agenda) and A/CN.9/WG.VI/WP.71/Add.5 and 6, as well as A/CN.9/WG.VI/WP.73 (Draft Guide to Enactment of the UNCITRAL 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 Guide to Enactment of the UNCITRAL Model Law on Secured Transactions.
5. Future work.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group considered notes by the Secretariat entitled "Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.71/Add.5 and 6, as well as A/CN.9/WG.VI/WP.73) and its future work. The deliberations and decisions of the Working Group are set forth below in chapters IV and V respectively. The Secretariat was requested to revise the draft Guide to Enactment to reflect the deliberations and decisions of the Working Group.

IV. Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

A. Chapter VII. Enforcement of a security right (A/CN.9/WG.VI/WP.71/Add.5)

Article 75. Right of affected persons to terminate enforcement

13. As a general matter, it was agreed that the draft Guide to Enactment should avoid repeating and focus more on explaining the text of the Model Law.

14. With respect to paragraph 60, it was agreed that: (a) the second sentence should refer to "the grantor, any other person with a right in the encumbered asset or the debtor" (and perhaps define them as "affected persons"); (b) it should refer to the fact that the right to terminate enforcement was known in some jurisdictions as the right to "redeem an encumbered asset"; and (c) the last sentence should explain that, unlike recommendation 140 of the Secured Transactions Guide on which article 75 was based, article 75 did not refer to the extinguishment of a security right, as that matter was addressed in article 12.

15. With respect to paragraph 61, it was agreed that: (a) it should refer to "affected", rather than to "interested", persons; and (b) in the case of extrajudicial enforcement,

if any affected person disputed the secured creditor's assertion that the cost of enforcement up to the time the assertion was made was reasonable, the court or other authority would determine whether that assertion was correct.

16. With respect to paragraph 62, it was agreed that: (a) it should clarify that, other than as provided in article 75, paragraph 2, under article 75, paragraph 3, the right of termination could be exercised even after the secured creditor had enforced its security right by entering into a lease or licence; (b) the rights of a lessee or a licensee should be respected; and (c) the reference to "residual value left in the encumbered asset" should be deleted, as it provided a practical, but not necessarily a legal, consideration to be taken into account and was already mentioned as a general matter in paragraph 60.

Article 76. Right of a higher-ranking secured creditor to take over enforcement

17. With respect to paragraph 63, it was agreed that: (a) the third sentence should be deleted and replaced by a succinct explanation of the reasons why a higher-ranking secured creditor should be entitled to take over enforcement, drawing a distinction between judicial and extrajudicial dispositions, and including cross-references to articles 79 and 81; and (b) the last sentence should include a reference to the "collection of an encumbered asset" and an explanation of the time limits for the exercise of the right of the higher-ranking secured creditor to take over enforcement.

18. With respect to paragraph 64, it was agreed that: (a) the words in parenthesis in the second sentence should be deleted, as article 76 did not apply to outright transfers of receivables and the matter should be addressed in the part of the draft Guide to Enactment that discussed article 1, paragraph 2, according to which articles 72 to 82 did not apply to outright transfers of receivables by agreement; and (b) the last sentence should better explain the circumstances in which article 4 would be applicable.

Article 77. Right of the secured creditor to obtain possession of an encumbered asset

19. With respect to paragraph 65, it was agreed that: (a) it should clarify that article 77 applied only to tangible assets and refer to the fact that the concept of "possession", as defined in the Model Law (see art. 2, subpara. (z)), applied only to tangible assets (and not, for example to receivables); and (b) it should refer to "extrajudicial enforcement", rather than to "self-help remedies", which, as understood in some jurisdictions, did not require the grantor's consent (it was agreed that the same change should be made throughout the draft Guide to Enactment).

20. With respect to paragraph 66, it was agreed that: (a) the first sentence should be placed in paragraph 65; and (b) the second sentence should be revised to explain that the secured creditor's right to obtain possession would be subject to the rights of another person who had possession of the encumbered asset, such as a lessee or licensee, the rights of whom were addressed in article 34, paragraphs 3 and 5.

21. With respect to paragraph 67, it was agreed that it should clarify that: (a) once the person in possession of the encumbered asset objected to extrajudicial repossession at the time it was attempted, the secured creditor had no alternative but to apply to a court or other authority even if that person was the grantor and even if the grantor had previously agreed to allow the secured creditor to take possession without applying to a court or other authority; (b) the reason for that approach was to avoid disturbances of the public order (see Secured Transactions Guide, chap. VIII, para. 54); (c) if the objection was found by the court or other authority to be unfounded, the person objecting would have to bear the costs of enforcement (in particular as if that person was the grantor, an unfounded objection would amount to unilateral withdrawal of the consent given in the security agreement); and (d) both the secured creditor and the person in possession of the encumbered asset would have to act in good faith and in a commercially reasonable way, as provided in article 4.

22. With respect to paragraph 69, it was agreed that: (a) the first sentence should clarify that a lower-ranking secured creditor should not be entitled to obtain

possession from a higher-ranking secured creditor, unless otherwise agreed; (b) subparagraph (b) of the second sentence was not clear and should be deleted; (c) the third sentence should be further explained by reference to the fact that the lower-ranking secured creditor could sell the encumbered asset (subject to the higher-ranking secured creditor's right) without obtaining possession on the understanding that the buyer could obtain such possession by paying off the higher-ranking secured creditor; and (d) the latter part of the third sentence ("and the buyer …") should be deleted, as it addressed a matter that was dealt with more accurately in article 81.

Article 78. Right of the secured creditor to dispose of an encumbered asset

23. With respect to paragraph 70, it was agreed that its last sentence should clarify that the enacting State should specify the rules applicable to judicial sales or other dispositions, leases or licences of encumbered assets.

24. With respect to paragraphs 71 and 72, it was agreed that: (a) paragraph 72 should be placed right after the second sentence of paragraph 71; (b) paragraph 71 should deal with each paragraph of article 78 in separate paragraphs and be further explained; (c) for the time periods referred to in article 78, paragraph 4 (b) and (c), one to five days should be suggested in the draft Guide to Enactment; (d) for the time period referred to in article 78, paragraph 5, ten to fifteen days should be suggested, while the reasons for those suggestions should be explained; and (e) examples of "recognized markets" should be given, such as a securities stock exchange through which shares of publicly listed companies might be bought and sold at publicly-quoted prices.

Article 79. Distribution of the proceeds of a disposition of an encumbered asset and debtor's liability for any deficiency

25. With respect to paragraph 73 (distribution of proceeds in the case of a judicial disposition of an encumbered asset), it was agreed that it should explain that: (a) the enacting State should specify the rules that would govern the distribution of proceeds; (b) such distribution should take place in line with the priority rules of the Model Law; and (c) the enacting State should provide in article 81, paragraph 1, that the buyer or other transferee of an encumbered asset would acquire it free of all security rights, including security rights having priority over the security right of the enforcing creditor, on the basis that the proceeds of disposition would have been paid first to the prior-ranking secured creditors in accordance with article 79, paragraph 1.

26. With respect to paragraph 74 (distribution of proceeds in the case of an extrajudicial disposition of an encumbered asset), it was agreed that it should explain that: (a) the enforcing creditor should apply the proceeds to the secured obligation (see art. 79, para. 2 (a)), then pay any surplus to subordinate competing claimants, as the disposition would result in the extinguishment of their rights under article 81, paragraph 3, and, if any balance was left, to the grantor (see art. 79, para. 2 (b)); (b) in the case of doubt as to the priority of subordinate competing claimants, the enforcing creditor should pay the surplus to a judicial or other authority or fund specified by the enacting State for distribution in accordance with the provisions of the Model Law on priority (see art. 79, para. 2 (c)); and (c) creditors with rights that had priority over the right of the enforcing creditor did not need to be paid from the proceeds of the disposition (as their rights would not be extinguished by an extrajudicial disposition under art. 81, para. 3).

27. With respect to paragraph 75, it was agreed that it should explain that: (a) the Model Law did not address the question whether the debtor's obligation might be reduced or extinguished if the secured creditor failed to comply with the provisions of the enforcement chapter governing disposition or failed to exercise its post-default rights in good faith and in a commercially reasonable manner; (b) the question whether the debtor had a claim or counter-claim in those circumstances was a matter left to other law of the enacting State; and (c) as a practical matter, the enforcing secured creditor should provide an accounting indicating whether there was a surplus or shortfall upon disposition of the encumbered asset for the rules in article 79, paragraphs 2 and 3 to apply. It was also agreed that the reference to the fact that

articles 72 to 82 did not apply to outright transfers of receivables by agreement should be deleted, as that matter was already dealt with in article 1, paragraph 2.

Article 80. Right to propose the acquisition of an encumbered asset by the secured creditor

28. With respect to paragraph 76, it was agreed that it should clarify that: (a) article 80 applied to both tangible and intangible assets (for example, all assets of the grantor or intellectual property of the grantor); (b) article 80, paragraph 2, contained a list of the persons to whom the secured creditor ought to send the proposal to acquire the encumbered asset; and (c) any person with a right in the encumbered asset or secured creditor of record should inform the enforcing secured creditor not later than a short period of time such as one to five days before the proposal was sent (see para. 24 (c) above).

29. With respect to paragraph 77, it was agreed that it should explain that: (a) any person entitled to receive the proposal should object or indicate its consent ten to fifteen days after that person received the proposal (see para. 24 (d) above); (b) if one of the persons entitled to receive the proposal objected to it (in the case of art. 80, para. 4) or did not give its consent (in the case of art. 80, para. 5) and the secured creditor chose to continue with the enforcement, the secured creditor could only exercise one of the other post-default rights provided in the security agreement, the secured transactions law or another law (see art. 72, para. 1); and (c) in the case of a proposal of the secured creditor to acquire an encumbered asset in partial satisfaction of the secured obligation, the requirement for positive consent was intended to protect the debtor who would remain liable for the balance of the secured obligation and subordinate claimants whose rights would be extinguished (see art. 81, para. 3, and para. 32 below).

30. In that connection, the view was expressed that article 80, paragraphs 4 and 5 did not expressly address the consequences of the failure of the secured creditor to send the proposal to a person entitled to receive it under article 80, paragraph 2, or to send a proposal that met all the conditions set out in article 80, paragraph 3. Differing views were expressed as to the legal consequences of such mistakes of the secured creditor and as to whether they should be addressed explicitly in article 80. After discussion, the Working Group agreed that the draft Guide to Enactment should explain that, if the secured creditor, failed to send the proposal to one or more persons entitled to receive it, the secured creditor would not acquire the encumbered asset. It was also agreed that whether a defective proposal would have the same result would depend on whether the defect was material (e.g. a substantial misstatement of the secured obligation), a matter that should be left to other law.

31. With respect to paragraph 78, it was agreed that it should explain that article 80, paragraph 6, was merely facilitative in nature since the formal proposal process remained the same even where it was initially triggered by a request from the grantor to the secured creditor.

Article 81. Rights acquired in an encumbered asset

32. With respect to paragraph 79, it was agreed that it should clarify that: (a) article 81, paragraphs 1 and 2, addressed judicially-supervised dispositions and required the enacting State to specify, in the case of a sale or other transfer, whether or not the transferee acquired the encumbered asset free of any rights, and in the case of a lease or licence, whether or not the lessee or licensee was entitled to use the encumbered asset during the term of the lease or licence unaffected by the security right; (b) as already noted (see art. 79, para. 1, and para. 1 above), in the case of a sale or other disposition, the enacting State should specify that the buyer or other transferee acquired the encumbered asset free of any security rights, including security rights ranking higher in priority to that of the enforcing creditor; and (c) for the same reason, a similar rule should apply in the case of a lease or licence of the encumbered asset.

33. With respect to paragraph 80, it was agreed that it should explain that: (a) article 81, paragraphs 3 and 4, took a different approach in the case of an extrajudicial sale or other disposition, lease or licence of an encumbered asset; (b) the reason for the difference in approach was that higher-ranking secured creditors were not entitled to share in the proceeds of an extrajudicial enforcement initiated by a subordinate creditor (see para. 26 (c) above); (c) the enacting State might wish to consider providing that the rule in article 81, paragraph 3, applied also to the acquisition of an encumbered asset by the secured creditor (see Secured Transactions Guide, rec. 161, second sentence).

34. With respect to paragraph 81, it was agreed that it should clarify that article 81, paragraph 5, provided that the rights acquired by a buyer or other transferee, lessee or licensee would be affected by the enforcing creditor's failure to comply with the requirements of the enforcement chapter only if: (a) they had knowledge of the violation; and (b) the violation materially prejudiced the rights of the grantor or another person.

35. In that connection, the Working Group noted that recommendation 163 of the Secured Transactions Guide, on which article 81, paragraph 5, was based, referred to recommendations 161 and 162, which were reflected in article 81, paragraphs 3 and 4. Thus, the Working Group agreed that the reference in article 81, paragraph 5, to paragraphs 1 and 2 was a typographical error and recommended to the Commission that a corrigendum be issued to refer in article 81, paragraph 5, to paragraphs 3 and 4 (for another typographical error to be corrected, see para. 41 below).

Article 82. Collection of payment

36. With respect to paragraph 82, it was agreed that it should: (a) clarify that collection was an additional enforcement right where the encumbered asset was a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security; and (b) give examples of rights securing or supporting payment of such encumbered assets (such as a guarantee or a stand-by letter of credit).

37. With respect to paragraph 83, it was agreed that it should explain that article 82, paragraph 4, limited the right of collection of a secured creditor if the encumbered asset was a right to payment of funds credited to a bank account and the security right was made effective against third parties solely by registration, but not if the security right was made effective against third parties by a method other than registration. It was also agreed that paragraph 83 should refer specifically to paragraph 107 of chapter VIII of the Secured Transactions Guide, which set out very clearly the reasons for the rule in article 82, paragraph 4.

Article 83. Collection of payment by an outright transferee of a receivable

38. With respect to paragraph 84, it was agreed that it should explain that: (a) article 83 provided that, in the case of an outright transfer of a receivable, the transferee was entitled to collect the receivable at any time provided that payment had become due; and (b) the overarching obligation of good faith and commercial reasonableness in article 4 also extended to the collection of receivables by an outright transferee; and (c) as a practical matter, where the receivable was transferred outright without recourse, the transferor could not by definition be prejudiced by the failure of the transferee to act in good faith and in a commercially reasonable manner in exercising its collection right.

39. Subject to the above-mentioned changes (see paras. 13-38 above), the Working Group approved the substance of paragraphs 60 to 84 of document A/CN.9/WG.VI/WP.71/Add.5.

B. Chapter VIII. Conflict of laws (A/CN.9/WG.VI/WP.71/Add.6)

Article 84. Mutual rights and obligations of the grantor and the secured creditor

40. With respect to paragraph 4, it was agreed that it should: (a) clarify that the only limitations to the party autonomy were the ones set out in article 93; (b) explain that other issues relating to party autonomy (such as how a choice of law could be made) were left to other law; and (c) examples should be given of rules governing party autonomy typically set out in the conflict-of-laws rules of various States.

Article 85. Security rights in tangible assets

41. With respect to paragraph 6, it was agreed that it should clarify that article 98 set out a limited exception to the *lex situs* rule contained in article 85, paragraph 1, as it provided a different rule only for the third-party effectiveness of certain types of, tangible and intangible, asset. In that connection, the Working Group noted that article 85, paragraph 1, made no reference to article 98 and agreed to recommend to the Commission to issue a corrigendum to include in article 85, paragraph 1, a reference to article 98 (for another typographical error to be corrected see para. 35 above).

42. With respect to paragraph 8, it was agreed that it should explain that: (a) for the rule in article 85, paragraph 4, to apply the tangible assets in transit ought to have reached their destination forty-five to sixty days after the putative creation of the security right; (b) if those tangible assets reached their destination and the security right had been previously created and made effective under the law of the State of their destination, the security right would be effective; (c) if those tangible assets did not reach their destination within the prescribed time period, the security right would be governed by the law of the State of their origin, as stated in article 85, paragraph 1.

43. With respect to paragraph 10, recalling a decision it made at its thirtieth session (see A/CN.9/899, para. 86), the Working Group agreed that it should be moved to the place in the draft Guide to Enactment in which issues relating to specialized registries were discussed (see A/CN.9/WG.VI/WP.73, paras. 28-30).

Article 86. Security rights in intangible assets

44. With respect to paragraph 11, it was agreed that no reference needed to be made to a receivable being an intangible asset, as it was clear that, while article 86 set out the law applicable generally to security rights in intangible assets, subsequent articles provided asset-specific rules for several types of intangible asset.

Article 87. Security rights in receivables relating to immovable property

45. With respect to paragraph 13, it was agreed that it should explain that, even if a secured creditor or another person did not find out that a receivable arose from a sale or lease of immovable property or was secured by immovable property, article 87 would apply and subject the security right to the law of the State under whose authority the immovable property registry was maintained.

Article 88. Enforcement of security rights

46. With respect to paragraph 14, it was agreed that: (a) the reference to the *lex fori* as the law governing enforcement should be deleted as the forum might not be the State in which a tangible asset was located at the time enforcement commenced; and (b) the cross-reference to article 100 should be explained as article 100 applied but did not refer explicitly to certificated non-intermediated securities (same point for the cross-reference to article 100 in paragraph 16 in connection with uncertificated non-intermediated securities).

47. With respect to paragraph 15, it was agreed that the phrase “if a security right is created in several tangible assets that are located in different States or” in the third

sentence should be deleted, as even under such circumstances enforcement might take place in one State.

48. With respect to paragraph 16, it was agreed that, for reasons of clarity, the second sentence should include a cross-reference to article 86 that dealt with the law applicable to security rights in intangible assets.

Article 89. Security right in proceeds

49. With respect to paragraph 17, it was agreed that: (a) an additional sentence should be inserted to explain article 89; and (b) the example provided in the second sentence should refer to instances where the laws of more than one State would be applicable.

50. With respect to paragraph 18, it was agreed the first sentence should further explain the difficulties that arose from the bifurcated rule contained in article 89.

Article 90. Meaning of "location" of the grantor

51. With respect to paragraph 19, it was agreed that it should explain: (a) the concepts of "place of business" and "habitual residence"; (b) that the concept of "place of business" meant place of activities of a natural or legal person (including, for example, of a non-profit foundation) and not only commercial activities; (c) that the concept of "habitual residence" would in most cases apply only to natural persons; (d) that the determination of the place of central administration of a person as a matter of fact was not a difficult exercise for a court; and (e) that the law that would most likely govern insolvency would be the law of the place in which a person had the centre of its main interests, which was generally interpreted to be the place in which that person had its central administration.

Article 91. Relevant time for determining location

52. With respect to paragraph 20, it was agreed that it should refer to the determination of the applicable law by reference to the location of the asset or the grantor.

53. With respect to paragraph 21, it was agreed that: (a) the second sentence should clarify that it was based on the assumption that State B had enacted the Model Law or its conflict-of-laws provisions; (b) the reference to "actual" location in the third sentence should be deleted and that sentence should be aligned more closely with article 91, paragraph 1 (b); and (c) the reference to the time an issue arose as the time of the occurrence of an event which triggered an inquiry as to what law would be applicable should be further clarified.

54. With respect to paragraph 23, it was agreed that it should explain that article 91, paragraph 2, required that the rights of *all* competing claimants should be established before the change of location (including judgement creditors) and not just the rights of secured creditors.

Article 92. Exclusion of renvoi

55. With respect to paragraph 24, it was agreed that it should clarify that: (a) the purpose of article 92 was to "exclude" (rather than "reject") the doctrine of renvoi; and (b) the result of article 92 would be to exclude the entire body of the private international law rules of the law of the State whose law was applicable under the conflict-of-laws rules of the Model Law.

Article 93. Overriding mandatory rules and public policy (*order public*)

56. With respect to paragraphs 25 to 29, it was agreed that: (a) examples could be provided relating to both overriding mandatory provisions and public policy; (b) with respect to article 93, paragraphs 2 and 4, an example that involved the enforcement (rather than the creation) of a security right should be given; and (c) the place of arbitration and the place of enforcement should be further explained.

Article 94. Impact of commencement of insolvency proceedings on the law applicable to a security right

57. With respect to paragraph 30, it was agreed that it should: (a) give a few more typical examples of matters left to the law governing insolvency by reference to recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law; and (b) draw the attention of enacting States of the need to ensure coordination between their secured transactions law and the insolvency law.

Articles 95 and 96

58. The Working Group was generally satisfied with the substance of paragraphs 31 to 35.

Article 97. Security rights in rights to payment of funds credited to a bank account

59. With respect to paragraph 36, it was agreed that: (a) the rules contained in article 97 should be explained by reference to the discussion in the Secured Transactions Guide (see chap. X, paras. 49 and 50) rather than with the overly broad and largely inaccurate words "to avoid interfering with banking law and practices".

60. With respect to paragraph 38, it was agreed that the reference to "receiving deposits" should be deleted to avoid giving the impression that that activity was separate from the activity of maintaining bank accounts (see the definition of "bank account" in art. 2, subpara. (c)).

61. With respect to article 97, paragraph 3, it was agreed that the draft Guide to Enactment should provide guidance, including possible drafting suggestions, as to how the fall-back rules of article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary could be implemented.

Article 98. Third-party effectiveness of a security right in certain types of asset by registration

62. With respect to paragraph 41, it was agreed that the last sentence should place the discussion of the priority of a security right over the rights of the insolvency representative or the mass of creditors and judgment creditors in the proper context of articles 35-37 of the Model Law.

Article 99. Security rights in intellectual property

63. With respect to paragraphs 42-44, it was agreed that they should clarify: (a) the different types of intellectual property rights that could be the subject of a security right; (b) the national treatment of intellectual property rights embodied in international conventions by reference to the Intellectual Property Supplement (see paras. 297 to 300); (c) that another benefit of the rule in article 99 was that a security right in a portfolio of intellectual property rights protected under the laws of several States could be created under a single law; (d) a licensee of intellectual property could grant a security right only in its rights under the licence agreement; and (e) that the effectiveness of a security right against intellectual property right holders that were not grantors was outside the scope of article 99.

Article 100. Security rights in non-intermediated securities

64. It was agreed that the order of paragraphs 45 to 50 should be reviewed to ensure a logical flow of the comments included in those paragraphs.

65. With respect to paragraph 46, it was agreed that it should avoid giving examples of entities that might be legal persons in some jurisdiction but not in others.

66. With respect to paragraph 47, it was agreed that it should: (a) refer to the "law of business organizations" rather than "corporate law", since many entities might not

be corporations; (b) explain the term "preferred shares"; and (c) clarify that not only lenders but also regulators and tax authorities might view subordinated debt as equity.

67. With respect to paragraph 48, it was agreed that it should clarify that article 95 would apply only by analogy, as it did not directly address the scenario envisaged in paragraph 48.

68. With respect to paragraph 54, it was agreed that the last sentence should clarify that the law applicable to the third-party effectiveness of a security right in equity securities would be the law of the State of the issuer's location, while the law applicable to the third-party effectiveness of a security right in debt securities would be the law governing the securities.

69. Subject to the above-mentioned changes (see paras. 40-68 above), the Working Group approved the substance of paragraphs 1 to 54 of document A/CN.9/WG.VI/WP.71/Add.6.

C. Chapter IX. Transition (A/CN.9/WG.VI/WP.71/Add.6)

Article 101. Amendment and repeal of other laws

70. With respect to paragraph 56, it was agreed that it should clarify that: (a) the Model Law was intended to be a complete system of secured transactions law "with respect to the assets subject to its scope", since the Model Law did not apply to certain types of movable asset; and (b) the enacting State ought to determine whether or not to address explicitly the issue of prior case law, as case law was not repealed.

71. With respect to paragraph 57, it was agreed that it should clarify that the enacting State should coordinate existing law with the new secured transactions law.

Article 102. General applicability of this Law

72. With respect to paragraph 58, it was agreed that it should: (a) follow more closely the language of article 102, paragraph 1 (a); and (b) be reviewed for clarity and coherence.

73. With respect to paragraph 59, it was agreed that it should clarify that the notion of "prior security right" in article 102, paragraph 1 (b), included: (a) rights, such as retention-of-title rights, that were not security rights under prior law but were treated as security rights under the new law; and (b) security rights in future assets (including assets acquired by the grantor after the entry into force of the new law enacting the Model Law), assuming that prior law permitted the creation of a security right in future assets (a matter that was to be determined under prior law in accordance with article 104).

74. With respect to paragraph 60, it was agreed that: (a) reference in the second sentence should be made to articles 103-106; and (b) its third sentence should be revised to better reflect the purpose of the remainder of the chapter. With respect to paragraph 61, it was agreed that it could be shortened.

Article 103. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

75. With respect to paragraphs 62 and 63, it was agreed that: (a) they should explain the relationship between paragraphs 1 and 2 of article 103 more clearly; (b) ensure that no confusion arose from the distinction between substantive and procedural law issues; and (c) clarify that article 103, paragraph 2, referred to steps that constituted enforcement under prior law.

Article 104. Applicability of prior law to the creation of a prior security right

76. With respect to paragraphs 64 and 65, it was agreed that: (a) they should explain the relationship between article 102 and article 104 more clearly; and (b) the examples given therein should be simplified.

Article 105. Transitional rules for determining the third-party effectiveness of a prior security right

77. With respect to paragraphs 66-71, it was agreed that: (a) paragraph 67 should refer to a more typical example, such as a retention-of-title sale; (b) the transitional period in article 105, paragraph 1 (b), should be from one to two years, coordinated with the entry into force of the new law and determined on the basis of various considerations to be set out in the draft Guide to Enactment, such as the size and complexity of the economy and the extent of the changes introduced by the new law; and (c) they should be reviewed for clarity and coherence.

Article 106. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

78. With respect to paragraph 72, it was agreed that the first sentence should be replicated in the commentary to articles 103-105.

79. With respect to paragraph 74, it was agreed that: (a) the words "and when no new competing rights arose after the new law became effective" should be added at the end of the last sentence; and (b) the revised sentence would be better placed in paragraph 73.

Article 107. Entry into force of this Law

80. The Working Group was generally satisfied with the substance of paragraphs 75 and 76.

81. Subject to the above-mentioned changes (see paras. 70-80 above), the Working Group approved the substance of paragraphs 55 to 76 of document A/CN.9/WG.VI/WP.71/Add.6.

D. General part of the draft Guide to Enactment (A/CN.9/WG.VI/WP.73, paras. 1-20)

Preface

82. The Working Group approved the substance of the preface unchanged.

Purpose of the draft Guide to Enactment

83. With respect to paragraph 3, it was agreed that it should clarify that information from the *travaux préparatoires* would be useful to legislators too, and not only to users of the text.

Purpose of the Model Law

84. The Working Group was generally satisfied with the substance of paragraph 4.

The Model Law as a tool for modernizing and harmonizing laws

85. With respect to paragraph 6, it was agreed that the reference to the term "deposit-taking institution" as an example of a term that might need to be adjusted could be retained on the understanding that reference would be made to the commentary on article 2, subparagraph (c), which clarified that the enacting State should use a term broad enough to include any institution authorized to receive deposits in any State whose law might be applicable (see A/CN.9/WG.VI/WP.73, para. 39).

Main features of the Model Law

86. With respect to paragraph 9, it was agreed that it should emphasize that one of the main reasons for preparing the Model Law was that it provided a higher degree of harmonization than the other UNCITRAL texts on which it was based.

87. With respect to paragraph 13, it was agreed that it should highlight that one of the main advantages of the Assignment Convention was that it was an instrument of unification of the law of States and provided a higher level of uniformity and transparency than a model law, which was an instrument of harmonization.

88. With respect to paragraph 14, it was agreed that: (a) paragraph 15 should be inserted right after the first sentence of paragraph 14 (as it dealt with the key objectives of the Model Law); and (b) the remaining part of paragraph 14 could be set out in a separate paragraph (as it dealt with the fundamental policies of the Model Law).

89. With respect to paragraph 17, it was agreed that: (a) the words "introduction of a case law reporting system" should be qualified with the words along the lines "when not already in place"; (b) the last sentence should highlight the need for the insolvency law to recognize in principle the effectiveness and priority of security rights; and (c) the revised paragraph 17 should be placed closer to paragraph 7, as both related to adjustments that needed to be made to the law implementing the Model Law or other law of the enacting State.

Assistance from the UNCITRAL Secretariat

90. The Working Group was generally satisfied with the substance of paragraphs 18-20.

91. Subject to the above-mentioned changes (see paras. 82-89 above), the Working Group approved the substance of paragraphs 1 to 20 of document A/CN.9/WG.VI/WP.73.

E. Chapter I. Scope of application and general provisions (A/CN.9/WG.VI/WP.73, paras. 21-78)

Article 1. Scope of application

92. With respect to paragraph 22, it was agreed that: (a) it should further clarify the reasons for including outright transfers of receivables within the scope of the Model Law and for subjecting outright transfers of and security rights in receivables to the same rules (with the exception of enforcement); (b) the words "that are clearly not financing transactions" should be revised along the following lines "that did not function as financing transactions"; and (c) the term "agent" should be replaced with the more neutral term "representative".

93. With respect to paragraph 23, it was agreed that it should clarify that the reason for the exclusion of rights to receive payment under an independent undertaking was that the implementation of the relevant recommendations of the Secured Transactions Guide would have made the Model Law unduly complex.

94. With respect to paragraph 25, it was agreed that it should express more clearly the reasons for excluding intermediated securities along the lines provided for in the Secured Transaction Guide (see chap. I, para. 37).

95. With respect to paragraph 27, it was agreed that it should be aligned more closely with article 1, paragraph 3 (e), to convey the notion that certain types of asset were to be excluded to the extent that other laws governed such types of asset.

96. With respect to the placement of paragraphs 28-30 (on specialized secured transactions and registration regimes), it was agreed that they should be revised to refer to the relevant issues (third-party effectiveness, priority, registration and conflict of laws) in a summary fashion with cross-references to the relevant paragraphs and recommendations of the Secured Transactions Guide.

97. With respect to paragraph 33, it was agreed that additional examples should be provided to explain the relationship between secured transactions law and consumer-protection laws, such as in the case of enforcement, where the consumer-protection

law might prohibit enforcement against a grantor or a debtor of a receivable that was a consumer.

98. With respect to paragraph 34, it was agreed that: (a) a reference to it might be made in paragraph 33 as it dealt with the general issue of statutory limitations; (b) the second sentence should be retained to provide useful guidance; and (c) the third sentence should end after the words "does not apply to contractual limitations" as article 1, paragraph 6, only dealt with statutory limitations.

99. As a drafting matter, it was suggested that the draft Guide to Enactment should refer to the respective provision explained in each paragraph rather than generally to the Model Law.

Article 2. Definitions and rules of interpretation

Acquisition security right

100. With respect to paragraph 38, it was agreed that it should clarify that the holder of an acquisition security right could be either a bank or a seller.

Bank account

101. With respect to paragraph 39, it was agreed that the last sentence should refer to "any institution authorized to receive deposits in *any* State whose law may be applicable".

Competing claimant

102. With respect to paragraph 41, it was agreed that it should refer to "steps necessary under other law of the enacting State to acquire a right in an encumbered asset".

Default

103. With respect to paragraph 44, it was agreed that reference should be made to the debtor's (rather than the grantor's) failure to perform the secured obligation, as if the grantor was a different person, it would not necessarily owe payment of the secured obligation or commit any other act that would constitute default.

Grantor

104. With respect to paragraph 47, it was agreed that it should clarify that a person that was not the owner but had a right to use an asset under a lease agreement could create a security right in that right.

Proceeds

105. With respect to paragraph 58, it was agreed that it should be revised to address rights in and limitations to rights in proceeds (rather than in original encumbered assets).

Securities

106. With respect to paragraph 64, it was agreed that it should: (a) distinguish between payment obligations that were securities and payment obligations that were not; and (b) explain that the definition of the term "securities" in the Model Law might differ from the definition of that term in securities regulations, the purpose of which might be different from the purpose of the Model Law (i.e. not to regulate security rights but rather protect public markets).

Security agreement

107. With respect to paragraph 66, it was agreed that it should clarify that, while a retention-of-title sale would not *create* title, under the functional approach followed in the Model Law, it would "provide for the creation of a security right".

Article 3. Party autonomy

108. In the context of its discussion of paragraph 73, the Working Group agreed that the draft Guide to Enactment (e.g. in the context of article 13) should clarify that, while a grantor might be liable for breach of a negative pledge agreement, the security right created would not be ineffective on the sole ground that it was created in breach of a negative pledge agreement.

109. With respect to paragraph 74, it was agreed that it should clarify that: (a) if other law allowed parties to agree to resolve any dispute with respect to their security agreement or security right by one of the alternative dispute resolution methods set out in article 3, paragraph 3, nothing in the Model Law would affect such an agreement; (b) article 3, paragraph 3, was based on the understanding (rather than the assumption) that alternative dispute resolution was important in particular for developing countries; and (c) article 3, paragraph 3, was intended to recognize the importance of alternative dispute resolution and did not prejudice the discussion of arbitrability, the protection of the rights of third parties or access to justice.[7]

Article 4. General standards of conduct

110. With respect to paragraph 76, it was agreed that it should: (a) clarify that the standards of good faith and commercial reasonableness applied to the exercise of the rights and the performance of obligations that any person might have under the Model Law (and not just the grantor); (b) provide examples of commercially reasonable behaviour; and (c) avoid suggesting that the standard of "commercial reasonableness" was a subjective standard.

Article 5. International origin and general principles

111. With respect to paragraphs 77 and 78, it was agreed that they should be clarified by reference to appropriate explanations included in other texts of UNCITRAL that contained a provision like article 5.

112. Subject to the above-mentioned changes (see paras. 92-111 above), the Working Group approved the substance of paragraphs 21 to 78 of document A/CN.9/WG.VI/WP.73.

F. Chapter II. Creation of a security right (A/CN.9/WG.VI/WP.73, paras. 79-114)

General rules

113. With respect to paragraph 79 it was agreed that, in view of their importance, the provisions on security rights in non-intermediated securities should not be mentioned as an example of asset-specific provisions that might be omitted.

Article 6. Creation of a security right and requirements for a security agreement

114. With respect to paragraph 83, it was agreed that: (a) it should clarify that article 6, paragraph 3, stated that a written agreement was required and set out the requirements for a written agreement; (b) it should explain that a written agreement was required because of the reasons mentioned in the Secured Transactions Guide (see chap. II, para. 30); and (c) it should explain the situation in which written form might serve evidentiary purposes giving the example of an oral agreement that would subsequently be confirmed in writing.

115. With respect to paragraph 85, it was agreed that it should clarify that possession was a substitute of a written agreement.

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[7] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 98.

Articles 7 and 8

116. The Working Group was generally satisfied with the substance of paragraphs 86 to 89.

Article 9. Description of encumbered assets and secured obligations

117. With respect to paragraph 91, it was agreed that it should clarify that article 9, paragraph 2, was an application of the principle in article 8, subparagraph (c), that a security right might encumber a generic category of movable assets.

Articles 10-12

118. The Working Group was generally satisfied with the substance of paragraphs 92 to 100.

Article 13. Contractual limitations on the creation of a security right in receivables

119. With respect to paragraph 102, it was agreed that examples should be given to clarify the different agreements envisaged therein.

Article 14. Personal or property rights securing or supporting payment or other performance of encumbered receivables or other intangible assets, or negotiable instruments

120. With respect to paragraph 107, it was agreed that it should refer to: (a) accessory or secondary guarantees or suretyships; (b) a security right in movable or immovable property; and (c) a secured creditor having to make further registration.

Article 15. Rights to payment of funds credited to a bank account

121. With respect to paragraph 111, it was agreed that it should clarify that the consent of the deposit-taking institution would not be required even if there was an agreement between the grantor and the deposit-taking institution limiting the grantor's right to create a security right in its right to payment of the funds credited to its bank account.

Articles 16-17

122. The Working Group was generally satisfied with the substance of paragraphs 112 to 114.

123. Subject to the above-mentioned changes (see paras. 113-122 above), the Working Group approved the substance of paragraphs 79 to 114 of document A/CN.9/WG.VI/WP.73.

G. Chapter III. Effectiveness of a security right against third parties (A/CN.9/WG.VI/WP.73, paras. 115-133)

Article 18. Primary methods for achieving third-party effectiveness

124. The Working Group was generally satisfied with the substance of paragraph 115.

Article 19. Proceeds

125. With respect to paragraph 119, it was agreed that it should clarify that article 18 or 19 or both would apply, depending on the description of the encumbered assets in the security agreement and the registered notice. In that connection, it was agreed that that matter should be also clarified in the commentary on article 10 that dealt with the creation of a security right in proceeds.

126. With respect to paragraph 120, it was agreed that it contained a rule of interpretation that applied to all time periods suggested in the draft Guide to

Enactment and should thus be moved to the commentary on article 2 on definitions and rules of interpretation.

Article 20. Tangible assets commingled in a mass or transformed into a product

127. With respect to paragraph 121, it was agreed that it should refer to the automatic third-party effectiveness of the security right in the mass or product once the security right in the assets commingled was effective against third parties.

Articles 21-23

128. The Working Group was generally satisfied with the substance of paragraphs 122 to 125.

Article 24. Acquisition security rights in consumer goods

129. With respect to paragraph 126, it was agreed that the fourth sentence should refer to the circumstances in which it would be commercially practicable for the secured creditor to register, while the last part of the last sentence referring to the cost of enforcement could be deleted.

Article 25. Rights to payment of funds credited to a bank account

130. With respect to paragraph 127, it was agreed that it should clarify that the precise action for the secured creditor to become the account holder would depend on other law to which the deposit-taking institution was subject and practice, as well as on the terms of the account agreement.

Article 26. Negotiable documents and tangible assets covered by negotiable documents

131. With respect to paragraph 130, it was agreed that the suggested time period should be ten rather than five days for the security right to remain effective against third parties during the short period of time the grantor or other person needed in order to take actions with respect to the encumbered assets like loading and unloading.

Article 27. Uncertificated non-intermediated securities

132. With respect to paragraph 131, it was agreed that it should include a reference to the definition of control agreement in article 2, subparagraph (g) (i).

Additional third-party effectiveness and method for negotiable instruments and non-intermediated securities

133. The Working Group was generally satisfied with the substance of paragraphs 132 and 133.

134. Subject to the above-mentioned changes (see paras. 124-133 above), the Working Group approved the substance of paragraphs 115 to 133 of document A/CN.9/WG.VI/WP.73.

V. Future work

135. At the close of its considerations, having approved the substance of the draft Guide to Enactment as a whole, the Working Group decided to submit it to the Commission for final consideration and adoption at its fiftieth session, which was scheduled to take place in Vienna from 3 to 21 July 2017.

136. The Working Group noted with appreciation the draft programme of the Fourth International Colloquium on Secured Transactions, which was scheduled to take place in Vienna from 15 to 17 March 2017 (see www.uncitral.org/uncitral/en/commission/colloquia_security.html) pursuant to a request by the Commission at its forty-ninth session in 2016. The Working Group also noted that a report of the Colloquium would be submitted to the Commission for its

consideration of future work in the area of secured transactions and related topics at its fiftieth session.[8] In the discussion, particular interest was expressed in the following topics of the Colloquium: contractual guide on secured transactions, warehouse receipt financing; ADR (including online dispute resolution) in secured transactions and technical assistance to States in the field of secured transactions.

[8] See footnote 6 above.

D. Note by the Secretariat on a draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

(A/CN.9/WG.VI/WP.73)

[Original: English]

Contents

Preface

At its forty-eighth session, in 2015, the Commission considered and approved the substance of article 26 of chapter IV of the draft Model Law on Secured Transactions and articles 1-29 of the draft Registry Act.[1]

At that session, the Commission also agreed that a guide to enactment of the Model Law should be prepared and referred that task to Working Group VI (Security Interests).[2]

At its forty-ninth session, in 2016, the Commission considered and adopted the UNCITRAL Model Law on Secured Transactions (the decision of the Commission and the relevant General Assembly resolution are contained in annexes I and II respectively).[3]

At that session, the Commission also noted that the Guide to Enactment was already at an advanced stage and was an extremely important text for the implementation and interpretation of the Model Law, and gave Working Group VI up to two sessions to complete its work and submit the Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session in 2017.[4]

At its thirtieth and thirty-first sessions in December 2016 and February 2017, Working Group VI approved the substance of the draft Guide to Enactment.[5]

[At its fiftieth session, in 2017, the Commission considered and adopted the Guide to Enactment to the UNCITRAL Model Law on Secured Transactions (the decision of the Commission and the relevant General Assembly resolution are contained in annexes III and IV respectively).[6]]

I. Purpose of the Guide to Enactment

1. The Guide to Enactment is intended to explain briefly the thrust of each provision of the UNCITRAL Model Law on Secured Transactions (the "Model Law") and its relationship with the corresponding recommendation(s) of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide")[7] and other UNCITRAL texts on secured transactions,[8] including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"),[9] the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement"),[10] and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[11]

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214. The draft Model Law and the draft registry Act are contained in documents A/CN.9/852 and A/CN.9/853.

[2] Ibid., para. 216.

[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 17-118. The draft Model Law, including the draft Model Registry-related Provisions, is contained in documents A/CN.9/884 and Add.1-4; the draft Guide to Enactment of the Model Law is contained in documents A/CN.9/885 and Add.1-4; and the compilation of comments by States is contained in documents A/CN.9/886, A/CN.9/887 and Add.1.

[4] Ibid., paras. 121 and 122.

[5] The reports of the Working Group are contained in documents A/CN.9/899 and A/CN.9/904. During these sessions, the Working Group considered documents A/CN.9/WG.VI/WP.71/Add.1-6 and A/CN.9/WG.VI/WP.73. Earlier versions of the Guide to Enactment are contained in documents A/CN.9/WG.VI/WP.66 and Add.1-4 and A/CN.9/WG.VI/WP.69 and Add.1-2.

[6] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. […]. The draft Guide to Enactment is contained in documents A/CN.9/914 and Add.1-6. For the earlier project of UNCITRAL on security interests (1975-1980), see http://www.uncitral.org/uncitral/uncitral_texts/security_past.html.

[7] United Nations publication, Sales No. E.09.V.12.

[8] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 215 and 216.

[9] General Assembly resolution 56/81, annex (United Nations publication, Sales No. E.04.V.14).

[10] United Nations publication, Sales No. E.11.V.6.

[11] United Nations publication, Sales No. E.14.V.6.

2. A number of the provisions of the Model Law indicate that a State enacting the Model Law (the "enacting State") is required to make a decision or choose among several options. The Guide to Enactment is also intended to explain the import of these decisions or choices and thus assist enacting State in making those decisions or choices.[12]

3. To better explain provisions of the Model Law while avoiding repetition, the Guide to Enactment incorporates by reference the relevant recommendations and commentary contained in the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide. While the focus of the Guide to Enactment is mainly on giving guidance to legislators, it also includes information from the *travaux préparatoires* of the Model Law, so as to be helpful to other users of the text, such as judges, arbitrators, practitioners and academics. [13]

II. Purpose of the Model Law

4. The Model Law is designed to assist States in implementing the recommendations of the Secured Transactions Guide, as well as the Intellectual Property Supplement and the Registry Guide with respect to security rights in movable assets. The overall objective of those texts and the Model Law is to increase the availability and decrease the cost of credit by providing an efficient, modern and certain legal framework for the creation of security rights in movable assets (see Secured Transactions Guide, rec. 1 (a)). Like those texts, the Model Law is based on the assumption that, to the extent that a secured creditor is entitled to rely on the value of the encumbered asset for the payment of the secured obligation, the risk of non-payment is reduced and that result is likely to have a beneficial impact on the availability and the cost of credit. It should also be noted that, like those texts, the Model Law is intended to be useful to all States, whether they do not currently have efficient and effective secured transactions laws or they already have such laws but wish to modernize and harmonize them with the laws of other States that are generally consistent with the Model Law (see Secured Transactions Guide, Introduction, para. 1).

III. The Model Law as a tool for modernizing and harmonizing laws

5. In general, States that incorporate the Model Law into their national law are advised to adhere as much as possible to its uniform text. This can help assure that the enacting State will obtain the full economic benefit of the legal system envisioned by the Model Law, avoid unintended consequences that may follow when a change in one provision has unforeseen effects elsewhere in the law, and enable the enacting State to gain the benefits flowing from the harmonization of its secured transactions law with that of other States. This does not deprive enacting States of any necessary flexibility as the Model Law provides options and leaves a number of matters to enacting States.

6. Examples of flexibility in the Model Law include the following: (a) the Model Law draws the attention of the enacting State to the need to adjust certain of the terms used in the Model Law to ensure that they are meaningful in the context of local law (e.g. "authorized deposit-taking institution", "movable property", "immovable

[12] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 216.

[13] The reports of the Working Group on its work during the six sessions devoted to the preparation of the Model Law are contained in documents A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871. During those sessions, the Working Group considered documents A/CN.9/WG.VI/WP.57 and Add.1 to 4, A/CN.9/WG.VI/WP.59 and Add.1, A/CN.9/WG.VI/WP.61 and Add.1 to 3, A/CN.9/WG.VI/WP.63 and Add.1 to 4, A/CN.9/WG.VI/WP.65 and Add.1 to 4, and A/CN.9/WG.VI/WP.68 and Add.1 and 2. For the reports of the Commission on its work during the two sessions it devoted to the Model Law and the document considered by the Commission during those sessions, see footnotes 1 and 3 above.

property" and "securities"; see art. 2, subparas. (c), (u) and (hh)); (b) several provisions of the Model Law refer within square brackets to issues that are left to the enacting State (e.g. art. 1, para. 3 (e)); (c) other provisions of the Model Law include options from which the enacting State is able to choose (e.g. art. 6, para. 3); (d) the Model Law leaves it to the enacting State to decide how to clarify in its enactment of the Model Law that that the general rules are subject to the asset-specific rules (see footnote 4); (e) the Model Law leaves it to the enacting State to decide whether to implement the Model Registry Provisions in its enactment of the Model Law, in a separate statute or in another type of legal instrument (see footnote 8); and (f) the Model Law leaves it to the enacting State to decide whether to incorporate the provisions in the conflict-of-laws provisions of the Model Law in its enactment of the Model Law or in a separate law addressing conflict-of-laws issues generally (see footnote 36).

7. The enacting State may need to make some changes to the Model Law in order to adapt it to its national legal system. Any modification, however, should not depart from the fundamental provisions of the Model Law, such as those implementing the functional, integrated and comprehensive approach to secured transactions (e.g. art. 1, para. 1, and art. 2, subpara. (kk)), the protection of the grantor and the debtor of the receivable (e.g. art. 1, paras. 5 and 6), the right of the parties to structure their security agreement as they wish to meet their needs (e.g. art. 3), the notice registration system (e.g. art. 18), the priority between a security right and the right of a competing claimant (e.g. art. 29) and the right to enforce a security right without application to a court or other authority while protecting the rights of the grantor and other parties with rights in the encumbered asset (e.g. art. 77, para. 3, and art. 78, para. 3). Otherwise, the enacting State will not be able to obtain the full economic benefits to be derived from the Model Law or achieve the harmonization of its law with the law of other States that will enact the Model Law (for the harmonization of the enactment of the Model Law with other laws of the enacting State, see para. 17 below).

8. Unlike an international convention, model legislation does not require enacting States to notify the United Nations or other enacting States. However, States are strongly encouraged to inform the UNCITRAL secretariat of their enactment of the Model Law (or indeed any other model law resulting from the work of UNCITRAL). This information will be made available on the UNCITRAL website to publicize the fact that the enacting State has adopted an international standard and, in any case, will assist other States in their consideration of the Model Law.

IV. Main features of the Model Law

A. Relationship of the Model Law with the secured transactions texts of UNCITRAL

9. The Secured Transactions Guide, the Intellectual Property Supplement of the Secured Transactions Guide and the Registry Guide contain detailed commentary and recommendations on the issues that need to be addressed in a modern law on secured transactions. However, they are lengthy texts and States will need assistance in transforming their recommendations into concrete legislative language. The Model Law was prepared to respond to this need.

10. The Model Law reflects the policies embodied in the recommendations of these texts. Differences in formulation between those recommendations and corresponding provisions of the Model Law are generally due to the legislative nature of the Model Law and are briefly explained in the relevant parts of the Guide to Enactment.

11. For reasons explained below in the relevant parts of the Guide to Enactment, the Model Law also addresses, in a manner that is consistent with the goals and the policies of the Secured Transactions Guide and the other texts of UNCITRAL on secured transactions, matters that were not addressed in a recommendation, or even discussed in those texts (e.g. security rights in non-intermediated securities). Conversely, certain matters that were addressed in the Secured Transactions Guide

are excluded from the scope of the Model Law (e.g. security rights in the right to receive the proceeds under an independent undertaking) or are not addressed specifically (e.g. security rights in attachments to encumbered movable assets or immovable property).

12. The provisions of the Model Law on security rights in receivables are substantially based on the recommendations of the Secured Transactions Guide, which in turn are based on the Assignment Convention. If a State ratifying or acceding to the Convention wishes to have an efficient and modern secured transactions law, it will nonetheless need to enact the Model Law, because: (a) the Convention applies only to security rights and outright transfers of receivables; (b) subject to limited exceptions, the Convention applies only to the assignment of international receivables and the international assignment of receivables (see art. 1, para. 1); (c) the Convention explicitly refers important matters (i.e. third-party effectiveness and priority) to the applicable domestic law, that is, the law of the assignor's location (see art. 22); and (d) the Convention leaves other issues (e.g. the form of the assignment) to domestic law.

13. Conversely, a State enacting the Model Law will still need to ratify or accede to the Convention in order to promote effective international receivables financing. Currently, exporters often face difficulty in obtaining financing based on receivables arising from the sale of exported goods because lenders are unwilling to extend credit secured by receivables owed by customers located in States whose laws are inconsistent with modern commercial finance practice. If both the enacting State and the State where the debtors of the receivables arising from the sale of exported goods are located ratify or accede to the Convention, lenders will be more willing to extend receivables financing to exporters because of the increased legal certainty that they will be able to collect the receivables.

B. Key objectives and fundamental policies of the Model Law

14. As already mentioned (see para. 4 above), the overall economic objective of the Model Law is the same as that of the Secured Transactions Guide (see Secured Transactions Guide rec. 1 and Introduction, paras. 43-59). The same is true for the fundamental policies of the Model Law and the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 60-72). One of these fundamental policies is the functional, integrated and comprehensive approach to secured transactions, under which any right created by agreement in any type of movable asset to secure the performance of an obligation is treated as a security right for the purposes of triggering the application of the Model Law, regardless of the terms used by the parties to describe their agreement (e.g. pledge, charge, transfer of title for security purposes, retention-of-title sale or financial lease; see Secured Transactions Guide, Introduction, para. 62, chap I, paras. 110-112, and chap. IX, paras. 60-84).

15. Depending on its drafting method and technique, the enacting State may wish to consider including the key objectives of the Model Law in a preamble or other similar statement accompanying its enactment of the Model Law. That statement could be used in interpreting and in filling gaps in the Model Law (see paras. 77 and 78 below).

16. The enacting State may also wish to consider producing an official commentary or guide to its enactment of the Model Law for use by courts and legal practitioners in interpreting and applying the law (see Secured Transactions Guide, Introduction, para. 86). This is likely to be particularly helpful if the Model Law introduces significant changes to the enacting State's previous secured transactions laws. Such a guide could explain the intent of particular provisions, in particular if they deviate significantly from previous law and, where necessary, provide concrete examples. Even more importantly, such an official commentary or guide could explain the fundamental principles that underlie the Model Law, such as the functional, integrated and comprehensive approach to secured transactions, under which the economic

substance of a transaction, rather than its form or the wording used by the parties to describe it, determines whether secured transactions law should apply. As the Guide to Enactment discusses all these and other relevant issues (either directly or by reference to the Secured Transactions Guide), the enacting State's commentary or guide could refer to the Guide to Enactment and the Secured Transactions Guide to allow its courts to obtain interpretative guidance from the international source from which its law was derived.

17. In enacting the Model Law, States will need to consider: (a) whether complementary amendments to other related laws (e.g. contract, property, insolvency, civil procedure and electronic commerce law) are required to ensure the overall coherence of its national law (see Secured Transactions Guide, Introduction, paras. 80-83); (b) harmonization with the existing concepts and drafting styles (see Secured Transactions Guide, Introduction, paras. 73-89); and (c) transition issues, including the preparation of an official commentary, model notice forms and agreements, the organization of educational programmes for users of the new law and the introduction of a case law reporting system (see Secured Transactions Guide, Introduction, paras. 84-89). For example, it is extremely important that the effectiveness of a security right, its priority and its enforceability is recognized in the case of the grantor's insolvency (for the treatment of security rights in insolvency, see Secured Transactions Guide, chap. XII).

V. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

18. In the context of its training and assistance activities, the UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (e.g. the UNCITRAL Model Law on Cross-Border Insolvency),[14] or considering adhesion to one of the international trade law conventions prepared by UNCITRAL (e.g. the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[15] and the Assignment Convention).

19. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the UNCITRAL secretariat at the address below:

International Trade Law Division, Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 or 4061
Telecopy: (+43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: www.uncitral.org

B. Information on the interpretation of legislation based on the Model Law

20. The UNCITRAL secretariat welcomes comments concerning the Model Law and the Guide to Enactment, as well as information concerning enactment of legislation based on the Model Law. Once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have

[14] United Nations publication, Sales No. E.14.V.2.
[15] United Nations publication, Sales No. E.97.V12.

emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The UNCITRAL secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and arbitral awards. In addition, upon individual request and subject to any copyright and confidentiality restrictions, the UNCITRAL secretariat makes available to the public all decisions and arbitral awards on the basis of which the abstracts were prepared. The system is explained in a user's guide that is available from the UNCITRAL secretariat in hard copy (A/CN.9/SER.C/GUIDE/1/Rev.2) and on the above-mentioned Internet home page of UNCITRAL.

VI. Article-by-article remarks

Chapter I. Scope of application and general provisions

Article 1. Scope of application

21. Article 1 is based on recommendations 1-7 of the Secured Transactions Guide (see chap. I, paras. 1-4, 13-15 and 101-112). It is intended to set out the various types of transaction and asset covered by the Model Law (see art. 1, paras. 1-4), as well as to clarify the relationship between the Model Law and other law (see art. 1, paras. 5 and 6). Generally, the Model Law follows the same functional, integrated and comprehensive approach to secured transactions as the Secured Transactions Guide. Thus, the Model Law applies to security rights, namely to property rights in movable assets, 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 (see art. 1, para. 1, and the definition of the term "security right" in art. 2, subpara. (kk)). However, there are some differences between the scope of the Model Law and the scope of the Secured Transactions Guide (see paras. 22-35 below).

22. Like the Secured Transactions Guide (see rec. 3) and the Assignment Convention (see art. 1, para. 1, and art. 2, subpara. (a)), the Model Law also applies to outright transfers of receivables by agreement, such as factoring (see art. 1, para. 2). The main reason for this approach is that the same third-party effectiveness and priority rules need to be applied to both outright transfers of and security rights in receivables because: (a) financing against receivables is sometimes done by an outright transfer of receivables rather than the creation of a security right in the receivables; and (b) it is sometimes difficult to determine at the outset of a transaction whether it will be held to involve an outright transfer of or the creation of a security right in a receivable (see Secured Transactions Guide, chap. I, paras. 25-31). While most modern secured transactions law generally follow this approach, some laws exclude certain types of outright transfers of receivables that are clearly not financing transactions, such as: (a) outright transfers of receivables for collection purposes where the transferee essentially acts only as an agent or trustee of the transferor; and (b) outright transfers of receivables as part of the sale of the business out of which they arose where the potential that the transfer will mislead other outright transferees or secured creditors is limited unless the old owner remains in apparent control of the business.

23. Unlike the Secured Transactions Guide which covered security rights in the right to receive payment under an independent undertaking (see rec. 2 (a)), the Model Law excludes from its scope security rights in both the right to receive and the right to request payment under an independent guarantee or letter of credit, whether commercial or standby (see art. 1, para. 3 (a)). The reason for this exclusion is that accommodating the various specialized financing practices in those areas would have made the Model Law unduly complex. Enacting States interested in dealing with security rights in those types of asset are encouraged to implement the relevant recommendations of the Secured Transactions Guide (recs. 27, 50, 107, 127, 176 and 212).

24. Like the Secured Transactions Guide (see rec. 4 (b)), to the extent that its provisions are inconsistent with law relating to intellectual property, the Model Law

defers to the enacting State's law relating to intellectual property (see art. 1, para. 3 (b)). This limitation is unnecessary if the enacting State has already coordinated the Model Law and its law relating to intellectual property or plans to do so in the context of the overall reform of its secured transactions law.

25. Unlike the Secured Transactions Guide which excludes from its scope all types of securities (see rec. 4 (c)), the Model Law excludes only security rights in non-intermediated securities (see art. 1, para. 3 (c)). The reasons for this approach are that: (a) non-intermediated securities often are part of commercial finance transactions (in which, for example, it is common for the lender's security to include in the assets to be encumbered shares of the borrower's wholly-owned subsidiaries or the shares of the borrower itself); (b) there are wide divergences among national regimes in this regard; and (c) security rights in non-intermediated securities are not addressed in any other uniform law text and thus no guidance is provided to States with regard to such securities. Conversely, security rights in intermediated securities are excluded as such securities are typically part of financial market transactions and are addressed in other uniform law texts (see Secured Transactions Guide, chap. 1, paras. 37 and 38).[16]

26. The Model Law excludes payment rights under or from financial contracts governed by netting agreements (see art. 1, para. 3 (d)), including foreign exchange transactions, because they raise complex issues that require special rules (see Secured Transactions Guide, chap. I, para. 39).

27. Combining the policy of recommendations 4 (a) and 7 of the Secured Transactions Guide, the Model Law permits the enacting State to exclude further types of asset (or transaction), provided that the matters that are addressed in the Model Law are governed by other law in force in that State (see art. 1, para. 3 (e)). The reason for this approach is to avoid inadvertently creating gaps (where that other law does not govern an issue addressed in the Model Law) or overlaps (where that other law governs an issue addressed in the Model Law).

28. Assets that may be excluded from the scope of the Model Law are, for example, assets that are subject to specialized secured transactions and registration regimes. Enacting States that do have such regimes with respect to assets that may be covered by the Model Law (e.g. ships, vehicles, aircraft or intellectual property) will have to consider whether registration with respect to security rights in those types of asset should take place in the security rights registry, in the specialized registry or in both. If registration may take place in both registries, the enacting State will have to ensure coordination of the applicable third-party effectiveness and priority rules. The Secured Transactions Guide recommends that, while a security right in an asset subject to a specialized registration system may be made effective against third parties by registration in the security rights registry, it is subordinate in priority to a security right or other right which was made effective against third parties by registration in the relevant specialized registry, irrespective of the temporal order of registration (see Secured Transactions Guide, recs. 43 and 77, subpara. (a); see also Registry Guide, paras. 23, 30 and 65).

29. The Secured Transactions Guide also recommends that, if registration in a specialized registry is possible in addition to registration in the security rights registry, an acquisition security right in consumer goods that is effective automatically (see art. 24) should not have the special priority of an acquisition security right over a security right registered in a specialized registry. The reason for this approach is to avoid any interference with any specialized registration system (see Secured Transactions Guide, chap. IX, paras. 125-128, and rec. 181).

30. The Secured Transactions Guide also discusses other ways of coordinating the security rights registry with any other registry that covers the same type of encumbered asset, including the automatic forwarding of information registered in

[16] Such as the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Unidroit Securities Convention") and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2006; the "Hague Securities Convention").

one registry to the other registry or the implementation of common gateways to enable registration in both registries simultaneously. However, the Secured Transactions Guide does not make any formal recommendations as to how States should ensure that registries are coordinated in the most efficient way. This approach takes into account the fact that specialized registries are typically subject to other law, and that the purposes, organization and administration of such registries vary from State to State and often from registry to registry (see Secured Transactions Guide, chap. IV, para. 117, and Registry Guide, para. 66).

31. With respect to security rights in attachments to immovable property and receivables arising from sale or lease of, or secured by, immovable property, the enacting State may wish to consider issues of coordination with immovable property registries (see Registry Guide, paras. 67-69). The enacting State may also wish to consider issues of international coordination among national security rights registries (see Registry Guide, para. 70).

32. Similarly, with respect to the application of the Model Law to proceeds, while the relevant provision of the Model Law (see art. 1, para. 4), is formulated somewhat differently from recommendation 6 of the Secured Transactions Guide, there is no policy difference between them. The policy may be explained as follows. In the case of a security right in an asset covered by the Model Law (e.g. receivables), the security right extends to its identifiable proceeds (see art. 10, para. 1); this rule applies even if the proceeds are of a type of asset that is outside the scope of the Model Law (e.g. intermediated securities), except to the extent that other law applies to proceeds of that type and governs the matters addressed in the Model Law.

33. With respect to the relationship with consumer-protection law, in line with the approach followed in the Assignment Convention (see art. 4, para. 4) and in the Secured Transactions Guide (see rec. 2 (b)), the Model Law is intended to preserve the application of consumer-protection law that protects a grantor or a debtor of an encumbered receivable (see art. 1, para. 5, of the Model Law). For example, under consumer-protection law, it may not be possible to create a security right in all present and future assets, employment benefits, at least up to a certain amount, or in necessary household items of a consumer. Enacting States that do not have a developed consumer-protection law may need to consider whether enactment of the Model Law should be accompanied by the enactment of such special protections for consumers. It should also be noted that the Model Law already includes certain consumer-specific rules (e.g. art. 24).

34. Following the approach of the Secured Transactions Guide (see rec. 18), the Model Law is intended to preserve limitations on the creation or the enforceability of a security right in certain types of asset (e.g. employment benefits) that are based on any other statutory or case law (see art. 1, para. 6). At the same time, it is intended to ensure that any such limitations based on the sole ground that an asset is a future asset, or a part of an asset or an undivided interest in an asset are overridden (see art. 8, subparas. (a) and (b)). However, paragraph 6 does not apply to contractual limitations on the creation of a security right in receivables (see art. 13) or rights to payment of funds credited to a bank account (see art. 15), or other contractual limitations such as a negative pledge agreement (for the effect of such an agreement on the creation of a security right, see para. 73 below).

35. Finally, like the Secured Transactions Guide, the general provisions of the Model Law apply to security rights in attachments to movable or immovable property, that is, movable assets that are attached to movable or immovable property, without losing their separate identity and thus becoming immovable property (see Secured Transactions Guide, Terminology). However, unlike the Secured Transactions Guide, the Model Law does not include specific provisions on security rights in attachments to movable or immovable property. Such provisions were not included in the Model Law to avoid making it even longer. In view of the importance of attachments, enacting States are encouraged to consider whether to include in their enactments of the Model Law provisions based on the relevant recommendations of the Secured Transactions Guide (see recs. 21, 25, 43, 48, 87, 88, 164, 165, 184, 195 and 196).

Article 2. Definitions and rules of interpretation

36. Article 2 contains definitions and rules of interpretation with respect to most key terms used in the Model Law. Other terms are defined or explained in various articles of the Model Law. For example, the term "judgment creditor" is defined in article 37, paragraph 1, of the Model Law.[17] Comments are not included below on all terms but only on those that are not self-explanatory or those that are not sufficiently explained in the Secured Transactions Guide, on the terminology of which article 2 is based (see Secured Transactions Guide, Introduction, paras. 15-20).

37. The rules of interpretation of the Secured Transactions Guide also apply to the Model Law. For example: (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).

Acquisition security right

38. An acquisition security right is a security right in a tangible asset that secures the grantor's obligation with respect to credit provided to enable the grantor to acquire that tangible asset (other than intangible assets embodied in a tangible asset, such as a negotiable instrument; see art. 2, subparas. (b) and (ll)), intellectual property or the rights of a licensee in intellectual property. This definition, in conjunction with the definition of "security right", results in the rights of any lender extending credit for the acquisition of an asset, whether a general bank lender, a retention-of-title seller or a financial lessor, being treated in the Model Law as acquisition security rights. It should be noted, however, that: (a) for a security right to be an acquisition security right, the credit it secures must in fact be used for that purpose; and (b) where a security right secures both other obligations and obligations incurred for the grantor to acquire a tangible asset, that security right is an acquisition security right to the extent it secures the obligation to pay the acquisition price and a non-acquisition security right to the extent it secures those other obligations.

Bank account

39. To underline the distinction between a "bank account" and a "securities account", the Model Law defines: (a) the former term as "an account maintained by an authorized deposit-taking institution to which funds may be credited or debited" (see art. 2, subpara. (c)); (b) the latter term as "an account maintained by an intermediary to whom securities may be credited or debited" (see art. 2, subpara. (ii)); and (c) the term "securities" in a manner that clearly excludes funds (see art. 2, subpara. (hh)). The term "bank account", therefore, includes any type of bank account (e.g. current or checking and savings account). The term does not include a right against the bank to payment evidenced by a negotiable instrument. The enacting State may wish to consider replacing the term "authorized deposit-taking institution" with a generic term broad enough to include any institution authorized to receive deposits in the State whose law may be applicable under article 97 of the Model Law.

Certificated non-intermediated securities

40. The term "represented" used in the definition of the term "certificated non-intermediated securities" (see art. 2, subpara. (d)) is intended to be broad enough to cover the approaches taken in different jurisdictions (e.g. "covered" or "embodied"). The term "certificate" means only a tangible document subject to physical possession. Thus, securities represented by an electronic certificate are considered to be uncertificated securities under the Model Law. It should be noted that securities represented by an electronic certificate may still qualify as non-intermediated securities.

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[17] Since the Model Registry Provisions may be enacted in a separate statute or other type of legal instrument, the term "registry" is defined both in article 2, subparagraph (ee) of the Model Law and article 1, subparagraph (k), of the Model Registry Provisions. If they are enacted as part of the Model Law, the latter provision will not be necessary.

Competing claimant

41. The term "competing claimant" is principally used in the context of a potential priority dispute between a security right and the rights of another person claiming rights in the encumbered asset (see art. 2, subpara. (e)). This term includes another creditor of the grantor (secured or not) that has a right in the asset (such as a judgement creditor that has taken certain steps to execute the judgment), a buyer or lessee of the asset and an insolvency representative in insolvency proceedings with respect of the grantor.

Consumer goods

42. Unlike the definition of the term "consumer goods" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law (see art. 2, subpara. (f)) includes the word "primarily" to ensure that: (a) goods primarily used or intended to be used for personal family or household purposes and only incidentally for business purposes would be treated as consumer goods; and (b) goods primarily used or intended to be used for business purposes and only incidentally for personal, family or household purposes would not be treated as consumer goods. Accordingly, it is the primary use or the primary intended use of tangible assets by the grantor that determines whether they will be classified as consumer goods, equipment or inventory. It should also be noted that the terms "consumer goods", "equipment" and "inventory" are primarily relevant to the articles on acquisition security rights (see paras. 46 and 50 below).

Control agreement

43. The term "control agreement" refers to an agreement between the grantor, the secured creditor and the issuer (in the case of securities) or the deposit taking institution (in the case of a right to payment of funds credited to a bank account), according to which the issuer or the deposit-taking institution agrees to follow the instructions of the secured creditor without further consent from the grantor. A control agreement can achieve three purposes: (a) to render a security right effective against third parties (see arts. 25 and 27); (b) to ensure the cooperation of the deposit-taking institution or the issuer of securities in the enforcement of a security right; and (c) to establish the priority of the secured creditor that has control. Unlike the definition of this term in the Secured Transactions Guide, on which it is based, the definition of the term in the Model Law does not refer to a "signed writing" (see art. 2, subpara. (g)). This difference does not reflect a policy change but rather a decision that this matter should be left to the evidentiary requirements of other law of the enacting State. In any case, a control agreement does not need to be in a single written document.

Default

44. The term "default" is defined in a generic way by reference to the grantor's failure to perform and to the agreement between the grantor and the secured creditor. What exactly constitutes failure to perform (e.g. a day's or a month's delay to pay) is a matter for the agreement between the parties and the law applicable to that agreement.

Encumbered asset

45. Any movable asset to which the Model Law applies may be an encumbered asset. In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, the term includes a receivable that is the subject of an outright transfer by agreement.

Equipment

46. Unlike the definition of the term "equipment" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law includes the word "primarily" to clarify that: (a) goods used or intended to be used by a person primarily

in the operation of its business and only incidentally for other purposes would be treated as equipment; and (b) goods used or intended to be used by a person primarily for other purposes and only incidentally in the operation of its business would not be treated as equipment (see art. 2, subpara. (l)). This definition also includes the words "other than inventory or consumer goods" as, depending on their primary use or primary intended use, the same type of tangible assets may be "equipment", "consumer goods" or "inventory" (see art. 2, subparas. (f), (l) and (q), and paras. 42 above and 50 below).

Grantor

47. The definition of the term "grantor" makes clear that a grantor of a security right may be the debtor of the secured obligation or another person (e.g. the parent company of the debtor-subsidiary if the parent company creates a security right in its assets so that the subsidiary may borrow (see art. 2, subpara. (o) (i)). A person who is not the owner of an asset but has rights in the asset (e.g. rights under a lease agreement; see art. 2, subpara. (o) (i)) may also be a grantor of a security right in those rights. A buyer or other transferee of an encumbered asset that acquires the asset subject to a security right is also treated as a grantor, even if that person did not create a security right in the asset (see art. 2, subpara. (o) (ii)). In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, the term "grantor" also includes a transferor under an outright assignment of receivables (see art. 2, subpara. (o) (iii)).

Insolvency representative

48. As the term "insolvency representative" is only used in the definition of the term "competing claimant" it is not defined in the Model Law. It is defined though in the Secured Transactions Guide (see Introduction, para. 20) and the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"; see Introduction, para. 12 (v)) in a sufficiently broad manner to include the person responsible for administering insolvency proceedings or supervising the debtor and the debtor's affairs (see Insolvency Guide, part two, chap. III, paras. 11-18 and 35). The Secured Transactions Guide and the Insolvency Guide contain definitions of other insolvency-related terms, such as the term "insolvency proceedings" (which is referred to in arts. 2, subpara. (e) (iii), 35 and 94), and the term "insolvency estate".

Intangible asset

49. The term "intangible asset" includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account and uncertificated non-intermediated securities, as well as any other asset that is not a tangible asset (see art. 2, subpara. (p)).

Inventory

50. The term "inventory" refers to tangible assets held by the grantor for sale or lease in the ordinary course of the grantor's business. Thus. it is the purpose for which tangible assets are held by the grantor that determines whether they constitute inventory (see paras. 42 and 46 above). The term "work in process" includes "semi-processed materials". In States in which a licence of tangible assets is possible, the term "lease of tangible assets" in this definition includes the licence of tangible assets (see art. 2, subpara. (q)).

Mass and product

51. The Model Law distinguishes between a "mass" and a "product". A "mass" is the combination that arises when two or more tangible assets of the same type are commingled in such a way that they lose their separate identity. This could happen, for example, when a quantity of oil from one source is pumped into a storage tanker that already contains some oil from another source, or when a truckload of one farmer's wheat is put into a grain silo that already contains wheat from another farmer. In contrast, a "product" arises when one or more tangible assets are transformed into

something different, through a production or manufacturing process; for example, when gold is used to make a ring, or when flour and yeast are used to make bread. The distinction is relevant to articles 11 and 33 (see paras. 97-99 below and A/CN.9/WG.VI/WP.71/Add.4, para. 15).

Money

52. The term "money" includes not only the national currency of the enacting State but also the currency of any other State (see art. 2, subpara. (t)). However, it does not include virtual currency, as virtual currency is not national currency and is intangible (and money is in principle defined as a tangible asset; see art. 2, subpara. (ll)). Currency must qualify as a legal tender to constitute money. Rights to payment of funds credited to a bank account and negotiable instruments are distinct concepts in the Model Law. They are not included in the term "money".

Movable asset

53. The enacting State may wish to ensure that this definition captures anything that its laws consider to be an asset other than immovable property (see art. 2, subpara. (u)). Depending on its legal tradition and the terminology used, the enacting State may also wish to consider whether to replace the terms "movable asset" and "immovable property" with the equivalent concepts in its law (e.g. "personal property" and "land").

Non-intermediated securities

54. The term "non-intermediated securities" refers to securities (i.e. shares and bonds) that are not credited to a securities account (see art. 2, subparas. (w) and (ii)). This definition is structured around the definition of the term "intermediated securities" in the Unidroit Securities Convention (see art. 1, subpara. (b)). It refers only to "rights", in contrast to the language used in the Unidroit Securities Convention which refers to "rights or interests", for reasons of consistency with the terminology of the Model Law in which the term "right" is a broad term that covers any right or interest. It should be noted that, if securities are held by an intermediary directly with the issuer (e.g. the intermediary is registered in the books of the issuer as the holder of the securities), these securities in the hands of the intermediary are non-intermediated, even though equivalent securities credited by the intermediary to a securities account in the name of a customer are intermediated securities in the hands of the customer.

Notification of a security right in a receivable

55. The definition of the term "notification of a security right in a receivable" is based on the definition of the term "notification of the assignment" and recommendation 118 of the Secured Transactions Guide (see art. 2, subpara. (y)), which in turn is based on the definition of that term in the Assignment Convention (see article 5, subpara. (d)). The requirement for the identification of the encumbered receivable and the secured creditor in the definition of that term in the Assignment Convention is reflected in article 62, paragraph 1, of the Model Law as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in that article.

Possession

56. The definition of the term "possession" (see art. 2, subpara. (z)) is based on the definition of that term in the Secured Transactions Guide. The words "directly or indirectly" that were included in recommendation 28 of the Secured Transactions Guide were not included in this definition or article 16 which is based on that recommendation, because the definition is sufficiently broad to cover situations in which a person holds a tangible asset through another person (e.g. the issuer of a negotiable document may hold it through various persons responsible to perform parts of a multimodal transport contract).

Priority

57. The definition of the term "priority" (see art. 2, subpara. (aa)) is based on the definition in that term in the Secured Transactions Guide, which is in turn partly based on the definition of that term in the Assignment Convention (see art. 5, subpara. (g)). Like the definition in the Secured Transactions Guide, this definition does not include in the concept of "priority" the steps required to establish third-party effectiveness. Like the definition in the Assignment Convention and unlike the definition in the Secured Transactions Guide, however, this definition refers directly to the right of a person in preference to the right of another person.

Proceeds

58. The term "proceeds" in the Model Law (see art. 2, subpara. (bb)) has the same meaning as in the Secured Transactions Guide. It is important to note that it covers: (a) proceeds of the sale or other disposition, lease or licence of an encumbered asset (broadly understood); (b) proceeds of proceeds (e.g. if receivables are generated by the sale of encumbered inventory and those proceeds are deposited to a bank account, the right to payment of those funds constitutes proceeds of proceeds); and (c) natural fruits (e.g. the calves of the encumbered cows) or civil fruits (e.g. rents arising from the lease of encumbered assets). It should be noted that the secured creditor's right in the encumbered assets or proceeds is limited by various provisions of the Model Law. For example, under article 10, the security right extends only to identifiable proceeds; and under article 34, paragraph 4, a buyer of tangible encumbered assets in the ordinary course of the grantor's business acquires its rights in the assets free of the security right (see also arts. 19, para. 2, 34, para. 2, and 59, para. 2). It should also be noted that the terms revenues, dividends and distributions, which were included in the definition of this term in the Secured Transactions Guide, have been deleted on the understanding that they are covered by the term "civil fruits".

59. The term is not limited to proceeds received by the original grantor but includes proceeds received by a transferee of an encumbered asset when that transferee is treated as a grantor because it acquired the encumbered asset subject to the security right. For example, where A creates a security right in its assets in favour of X and then A transfers the assets to B who acquires its rights in the assets subject to X's security right and B subsequently sells the assets to C for a price of € 1.000 payable at a future date, the receivable arising from the sale by B to C constitutes proceeds covered by X's security right. The reason for this approach is that, otherwise, a transferee of an encumbered asset that acquired the asset subject to the security right (in the example, B) could sell the asset further (in the example, to C) and keep the proceeds free of the security right (for the issue of third-party transferees who are likely to search the registry under the name of their immediate transferor and who do not find a notice about a security right created by the first in a chain of transferors, see art. 26 of the Model Registry Provisions and A/CN.9/WG.VI/WP.71/Add.3, paras. 48-53).

60. It should be noted that proceeds may arise as a result of an action taken by a person other than the grantor or a transferee. Thus, article 10, paragraph 2, applies to funds in a bank account that are transferred to another bank account (even if this transfer takes place at the instigation of the deposit-taking institution) as the funds in the second bank account are "proceeds" (see para. 96 below).

Receivable

61. Like the Secured Transactions Guide, the Model Law defines the term "receivable" in a broad way to cover even non-contractual receivables, such as a claim for damages for the violation of law (see art. 2, subpara. (dd)). However, the term "receivable" does not include rights to payment evidenced by a negotiable instrument, rights to payment of funds credited to a bank account and rights to payment under a non-intermediated security, as they are treated as distinct types of asset that are subject to different asset-specific rules.

Secured creditor

62. The term "secured creditor" refers to the holder of a security right and includes a transferee in an outright transfer of a receivable by agreement (e.g. a factor in a factoring contract).

Secured obligation

63. The term "secured obligation" includes any obligation secured by a security right, including obligations arising from credit extended by a lender, a retention-of-title seller or a financial lessor (see art. 2, subpara. (gg)). It covers both monetary and non-monetary obligations, obligations already incurred at the time of the extension of the credit, as well as obligations incurred thereafter, if the security agreement so provides. As there is no secured obligation in an outright transfer of a receivable, the provisions that refer to a "secured obligation" do not apply to an outright transfer of a receivable.

Securities

64. The definition of the term "securities" in the Model Law is narrower than the definition of the term in article 1, subparagraph (a), of the Unidroit Securities Convention (see art. 2, subpara. (hh)). The reason is that, while a broad definition is appropriate for the purposes of that Convention, a broad definition for the purposes of the Model Law could result in an overlap with the terms money, receivables, negotiable instruments and other generic intangible assets and thus in uncertainty as to the regime applicable to security rights in those types of asset. In any case, the enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of the term in its law governing the transfer of securities.

Securities account

65. The definition of the term "securities account" in the Model Law is derived from article 1, subparagraph (c), of the Unidroit Securities Convention (see art. 2, subpara. (ii)). It refers to an account maintained with a securities intermediary to which securities may be credited or debited.

Security agreement

66. The term "security agreement" is defined by reference to an agreement that provides for the creation of a security right (see art. 2, subpara. (jj)). In line with the functional, integrated and comprehensive approach followed in the Model Law (see paras. 7 and 15 above), the parties need not use any special words; and even if the parties use wording that does not refer to security rights, the agreement is a security agreement if it creates by agreement a property right in a movable asset that secures the payment or other performance of an obligation (see art. 2, subpara. (kk)). Thus, transactions such as transfers of property for security purposes, retention-of-title sales, hire-purchase agreements and financial leases are treated as secured transactions. To ensure that the provisions of the Model Law apply to outright transfers of receivables, the term "security agreement" is defined so as to include an agreement for the outright transfer of receivables.

Security right

67. The term "security right" is defined by reference to a property right created by agreement to secure payment or other performance of an obligation. In line with the functional, integrated and comprehensive approach followed in the Model Law (see paras. 7, 15 and 66 above), it is irrelevant whether or not the parties have denominated the right as a security right or even that they have used wording that does not refer to a security right. To ensure that the provisions of the Model Law apply to outright transfers of receivables, the term "security right" is defined so as to include the right of the transferee under an outright transfer of a receivable by agreement.

Tangible asset

68. The term "tangible asset" in the Model Law includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities (some of them being intangible rights embodied in a document) except for the purposes of certain articles that contain rules that are not appropriate for those types of asset. For example, the term "tangible asset" in the definition of the term "mass" (see in art. 2, subpara. (s)) does not include negotiable documents because negotiable documents cannot be part of a mass as they are not interchangeable with other documents and are not fungible.

Writing

69. The definition of the term "writing" is intended to ensure that where the term is referred to in the Model Law (see arts. 2 (g) and (x), 6, para. 3, 63, paras. 2 and 9, 65, paras. 1 and 2, 77, para. 2 (a), 78, para. 4 (b) and 80, paras. 1, 2 (b), 4 and 6, of the Model Law, as well as arts. 2, paras. 1-3, and 20, para. 5, of the Model Registry Provisions), this reference will include electronic communications (see art. 2, subpara. (nn)). The definition is based on recommendation 11 of the Secured Transactions Guide, which in turn is based on article 9, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention"). However, the Model Law does not include an article on the electronic equivalent of signature along the lines of recommendation 12 of the Secured Transactions Guide, which is in turn based on article 9, paragraph 3, of the Electronic Communications Convention. For the purpose of those articles of the Model Law that refer to signature (see arts. 6, para. 1, and 65, paras. 1 and 2), the enacting States may wish to consider whether to include in their enactment of the Model Law an article along the lines of recommendation 12 of the Secured Transactions Guide.

International obligations of the enacting State

70. The Model Law leaves to the enacting State the issue whether international treaties (such as the United Nations Convention on Contracts for the International Sale of Goods ("CISG") or the Assignment Convention when it enters into force) prevail over domestic law. For example, in the case of a conflict between a provision of the Model Law and a provision of any treaty or other form of agreement to which an enacting State is a party with one or more other States, the requirements of the treaty or agreement may prevail (see art. 3 of the UNCITRAL Model Law on Cross-Border Insolvency). Such an approach may need to be limited to international treaties that directly address matters governed by the Model Law (e.g. the creation, third-party effectiveness, priority and enforcement of a security right in movable assets). In other States, in which international treaties are not self-executing but require internal legislation in order to become enforceable law, such an approach might be inappropriate or unnecessary (see Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, paras. 91-93).

Article 3. Party autonomy

71. Article 3 is based on article 6 of the Assignment Convention (the first sentence of which is based on art. 6 of CISG) and recommendation 10 of the Secured Transactions Guide. Paragraph 1 is intended to reflect the principle that, with the exception of the provisions listed in paragraph 1, parties are free to vary by agreement the effect of the provisions of the Model Law as between them. An agreement derogating from the provisions of the Model Law or varying its terms may be between any two parties whose rights are affected by the Model Law (e.g. between the secured creditor and the grantor, between the secured creditor and a competing claimant, between the secured creditor and the debtor of an encumbered receivable, or between the grantor and the debtor of the receivable).

72. The provisions listed in paragraph 1 are not subject to contrary agreement as permitting such an agreement with respect to these issues could result in abuse or uncertainty. In particular, article 4 sets out the general standard of conduct with which

the parties have to comply with in exercising their rights and performing their obligations under the Model Law; article 6 deals with the creation of a security right and sets out the requirements for the creation of a security right; article 9 deals with the standard for the description of encumbered assets and secured obligations; articles 53 and 54 deal with obligations of the party in possession to exercise reasonable care and the obligation of the secured creditor to return the encumbered assets; and article 72, paragraph 3, deals with the variation of the rights under the enforcement provisions of the Model Law and permits variation by the grantor or the debtor only after default to avoid abuse at the time of the conclusion of the security agreement. Articles 85-87, in the chapter of conflict of laws, deal with the law applicable to property law matters; determination of the law applicable to such matters is generally not left to a choice of law by the parties to ensure certainty with regard to the law applicable to property law matters, which are bound to involve rights of third parties.

73. Paragraph 2 reiterates the general principle that an agreement between two parties cannot affect the rights of a third party. For example: (a) if there are two debtors of a receivable that is an encumbered asset, and one of the two debtors agrees, pursuant to article 65, not to raise certain defences against a secured creditor, that agreement does not bind the other debtor of the receivable; and (b) if a secured creditor agrees that the grantor may not create another security right in the same assets in favour of another creditor (negative pledge agreement), that other creditor is not bound by the negative pledge agreement. The reason for stating a general principle of contract law is that the Model Law deals with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might otherwise appear to have an undue impact on the rights of third parties (under art. 61, there is a limited impact of an agreement between the grantor of a security right in a receivable and the secured creditor in the sense that, for example, the debtor of a receivable may have to pay a person other than the initial creditor).

74. Paragraph 3 makes clear that, if other law allows the grantor and the secured creditor to agree to resolve any dispute that may arise between them from their security agreement or a security right created by that agreement by arbitration, mediation, conciliation and online dispute resolution, nothing in the Model Law affects any agreement to use such alternate dispute resolution mechanisms. Paragraph 3 is based on the assumption that, the use of alternative dispute resolution mechanisms to resolve disputes arising between the parties from their security agreement or the security right created by that agreement is important, in particular for developing countries, to attract investment. To the extent it is inefficient, judicial enforcement is likely to have a negative impact on the availability and the cost of credit. It should be noted that paragraph 3 is intended to recognize alternative dispute resolution mechanisms, without interfering with the way in which the various legal systems deal with arbitrability of disputes arising under a security agreement or a security right, the protection of rights of third parties or access to justice.

Article 4. General standards of conduct

75. Article 4 is based on recommendation 131 of the Secured Transactions Guide (see chap. VIII, para. 15). It is included in chapter I on the scope of application and general provisions, rather than in chapter VII on enforcement, as it states standards of conduct with which parties should comply when they exercise their rights and perform their obligations under the Model Law, even outside the context of enforcement. Under article 4, any person must exercise all its rights and perform all its obligations under the Model Law in good faith and in a commercially reasonable manner. The violation of this obligation may result in liability for damages and other consequences that are left to the relevant law of the enacting State.

76. The concept of “commercial reasonableness” is not defined in the Model Law but it typically refers to actions that a reasonable person might take in circumstances that would be similar to those encountered by the grantor in a particular case. Inasmuch as there is typically no single course of action that all reasonable persons would take in a particular situation, a wide range of actions may be considered as

meeting the standard of "commercial reasonableness". It should be noted that meeting the specific standards referred to in other provisions of the Model Law (e.g. art. 78, para. 4, according to which notice is to be given within a short period of time) should generally be construed as meeting the general standards of conduct referred to in this article. It should also be noted that, article 4 is listed in article 3 as a mandatory law rule. As a result, the duty to act in good faith and in a commercially reasonable manner cannot be waived or varied by agreement.

Article 5. International origin and general principles

77. Article 5 is inspired by article 7 of the CISG and based on article 3 of the UNCITRAL Model Law on Electronic Commerce, article 4 of the UNCITRAL Model Law on Electronic Signatures and article 2A of the UNCITRAL Model Law on International Commercial Arbitration. It is intended to limit the extent to which a national law implementing the Model Law would be interpreted only by reference to concepts of the national law of the enacting State, and reference would also be made to concepts of the Model Law and laws of other States that have enacted the Model Law.

78. The Model Law is a tool not only for modernizing but also for harmonizing secured transactions laws (see paras. 5-9 above). To promote harmonization, paragraph 1 provides that the provisions of a national law implementing the Model Law should be interpreted with reference to its international origin and the observance of good faith. The term "good faith" is also used in article 4 as an obligation of persons who have rights and obligations under the Model Law. By contrast, in this article, the term identifies a consideration to be taken into account in the interpretation of the Model Law. Under paragraph 2, gaps in a law implementing the Model Law are to be filled by reference to the general principles on which the Model Law is based (see para. 15 above).

Chapter II. Creation of a security right

A. General rules

79. This chapter, and several other chapters, contain a section A with general rules and a section B with asset-specific rules. This approach is followed to avoid overloading the general rules with asset-specific details. In some cases, it can make it easier for States that conclude that they do not need all of the asset-specific rules to leave some of them out of its law. For example, an enacting State may omit the rules dealing with security rights in non-intermediated securities. However, not all asset-specific rules may be omitted. For example, some asset-specific rules deal with core commercial assets such as receivables and no enacting State should omit them from its enactment of the Model Law. The result of this approach is that the general rules apply to all assets, but, in relation to certain types of asset, they apply subject to the asset-specific rules. The enacting State may wish to consider whether to include in the general rules of each chapter of its enactment of the Model Law cross-references to the asset-specific rules in that chapter or a provision that would state explicitly that the general rules in each chapter are subject to the asset-specific rules in that chapter (see footnote 4 of the Model Law).

Article 6. Creation of a security right and requirements for a security agreement

80. Article 6 is based on recommendations 13-15 of the Secured Transactions Guide (see chap. II, paras. 12-37). Its purpose is to deal with the creation of a security right, as well as the form and the minimum content of a security agreement, so as to enable parties to obtain a security right in a simple and efficient manner (see Secured Transactions Guide, rec. 1, subpara. (c)). A security right is created by agreement, for the content of which there are no requirements other than those listed in paragraphs 3 and 4, and for the conclusion of which no terms of art or special words need be used.

81. Under paragraph 1, an agreement is sufficient to create a security right, provided that the grantor has either a right in the asset to be encumbered or the power to encumber it. The grantor has the right to encumber an asset where the grantor is the owner of the asset. Where the grantor is in possession of the asset on the basis of an agreement with the owner, such as a lease agreement, the grantor has a right to create a security right in its rights under the lease agreement. The grantor has the power (rather than the right) to create a security right in a receivable, where the grantor has already transferred the receivable. That power is implicit in the fact that the third-party effectiveness and priority rules of the Model Law apply to outright transfers of receivables by agreement. As a practical matter, if the transferee does not make its right effective against third parties before a subsequent competing transferee or secured creditor does so, then the first transferee does not have priority over the subsequent competing transferee or secured creditor. However, if the first transferee made its right effective against third parties before the subsequent competing transferee or secured creditor, there would be no value left in the receivable for the subsequent transferee or secured creditor. It should also be noted that, in line with article 13, paragraph 1, the owner/grantor of a receivable to which that article applies has a right in the receivable or the power encumber it despite an anti-assignment agreement with the debtor of the receivable.

82. Paragraph 2 clarifies that a security agreement may provide for the creation of a security right in future assets (i.e. assets produced or acquired by the grantor after the conclusion of the security agreement; see definition in art. 2, subpara. (n)). However, the security right is created when the grantor acquires rights in them or the power to encumber them.

83. Paragraph 3 sets out the requirements for a written security agreement. From the two alternative wordings set out in the chapeau of paragraph 3 within square brackets, the enacting State may wish to select the one that is most fitting to its contract law and its law of evidence. If the enacting State retains the words “concluded in”, a security agreement that is not in written form is not effective (except as provided in art. 6, para. 4). If the enacting State retains the words “evidenced by”, a security agreement that is not in written form may still be effective if its terms are evidenced by a written document that is signed by the grantor (e.g. in a written offer by the grantor that the secured creditor accepts by way of its conduct).

84. Depending on what it considers as the most efficient financing practices and reasonable assumptions of credit market participants, the enacting State may wish to consider whether to retain paragraph 3 (d). One approach is to retain paragraph 3 (d) to facilitate the grantor’s access to secured financing from other creditors in situations where the value of the assets encumbered by the prior security right exceeds the maximum amount indicated in the notice registered with respect to that right. Another approach is to leave out paragraph 3 (d) to facilitate the grantor’s access to credit by the first secured creditor (for the comparative advantages and disadvantages of the two approaches, see Secured Transactions Guide, chap. IV, paras. 92-97, and Registry Guide, paras. 200-204). If paragraph 3 (d) is retained, the enacting State will need to make provision for the maximum amount to appear on the notice (see art. 8, subpara. (e) of the Model Registry Provisions). Otherwise the benefits of retaining paragraph 3 (d) will not be known to potential subsequent creditors (art. 24, para. 7, of the Model Registry Provisions would also need to be retained to deal with an error in stating the maximum amount on the notice).

85. Under paragraph 4, where the secured creditor is in possession of the encumbered asset on the basis of an oral security agreement with the grantor, there is no need for a written security agreement. The fact that the secured creditor is in possession of the encumbered asset is itself evidence of the existence of the security agreement (see Secured Transactions Guide, chap. II, paras. 30-33).

Article 7. Obligations that may be secured

86. Article 7 is based on recommendation 16 of the Secured Transactions Guide (see chap. II, paras. 38-48). It is primarily intended to ensure that future, conditional and fluctuating obligations may be secured. The main reason for this approach is to

facilitate modern financing transactions, in the context of which an agreement may provide that disbursements of funds by the secured creditor may be made at different times depending on the needs of the grantor (e.g. revolving credit facilities for the grantor to buy inventory). This approach does not necessarily mean that grantors may not be protected from excessive economic commitments. For example, depending on the grantor's financing needs, a maximum amount may be set for which the security right may be enforced (see art. 6, para. 3 (d), and para. 84 above).

Article 8. Assets that may be encumbered

87. Article 8 is based on recommendation 17 of the Secured Transactions Guide (see chap. II, paras. 49-57 and 61-70). It is primarily intended to ensure that future movable assets, parts of movable assets and undivided rights in movable assets, generic categories of movable assets, as well as all the movable assets a person has, may be the subject of a security agreement (for the time when a security right in future assets is created, see art. 6, para. 2, and para. 82 above).

88. It should be noted that the fact that future movable assets may be subject to a security right does not mean that statutory limitations on the creation or enforcement of a security right in specific types of movable asset (e.g. employment benefits in general or up to a specific amount) are overridden (see art. 1, para. 6, and para. 34 above).

89. It should also be noted that the fact that all the movable assets a person has may be subject to a security right so as to maximize the amount of credit that may be available and improve the terms of the credit agreement does not mean that other creditors of the grantor are necessarily unprotected. The protection of other creditors (within and outside insolvency proceedings) is a matter of other law and is foreseen in articles 35 and 36 of the Model Law (see A/CN.9/WG.VI/WP.71/Add.4, paras. 23-27).

Article 9. Description of encumbered assets and secured obligations

90. Article 9 is based on recommendation 14 (d) of the Secured Transactions Guide (see chap. II, paras. 58-60). In view of its importance, the standard for the description of encumbered assets in a security agreement is presented in a separate article (rather than in art. 6, para. 3, as it was done in rec. 14 (d) of the Secured Transactions Guide, on which art. 6, para. 3, of the Model Law is based).

91. Paragraph 1 sets out the general standard that must be met in the description of encumbered assets and the secured obligations for a security agreement to be effective (the description must reasonably allow their identification). Paragraph 2 is intended to ensure that a security right may be created in an asset or class of assets even if the description in the security agreement is generic, such as "all inventory" or "all receivables" (see Secured Transactions Guide, chap. II, paras. 58-60). Paragraph 3 sets out the same standard for the description of secured obligations.

Article 10. Rights to proceeds and commingled funds

92. Article 10 is based on recommendations 19 and 20 of the Secured Transactions Guide (see chap. II, paras. 72-89). Paragraph 1 is intended to ensure that, unless otherwise agreed by the parties (as this article is not listed in article 3 as a mandatory law rule), a security right in an asset automatically extends to its identifiable proceeds (for the definition of "proceeds" see art. 2, subpara. (bb)). The rationale for this rule is that it reflects the normal expectations of the parties and ensures that the secured creditor is sufficiently protected. This protection includes the secured creditor's right to enforce its security right both in the encumbered assets (provided that the transferee acquired its rights in the assets subject to the security right) and in the proceeds, although only up to the amount of the secured obligation. Otherwise, a grantor could effectively deprive a secured creditor of its security either by disposing of the

encumbered assets to a person who would take free of the security right or to a person from whom those assets could not easily be recovered.

93. By way of example, where the original encumbered asset is inventory, receivables generated from the sale of the inventory are proceeds (if they are identifiable). If upon payment of the receivables the funds received are deposited in a bank account, the right to payment of the funds credited to the bank account is also proceeds (proceeds of proceeds of the inventory). So, too, is the right to payment pursuant to a negotiable instrument (e.g. a cheque issued by the holder of that bank account to buy new inventory), as well as a negotiable warehouse receipt issued by the warehouse in which new inventory may be stored.

94. Paragraph 2 introduces an exception to the identifiability requirement in paragraph 1. A security right in an asset extends to its proceeds in the form of funds that are commingled with other funds even though the funds that are proceeds cannot be identified separately from the funds that are not proceeds (see para. 2 (a)). Paragraph 2 (b) limits that security right to the value of the proceeds immediately before they were commingled. So, if a sum of €1,000 is deposited in a bank account and at the time of enforcement the bank account has a balance of €2,500, the security right extends only to the sum of €1,000.

95. Paragraph 2 (c) deals with situations in which the balance in the bank account fluctuates and, at some point of time, is less than the value of the proceeds deposited (in the example set out in the previous paragraph, less than €1,000). In such a case, the security right extends only to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed. So, if in the example given in the previous paragraph, the balance in the account immediately after the proceeds were deposited was €1,500, then it went down to €500 and at the time of enforcement was €750, the security right extends only to €500 (i.e. the lowest intermediate balance). The rationale for this approach is that, if the balance of a bank account falls, funds deposited later are unlikely to be proceeds of the original encumbered assets.

96. Where funds in a bank account are original encumbered assets, and the funds are transferred into another bank account and mixed with other funds in that other account, then the funds as transferred into that other account will be “proceeds” of the original funds, and thus the rules in article 10 will apply (see para. 60 above).

Article 11. Tangible assets commingled in a mass or transformed into a product

97. Article 11 is based on recommendations 22 and 91 of the Secured Transactions Guide (see chap. II, paras. 90-95 and 100-102, and chap. V, paras. 117-123). It accomplishes two related objectives. First, it transforms a security right in a tangible asset commingled in a mass or transformed into a product into a security right in the mass or product. Second, it limits the value of that security right by reference to the quantity (in the case of a mass) or the value (in the case of a product) of the tangible asset commingled in the mass or product. Article 33 then addresses situations in which more than one secured creditor has a claim to a mass or product as a result of a security right in its components (see A/CN.9/WG.VI/WP.71/Add.4, para. 15). Paragraph 1 is intended to ensure that a security right in a tangible asset that is commingled in a mass or transformed into product will continue in the mass or product.

98. Paragraph 2 provides that a security right in a tangible asset that extends to a mass is limited to the same proportion of the mass that the asset bore to the quantity of the entire mass immediately after it was commingled in the mass. So, if a secured creditor has a security right in 100,000 litres of oil that is commingled with 50,000 litres of oil in the same tank so that the mass comprises 150,000 litres of oil, the security right is limited to two-thirds of the oil in the tank (i.e. 100,000 litres). If the quantity of the oil in the tank decreases, however, the secured creditor will still have security in two-thirds of the oil in the tank. For example, if one half of the oil leaks out so that only 75,000 litres remain, then the secured creditor will have a security right in two thirds of those 75,000 litres, namely in 50,000 litres only. The

value of the security right will decrease if the value of the oil in the tank goes down and correspondingly increase if the value of the oil in the tank goes up. This reflects commercial expectations, as it puts the secured creditor in the same position that the secured creditor would have been in if the oil had not been commingled in the tank with other oil in the first place.

99. Paragraph 3 applies a slightly different rule to products, consistent with the Secured Transactions Guide (see chap. II, para. 94). If the rule in paragraph 2 were to apply to security rights in assets that are transformed into a product, then this would provide the secured creditor with a windfall gain, if the value of the finished product is greater than the value of its components (e.g. because of value that is added by the debtor's production efforts including the labour of its employees). For this reason, paragraph 3 provides instead that a security right in an asset that is transformed into a product is limited to the value of the asset immediately before it became part of the product. So, if encumbered flour worth €100 is mixed with yeast to make bread worth €500, the security right is limited to €100.

Article 12. Extinguishment of security rights

100. Article 12 deals with the extinguishment of security rights, which triggers the obligation of a secured creditor in possession to return an encumbered asset or of a secured creditor who has registered a notice of its security right to register an amendment or cancellation notice (see art. 54 of the Model Law and art. 20, para. 3 (c), of the Model Registry Provisions). Under article 12, a security right is extinguished only where there is full payment or other satisfaction of all secured obligations and there is no longer any commitment of the secured creditor to extend further credit secured by the security right. For example, if a security right secures an amount owed under a revolving credit agreement, the security right is not extinguished where temporarily there is no amount outstanding under the credit agreement, since there may still be a contingent secured exposure under the commitment of the secured creditor to extend further credit.

B. Asset-specific rules

Article 13. Contractual limitations on the creation of security rights in receivables

101. Article 13 is based on recommendation 24 of the Secured Transactions Guide (see chap. II, paras. 106-110 and 113), which in turn is based on article 9 of the Assignment Convention. Paragraph 1 provides that an agreement limiting the grantor's right to create a security right in the receivables listed in paragraph 3 (often referred to as "trade receivables") does not prevent the creation of a security right. The rationale underlying this approach is to facilitate the use of receivables as security for credit, which is in the interest of the economy as a whole, without unduly interfering with party autonomy. This rule does not affect statutory limitations on the creation or enforcement of a security right in certain types of receivable (e.g. consumer or sovereign receivables; see art. 1, paras. 5 and 6, and paras. 33 and 34 above).

102. The agreement referred to in paragraph 1 may be entered into: (a) between the initial creditor/grantor and the debtor of the receivable; (b) where the initial creditor/grantor transfers the receivable to another person and that person creates a security right in the receivable, between that person (subsequent grantor) and the debtor of the receivable; (c) the initial creditor/grantor and the initial secured creditor; and (d) where the initial creditor/grantor transfers the asset to a person and that person creates a security right, between that person (subsequent grantor) and any secured creditor who obtained a security right from that person (subsequent secured creditor).

103. Paragraph 2 makes it clear that, while under paragraph 1 a security right is effective notwithstanding an agreement to the contrary, the grantor that creates a security right in a receivable despite that agreement (e.g. the initial creditor) is not excused from any liability to its counter-party (e.g. the debtor of the receivable) for

damages caused by breach of that contractual provision, if such liability exists under other law. Thus, under paragraph 2, if a party has sufficient negotiating power to convince its counterparty to consent to an anti-assignment agreement and a breach of that agreement by the grantor results in a loss to the debtor of the receivable, the grantor may be liable to the debtor of the receivable for damages under the law of the State whose law governs that agreements. However, the debtor of the receivable may not avoid the contract because of that breach or raise against the secured creditor (assignee) by way of set off or otherwise any claim it may have against the grantor for that breach. In addition, a secured creditor that accepts a receivable as security for credit is not liable to the debtor of the receivable for the grantor's breach just because it had knowledge of the anti-assignment agreement. Otherwise, the anti-assignment agreement would in effect prevent a secured creditor from obtaining a security right in a receivable covered by the anti-assignment agreement.

104. One of the benefits of the rules in paragraphs 1 and 2 is that a secured creditor does not have to examine each contract from which a receivable might arise to determine whether it contains a contractual limitation on assignment that may affect the effectiveness of a security right. This facilitates transactions relating to pools of receivables that are not specifically identified (with respect to which a review of the underlying transactions is possible but not necessarily time- or cost-efficient), as well as transactions relating to future receivables (with respect to which such a review would not be possible at the time of the conclusion of the security agreement, with the result that future receivables could not be accepted by lenders as security for credit).

105. Paragraph 3 limits the scope of the rule in paragraph 1 to what could broadly be described as trade receivables. It does not apply to so-called "financial receivables", "because, where the debtor of the receivable is a financial institution, even partial invalidation of an anti-assignment agreement could affect obligations undertaken by the financial institution towards third parties. Such a result is likely to have negative effects on important financing transactions, such as those involving the assignment of receivables arising from or under securities or financial contracts" (see Secured Transactions Guide, chap. II, para. 108).

106. Article 13 (read together with art. 14) is intended to apply also to anti-assignment agreements limiting the creation of a security right in any personal or property rights securing or supporting payment or other performance of an encumbered intangible asset other than a receivable or an encumbered negotiable instrument.

Article 14. Personal or property rights securing or supporting payment or other performance of encumbered receivables or other intangible assets, or negotiable instruments

107. The first sentence of article 14 reflects the thrust of recommendation 25 of the Secured Transactions Guide (see chap. II, paras. 111-122), which in turn is based on article 10 of the Assignment Convention. It is intended to ensure that a secured creditor with a security right in the types of asset described in article 14 automatically has the benefit of any personal or property right that secures or supports payment or other performance of those types of asset. For example, a personal or property right that *secures* payment of a receivable may be an accessory guarantee or a security right in immovable property; and a personal right that *supports* payment of a receivable may be an independent guarantee or a stand-by letter of credit. For example, if a receivable is secured by a personal guarantee or an encumbrance on immovable property, the secured creditor with a security right in that receivable obtains the benefit of that personal guarantee or encumbrance. This means that, if the receivable is not paid, the secured creditor may seek payment from the guarantor or enforce the encumbrance in accordance with the terms of the guarantee or the encumbrance (which may require that the secured creditor register the encumbrance; see para. 108 below).

108. The first sentence of article 14 does not include recommendation 25 (h), of the Secured Transactions Guide (which was based on art. 10, para. 6, of the Assignment

Convention). This is because it should be self-evident that the article does not apply to matters not addressed in it. Thus, to the extent that the automatic effects of the first sentence of article 14 are not impaired, 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 the Model Law (e.g. registration of an encumbrance on the relevant immovable property registry) is not affected.

109. The second sentence of article 14, which reflects the thrust of article 10, paragraph 1, of the Assignment Convention, is necessary because, in many States, some personal or property rights that might secure or support payment or other performance of a receivable or other intangible asset, or a negotiable instrument are transferable only with a new act of transfer. In such a case, the grantor is obliged to transfer the benefit of that right to the secured creditor. The reference in that sentence to the law governing the security or other supporting rights, is intended to ensure that other law that may require a new act of transfer is not overridden.

110. In addition, as this matter is addressed in articles 57-68, article 14 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.

Article 15. Rights to payment of funds credited to a bank account

111. Article 15 is based on recommendation 26 of the Secured Transactions Guide (see chap. II, paras. 123-125). It is intended to implement the principles underlying article 13 with respect to rights to payment of funds credited to a bank account (see para. 107 above). As a result of article 15, a security right may be created in a right to payment of funds credited to a bank account without the consent of the deposit-taking institution. However, as a result of article 69, the creation of such a security right does not affect the rights and obligations of the deposit-taking institution or obligate the deposit-taking institution to provide any information about the bank account to third parties (see A/CN.9/WG.VI/WP.71/Add.5, paras. 42-45).

Article 16. Negotiable documents and tangible assets covered by negotiable documents

112. Article 16 is based on recommendation 28 of the Secured Transactions Guide (see chap. II, para. 128). Its purpose is to follow existing law in which a negotiable document is treated as embodying rights in the tangible assets it covers. As a result, there is no need separately to create a security right in those tangible assets if there is a security right in the document (e.g. cargo covered by a negotiable document issued by the person in possession of tangible assets or agricultural products covered by a negotiable warehouse receipt issued by the operator of the warehouse in which those products have been deposited).

113. In view of the definition of the term “possession” in article 2, subparagraph (z), possession of tangible assets by the issuer of a negotiable document covering those assets includes possession by its representative or a person acting on behalf of the issuer (including in situations where the issuer is a carrier that uses other persons for the transportation of those assets on its behalf pursuant to a multi-modal transport contract). A security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist (subject to the terms of the security agreement) even after the document no longer covers those assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets and lapses once they are released by the issuer (see art. 26, para. 2, and para. 129 below).

Article 17. Tangible assets with respect to which intellectual property is used

114. Article 17 is based on recommendation 243 of the Intellectual Property Supplement (see paras. 108-112). It is intended to recognize the distinction between a tangible asset with respect to which intellectual property is used and the intellectual property used in connection with that asset. As a result, for a secured creditor to obtain

a security right in both a tangible asset with respect to which intellectual property is used (e.g. a personal computer or television set) and the intellectual property itself, the security agreement would need to expressly provide for it.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

115. Article 18 is based on recommendation 32 of the Secured Transactions Guide (see chap. III, paras. 19-86). It is intended to set out the primary methods for achieving third-party effectiveness of a security right. The first is registration of a notice of the security right in the Registry established under article 28. This method of third-party effectiveness is available for all types of movable asset to which the Model Law applies. The second is physical possession of the encumbered asset by the secured creditor (for the definition of the term "possession", see art. 2, subpara. (z)). This latter method, as a practical matter, is available only for tangible assets. Alternative methods of third-party effectiveness for security rights in rights to payment of funds credited to a bank account and in non-intermediated securities are set out in the asset-specific provisions of this chapter (see arts. 25-27 and paras. 127 and 131 below).

Article 19. Proceeds

116. Article 19 is based on recommendations 39 and 40 of the Secured Transactions Guide (see chap. III, paras. 87-96). It addresses the circumstances in which the security right in identifiable proceeds that is provided for in article 10 is effective against third parties.

117. Under paragraph 1, if a security right in an asset is effective against third parties, a security right in its identifiable proceeds in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account is automatically effective against third parties, that is, without the need for any further act. For example, upon the sale of inventory that is subject to a security right that is effective against third parties, a security right in receivables arising from the sale of the inventory that are identifiable proceeds is effective against third parties without any further act.

118. Unlike recommendation 39, on which this article is based, paragraph 1 does not refer to the description of the proceeds in the notice. This is a drafting change and does not constitute a change of policy. The reason for this change is that, if the proceeds are described in the notice (in line with the security agreement), they constitute original encumbered assets, and article 18 is sufficient in dealing with the third-party effectiveness of a security right in those assets (and, as a result, the secured creditor does not need to rely on article 19 for this matter).

119. For proceeds other than those covered in paragraph 1, paragraph 2 provides that, if a security right in an asset was effective against third parties, the security right in those types of proceeds (if they are identifiable) is effective against third parties for a short period of time that should be enough for the secured creditor to find out that proceeds have been generated and take action (such as 20-25 days); thereafter, the security right in the proceeds continues to be effective against third parties only if it is made effective against third parties before the expiry of that short time period by one of the methods set out in article 18 or the asset-specific provisions of this chapter. For example, if an encumbered motor vehicle is exchanged for another motor vehicle, the other motor vehicle constitutes proceeds to which paragraph 2 applies; and the security right in the second motor vehicle will cease to be effective against third parties if no registration is made prior to the expiry of the time period set out in paragraph 2.

120. It should be noted that time periods set out in the Guide to Enactment are suggestions (not recommendations) for the enacting State to use for its consideration of what would be appropriate for its own circumstances. It should also be noted that issues relating to the measurement of time (e.g. whether only working days are meant) are left to other law of the enacting State. However, depending on how those issues are addressed (e.g. whether holidays are to be included), the time periods suggested in the Guide to Enactment may need to be adjusted.

Article 20. Tangible assets commingled in a mass or transformed into a product

121. Article 20 is based on recommendation 44 of the Secured Transactions Guide. Its purpose is to ensure that a security right created in a tangible asset that is commingled in a mass or transformed into a product under article 11 is automatically effective against third parties, that is, no separate act is necessary to make the security right effective against third parties (for the priority of this security right, see art. 42 and A/CN.9/WG.VI/WP.71/Add.4, para. 48). It should be noted that preserving continuity of third-party effectiveness is relevant for the purposes of the priority rules.

Article 21. Changes in the method for achieving third-party effectiveness

122. Article 21 is based on recommendation 46 of the Secured Transactions Guide (see chap. III, paras. 120 and 121). It is intended to ensure that a security right made effective by one method (e.g. registration) may later be made effective by another method (e.g. a control agreement), and that third-party effectiveness is continuous as long as there is no gap between the time third-party effectiveness was achieved by the first and the second method.

Article 22. Lapses in third-party effectiveness

123. Article 22 is based on recommendation 47 of the Secured Transactions Guide (see chap. III, paras. 122-127). It is intended to ensure that, if third-party effectiveness lapses, it may be re-established. In such a case, third-party effectiveness dates only from the time it is re-established.

Article 23. Continuity in third-party effectiveness upon a change of the applicable law to this Law

124. Article 23 is based on recommendation 45 of the Secured Transactions Guide (see chap. III, paras. 117-119). Under paragraph 1, if the law enacting the Model Law becomes applicable as a result, for example, of a change in the location of the encumbered asset or the grantor, a security right that was effective against third parties under the previously applicable law continues to be effective against third parties under the law enacting the Model Law for a short period of time that should be sufficient for the secured creditor to find out that the applicable law has changed and take action (such as 45-60 days).

125. This rule does not apply if the third-party effectiveness of a security right under the initially applicable law has already lapsed or lapses during the short period of time set out in paragraph 1 (b) but before the security right is made effective against third parties within that period. Thereafter, the security right continues to be effective against third parties only if, before the expiry of that period, it is made effective against third parties under the relevant provisions of the law enacting the Model Law. Under paragraph 2, if the third-party effectiveness of a security right continues (i.e. it did not lapse and the secured creditor satisfied the requirements for third-party effectiveness before the lapse and within the short period of time set out in para. 1 (b)), it dates back to the time it was first achieved under the previously applicable law. As already mentioned (see para. 123 above), if third-party effectiveness lapses, it may be re-established, but third-party effectiveness dates from the time it is re-established.

Article 24. Acquisition security rights in consumer goods

126. Article 24 is based on recommendation 179 of the Secured Transactions Guide (see chap. IX, paras. 125-128). An acquisition security right in consumer goods is automatically effective against third parties if the purchase price of the consumer goods is below an amount to be specified by the enacting State. While this limitation is intended to exempt from registration only low-value consumer transactions, for it to be meaningful, it must be set at a reasonably high price (for the question whether a buyer acquires its rights free of an acquisition security right that is automatically effective against third parties, see art. 34, para. 9, and A/CN.9/WG.VI/WP.71/Add.4, para. 21). That price should not be so high as to prevent a consumer from encumbering his or her assets to obtain credit, but not too low either to make it necessary for a secured creditor to register a notice of its security right. For example, the price could be several times the cost of registration or amount to the cost of typical durable household goods, or could be set at a level that would not justify the cost of enforcement of a security right.

B. Asset-specific rules

Article 25. Rights to payment of funds credited to a bank account

127. Article 25 is based on recommendation 49 of the Secured Transactions Guide (see chap. III, paras. 138-148). It adds to the methods set out in article 18 three asset-specific methods of achieving the third-party effectiveness of a security right in a right to payment of funds credited to a bank account. First, if the secured creditor is the deposit-taking institution with which the account is held, no additional action is required for a security right to become effective against third parties. Second, the security right is effective against third parties upon conclusion of a control agreement among the grantor, the secured creditor and the deposit-taking institution (for the definition of the term "control agreement", see art. 2, subpara. (g) (ii)). Third, the security right is effective against third parties if the secured creditor becomes the account holder. The precise action required for the secured creditor to become the account holder depends on the relevant law of the enacting State.

Article 26. Negotiable documents and tangible assets covered by negotiable documents

128. Article 26 is based on recommendations 51-53 of the Secured Transactions Guide (see chap. III, paras. 154-158). It addresses the relationship between the third-party effectiveness of a security right in a negotiable document and the third-party effectiveness of a security right in the tangible assets covered by the document.

129. Under paragraph 1, if a security right in a negotiable document (which extends to the assets covered by the document under article 16) is effective against third parties, the security right in the assets covered by the document is also effective against third parties for as long as the assets are covered by the document. Under paragraph 2, possession of the document is sufficient to make the security right in the assets covered by the document effective against third parties.

130. Under paragraph 3, the security right in an asset 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 (such as 5 days) after the secured creditor relinquishes the possession of the document or the assets covered by the document for the purpose of enabling the grantor to deal with those assets. In paragraph 3, the words "or the asset covered by the document", which did not appear in recommendation 53, were added for clarification as to what would happen in actual practice; and the words "physical actions like loading and unloading", which appeared in that recommendation, were deleted on the understanding that the words "dealing with the asset" are sufficiently broad to cover not only transactions like sale and exchange but also physical actions like loading and unloading.

Article 27. Uncertificated non-intermediated securities

131. Article 27 is a new provision that does not correspond to any of the recommendations of the Secured Transactions Guide, which did not apply to security rights in any type of securities (see rec. 4 (c)). It addresses the methods, other than registration of a notice, by which a security right in uncertificated non-intermediated securities may be made effective against third parties. First, the security right may be made effective against third parties by notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained by the issuer or by another person on behalf of the issuer for the purpose of recording the name of the holder of securities (the enacting State should choose the method that would be best in line with its legal system; and if both methods are used in an enacting State, that State may choose to retain them both). Second, as in the case of a security right in a right to payment of funds credited to a bank account, the conclusion of a control agreement (between the grantor, the secured creditor and the issuer) with respect to the encumbered securities will result in the security right in those securities being effective against third parties.

Additional third-party effectiveness method for negotiable instruments and non-intermediated securities

132. Under article 19 of the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930; the "Geneva Uniform Law"), "when an endorsement contains the statements 'value in security' ('valeur en garantie'), 'value in pledge' ('valeur en gage'), or any other statement implying a pledge, the holder may exercise all the rights arising out of the bill of exchange, but an endorsement by him has the effects only of an endorsement by an agent". 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, according to which "if an endorsement contain the words "value in security, or any other words indicating a pledge, the endorsee is a holder who: (a) may exercise all rights arising out of the instrument …".

133. An enacting State that has enacted the Geneva Uniform Law (or the Bills and Notes Convention) may wish to include: (a) this rule in its enactment of the Model Law (as a rule of creation and/or third-party effectiveness of a security right in negotiable instruments and non-intermediated securities); and (b) a rule dealing with the comparative priority of such a security right. Another option would be to leave the matter to articles 46, paragraph 2, 49, paragraph 3, and 51, paragraph 5, under which such a holder of a negotiable instrument or a non-intermediated security would take its rights free of, or unaffected by, any security right. A further option would be to leave the matter to the relevant domestic law rule dealing with the hierarchy between domestic law and an international convention (see para. 70 above).

E. Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

(A/CN.9/914 and Add.1-6)

[Original: English]

Contents

Preface

At its forty-eighth session, in 2015, the Commission considered and approved the substance of article 26 of chapter IV of the draft Model Law on Secured Transactions and articles 1-29 of the draft Registry Act.[1]

At that session, the Commission also agreed that a guide to enactment of the Model Law should be prepared and referred that task to Working Group VI (Security Interests).[2]

At its forty-ninth session, in 2016, the Commission considered and adopted the UNCITRAL Model Law on Secured Transactions (the decision of the Commission and the relevant General Assembly resolution are contained in annexes I and II respectively).[3]

At that session, the Commission also noted that the Guide to Enactment was already at an advanced stage and was an extremely important text for the implementation and interpretation of the Model Law, and gave Working Group VI up to two sessions to complete its work and submit the Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session in 2017.[4]

At its thirtieth and thirty-first sessions in December 2016 and February 2017, Working Group VI approved the substance of the draft Guide to Enactment.[5]

[At its fiftieth session, in 2017, the Commission considered and adopted the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions (the decision of the Commission and the relevant General Assembly resolution are contained in annexes III and IV respectively).[6]]

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[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 214. The draft Model Law and the draft registry Act are contained in documents A/CN.9/852 and A/CN.9/853.

[2] Ibid., para. 216.

[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 17-118. The draft Model Law, including the draft Model Registry-related Provisions, is contained in documents A/CN.9/884 and Add.1-4; the draft Guide to Enactment of the Model Law is contained in documents A/CN.9/885 and Add.1-4; and the compilation of comments by States is contained in documents A/CN.9/886, A/CN.9/887 and Add.1.

[4] Ibid., paras. 121 and 122.

[5] The reports of the Working Group are contained in documents A/CN.9/899 and A/CN.9/904. During these sessions, the Working Group considered documents A/CN.9/WG.VI/WP.71/Add.1-6 and A/CN.9/WG.VI/WP.73. Earlier versions of the Guide to Enactment are contained in documents A/CN.9/WG.VI/WP.66 and Add.1-4 and A/CN.9/WG.VI/WP.69 and Add.1-2.

[6] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), para. […]. The draft Guide to Enactment is contained in documents A/CN.9/914 and Add.1-6. For the earlier project of UNCITRAL on security interests (1975-1980), see http://www.uncitral.org/uncitral/uncitral_texts/security_past.html.

I. Purpose of the Guide to Enactment

1. The Guide to Enactment is intended to explain briefly the thrust of each provision of the UNCITRAL Model Law on Secured Transactions (the "Model Law") and its relationship with the corresponding recommendation(s) of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide")[7] and other UNCITRAL texts on secured transactions,[8] including the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"),[9] the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (the "Intellectual Property Supplement"),[10] and the UNCITRAL Guide on the Implementation of a Security Rights Registry (the "Registry Guide").[11]

2. A number of the provisions of the Model Law indicate that a State enacting the Model Law (the "enacting State") is required to make a decision or choose among several options. The Guide to Enactment is also intended to explain the import of these decisions or choices and thus assist enacting States in making those decisions or choices.[12] To avoid unnecessary repetition, the Guide to Enactment incorporates by reference the relevant recommendations and commentary contained in the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide, rather than repeating them.

3. The Guide to Enactment is primarily directed to executive and legislative branches of Governments. However, it may also provide useful insight to other users of the text, such as judges, arbitrators, practitioners and academics. It has been prepared by the Secretariat at the request of the Commission,[13] and is based on the deliberations and decisions of the Commission and Working Group VI.[14]

II. Purpose of the Model Law

4. The Model Law is designed to assist States in implementing the recommendations of the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide with respect to security rights in movable assets. The overall objective of those texts and the Model Law is to increase the availability of and decrease the cost of credit by providing for an effective and efficient secured transactions law (see Secured Transactions Guide, rec. 1 (a)). Like those texts, the Model Law is based on the assumption that, to the extent that a secured creditor is entitled to rely on the value of the encumbered asset for the payment of the secured obligation, the risk of non-payment is reduced and this is likely to have a beneficial impact on the availability and the cost of credit. It should also be noted that, like those texts, the Model Law is intended to be useful to both States that currently do not have efficient and effective secured transactions laws and States that already have such laws but wish to modernize them, and harmonize them with the laws of other States

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[7] United Nations publication, Sales No. E.09.V.12.

[8] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 215 and 216.

[9] General Assembly resolution 56/81, annex (United Nations publication, Sales No. E.04.V.14).

[10] United Nations publication, Sales No. E.11.V.6.

[11] United Nations publication, Sales No. E.14.V.6.

[12] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 216.

[13] See footnote 1 above.

[14] The reports of the Working Group on its work during the six sessions devoted to the preparation of the Model Law are contained in documents A/CN.9/796, A/CN.9/802, A/CN.9/830, A/CN.9/836, A/CN.9/865 and A/CN.9/871. During those sessions, the Working Group considered documents A/CN.9/WG.VI/WP.57 and Add.1 to 4, A/CN.9/WG.VI/WP.59 and Add.1, A/CN.9/WG.VI/WP.61 and Add.1 to 3, A/CN.9/WG.VI/WP.63 and Add.1 to 4, A/CN.9/WG.VI/WP.65 and Add.1 to 4, and A/CN.9/WG.VI/WP.68 and Add.1 and 2. For the reports of the Commission on its work during the two sessions it devoted to the Model Law and the document considered by the Commission during those sessions, see footnotes 1 and 3 above.

that have modern secured transactions laws that are generally consistent with the Model Law (see Secured Transactions Guide, Introduction, para. 1).

III. The Model Law as a tool for modernizing and harmonizing laws

5. In general, States that incorporate the Model Law into their national law are advised to adhere as much as possible to its uniform text. This can help the enacting State to obtain the full economic benefit of the legal system envisioned by the Model Law, to avoid unintended consequences that may follow when a change in one provision has unforeseen effects elsewhere in the law, and to gain the benefits flowing from the harmonization of its secured transactions law with that of other States. This does not deprive enacting States of any necessary flexibility as the Model Law provides options and leaves a number of matters to enacting States.

6. Examples of flexibility in the Model Law include the following: (a) the Model Law draws the attention of the enacting State to the need to adjust certain terms used in the Model Law to ensure that they are meaningful in the context of local law (e.g. "authorized deposit-taking institution", "movable property", "immovable property" and "securities"; see art. 2, subparas. (c), (u) and (hh)); (b) several provisions of the Model Law refer within square brackets to issues that are left to the enacting State (e.g. art. 1, para. 3 (e)); (c) other provisions of the Model Law include options from which the enacting State is able to choose (e.g. art. 6, para. 3); (d) the Model Law leaves it to the enacting State to decide how to clarify in its enactment of the Model Law that the general rules are subject to the asset-specific rules (see footnote 4 of the Model Law); (e) the Model Law leaves it to the enacting State to decide whether to implement the Model Registry Provisions in its enactment of the Model Law, in a separate statute or in another type of legal instrument (see footnote 8 of the Model Law); and (f) the Model Law leaves it to the enacting State to decide whether to incorporate the conflict-of-laws provisions of the Model Law in its enactment of the Model Law or in a separate law addressing conflict-of-laws issues generally (see footnote 36 of the Model Law).

7. The enacting State may need to make some changes to the Model Law in order to adapt it to its national legal system. Any modification, however, should not depart from the fundamental provisions of the Model Law, such as those implementing the functional, integrated and comprehensive approach to secured transactions (e.g. art. 1, para. 1, and art. 2, subpara. (kk)), the protection of the grantor and the debtor of the receivable (e.g. art. 1, paras. 5 and 6), the right of the parties to structure their security agreement as they wish to meet their needs (e.g. art. 3), the notice registration system (e.g. art. 18), the priority between a security right and the right of a competing claimant (e.g. art. 29) and the right to enforce a security right without application to a court or other authority while protecting the rights of the grantor and other parties with rights in the encumbered asset (e.g. art. 77, para. 3, and art. 78, para. 3). Otherwise, the enacting State will not be able to obtain the full economic benefits to be derived from the Model Law or achieve the harmonization of its law with the law of other States that enact the Model Law (for the harmonization of the enactment of the Model Law with other laws of the enacting State, see para. 8 below).

8. In enacting the Model Law, States will also need to consider whether complementary amendments to other related laws (e.g. contract, property, insolvency, civil procedure and electronic commerce law) are required to ensure the overall coherence of its national law (see Secured Transactions Guide, Introduction, paras. 80-83). For example, it is extremely important that the insolvency law of the enacting State recognizes the effectiveness of a security right, its priority and its enforceability in the case of the grantor's insolvency (for the treatment of security rights in insolvency, see Secured Transactions Guide, chap. XII). In addition, enacting States will need to consider: (a) harmonization with the existing concepts and drafting styles (see Secured Transactions Guide, Introduction, paras. 73-89); and (b) transition issues, including the preparation of an official commentary, model notice forms and

agreements, the organization of educational programmes for users of the new law and the introduction of a case law reporting system if one is not already in place (see Secured Transactions Guide, Introduction, paras. 84-89).

9. Unlike an international convention, model laws do not require enacting States to notify the United Nations or other enacting States of their enactment. However, States are strongly encouraged to inform the UNCITRAL secretariat of their enactment of the Model Law (or indeed any other model law resulting from the work of UNCITRAL). This information will be made available on the UNCITRAL website to publicize the fact that the enacting State has adopted an international standard and will assist other States in their consideration of the Model Law.

IV. Main features of the Model Law

A. Relationship of the Model Law with the secured transactions texts of UNCITRAL

10. The Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide contain detailed commentary and recommendations on the issues that need to be addressed in a modern law on secured transactions. However, they are lengthy texts and States will need assistance in transforming their recommendations into concrete legislative language. The Model Law responds to this need. By providing concrete legislative language, the Model Law also provides a higher level of uniformity than a guide.

11. The Model Law reflects the policies embodied in the recommendations of the Secured Transactions Guide, the Intellectual Property Supplement and the Registry Guide. Differences in formulation between those recommendations and corresponding provisions of the Model Law are generally due to the legislative nature of the Model Law and are briefly explained in the relevant parts of the Guide to Enactment.

12. For reasons explained below in the relevant parts of the Guide to Enactment, the Model Law also addresses, in a manner that is consistent with the goals and the policies of the Secured Transactions Guide and the other texts of UNCITRAL on secured transactions, matters that were not addressed in a recommendation, or even discussed in those texts (e.g. security rights in non-intermediated securities). Conversely, certain matters that were addressed in the Secured Transactions Guide are excluded from the scope of the Model Law (e.g. security rights in the right to receive the proceeds under an independent undertaking) or are not addressed specifically (e.g. security rights in attachments to encumbered movable assets or immovable property).

13. The provisions of the Model Law on security rights in receivables are substantially based on the recommendations of the Secured Transactions Guide, which in turn are based on the Assignment Convention. Even if a State that does not yet have an efficient and modern secured transactions law ratifies or accedes to the Convention, it will need to enact the Model Law as well, because: (a) the Convention applies only to security rights and outright transfers of receivables; (b) subject to limited exceptions, the Convention applies only to the assignment of international receivables and the international assignment of receivables (see art. 1, para. 1); (c) the Convention explicitly refers important matters (i.e. third-party effectiveness and priority) to the applicable domestic law, that is, the law of the assignor's location (see art. 22); and (d) the Convention leaves other issues (e.g. the form of the assignment) to domestic law.

14. Conversely, a State enacting the Model Law will be well advised to ratify or accede to the Convention as well, in order to promote effective international receivables financing, in particular as a convention provides a higher level of uniformity and transparency than a model law. States that are parties to a convention have the same law, except to the extent the convention allows reservations, while States enacting a model law have compatible but rarely exactly the same laws. As an

example of the benefits that can flow from ratification or accession to the Convention, it should be noted that exporters often face difficulty in obtaining financing based on receivables arising from the sale of exported goods because lenders in the exporter's State are unwilling to extend credit secured by receivables owed by customers located in States with whose laws the lenders are not familiar, or are only prepared to extend such credit at a higher cost, which small- and medium-size enterprises may not be able to afford. If both the enacting State (where the assignor and the assignee are located) and the State where the debtors of the receivables arising from the sale of exported goods are located ratify or accede to the Convention, lenders will be more willing to extend receivables financing to the exporters and at more affordable cost, because they will understand the legal rules that apply to the receivables owed to the exporters and thus will be more confident that they will be able to collect them.

B. Key objectives and fundamental policies of the Model Law

15. As already mentioned (see para. 4 above), the overall economic objective of the Model Law is the same as that of the Secured Transactions Guide (see Secured Transactions Guide rec. 1 and Introduction, paras. 43-59). Depending on its drafting method and technique, the enacting State may wish to consider including the key objectives of the Model Law in a preamble or other similar statement accompanying its enactment of the Model Law. That statement could be used in interpreting and in filling gaps in the Model Law (see para. 77 below).

16. The same is true for the fundamental policies of the Model Law and the Secured Transactions Guide (see Secured Transactions Guide, Introduction, paras. 60-72). One of these fundamental policies is a functional, integrated and comprehensive approach to secured transactions, under which any right created by agreement in any type of movable asset to secure the performance of an obligation is treated as a security right for the purposes of triggering the application of the Model Law, regardless of the terms used by the parties to describe their agreement (e.g. pledge, charge, transfer of title for security purposes, retention-of-title sale or financial lease; see Secured Transactions Guide, Introduction, para. 62, chap I, paras. 110-112, and chap. IX, paras. 60-84).

17. The enacting State may also wish to consider producing an official commentary or guide to its enactment of the Model Law for use by courts and legal practitioners in interpreting and applying the law (see Secured Transactions Guide, Introduction, para. 86). This is likely to be particularly helpful if the Model Law introduces significant changes to the enacting State's previous secured transactions laws. Such a guide could explain the intent of particular provisions, in particular if they deviate significantly from the previous law, and, where necessary, provide concrete examples. Even more importantly, such an official commentary or guide could explain the fundamental principles that underlie the Model Law, such as the functional, integrated and comprehensive approach to secured transactions referred to in the previous paragraph. As the Guide to Enactment discusses all these and other relevant issues (either directly or by reference to the Secured Transactions Guide), the enacting State's commentary or guide could refer to the Guide to Enactment and the Secured Transactions Guide to allow its courts to obtain interpretative guidance from the international source from which its law was derived.

V. Assistance from the UNCITRAL secretariat

A. Assistance in drafting legislation

18. In the context of its training and assistance activities, the UNCITRAL secretariat assists States with technical consultations for the preparation of legislation based on the Model Law. The same assistance is brought to Governments considering legislation based on other UNCITRAL model laws (e.g. the UNCITRAL Model Law

on Cross-Border Insolvency),[15] or considering adhesion to one of the international trade law conventions prepared by UNCITRAL (e.g. the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)[16] and the Assignment Convention).

19. Further information concerning the Model Law and other model laws and conventions developed by UNCITRAL, may be obtained from the UNCITRAL secretariat at the address below:

International Trade Law Division, Office of Legal Affairs
United Nations
Vienna International Centre
P.O. Box 500
A-1400 Vienna, Austria
Telephone: (+43-1) 26060-4060 or 4061
Telecopy: (+43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet home page: www.uncitral.org

B. Information on the interpretation of legislation based on the Model Law

20. The UNCITRAL secretariat welcomes comments concerning the Model Law and the Guide to Enactment, as well as information concerning enactment of legislation based on the Model Law. Once enacted, the Model Law will be included in the CLOUT information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws that have emanated from the work of UNCITRAL. The purpose of the system is to promote international awareness of the legislative texts formulated by UNCITRAL and to facilitate their uniform interpretation and application. The UNCITRAL secretariat publishes, in the six official languages of the United Nations, abstracts of decisions and arbitral awards. In addition, upon individual request and subject to any copyright and confidentiality restrictions, the UNCITRAL secretariat makes available to the public all decisions and arbitral awards on the basis of which the abstracts were prepared. The system is explained in a user's guide that is available from the UNCITRAL secretariat in hard copy (A/CN.9/SER.C/GUIDE/1/Rev.2) and on the above-mentioned Internet home page of UNCITRAL.

VI. Article-by-article remarks

Chapter I. Scope of application and general provisions

Article 1. Scope of application

21. Article 1 is based on recommendations 1-7 of the Secured Transactions Guide (see chap. I, paras. 1-4, 13-15 and 101-112). It is intended to set out the various types of transaction and asset covered by the Model Law (see art. 1, paras. 1-4), as well as to clarify the relationship between the Model Law and other law (see art. 1, paras. 5 and 6). Generally, the Model Law follows the same functional, integrated and comprehensive approach to secured transactions as the Secured Transactions Guide. Thus, the Model Law applies to security rights, that is, to property rights in movable assets, created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated them as security rights (see art. 1, para. 1, and the definition of the term "security right" in art. 2, subpara. (kk)). However, there are some differences between the scope of the Model Law and the scope of the Secured Transactions Guide (see paras. 22-31 below).

[15] United Nations publication, Sales No. E.14.V.2.
[16] United Nations publication, Sales No. E.97.V.12.

22. Like recommendation 3 of the Secured Transactions Guide and article 1, paragraph 1, of the Assignment Convention, article 1, paragraph 2, of the Model Law also applies to outright transfers of receivables by agreement that are used in financing transactions, such as factoring. The main reason for this approach is the need for the same third-party effectiveness and priority rules to apply to both outright transfers of and security rights in receivables because: (a) financing against receivables is sometimes done by an outright transfer of the receivables rather than the creation of a security right in the receivables; and (b) it is sometimes difficult to determine at the outset of a transaction whether it will be held to involve an outright transfer of or the creation of a security right in the receivables (see Secured Transactions Guide, chap. I, paras. 25-31). While most modern secured transactions laws generally follow this approach, some laws exclude certain types of outright transfers of receivables that do not function as financing transactions, such as: (a) outright transfers of receivables for collection purposes where the transferee essentially acts only as a representative or trustee of the transferor; and (b) outright transfers of receivables as part of the sale of the business out of which they arose (unless the former owner remains in apparent control of the business), where the potential for other outright transferees or secured creditors to be misled is limited.

23. Unlike the Secured Transactions Guide which covered security rights in the right to receive payment under an independent undertaking (see rec. 2 (a)), the Model Law excludes from its scope security rights in both the right to receive and the right to request payment under an independent guarantee or letter of credit, whether commercial or standby (see art. 1, para. 3 (a)). The reason for this exclusion is that implementation of the relevant recommendations of the Secured Transactions Guide would have made the Model Law unduly complex. Enacting States interested in dealing with security rights in those types of asset are encouraged to implement the relevant recommendations of the Secured Transactions Guide (recs. 27, 50, 107, 127, 176 and 212).

24. Like recommendation 4 (b) of the Secured Transactions Guide, to the extent that the provisions of the Model Law are inconsistent with law relating to intellectual property, article 1, paragraph 3 (b), of the Model Law defers to the enacting State's law relating to intellectual property. This limitation is unnecessary if the enacting State has already coordinated the Model Law and its law relating to intellectual property or plans to do so in the context of the overall reform of its secured transactions law.

25. Unlike recommendation 4 (c) of the Secured Transactions Guide which excludes from its scope all types of securities, article 1, paragraph 3 (c), excludes only intermediated securities. The reasons for this approach are that: (a) non-intermediated securities often are part of commercial finance transactions (in which, for example, it is common for the lender to obtain a security right in shares in the borrower's wholly-owned subsidiaries or the shares of the borrower itself); (b) there are wide divergences among national regimes in this regard; and (c) security rights in non-intermediated securities are not addressed in any other uniform law text and thus no guidance is provided to States with regard to such securities. Conversely, security rights in intermediated securities are excluded as the nature of such securities and their importance for the functioning of financial markets raise a broad range of issues that merit special legislative treatment and are addressed in other uniform law texts (see Secured Transactions Guide, chap. 1, paras. 37 and 38).[17]

26. Article 1, paragraph 3 (d), excludes payment rights under or from financial contracts governed by netting agreements, including foreign exchange transactions, because they raise complex issues that require special rules (see Secured Transactions Guide, chap. I, para. 39).

[17] Such as the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009; the "Unidroit Securities Convention") and the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary (The Hague, 2006; the "Hague Securities Convention").

27. Combining the policy of recommendations 4 (a) and 7 of the Secured Transactions Guide, article 1, paragraph 3 (e), provides that the enacting State may exclude further types of asset (or transaction) to the extent that the matters that are addressed in the Model Law are governed by other law of the enacting State. The reason for this approach is to avoid inadvertently creating gaps (where that other law does not govern an issue addressed in the Model Law) or overlaps (where that other law governs an issue that is addressed in the Model Law as well). Assets that may be excluded from the scope of the Model Law in article 1, paragraph 3 (e) are, for example, assets that are subject to specialized secured transactions and registration regimes. Enacting States that do have such regimes with respect to assets that may be covered by the Model Law (e.g. ships, vehicles, aircraft or intellectual property) will have to consider a number of issues, including the following: (a) whether registration with respect to security rights in those types of asset should take place in the security rights registry, in the specialized registry or in both; (b) if registration may take place in both registries, coordination of the relevant registries (see Secured Transactions Guide, chap. IV, para. 117, and Registry Guide, paras. 66 and 70) and coordination of the relevant third-party effectiveness and priority rules (see Secured Transactions Guide, recs. 43 and 77, subpara. (a); see also Registry Guide, paras. 23, 30 and 65); (c) the priority of acquisition security rights in consumer goods that are effective automatically (see art. 24; and Secured Transactions Guide, chap. IX, paras. 125-128, and rec. 181); and (d) the determination of law that is applicable to security rights in tangible assets subject to specialized registration (see Secured Transactions Guide, chap. X, paras. 37 and 38, as well as rec. 205).

28. Like recommendation 6 of the Secured Transactions Guide, article 1, paragraph 4, provides that, in the case of a security right in an asset covered by the Model Law (e.g. receivables), the security right extends to its identifiable proceeds (see art. 10, para. 1). This rule applies even if the proceeds are of a type of asset that is outside the scope of the Model Law (e.g. intermediated securities), except to the extent that other law applies to proceeds of that type and governs the matters addressed in the Model Law.

29. With respect to the relationship with consumer-protection law, in line with the approach followed in the Assignment Convention (see art. 4, para. 4) and in the Secured Transactions Guide (see rec. 2 (b)), article 1, paragraph 5, is intended to preserve the application of consumer-protection law that protects a grantor or a debtor of an encumbered receivable (see also art. 1, para. 6, which preserves statutory limitations in general). For example, under consumer-protection law, it may not be possible to create or enforce a security right in all present and future assets, employment benefits, at least up to a certain amount, or in necessary household items of a consumer, or to collect an encumbered receivable from a debtor that is a consumer. Enacting States that do not have a developed consumer-protection law may need to consider whether enactment of the Model Law should be accompanied by the enactment of such special protections for consumers. It should also be noted that the Model Law already includes certain consumer-specific rules (e.g. art. 24).

30. Following the approach of recommendation 18 of the Secured Transactions Guide, article 1, paragraph 6 is intended to preserve limitations on the creation or the enforceability of a security right in certain types of asset (e.g. employment benefits) that are based on any other statutory or case law. At the same time, it is intended to ensure that any such limitations based on the sole ground that an asset is a future asset, or a part of an asset or an undivided interest in an asset are overridden (see art. 8, subparas. (a) and (b)). However, paragraph 6 does not apply to contractual limitations on the creation or enforceability of a security right in receivables (see art. 13) or rights to payment of funds credited to a bank account (see art. 15).

31. Finally, like the Secured Transactions Guide, the general provisions of the Model Law apply to security rights in attachments to movable or immovable property, that is, movable assets that are attached to movable or immovable property without losing their separate identity and thus becoming part of the movable or immovable property to which they have been attached (see Secured Transactions Guide, Terminology). However, unlike the Secured Transactions Guide, the Model Law does

not include specific provisions on security rights in attachments to movable or immovable property. Such provisions were not included in the Model Law to avoid making it even longer. In view of the importance of attachments, enacting States are encouraged to consider whether to include in their enactments of the Model Law provisions based on the relevant recommendations of the Secured Transactions Guide (see recs. 21, 25, 43, 48, 87, 88, 164, 165, 184, 195 and 196).

Article 2. Definitions and rules of interpretation

32. Article 2 contains definitions and rules of interpretation with respect to most key terms used in the Model Law. [18] Other terms are defined or explained in various articles of the Model Law. For example, the term "judgment creditor" is defined in article 37, paragraph 1, of the Model Law. Comments are not included below on all terms but only on those that are not self-explanatory or those that are not sufficiently explained in the Secured Transactions Guide, on the terminology of which article 2 is based (see Secured Transactions Guide, Introduction, paras. 15-20).

33. The rules of interpretation of the Secured Transactions Guide also apply to the Model Law. For example: (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).

34. It should be noted that time periods set out in the Guide to Enactment are suggestions (not recommendations) for the enacting State to use for its consideration of what would be appropriate for its own circumstances. It should also be noted that issues relating to the measurement of time (e.g. whether only working days are meant) are left to other law of the enacting State. However, depending on how those issues are addressed (e.g. whether official holidays are to be included), the enacting State may wish to consider adjusting the time periods suggested in the Guide to Enactment.

Acquisition security right

35. An acquisition security right is a security right in a tangible asset (other than a tangible asset that embodies an intangible asset, such as a negotiable instrument; see art. 2, subparas. (b) and (ll)), or in intellectual property or the rights of a licensee that secures the grantor's obligation with respect to credit provided by a lender, seller or financial lessor to enable the grantor to acquire title to or the right to use that tangible asset or intellectual property, or those rights of a licensee in intellectual property. This definition, in conjunction with the definition of "security right", results in the security right of any lender, seller or financial lessor extending credit for the acquisition of title to or right to use an asset being treated in the Model Law as an acquisition security right. It should be noted, however, that: (a) for a security right to be an acquisition security right, the credit it secures must in fact be used for that purpose; and (b) where a security right secures both obligations incurred for the grantor to acquire a tangible asset and other obligations, that security right is only an acquisition security right to the extent it secures the obligation to pay the acquisition price, and is a non-acquisition security right to the extent it secures those other obligations.

Bank account

36. To underline the distinction between a "bank account" and a "securities account", the Model Law defines: (a) the former term as "an account maintained by an authorized deposit-taking institution to which funds may be credited or debited" (see art. 2, subpara. (c)); (b) the latter term as "an account maintained by an intermediary to whom securities may be credited or debited" (see art. 2, subpara. (ii)); and (c) the term "securities" in a manner that clearly excludes funds (see art. 2,

[18] Since the Model Registry Provisions may be enacted in a separate statute or other type of legal instrument, the term "registry" is defined both in article 2, subparagraph (ee), of the Model Law and article 1, subparagraph (k), of the Model Registry Provisions. If they are enacted as part of the Model Law, the latter provision will not be necessary.

subpara. (hh)). The term "bank account", therefore, includes any type of bank account (e.g. current or checking and savings account). The term does not include a right against the bank to payment evidenced by a negotiable instrument. The enacting State may wish to consider replacing the term "authorized deposit-taking institution" with a generic term broad enough to include any institution authorized to receive deposits in any State whose law may be applicable under article 97 of the Model Law.

Certificated non-intermediated securities

37. The term "represented" used in the definition of the term "certificated non-intermediated securities" (see art. 2, subpara. (d)) is intended to be broad enough to cover the approaches taken in different jurisdictions (e.g. "covered" or "embodied"). The term "certificate" means only a tangible document that can be subject to physical possession. Thus, non-intermediated securities represented by an electronic certificate will be uncertificated non-intermediated securities under the Model Law.

Competing claimant

38. The term "competing claimant" is principally used in the context of a potential priority dispute between a security right and the rights of another person claiming rights in the encumbered asset (see art. 2, subpara. (e)). This term includes another creditor of the grantor (secured or not) that has a right in the asset (such as a judgment creditor that has taken the steps necessary under other law of the enacting State to acquire a right in the encumbered asset), an insolvency representative in insolvency proceedings with respect to the grantor, and a buyer or other transferee, lessee or licensee of the asset.

Consumer goods

39. Unlike the definition of the term "consumer goods" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law (see art. 2, subpara. (f)) includes the word "primarily" to ensure that: (a) goods primarily used or intended to be used by the grantor for personal, family or household purposes and only incidentally for business purposes would be treated as consumer goods; and (b) goods primarily used or intended to be used by the grantor for business purposes and only incidentally for personal, family or household purposes would not be treated as consumer goods. Accordingly, it is the primary use or the primary intended use of tangible assets by the grantor that determines whether they will be classified as consumer goods, equipment or inventory. It should also be noted that the terms "consumer goods", "equipment" and "inventory" are primarily relevant to the articles on acquisition security rights (see paras. 43 and 47 below).

Control agreement

40. The term "control agreement" refers to an agreement between the grantor, the secured creditor and the issuer (in the case of securities) or the deposit taking institution (in the case of a right to payment of funds credited to a bank account), according to which the issuer or the deposit-taking institution agrees to follow the instructions of the secured creditor without the further consent of the grantor (see art. 2, subpara. (g)). A control agreement can achieve two purposes: (a) to render a security right effective against third parties (see arts. 25 and 27); and (b) to establish the priority of the secured creditor that has control (see arts. 47 and 51). In addition, a control agreement can be useful to a secured creditor as a practical matter, because it can help ensure the cooperation of the deposit-taking institution or the issuer of securities if the secured creditor needs to enforce its security right. Unlike the definition of this term in the Secured Transactions Guide, on which it is based, the definition of the term in the Model Law does not refer to a "signed writing". This difference does not reflect a policy change but rather a decision that this matter should be left to the evidentiary requirements of other law of the enacting State. In any case, a control agreement does not need to be in a single written document.

Default

41. The term "default" is defined in a generic way to mean the debtor's failure to pay or otherwise perform the secured obligation and anything else that constitutes default under the agreement between the grantor and the secured creditor. What exactly constitutes failure to perform (e.g. a day's or a month's delay to pay) is a matter for the agreement between the parties and the law applicable to that agreement.

Encumbered asset

42. Any movable asset to which the Model Law applies may be an encumbered asset. In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, the term also includes a receivable that is the subject of an outright transfer by agreement.

Equipment

43. Unlike the definition of the term "equipment" in the Secured Transactions Guide on which it is based, the definition of the term in the Model Law includes the word "primarily" to clarify that: (a) goods used or intended to be used by a person primarily in the operation of its business and only incidentally for other purposes would be treated as equipment; and (b) goods used or intended to be used by a person primarily for other purposes and only incidentally in the operation of its business would not be treated as equipment (see art. 2, subpara. (l)). This definition also includes the words "other than inventory or consumer goods" as, depending on their primary use or primary intended use, the same type of tangible assets may be, at different times, "equipment", "consumer goods" or "inventory" (see art. 2, subparas. (f), (l) and (q), and paras. 39 above and 47 below).

Grantor

44. The definition of the term "grantor" makes clear that a grantor of a security right may be the debtor of the secured obligation or another person (e.g. the parent company of the debtor-subsidiary if the parent company creates a security right in its assets so that the subsidiary may borrow; see art. 2, subpara. (o) (i)). A person who is not the owner of an asset but has rights in the asset (e.g. rights under a lease or licence agreement; see art. 2, subpara. (o) (i)) may also be a grantor of a security right, not in the asset, but in the rights that that person has in that asset. A buyer or other transferee of an encumbered asset that acquires the asset subject to a security right is also treated as a grantor, even if that person did not create a security right in the asset (see art. 2, subpara. (o) (ii)). In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, the term "grantor" also includes a transferor under an outright assignment of receivables (see art. 2, subpara. (o) (iii)).

Insolvency representative

45. As the term "insolvency representative" is used only in the definition of the term "competing claimant" it is not defined in the Model Law. For the same reason, the term "insolvency proceedings", which is referred to in articles 2, subparagraph (e) (iii), 35 and 94 (and other insolvency-related terms, such as the term "insolvency estate"), is not defined in the Model Law. Those terms are defined though in the Secured Transactions Guide (see Introduction, para. 20) and the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"; see Introduction, para. 12). In particular the term "insolvency representative" is defined in a sufficiently broad manner to include the person responsible for administering insolvency proceedings or supervising the debtor and the debtor's affairs (see Insolvency Guide, part two, chap. III, paras. 11-18 and 35).

Intangible asset

46. The term "intangible asset" includes receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank

account and uncertificated non-intermediated securities, as well as any other movable asset that is not a tangible asset (see art. 2, subpara. (p)).

Inventory

47. The term "inventory" refers to tangible assets held by the grantor for sale or lease in the ordinary course of the grantor's business. Thus, it is the purpose for which tangible assets are held by the grantor that determines whether they constitute inventory (see paras. 39 and 43 above). The term "work in process" includes "semi-processed materials". In States in which a licence of tangible assets is possible, the term "lease of tangible assets" in this definition includes the licence of tangible assets (see art. 2, subpara. (q)).

Mass and product

48. The Model Law distinguishes between a "mass" and a "product". A "mass" is a combination that arises when two or more tangible assets of the same type are commingled in such a way that they lose their separate identity. This could happen, for example, when a quantity of oil from one source is pumped into a storage tanker that already contains some oil from another source, or when a truckload of one farmer's wheat is put into a grain silo that already contains wheat from another farmer. In contrast, a "product" arises when a tangible asset is physically transformed so that it loses its separate identity, or is physically united with one or more tangible assets so that they lose their separate identities, through a production or manufacturing process; for example, when gold is used to make a ring, or when flour and yeast are used to make bread. The distinction is relevant to articles 11 and 33.

Money

49. The term "money" includes not only the national currency of the enacting State but also the currency of any other State (see art. 2, subpara. (t)). However, it does not include virtual currency, as virtual currency is not national currency and is intangible (and money is in principle defined as a tangible asset; see art. 2, subpara. (ll)). Currency must qualify as a legal tender to constitute money. Rights to payment of funds credited to a bank account and negotiable instruments are distinct concepts in the Model Law. They are not included in the term "money".

Movable asset

50. The enacting State may wish to ensure that this definition captures anything that its laws consider to be an asset other than immovable property (see art. 2, subpara. (u)). Depending on its legal tradition and the terminology used, the enacting State may also wish to consider whether to replace the terms "movable asset" and "immovable property" with the equivalent concepts in its law (e.g. "personal property" and "land").

Non-intermediated securities

51. The term "non-intermediated securities" refers to securities (i.e. shares and bonds) that are not credited to a securities account (see art. 2, subparas. (w) and (ii)). This definition is structured around the definition of the term "intermediated securities" in the Unidroit Securities Convention (see art. 1, subpara. (b)). It refers only to "rights", in contrast to the language used in the Unidroit Securities Convention which refers to "rights or interests", for reasons of consistency with the terminology of the Model Law in which the term "right" is a broad term that covers any right or interest. It should be noted that, if securities are held by an intermediary directly with the issuer (e.g. the intermediary is registered in the books of the issuer as the holder of the securities), these securities in the hands of the intermediary are non-intermediated, even though equivalent securities credited by the intermediary to a securities account in the name of a customer are intermediated securities in the hands of the customer.

Notification of a security right in a receivable

52. The definition of the term "notification of a security right in a receivable" (see art. 2, subpara. (v)) is based on the definition of the term "notification of the assignment" in the Secured Transactions Guide (see Introduction, para. 20, and rec. 118), which in turn is based on the definition of that term in the Assignment Convention (see art. 5, subpara. (d)). The requirement for the identification of the encumbered receivable and the secured creditor in the definition of that term in the Assignment Convention is reflected in article 62, paragraph 1, of the Model Law as it states a substantive rule on the effectiveness of a notification of a security right, a matter that is already addressed in that article.

Possession

53. The definition of the term "possession" (see art. 2, subpara. (z)) is based on the definition of that term in the Secured Transactions Guide. The words "directly or indirectly" that were included in recommendation 28 of the Secured Transactions Guide were not included in this definition or article 16 which is based on that recommendation, because the definition is sufficiently broad to cover situations in which a person holds a tangible asset through another person (e.g. the issuer of a negotiable document may hold it through various persons responsible to perform parts of a multimodal transport contract).

Priority

54. The definition of the term "priority" (see art. 2, subpara. (aa)) is based on the definition of that term in the Secured Transactions Guide, which is in turn partly based on the definition of that term in the Assignment Convention (see art. 5, subpara. (g)). Like the definition in the Secured Transactions Guide, this definition does not include in the concept of "priority" the steps required to establish third-party effectiveness. Like the definition in the Assignment Convention and unlike the definition in the Secured Transactions Guide, however, this definition refers directly to the right of a person in preference to the right of another person.

Proceeds

55. The term "proceeds" in the Model Law (see art. 2, subpara. (bb)) has the same meaning as in the Secured Transactions Guide. It is important to note that it covers: (a) proceeds of the sale or other disposition, lease or licence of an encumbered asset (broadly understood); (b) proceeds of proceeds (e.g. if receivables are generated by the sale of encumbered inventory and those proceeds are deposited to a bank account, the right to payment of those funds constitutes proceeds of proceeds); and (c) natural fruits (e.g. the calves of encumbered cows) or civil fruits (e.g. rents arising from the lease of encumbered assets). It should be noted that the secured creditor's right in proceeds is limited by various provisions of the Model Law. For example, under article 10, paragraph 1, the security right extends only to identifiable proceeds (see also art. 19, para. 2). It should also be noted that the terms "revenues", "dividends" and "distributions", which were included in the definition of this term in the Secured Transactions Guide, have been deleted on the understanding that they are covered by the term "civil fruits".

56. The term is not limited to proceeds received by the original grantor but includes proceeds received by a transferee of an encumbered asset when that transferee is treated as a grantor because it acquired the encumbered asset subject to the security right. For example, where A creates a security right in its assets in favour of X and then A transfers the assets to B who acquires its rights in the assets subject to X's security right and B subsequently sells the assets to C for a price of €1,000 payable at a future date, the receivable arising from the sale by B to C constitutes proceeds covered by X's security right. The reason for this approach is that, otherwise, a transferee of an encumbered asset that acquired the asset subject to the security right (in the example, B) could sell the asset further (in the example, to C) and keep the proceeds free of the security right (the issue of third-party transferees who are likely to search the registry under the name of their immediate transferor and who do not

find a notice about a security right created by the first in a chain of transferors is dealt with in art. 26 of the Model Registry Provisions).

57. It should be noted that proceeds may arise as a result of an action taken by a person other than the grantor or a transferee. Thus, article 10, paragraph 2, applies to funds in a bank account that are transferred to another bank account (even if the transfer takes place at the instigation of the deposit-taking institution) as the funds in the second bank account are "proceeds".

Receivable

58. The term "receivable" means a contractual or non-contractual right to payment of money (e.g. the right of a seller to the payment of a purchase price, the right of a lender for the payment of a loan or the right of a person for damages for breach of law; see art. 2, subpara. (dd)). However, it does not include rights to payment evidenced by a negotiable instrument, rights to payment of funds credited to a bank account and rights to payment under a non-intermediated security, as they are treated as distinct types of asset that are subject to different asset-specific rules.

Secured creditor

59. The term "secured creditor" refers to the person that has a security right. In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, it includes a transferee of a receivable in an outright transfer by agreement (e.g. a factor in a factoring contract).

Secured obligation

60. The term "secured obligation" includes any obligation secured by a security right, including obligations arising from credit extended by a lender, a retention-of-title seller or a financial lessor (see art. 2, subpara. (gg)). It covers both monetary and non-monetary obligations, obligations already incurred at the time of the extension of the credit and obligations incurred thereafter, if the security agreement so provides. However, as there is no secured obligation in an outright transfer of a receivable, the provisions that refer to a "secured obligation" do not apply to an outright transfer of a receivable.

Securities

61. The definition of the term "securities" in the Model Law is narrower than the definition of the term in article 1, subparagraph (a), of the Unidroit Securities Convention (see art. 2, subpara. (hh)). The reason is that, while a broad definition is appropriate for the purposes of that Convention, a broad definition for the purposes of the Model Law could result in an overlap with the terms "money", "receivable", "negotiable instrument" and other generic intangible assets and thus could cause uncertainty as to the regime applicable to security rights in those types of asset. In any case, the enacting State would need to coordinate the definition of the term "securities" in its secured transactions law with the definition of the term in its law governing the transfer of securities. It should be noted that the definition of the term "securities" may also differ from the definition of the term as it is used in laws that regulate trading in securities, as the policies that inform the content of that definition may be different from the policies of the Model Law (e.g. the policy behind the definition of that term in those other laws is not to regulate security rights but rather to protect public markets).

Securities account

62. The definition of the term "securities account" in the Model Law is derived from article 1, subparagraph (c), of the Unidroit Securities Convention (see art. 2, subpara. (ii)). It refers to an account, which is maintained with a securities intermediary and to which securities may be credited or debited.

Security agreement

63. The term "security agreement" is defined as an agreement that provides for the creation of a security right (see art. 2, subpara. (jj)). In line with the functional, integrated and comprehensive approach followed in the Model Law (see para. 16 above), the parties need not use any special words; and even if the parties use wording that does not refer to security rights, the agreement is a security agreement if it provides for the creation of a property right in a movable asset that secures the payment or other performance of an obligation. As an example, it should be noted that, under the functional approach that characterises a transaction as a secured transaction if that is its functional effect, a retention-of-title sale *provides for the creation* of a security right in the asset that is the subject of the sale. Similarly, transactions such as transfers of property for security purposes, hire-purchase agreements and financial leases are treated as secured transactions, and an agreement that provides for them is a security agreement. In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, the term "security agreement" also includes an agreement for the outright transfer of receivables.

Security right

64. The term "security right" is defined as a property right that is created by agreement to secure payment or other performance of an obligation. In line with the functional, integrated and comprehensive approach followed in the Model Law (see paras. 16 and 63 above), it is irrelevant whether or not the parties have denominated the right as a security right or whether or not the parties have used wording that refers to a security right. In order to apply the provisions of the Model Law to outright transfers of receivables by agreement, the term "security right" also includes the right of the transferee under an outright transfer of a receivable by agreement.

Tangible asset

65. The term "tangible asset" in the Model Law includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities (some of these being intangible rights embodied in a document) except for the purposes of certain articles that contain rules that are not appropriate for those types of asset. For example, the term "tangible asset" in the definition of the term "mass" (see art. 2, subpara. (s)) does not include negotiable documents because negotiable documents cannot be part of a mass as they are not interchangeable with other documents and are not fungible.

Writing

66. The definition of the term "writing" is intended to ensure that where the term is referred to in the Model Law (see arts. 2 (g) and (x), 6, para. 3, 63, paras. 2 and 9, 65, paras. 1 and 2, 77, para. 2 (a), 78, para. 4 (b) and 80, paras. 1, 2 (b), 4 and 6, of the Model Law, as well as arts. 2, paras. 1-3, and 20, para. 5, of the Model Registry Provisions), this reference will include electronic communications (see art. 2, subpara. (nn)). The definition is based on recommendation 11 of the Secured Transactions Guide, which in turn is based on article 9, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention"). However, the Model Law does not include an article on the electronic equivalent of signature along the lines of recommendation 12 of the Secured Transactions Guide, which is in turn based on article 9, paragraph 3, of the Electronic Communications Convention. For the purpose of those articles of the Model Law that refer to signature (see arts. 6, para. 1, and 65, paras. 1 and 2), the enacting States may wish to consider whether to include in their enactment of the Model Law an article along the lines of recommendation 12 of the Secured Transactions Guide.

International obligations of the enacting State

67. The Model Law leaves to the enacting State the issue whether international treaties (such as the United Nations Convention on Contracts for the International Sale of Goods ("CISG") or the Assignment Convention when it enters into force) prevail over domestic law. For example, in the case of a conflict between a provision of the Model Law and a provision of any treaty or other form of agreement to which an enacting State is a party with one or more other States, the requirements of the treaty or agreement may prevail (see art. 3 of the UNCITRAL Model Law on Cross-Border Insolvency). Such an approach may need to be limited to international treaties that directly address matters governed by the Model Law (e.g. the creation, third-party effectiveness, priority and enforcement of a security right in movable assets). In other States, in which international treaties are not self-executing but require internal legislation in order to become enforceable law, such an approach might be inappropriate or unnecessary (see Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, paras. 91-93).

Article 3. Party autonomy

68. Article 3 is based on article 6 of the Assignment Convention (the first sentence of which is based on art. 6 of CISG) and recommendation 10 of the Secured Transactions Guide. Paragraph 1 is intended to reflect the principle that, with the exception of the provisions listed in paragraph 1, parties are free to vary by agreement the effect of the provisions of the Model Law as between them. An agreement derogating from the provisions of the Model Law or varying its terms may be between any two parties whose rights are affected by the Model Law (e.g. between the secured creditor and the grantor, between the secured creditor and a competing claimant, between the secured creditor and the debtor of an encumbered receivable, or between the grantor and the debtor of the receivable).

69. The provisions listed in paragraph 1 are not subject to contrary agreement as permitting such an agreement with respect to these issues could result in abuse or uncertainty. In particular, article 4 sets out the general standard of conduct with which the parties have to comply when exercising their rights and performing their obligations under the Model Law; article 6 deals with the creation of a security right and sets out the requirements for the creation of a security right; article 9 deals with the standard for the description of encumbered assets and secured obligations; articles 53 and 54 deal with obligations of the party in possession to exercise reasonable care and the obligation of the secured creditor to return the encumbered assets; and article 72, paragraph 3, deals with the variation of rights under the enforcement provisions of the Model Law, and only permits variation by the grantor or the debtor after default, in order to avoid abuse at the time of the conclusion of the security agreement. Articles 85-87, in the chapter of conflict of laws, deal with the law applicable to property law matters; determination of the law applicable to such matters is generally not left to a choice of law by the parties, in order to ensure certainty with regard to the law applicable to property law matters, which are bound to involve rights of third parties.

70. Paragraph 2 reiterates the general principle of contract law that an agreement between two parties cannot affect the rights of a third party. For example: (a) if there are two debtors of a receivable that is an encumbered asset, and one of the two debtors agrees, pursuant to article 65, not to raise certain defences against a secured creditor, that agreement does not bind the other debtor of the receivable; and (b) if there are three secured creditors with a security right in the same encumbered assets whose order of priority is A, B and C, and secured creditor A agrees to subordinate its security right to that of secured creditor C, the rights of secured creditor B cannot be affected. The reason for reiterating this general principle of contract law is that the Model Law deals with relationships in which an agreement between two parties (e.g. the grantor and the secured creditor) might otherwise appear to have an undue impact on the rights of third parties. It should be noted, however, that, under article 61, the impact of an agreement between the grantor of a security right in a

receivable and the secured creditor is limited in the sense that, for example, the debtor of a receivable may have to pay a person other than the initial creditor.

71. Paragraph 3 makes clear that, if other law allows the parties to a security agreement to agree to resolve any dispute with respect to their security agreement or a security right created by that agreement by arbitration, mediation, conciliation and online dispute resolution, nothing in the Model Law affects that agreement. Paragraph 3 is based on the understanding that, the use of alternative dispute resolution mechanisms to resolve such disputes is important, in particular for developing countries and countries with inefficient judicial enforcement mechanisms, to attract investment, as inefficient judicial enforcement mechanisms are likely to have a negative impact on the availability and the cost of credit. It should be noted that paragraph 3 is intended to recognize the importance of alternative dispute resolution mechanisms and does not prejudice the resolution of questions relating to arbitrability, the protection of rights of third parties or access to justice.

Article 4. General standards of conduct

72. Article 4 is based on recommendation 131 of the Secured Transactions Guide (see chap. VIII, para. 15). It is included in chapter I on the scope of application and general provisions, rather than in chapter VII on enforcement, as it states standards of conduct with which parties should comply when they exercise their rights and perform their obligations under the Model Law, even outside the context of enforcement. Under article 4, any person must exercise all its rights and perform all its obligations under the Model Law in good faith and in a commercially reasonable manner. A breach of this obligation may result in liability for damages and other consequences that are left to the relevant law of the enacting State.

73. The concept of "commercial reasonableness" is not defined in the Model Law but it typically refers to actions that a reasonable person might take in circumstances that would be similar to those encountered in a particular case by any person that had rights and obligations under the Model Law. Inasmuch as there is typically no single course of action that all reasonable persons would take in a particular situation, depending on the circumstances and the type of right or obligation involved, a range of actions may meet the objective standard of "commercial reasonableness". It should be noted that meeting the specific standards referred to in other provisions of the Model Law (e.g. art. 78, para. 4, according to which notice is to be given within a short period of time) should generally be sufficient to meet the general standards of conduct referred to in this article. It should also be noted that, article 4 is listed in article 3 as a mandatory law rule. As a result, the duty to act in good faith and in a commercially reasonable manner cannot be waived or varied by agreement.

Article 5. International origin and general principles

74. Article 5 is inspired by article 7 of the CISG and based on article 3 of the UNCITRAL Model Law on Electronic Commerce, article 4 of the UNCITRAL Model Law on Electronic Signatures and article 2A of the UNCITRAL Model Law on International Commercial Arbitration. It is intended to provide guidance in the interpretation of the Model Law. The expected effect of article 5 is to limit the extent to which the Model Law, once incorporated in national law, would be interpreted only by reference to concepts of the national law.

75. The purpose of paragraph 1 is to draw the attention of any person that might be called to interpret and apply the Model Law (or a national law implementing the Model Law) to the fact that the provisions of the Model Law, while implemented as part of a national law, should be interpreted by reference to its international origin in order to ensure uniformity in the interpretation of the Model Law and the observance of good faith in all enacting States. It should be noted that the term "good faith" in paragraph 1 identifies a consideration to be taken into account in the interpretation of the Model Law. In contrast, in article 4, the term sets a standard to be complied with by parties in the exercise of their rights and the performance of their obligations under the Model Law.

76. Under paragraph 2, gaps in a law implementing the Model Law are to be filled by reference to the general principles on which the Model Law is based. As already noted (see para. 15 above), the overall economic objective of the Model Law is the same as that of the Secured Transactions Guide, to promote low-cost credit by enhancing the availability of secured credit (for a complete statement and discussion of the key objectives of an effective and efficient secured transactions law, see Secured Transactions Guide rec. 1 and Introduction, paras. 43-59).

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Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Chapter II. Creation of a security right

A. General rules

1. This chapter, and several other chapters, contain a section A with general rules and a section B with asset-specific rules. This approach is followed to avoid overloading the general rules with asset-specific details. The general rules apply to all assets, but, in relation to certain types of asset, they apply subject to the asset-specific rules. The enacting State may wish to consider whether to include in the general rules of each chapter of its law cross-references to the asset-specific rules in that chapter or a provision that states explicitly that the general rules in each chapter are subject to the asset-specific rules in that chapter (see footnote 4 of the Model Law). The rules in each chapter are divided between general and asset-specific rules also to make it easier for an enacting State to leave out of its law any asset-specific rules that they may not need. If an enacting State concludes that it does not need all of the asset-specific rules, it may decide to leave some of them out of its law. However, not all asset-specific rules should be omitted. For example, some asset-specific rules deal with core commercial assets such as receivables and no enacting State should omit them from its enactment of the Model Law.

Article 6. Creation of a security right and requirements for a security agreement

2. Article 6 is based on recommendations 13-15 of the Secured Transactions Guide (see chap. II, paras. 12-37). Its purpose is to deal with the creation of a security right, as well as the form and the minimum content of a security agreement, so as to enable parties to obtain a security right in a simple and efficient manner (see Secured Transactions Guide, rec. 1, subpara. (c)). A security right is created by agreement, for the content of which there are no requirements other than those listed in paragraphs 3 and 4, and for the conclusion of which no terms of art or special words need be used.

3. Under paragraph 1, an agreement is sufficient to create a security right, if the grantor has either a right in the asset to be encumbered or the power to encumber it. The grantor has the right to encumber an asset where the grantor is the owner of the asset. Where the grantor is in possession of the asset on the basis of an agreement with the owner, such as a lease agreement, the grantor has a right to create a security right in its rights under the lease agreement. Also, the creditor of a receivable has the power (rather than the right) to create a security right in the receivable, even if it has already transferred the receivable. That power is implicit in the fact that the third-party effectiveness and priority rules of the Model Law apply to outright transfers of receivables by agreement. If a transferee in an outright transfer of a receivable does not make its right effective against third parties before a subsequent competing secured creditor does so, then the transferee will not have priority over the competing secured creditor. If the transferee made its right effective against third parties before the subsequent competing secured creditor, then technically the transferor will still have the power to encumber (or transfer) the receivable in favour of the subsequent secured creditor, but as a practical matter there would be no value left in the receivable for the subsequent secured creditor to benefit from. It should also be noted that, in line with article 13, paragraph 1, the creditor of a receivable to which that article applies has a right in the receivable or the power to encumber it despite any anti-assignment agreement with the debtor of the receivable.

4. Paragraph 2 clarifies that a security agreement may provide for the creation of a security right in future assets (i.e. assets produced or acquired by the grantor after the conclusion of the security agreement; see definition in art. 2, subpara. (n)). However, the security right is created in the future assets only when the grantor acquires rights in them or the power to encumber them.

5. Paragraph 3 states that writing is required for a security agreement and sets out what the writing needs to contain. Written form provides objective evidence of the existence of a security agreement and its key terms (for other reasons why a security agreement might be required, see Secured Transactions Guide, chap. II, para. 30).

From the two alternative wordings set out in the chapeau of paragraph 3 within square brackets, the enacting State may wish to select the one that is most fitting to its contract law and its law of evidence. If the enacting State retains the words "concluded in", a security agreement that is not in written form will not be effective, except as provided in article 6, paragraph 4. For example, a written offer by the grantor that is subsequently accepted by the secured creditor by conduct would not be a sufficient security agreement under this option. If the enacting State retains the words "evidenced by", however, a security agreement that is not in written form may still be effective if its terms are evidenced by a written document that is signed by the grantor (e.g. an oral agreement that is subsequently confirmed in writing).

6. Depending on what it considers as the most efficient financing practices and reasonable assumptions of credit market participants, the enacting State may wish to consider whether to retain paragraph 3 (d). One approach is to retain paragraph 3 (d) to facilitate the grantor's access to secured financing from other creditors in situations where the value of the assets encumbered by the prior security right exceeds the maximum amount indicated in the notice registered with respect to that right. Another approach is to leave out paragraph 3 (d), in order to facilitate the grantor's access to credit by the first secured creditor (for the comparative advantages and disadvantages of the two approaches, see Secured Transactions Guide, chap. IV, paras. 92-97, and Registry Guide, paras. 200-204). If paragraph 3 (d) is retained, the enacting State will need to make provision for the maximum amount to appear on the notice (see art. 8, subpara. (e), of the Model Registry Provisions). Otherwise the benefits of retaining paragraph 3 (d) may not be realized because the maximum amount may not be known to potential subsequent creditors (art. 24, para. 7, of the Model Registry Provisions would also need to be retained to deal with an error in stating the maximum amount on the notice).

7. Under paragraph 4, where the secured creditor is in possession of the encumbered asset, an oral security agreement with the grantor is sufficient. The fact that the secured creditor is in possession of the encumbered asset is itself evidence that the asset may be encumbered (see Secured Transactions Guide, chap. II, para. 33).

Article 7. Obligations that may be secured

8. Article 7 is based on recommendation 16 of the Secured Transactions Guide (see chap. II, paras. 38-48). It is primarily intended to ensure that future, conditional and fluctuating obligations may be secured. The main reason for this approach is to facilitate modern financing transactions, in the context of which an agreement may provide that disbursements of funds by the secured creditor may be made at different times depending on the needs of the grantor (e.g. revolving credit facilities for the grantor to buy inventory). This approach does not necessarily mean that grantors may not be protected from excessive economic commitments. For example, depending on the grantor's financing needs, a maximum amount may be set for which the security right may be enforced (see art. 6, para. 3 (d), and para. 6 above).

Article 8. Assets that may be encumbered

9. Article 8 is based on recommendation 17 of the Secured Transactions Guide (see chap. II, paras. 49-57 and 61-70). It is primarily intended to ensure that future movable assets, parts of movable assets and undivided rights in movable assets, generic categories of movable assets, as well as all the movable assets a person has, may be the subject of a security agreement (for the time when a security right in future assets is created, see art. 6, para. 2, and para. 4 above).

10. The fact that future movable assets may be subject to a security right does not mean that statutory limitations on the creation or enforcement of a security right in specific types of movable asset (e.g. employment benefits in general or up to a specific amount) are overridden (see art. 1, para. 6).

11. The fact that all the movable assets a person has may be subject to a security right so as to maximize the amount of credit that may be available and improve the

terms of the credit agreement does not mean that other creditors of the grantor are necessarily unprotected. The protection of other creditors (within and outside insolvency proceedings) is a matter of other law and is referred to in articles 35 and 36 of the Model Law.

Article 9. Description of encumbered assets and secured obligations

12. Article 9 is based on recommendation 14 (d) of the Secured Transactions Guide (see chap. II, paras. 58-60). In view of its importance, the standard for the description of encumbered assets in a security agreement is presented in a separate article (rather than in art. 6, para. 3, as it was done in rec. 14 (d) of the Secured Transactions Guide, on which art. 6, para. 3, of the Model Law is based).

13. Paragraph 1 sets out the general standard that must be met in the description of encumbered assets and the secured obligations for a security agreement to be effective (the description must reasonably allow their identification). Paragraph 2 is intended to ensure that, if a security right is created in a generic category of assets under article 8, subparagraph (c), a generic description in the security agreement, such as "all inventory" or "all receivables", is sufficient to meet the standard in paragraph 1 (see Secured Transactions Guide, chap. II, paras. 58-60). Paragraph 3 sets out the same standard for the description of secured obligations.

Article 10. Rights to proceeds and commingled funds

14. Article 10 is based on recommendations 19 and 20 of the Secured Transactions Guide (see chap. II, paras. 72-89). Paragraph 1 is intended to ensure that, unless otherwise agreed by the parties (as this article is not listed in art. 3 as a mandatory law rule), a security right in an asset automatically extends to its identifiable proceeds (for the definition of "proceeds" see art. 2, subpara. (bb)). The rationale for this rule is that it reflects the normal expectations of the parties and ensures that the secured creditor is sufficiently protected. This protection includes the secured creditor's right to enforce its security right both in the encumbered assets (provided that the transferee acquired its rights in the assets subject to the security right) and in the proceeds, although only up to the amount of the secured obligation. Otherwise, a grantor could effectively deprive a secured creditor of its security by disposing of the encumbered assets either to a person who would take free of the security right or to a person from whom those assets could not easily be recovered.

15. By way of example, where the original encumbered asset is inventory, receivables generated from the sale of the inventory are proceeds (if they are identifiable). If upon payment of the receivables the funds received are deposited in a bank account, the right to payment of the funds credited to the bank account is also proceeds (proceeds of proceeds of the inventory). So, too, is the right to payment pursuant to a negotiable instrument (e.g. a cheque issued by the holder of that bank account to buy new inventory), as well as a negotiable warehouse receipt issued by the warehouse in which new inventory may be stored. It should be noted that, if the description of the encumbered asset is comprehensive and covers all assets received in respect of the original encumbered asset, they will all be original encumbered assets, and thus article 6, which governs the creation of a security right in original encumbered assets would apply, and not article 10.

16. Paragraph 2 introduces an exception to the identifiability requirement in paragraph 1. A security right in an asset extends to its proceeds in the form of funds that are commingled with other funds even though the funds that are proceeds cannot be identified separately from the funds that are not proceeds (see para. 2 (a)). Paragraph 2 (b) limits that security right to the value of the proceeds immediately before they were commingled. So, if a sum of €1,000 is deposited in a bank account and at the time of enforcement the bank account has a balance of €2,500, the security right extends only to the sum of €1,000.

17. Paragraph 2 (c) deals with situations in which the balance in the bank account fluctuates and, at some point of time, is less than the value of the proceeds deposited (in the example set out in the previous paragraph, less than €1,000). In such a case,

the security right extends only to the lowest value between the time when the proceeds were commingled and the time the security right in the proceeds is claimed. So, if in the example given in the previous paragraph, the balance in the account immediately after the proceeds were deposited was €1,500, then it went down to €500 and at the time of enforcement was €750, the security right extends only to €500 (i.e. the lowest intermediate balance). The rationale for this approach is that, if the balance of a bank account falls, funds deposited later are unlikely to be proceeds of the original encumbered assets.

18. Where funds in a bank account are original encumbered assets, and the funds are transferred into another bank account and mixed with other funds in that other account, then the funds as transferred into that other account will be "proceeds" of the original funds, and thus the rules in article 10 will apply.

Article 11. Tangible assets commingled in a mass or transformed into a product

19. Article 11 is based on recommendations 22 and 91 of the Secured Transactions Guide (see chap. II, paras. 90-95 and 100-102, and chap. V, paras. 117-123). It accomplishes two related objectives. First, it transforms a security right in a tangible asset that is commingled in a mass or transformed into a product into a security right in the mass or product. Second, it limits the value of that security right by reference to the quantity (in the case of a mass) or the value (in the case of a product) of the tangible asset commingled in the mass or product. Article 33 then addresses situations in which more than one secured creditor has a claim to a mass or product as a result of a security right in its components. Paragraph 1 is intended to ensure that a security right in a tangible asset that is commingled in a mass or transformed into a product will continue in the mass or product.

20. Paragraph 2 provides that a security right in a tangible asset that extends to a mass is limited to the same proportion of the mass that the asset bore to the quantity of the entire mass immediately after it was commingled in the mass. So, if a secured creditor has a security right in 100,000 litres of oil that is commingled with 50,000 litres of oil in the same tank so that the mass comprises 150,000 litres of oil, the security right is limited to two-thirds of the oil in the tank (i.e. 100,000 litres). If the quantity of the oil in the tank decreases, however, the secured creditor will still have security in two-thirds of the oil in the tank. For example, if one half of the oil leaks out so that only 75,000 litres remain, then the secured creditor will have a security right in two-thirds of those 75,000 litres, namely in 50,000 litres only. The value of the security right will decrease if the value of the oil in the tank goes down and correspondingly increase if the value of the oil in the tank goes up. This reflects commercial expectations, as it puts the secured creditor in the same position that the secured creditor would have been in if the oil had not been commingled in the tank with other oil in the first place.

21. Paragraph 3 applies a slightly different rule to products, consistent with the Secured Transactions Guide (see chap. II, para. 94). If the rule in paragraph 2 were to apply to security rights in assets that are transformed into a product, then this may provide the secured creditor with a windfall gain, if the value of the finished product is greater than the value of its components (e.g. because of value that is added by the debtor's production efforts including the labour of its employees). For this reason, paragraph 3 provides instead that a security right in an asset that is transformed into a product is limited to the value of the asset immediately before it became part of the product. So, if encumbered flour worth €100 is mixed with yeast to make bread worth €500, the security right is limited to €100.

Article 12. Extinguishment of security rights

22. Under article 12, a security right is extinguished only where there is full payment or other satisfaction of all secured obligations and there is no longer any commitment of the secured creditor to extend further credit secured by the security right. For example, if a security right secures an amount owed under a revolving credit agreement, the security right is not extinguished where temporarily there is no amount

outstanding under the credit agreement, since there may still be a contingent secured exposure under the commitment of the secured creditor to extend further credit.

23. The extinguishment of a security right triggers the obligation of a secured creditor in possession to return the encumbered asset or of a secured creditor that has registered a notice of its security right to register an amendment or cancellation notice (see art. 54 of the Model Law and art. 20, para. 3 (c), of the Model Registry Provisions).

B. Asset-specific rules

Article 13. Contractual limitations on the creation of security rights in receivables

24. Article 13 is based on recommendation 24 of the Secured Transactions Guide (see chap. II, paras. 106-110 and 113), which in turn is based on article 9 of the Assignment Convention. Paragraph 1 provides that an agreement limiting the grantor's right to create a security right in the receivables listed in paragraph 3 (often referred to as "trade receivables") does not prevent the grantor from creating a security right. The rationale underlying this approach is to facilitate the use of receivables as security for credit, which is in the interest of the economy as a whole, without unduly interfering with party autonomy. This rule does not affect statutory limitations on the creation or enforcement of a security right in certain types of receivable (e.g. consumer or sovereign receivables; see art. 1, paras. 5 and 6, and A/CN.9/914, paras. 29 and 30).

25. The agreement referred to in paragraph 1 may be entered into: (a) between the initial creditor/grantor and the debtor of the receivable (e.g. where the encumbered receivable is the claim of a seller for the outstanding balance of the purchase price, an agreement between the seller and the buyer); (b) where the initial creditor/grantor transfers the receivable to another person and that person creates a security right in the receivable, between that person (subsequent grantor) and the debtor of the receivable (e.g. where the seller sells the receivable to A and A creates a security right in favour of B, an agreement between A and the debtor of the receivable); (c) between the initial creditor/grantor and the initial secured creditor (e.g. an agreement between the seller and A); and (d) where the initial creditor/grantor transfers the receivable to a person and that person creates a security right, between that person (referred to in art. 13 as a subsequent grantor) and any secured creditor who obtained a security right from that person (referred to in art. 13 as a subsequent secured creditor; e.g. an agreement between A and B).

26. Paragraph 2 makes it clear that, while under paragraph 1 a security right is effective notwithstanding an agreement to the contrary, a person that creates a security right in a receivable in breach of that agreement is not excused from any liability to its counter-party for damages caused by breach of that contractual provision, if such liability exists under other law. Thus, for example, if the debtor of a receivable has sufficient negotiating power to convince the creditor of the receivable to consent to an anti-assignment agreement, and the creditor creates a security right in the receivable despite that agreement in a way that results in a loss to the debtor of the receivable, the creditor may be liable to the debtor of the receivable for damages under the law of the State whose law governs that agreement. However, the debtor of the receivable may not avoid the contract because of that breach or raise against the secured creditor (including an outright transferee) by way of set off or otherwise any claim it may have against the grantor (including an outright transferor) for that breach. In addition, a secured creditor that accepts a receivable as security for credit is not liable to the debtor of the receivable for such a breach just because it had knowledge of the anti-assignment agreement. Otherwise, the anti-assignment agreement would in effect prevent a secured creditor from obtaining a security right in a receivable covered by the anti-assignment agreement.

27. One of the benefits of the rules in paragraphs 1 and 2 is that a secured creditor does not have to examine each contract from which a receivable might arise to

determine whether it contains a contractual limitation on assignment that may affect the effectiveness of a security right. This facilitates transactions relating to pools of receivables that are not specifically identified (with respect to which a review of the underlying transactions is possible but not necessarily time- or cost-efficient), as well as transactions relating to future receivables (with respect to which such a review would not be possible at the time of the conclusion of the security agreement, with the result that future receivables could not be accepted by lenders as security for credit).

28. Paragraph 3 limits the scope of the rule in paragraph 1 to what could broadly be described as trade receivables. It does not apply to so-called "financial receivables", "because, where the debtor of the receivable is a financial institution, even partial invalidation of an anti-assignment agreement could affect obligations undertaken by the financial institution towards third parties. Such a result is likely to have negative effects on important financing transactions, such as those involving the assignment of receivables arising from or under securities or financial contracts" (see Secured Transactions Guide, chap. II, para. 108).

29. Article 13 (read together with art. 14) is intended to apply also to anti-assignment agreements limiting the creation of a security right in any personal or property rights securing or supporting payment or other performance of an encumbered intangible asset other than a receivable or an encumbered negotiable instrument.

Article 14. Personal or property rights securing or supporting payment or other performance of encumbered receivables or other intangible assets, or negotiable instruments

30. The first sentence of article 14 reflects the thrust of recommendation 25 of the Secured Transactions Guide (see chap. II, paras. 111-122), which in turn is based on article 10 of the Assignment Convention. It is intended to ensure that a secured creditor with a security right in the types of asset described in article 14 automatically has the benefit of any personal or property right that secures or supports payment or other performance of those types of asset. For example, a personal or property right that *secures* payment of a receivable may be an accessory or secondary guarantee (or suretyship) or a security right in immovable property; and a personal right that *supports* payment of a receivable may be an independent guarantee or a stand-by letter of credit. For example, if a receivable is secured by a personal guarantee or a security right in movable or immovable property, the secured creditor with a security right in that receivable obtains the benefit of that personal guarantee or security right. This means that, if the receivable is not paid, the secured creditor may seek payment from the guarantor or enforce the security right in accordance with the terms of the guarantee or the security right (which may require the secured creditor to register, if no registration was previously made, or make further registrations, if registration had already taken place; see para. 31 below).

31. The first sentence of article 14 does not include recommendation 25 (g) of the Secured Transactions Guide. This is because this matter is addressed in articles 57-58. Similarly, the first sentence of article 14 does not include recommendation 25 (h), of the Secured Transactions Guide (which was based on art. 10, para. 6, of the Assignment Convention). This is because it should be self-evident that the article does not apply to matters not addressed in it. Thus, to the extent that the automatic effects of the first sentence of article 14 are not impaired, 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 the Model Law (e.g. registration of an encumbrance on the relevant immovable property registry) is not affected.

32. The second sentence of article 14, which reflects the thrust of article 10, paragraph 1, of the Assignment Convention, is necessary because, in many States, some personal or property rights that might secure or support payment or other performance of a receivable or other intangible asset, or a negotiable instrument are transferable only with a new act of transfer. In such a case, the grantor is obliged to transfer the benefit of that right to the secured creditor. The reference in that sentence

to the law governing the security or other supporting rights is intended to ensure that any other law that may require a new act of transfer is not overridden.

Article 15. Rights to payment of funds credited to a bank account

33. Article 15 is based on recommendation 26 of the Secured Transactions Guide (see chap. II, paras. 123-125). It is intended to implement the principles underlying article 13 with respect to rights to payment of funds credited to a bank account (see para. 30 above). As a result of article 15, a security right may be created in a right to payment of funds credited to a bank account even if there was an agreement between the grantor and the deposit-taking institution prohibiting the creation of a security right. However, as a result of article 69, the creation of such a security right does not affect the rights and obligations of the deposit-taking institution or obligate the deposit-taking institution to provide any information about the bank account to third parties.

Article 16. Negotiable documents and tangible assets covered by negotiable documents

34. Article 16 is based on recommendation 28 of the Secured Transactions Guide (see chap. II, para. 128). Its purpose is to follow existing law in which a negotiable document is treated as embodying rights in the tangible assets it covers. As a result, there is no need separately to create a security right in those tangible assets if there is a security right in the document (e.g. cargo covered by a negotiable document issued by the person in possession of tangible assets or agricultural products covered by a negotiable warehouse receipt issued by the operator of the warehouse in which those products have been deposited).

35. In view of the definition of the term "possession" in article 2, subparagraph (z), possession of tangible assets by the issuer of a negotiable document covering those assets includes possession by its representative or a person acting on behalf of the issuer (including in situations where the issuer is a carrier that uses other persons for the transportation of those assets on its behalf pursuant to a multi-modal transport contract). A security right in a negotiable document extends to the tangible assets covered by the document and will continue to exist (subject to the terms of the security agreement) even after the document no longer covers those assets. However, effectiveness against third parties through possession of the document applies only as long as the document covers the assets and lapses once they are released by the issuer (see art. 26, para. 2, and para. 49 below).

Article 17. Tangible assets with respect to which intellectual property is used

36. Article 17 is based on recommendation 243 of the Intellectual Property Supplement (see paras. 108-112). It is intended to recognize the distinction between a tangible asset with respect to which intellectual property is used and the intellectual property used in connection with that asset. As a result, for a secured creditor to obtain a security right in both a tangible asset with respect to which intellectual property is used (e.g. a personal computer or television set) and the intellectual property itself, the security agreement would need to expressly provide for it.

Chapter III. Effectiveness of a security right against third parties

A. General rules

Article 18. Primary methods for achieving third-party effectiveness

37. Article 18 is based on recommendation 32 of the Secured Transactions Guide (see chap. III, paras. 19-86). It is intended to set out the primary methods for achieving

third-party effectiveness of a security right. The first is registration of a notice of the security right in the Registry established under article 28. This method of third-party effectiveness is available for all types of movable asset to which the Model Law applies. The second is physical possession of the encumbered asset by the secured creditor (for the definition of the term "possession", see art. 2, subpara. (z)). As intangible assets may not be the subject of physical possession, this latter method is available only for tangible assets. Alternative methods of third-party effectiveness for security rights in rights to payment of funds credited to a bank account and in non-intermediated securities are set out in the asset-specific provisions of this chapter (see arts. 25 and 27 and paras. 47 and 51 below).

Article 19. Proceeds

38. Article 19 is based on recommendations 39 and 40 of the Secured Transactions Guide (see chap. III, paras. 87-96). It addresses the circumstances in which the security right in identifiable proceeds that is provided for in article 10 is effective against third parties.

39. Under paragraph 1, if a security right in an asset is effective against third parties, a security right in its identifiable proceeds in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account is automatically effective against third parties, that is, without the need for any further act. For example, upon the sale of inventory that is subject to a security right that is effective against third parties, a security right in receivables arising from the sale of the inventory that are identifiable proceeds is effective against third parties without any further act. If those assets are described in the security agreement and the notice as original encumbered assets, article 18, which governs the third-party effectiveness of a security right in original encumbered assets, would apply, and not article 19 (this is the reason why, unlike rec. 39, on which this article is based, para. 1 does not refer to the description of the proceeds in the notice). If those assets are described in the security agreement as original encumbered assets but not in the notice, the security right in the proceeds would not be effective unless the conditions of paragraph 2 are satisfied.

40. For proceeds other than those covered in paragraph 1, paragraph 2 provides that, if a security right in an asset was effective against third parties, the security right in those types of proceeds (if they are identifiable) is effective against third parties for a short period of time that should be enough for the secured creditor to find out that proceeds have been generated and take action (such as 20-25 days); thereafter, the security right in the proceeds continues to be effective against third parties only if it is made effective against third parties before the expiry of that short time period by one of the methods set out in article 18 or the asset-specific provisions of this chapter. For example, if an encumbered motor vehicle with a specific description is exchanged for another motor vehicle with a different description, the latter motor vehicle constitutes proceeds to which paragraph 2 applies; and the security right in the latter motor vehicle will cease to be effective against third parties if no registration is made prior to the expiry of the time period set out in paragraph 2.

Article 20. Tangible assets commingled in a mass or transformed into a product

41. Article 20 is based on recommendation 44 of the Secured Transactions Guide. Its purpose is to ensure that, if an asset is subject to a security right that is effective against third parties is commingled in a mass or transformed into a product, and the security right extends to the mass or product under article 11, the security right in the mass or product will be automatically effective against third parties. In other words, no separate act is necessary to make the security right in the mass or product effective against third parties (for the priority of this security right, see art. 42). It should be noted that preserving continuity of third-party effectiveness is relevant for the purposes of the priority rules.

Article 21. Changes in the method for achieving third-party effectiveness

42. Article 21 is based on recommendation 46 of the Secured Transactions Guide (see chap. III, paras. 120 and 121). It is intended to ensure that a security right that has been made effective by one method (e.g. registration) may later be made effective by another method (e.g. a control agreement), and that third-party effectiveness is continuous as long as there is no gap between the time third-party effectiveness was achieved by the first and the second method.

Article 22. Lapses in third-party effectiveness

43. Article 22 is based on recommendation 47 of the Secured Transactions Guide (see chap. III, paras. 122-127). It is intended to ensure that, if third-party effectiveness lapses, it may be re-established. In such a case, however, the third-party effectiveness dates only from the time it is re-established.

Article 23. Continuity in third-party effectiveness upon a change of the applicable law to this Law

44. Article 23 is based on recommendation 45 of the Secured Transactions Guide (see chap. III, paras. 117-119). Under paragraph 1, if the law enacting the Model Law becomes applicable as a result, for example, of a change in the location of the encumbered asset or the grantor, a security right that was effective against third parties under the previously applicable law continues to be effective against third parties under the law enacting the Model Law for a short period of time (such as 45-60 days) to give the secured creditor an opportunity to find out that the applicable law has changed and take action.

45. This rule does not apply if the third-party effectiveness of a security right under the initially applicable law has already lapsed or lapses during the short period of time set out in paragraph 1 (b) but before the security right is made effective against third parties. Thereafter, the security right continues to be effective against third parties only if, before the expiry of that period, it is made effective against third parties under the relevant provisions of the law enacting the Model Law. Under paragraph 2, if the third-party effectiveness of a security right continues (i.e. it did not lapse and the secured creditor satisfied the requirements for third-party effectiveness before the lapse and within the short period of time set out in para. 1 (b)), it dates back to the time it was first achieved under the previously applicable law. As already mentioned (see para. 43 above), if third-party effectiveness lapses, it may be re-established, but third-party effectiveness will then only date from the time it is re-established.

Article 24. Acquisition security rights in consumer goods

46. Article 24 is based on recommendation 179 of the Secured Transactions Guide (see chap. IX, paras. 125-128). An acquisition security right in consumer goods is automatically effective against third parties if the purchase price of the consumer goods is below an amount to be specified by the enacting State. While this limitation is intended to exempt from registration only low-value consumer transactions, for it to be meaningful, it must be set at a reasonably high price. That price should not be so high as to prevent a consumer from encumbering his or her assets to obtain credit, but not so low either to make it necessary for a secured creditor to register a notice of its security right in circumstances in which it would not be commercially practicable to do so. For example, the price could be several times the cost of registration to reflect the cost of typical durable household goods (for the question whether a buyer acquires its rights free of an acquisition security right that is automatically effective against third parties, see art. 34, para. 9).

B. Asset-specific rules

Article 25. Rights to payment of funds credited to a bank account

47. Article 25 is based on recommendation 49 of the Secured Transactions Guide (see chap. III, paras. 138-148). It adds to the general methods for achieving third-party effectiveness that are set out in article 18 three asset-specific methods of achieving the third-party effectiveness of a security right in a right to payment of funds credited to a bank account. First, if the secured creditor is the deposit-taking institution with which the account is held, no additional action is required for a security right to become effective against third parties. Second, the security right is effective against third parties upon conclusion of a control agreement among the grantor, the secured creditor and the deposit-taking institution (for the definition of the term "control agreement", see art. 2, subpara. (g) (ii)). Third, the security right is effective against third parties if the secured creditor becomes the account holder. The precise action required for the secured creditor to become the account holder will depend on other factors, such as the law to which the deposit-taking institution is subject and the terms of the account agreement.

Article 26. Negotiable documents and tangible assets covered by negotiable documents

48. Article 26 is based on recommendations 51-53 of the Secured Transactions Guide (see chap. III, paras. 154-158). It addresses the relationship between the third-party effectiveness of a security right in a negotiable document and the third-party effectiveness of a security right in the tangible assets covered by the document.

49. Under paragraph 1, if a security right in a negotiable document is effective against third parties and extends to the assets covered by the document under article 16, the security right in the assets covered by the document will also be effective against third parties for as long as the assets are covered by the document. Under paragraph 2, the security right in the assets covered by the document can be made effective against third parties by possession of the document.

50. Under paragraph 3, a security right in an asset that is 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 (such as 10 days) even if possession of the document or the assets covered by the document is relinquished for the purpose of dealing with those assets. In paragraph 3, the words "or the asset covered by the document", which did not appear in recommendation 53, were added for clarification as to what would happen in actual practice; and the words "physical actions like loading and unloading", which appeared in that recommendation, were deleted on the understanding that the words "dealing with the asset" are sufficiently broad to cover not only transactions like sale and exchange but also physical actions like loading and unloading.

Article 27. Uncertificated non-intermediated securities

51. Article 27 does not correspond to any of the recommendations of the Secured Transactions Guide, as the Guide did not apply to security rights in any type of securities (see rec. 4 (c)). It addresses the methods, other than registration of a notice, by which a security right in uncertificated non-intermediated securities may be made effective against third parties. First, the security right may be made effective against third parties by notation of the security right or entry of the name of the secured creditor as the holder of the securities in the books maintained by the issuer or by another person on behalf of the issuer for the purpose of recording the name of the holder of securities. The enacting State should choose the method that best fits its legal system; and if both methods are used in an enacting State, that State may choose to retain them both. Second, as in the case of a security right in a right to payment of funds credited to a bank account, the security right may be made effective against third parties through the conclusion of a control agreement between the grantor, the

secured creditor and the issuer (for the definition of the term "control agreement", see art. 2, subpara. 2 (g) (i)).

Additional third-party effectiveness method for negotiable instruments and non-intermediated securities

52. Under article 19 of the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes (Geneva, 1930; the "Geneva Uniform Law"), "when an endorsement contains the statements 'value in security' ('valeur en garantie'), 'value in pledge' ('valeur en gage'), or any other statement implying a pledge, the holder may exercise all the rights arising out of the bill of exchange, but an endorsement by him has the effects only of an endorsement by an agent". 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, according to which "if an endorsement contains the words 'value in security', or any other words indicating a pledge, the endorsee is a holder who: (a) may exercise all rights arising out of the instrument …".

53. An enacting State that has enacted the Geneva Uniform Law (or the Bills and Notes Convention) may wish to include: (a) this rule in its enactment of the Model Law (as a rule of creation and/or third-party effectiveness of a security right in negotiable instruments and non-intermediated securities); and (b) a rule dealing with the comparative priority of such a security right. Another option would be to leave the matter to articles 46, paragraph 2, 49, paragraph 3, and 51, paragraph 5, under which such a holder of a negotiable instrument or a non-intermediated security would take its rights free of, or unaffected by, any security right. A further option would be to leave the matter to the relevant domestic law rule dealing with the hierarchy between domestic law and an international convention (see A/CN.9/914, para. 67).

(A/CN.9/914/Add.2) (Original: English)

Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Chapter IV. The registry system

Article 28. Establishment of the Registry

1. Article 28 is based on recommendations 1(f) of the Secured Transactions Guide and 1 of the Registry Guide. It provides for the establishment by the enacting State of a public registry to give effect to the provisions of the Model Law relating to the registration of notices with respect to security rights (the "Registry"). In particular, under article 18 of the Model Law, a non-possessory security right in an encumbered asset is effective against third parties, as a general rule, only if a notice with respect to the security right is registered in the Registry (see Secured Transactions Guide, chap. III, paras. 29-46 and the Registry Guide, paras. 20-25). Under article 29 of the Model Law, the time of registration, again as a general rule, is also the basis for determining the order of priority between a security right and the right of a competing claimant (see Secured Transactions Guide, chap. V, paras. 42-50, and the Registry Guide, paras. 36-46).

2. Depending on its drafting conventions, an enacting State may decide to incorporate the provisions relating to the registry system in its secured transactions law implementing the Model Law, in a separate law or other legal instrument, or in a combination thereof. To preserve flexibility for enacting States, all the relevant registry-related provisions are collected in a set of rules presented after article 28 of the Model Law and called the "Model Registry Provisions".[1]

3. These Provisions have been drafted to accommodate flexibility in registry design. That said, the Secured Transactions Guide recommends that, if possible, the Registry should be electronic in the sense of permitting information in registered notices to be stored in electronic form in a single database (see Secured Transactions Guide, rec. 54 (j)(i), and chap. IV, paras. 38-41 and 43). An electronic registry database is the most efficient and practical means to implement the recommendation of the Secured Transactions Guide that the registry record should be centralized and consolidated (see rec. 54 (e), and chap. IV, paras. 21-24).

4. Access to registry services should be electronic in the sense of permitting users to directly submit notices and search requests over the Internet or via direct networking systems (see Secured Transactions Guide, rec. 54 (j)(ii), and chap. IV, paras. 23-26 and 43). This approach eliminates the risk of registry staff error in entering the information contained in a paper notice into the registry record, facilitates speedier and more efficient access to registry services by users, and greatly reduces the operational costs of the Registry, translating into lower fees for registry users (for a discussion of these advantages and guidance on implementation, see Registry Guide, paras. 82-89).

5. The scope of application of the Model Law is limited to consensual security rights and outright transfers of receivables (see arts. 1 and 2, subpara. (kk)). While the Model Law does not recommend this approach, some States provide for the registration of notices of rights and/or preferential claims created by operation of law in favour of specified classes of creditors (e.g. the State for tax claims and employees for employment benefits; see Registry Guide, paras. 46 and 51). If the enacting State follows this approach, it will need to specify the priority effect of registration (see art. 37 of the Model Law and A/CN.9/914, para. 31; see also Secured Transactions Guide, chap. V, para. 90, and Registry Guide, para. 51).

6. In addition, some States provide for the registration of notices of judgments obtained by a creditor of a grantor and treat registration as generally giving priority to the judgment creditor over consensual security rights that are subsequently made effective against third parties by registration. If the enacting State adopts this approach, it will need to adjust its general creditor-debtor law and its version of the Model Law (see art. 37 of the Model Law and A/CN.9/914, para. 31; see also Registry Guide, para. 40).

[1] A reference to an article in this chapter is a reference to an article of the Model Registry Provisions, unless otherwise indicated.

7. Moreover, some States provide for the registration of the ownership rights of consignors and lessors under commercial consignments of inventory and long-term operating leases of tangible assets. Even though these arrangements do not function to secure an obligation, bringing them within the registration regime ensures that the consignor's or lessor's right is publicized to third parties who deal with the consigned or leased goods in the hands of the consignee or lessee (see Secured Transactions Guide, Introduction, para. 26, and Registry Guide, paras. 50 and 78).

Model Registry Provisions

Section A. General rules

Article 1. Definitions and rules of interpretation

8. Article 1 contains definitions of key terms used in the Model Registry Provisions. These terms are derived from the Registry Guide (see Registry Guide, paras. 8 and 9). If the enacting State decides to incorporate the Model Registry Provisions in its enactment of the Model Law, these definitions should be included in the provision implementing article 2 of the Model Law (with the exception of the definition of the term "registry" which is also included in art. 2, subpara. (ee); see footnote 9 of the Model Law). In general, the definitions are self-explanatory. Where elaboration is needed, it is provided in the commentary on the relevant articles below.

Article 2. Grantor's authorization for registration

9. Article 2 is based on recommendations 71 of the Secured Transactions Guide (see chap. IV, para. 106) and 7(b), of the Registry Guide (see para. 101). Paragraph 1 provides that the registration of an initial notice is ineffective unless authorized by the grantor in writing (the rule is formulated in the negative, as the effectiveness of a registration is also subject to other requirements). If the grantor's authorization covers a narrower range of encumbered assets than that described in the registered notice, the registration would be effective only with respect to the assets to the extent authorized by the grantor. To ensure that this rule does not interfere with the efficiency of the registration process, paragraph 6 confirms that the Registry is not entitled to require evidence of the existence of the grantor's authorization.

10. Paragraphs 4 and 5 confirm that: (a) the grantor's authorization need not be obtained before registration; and (b) the conclusion of a written security agreement automatically constitutes authorization without the need to include an express authorization clause. Thus, the post-registration conclusion of a security agreement will constitute retrospective "ratification" of an initially unauthorized registration only with respect to the assets covered by the security agreement.

11. Paragraph 2 requires the grantor's authorization for the registration of an amendment notice that adds encumbered assets to those described in the prior registered notice. There is no need to register an amendment notice (and thus no need to obtain the authorization of the grantor) with respect to "additional assets" that are proceeds of encumbered assets described in a registered notice if the proceeds are: (a) of a type that fall within the existing description (for example, the description covers "all tangible assets" and the grantor exchanges one type of tangible asset for another; see Secured Transactions Guide, rec. 39); or (b) "cash proceeds", that is, money, receivables, negotiable instruments or funds credited to a bank account (see art. 19, para. 1, of the Model Law).

12. Under the bracketed language in paragraph 2, the grantor's written authorization must also be obtained for the registration of an amendment notice to increase the maximum amount set out in a registered notice for which the security right to which the registration relates may be enforced. This provision is only needed in systems that require this information to be set out in the security agreement and in the registered notice (see art. 8, subpara. (e), of the Model Registry Provisions and art. 6, para. 3(d) of the Model Law).

13. Where an amendment notice seeks to add a new grantor, paragraph 3 generally requires the additional grantor's authorization to be obtained. The grantor's authorization is not required for the registration of an amendment notice to disclose a post-registration change in the identifier of the grantor for the purposes of article 25; nor is the grantor's authorization needed to register the identifier of a buyer of the encumbered assets as a new grantor for the purposes of article 26, option A or option B.

14. If the grantor did not authorize the registration of the notice, or only authorized the registration of a notice covering a narrower range of encumbered assets, or has withdrawn an initial authorization, article 20 provides a procedure by which the grantor can compel the secured creditor to register a cancellation or amendment notice, as the case may be, to reflect the terms of the actual security or other agreement, if any, between the parties.

15. Registration of an amendment notice that adds encumbered assets, increases the maximum amount or adds a new grantor takes effect only from the time of the registration of the amendment notice regardless of whether authorization was obtained before or after its registration (see art. 13, para. 1).

Article 3. One notice sufficient for multiple security rights

16. Article 3 is based on recommendations 68 of the Secured Transactions Guide (see chap. IV, para. 101) and 14 of the Registry Guide (see paras. 125 and 126). It confirms that a single registered notice is sufficient to achieve the third-party effectiveness of security rights arising under one or more security agreements between the grantor and the secured creditor. This rule applies regardless of whether the agreements are related to one another or are separate and distinct, as where, for example, the initial security agreement covered the grantor's tangible assets and the parties subsequently conclude a new security agreement creating a security right in the grantor's receivables.

17. It should be emphasized that a single registration is sufficient under article 3 only to the extent that the information in the registered notice corresponds to the content of all the security or other agreement between the parties (see Registry Guide, para. 126). If, in the above-mentioned example, the registered notice described the encumbered assets as "all the grantor's tangible assets", a new initial notice (or an amendment to the existing notice) would have to be registered for the security right in grantor's receivables under the subsequent agreement to be effective against third parties, and that notice would take effect against third parties only from the time of its registration (see arts. 13, para. 1, and 29 of the Model Law). On the other hand, if the description in the registered notice covered "all of the grantor's movable assets", it would be sufficient to achieve the third-party effectiveness of its security right under both the initial and subsequent agreements, and its priority would date from the time of the initial registration (see art. 29 of the Model Law).

Article 4. Advance registration

18. Article 4 is based on recommendations 67 of the Secured Transactions Guide (see chap. IV, paras. 98-101) and 13 of the Registry Guide (see paras. 122-124). It confirms that a registration may be made before the creation of a security right to which the notice relates. This enables a security right under a security agreement covering after-acquired assets of the grantor to be made effective against third parties by a single registration before the assets are actually acquired by the grantor and the security right comes into existence.

19. Article 4 also confirms that a registration may be made before the conclusion of any security agreement between the parties to which the notice relates. As already noted in relation to article 2 (see para. 9 above), the underlying security agreement does not have to be submitted to the Registry. Advance registration is useful because it enables a secured creditor to establish its priority ranking against competing secured creditors under the general first-to-register priority rule in article 29 of the Model Law even before the security agreement with the grantor is formally concluded. However,

advance registration does not give the secured creditor priority over other categories of competing claimants, if they acquire rights in the encumbered assets before the security agreement is actually entered into and the other requirements for creation of the security right to which the notice relates are satisfied (see, notably, arts. 34, 36 and 37 of the Model Law).

20. Advance registration may be prejudicial to the grantor identified in a registered notice if a security agreement is never concluded or covers a narrower range of assets than those described in the registered notice. To protect the grantor in this scenario, article 20 provides a procedure to enable the grantor to obtain the compulsory amendment or cancellation of the registered notice, as the case may be.

Section B. Access to registry services

Article 5. Conditions for access to registry services

21. Article 5 is based on recommendations 54, subparagraph (c), (f) and (g), and 55(b), of the Secured Transactions Guide (see chap. IV, paras. 25-228) and 4, 6 and 9 of the Registry Guide (see paras. 95-97 and 103-105).

22. Paragraphs 1 and 3 confirm that the Registry must be public in the sense that any person is entitled to register a notice or search the registry record subject only to meeting the conditions governing access. For both types of service, access requires that the registrant must submit the prescribed form of notice or search request and pay or make any arrangements to pay the prescribed fees, if any (as to the latter, see art. 33).

23. Under paragraph 1(b), a registrant, as opposed to a searcher, additionally must identify itself to the Registry in the prescribed manner. This additional requirement is aimed at assisting the person identified in a registered notice as the grantor to determine the identity of the registrant in the event that the grantor did not authorize the registration (see Registry Guide, para. 96). This consideration must be balanced against the need to ensure efficiency and speed in the registration process. Accordingly, the evidence of identity required of a registrant should be that which is generally accepted as sufficient in day-to-day commercial transactions in the enacting State (for example, an identity card, driver's licence or other state-issued official document) provided it includes the registrant's contact details.

24. If access to registry services is refused, paragraph 4 requires the Registry to communicate the specific reason (for example, the registrant failed to use the prescribed form or to pay the prescribed fee) "without delay". What this means depends on the mode by which the notice or search request is submitted to the Registry. If the system is designed to enable users to submit notices and search requests through electronic means of communication directly to the Registry, the system should be programmed to automatically communicate the reason during the registration process and display the reason on the registrant's screen. If the system also permits notices and search requests to be submitted in paper form, the registry staff will need a reasonable period of time to verify compliance with the conditions of access and prepare and communicate a response.

25. To facilitate efficient and secure access to registry services, the Registry should be organized to accept payments made electronically in a manner that ensures the confidentiality of financial information submitted by users (see Registry Guide, para. 138). To facilitate efficient access by frequent users in particular (such as financial institutions, automobile dealers or other suppliers of goods on credit, lawyers and other intermediaries), they should be given the option of setting up an account that enables them to deposit funds to pay for their ongoing requests for services.

26. To limit the risk of registration of an amendment or cancellation notice that is not authorized by the person identified in the initial notice as the secured creditor, paragraph 2 requires persons who submit an amendment or cancellation notice for registration to satisfy the prescribed secure access requirements. For example, registrants may be required to set up a password-protected account when submitting

an initial notice and submit all amendment and cancellation notices through that account. Alternatively, the system might be designed to automatically assign a unique user code to registrants upon registration of an initial notice, with that code then required to be entered on all amendment and cancellation notices submitted for registration (with respect to the effectiveness of the registration of unauthorized amendment or cancellation notices, see art. 21).

Article 6. Rejection of the registration of a notice or a search request

27. Article 6 is based on recommendations 8 and 10 of the Registry Guide (see paras. 97-99 and 106). Paragraph 1 obligates the Registry to reject the registration of a notice if no information or illegible information has been entered in any one of the mandatory designated fields in the notice. As all mandatory fields must be completed for a registered notice to be effective, this provision ensures that submitted notices that are self-evidently ineffective are never entered into the registry record. For example, art. 8, paragraph (c), requires an initial notice to include a description of the encumbered assets. If no information or only illegible information is entered in the field reserved for setting out the description, the registration will be rejected. On the other hand, the registration will be accepted if legible information is set out in the field designated for entering a description, even if the information that is entered is incorrect or incomplete, for example, the registrant mistakenly entered the address of the grantor in the designated description field.

28. Paragraph 2 obligates the Registry to reject a search request if no information or illegible information is entered in one of the designated fields for entering a search criterion. Since searchers are entitled to search by either the identifier of the grantor or the registration number assigned to the initial notice (see art. 22), it is sufficient if legible information is entered into at least one of the search criterion fields.

29. To avoid any arbitrary decisions on the part of the Registry, paragraph 3 confirms that the Registry may not reject the registration of a notice or search request where the registrant or searcher satisfies the access conditions set out in paragraphs 1 and 2 respectively.

30. Paragraph 4 requires the Registry to provide the reason for rejecting the registration of a notice or a search request without delay. As already noted (see para. 24 above), the mode of communication of the reasons depends on whether the notice or search request was submitted in paper form or through electronic means directly to the Registry.

Article 7. Information about the registrant's identity and scrutiny of the form or contents of a notice by the Registry

31. Article 7 is based on recommendations 54(d), and 55(b), of the Secured Transactions Guide (see chap. IV, paras. 15-17 and 48) and 7 of the Registry Guide (see paras. 100 and 102). Paragraph 1 obligates the Registry to maintain the identity information submitted by registrants in compliance with article 5, paragraph 1(b), and to provide that information upon request to the person identified in the registered notice as the grantor. While this information does not form part of the public or archived registry record, it nonetheless must be preserved by the Registry in a manner that enables this information to be retrieved in association with the registered notice to which it relates. This is consistent with the rationale for obtaining and preserving this information which is to assist the grantor in identifying the registrant in cases where the registration of the notice was not authorized by the grantor (see para. 22 above). In order to ensure that this objective is balanced against the need to facilitate efficiency of the registration process, paragraph 2 provides that the Registry may not require further verification of the identity information provided by a registrant under article 5, paragraph 1(b). With the same objective in mind, paragraph 3 generally prohibits the Registry from scrutinizing the form or content of notices and search requests submitted to it except to the extent needed to give effect to articles 5 and 6.

Section C. Registration of a notice

Article 8. Information required in an initial notice

32. Article 8 is based on recommendations 57 of the Secured Transactions Guide (see chap. IV, para. 65) and 23 of the Registry Guide (see paras. 157-160). It sets out the items of information required to be entered in the appropriate designated fields in an initial notice. The items of information specified in subparagraphs (a), (b) and (c) are the subject of articles 9, 10 and 11, and the reader is generally referred to the commentary on those articles. It should be noted that where a notice relates to more than one grantor or secured creditor, the required information should be entered in separate designated fields for each grantor or secured creditor.

33. Subject to its privacy laws, the enacting State may decide to require "additional information" (such as the birth date of the grantor or an identification number issued by the enacting State) to be entered to assist in uniquely identifying a grantor where there is a risk that many persons may have the same name (see bracketed text in art. 8, subpara. (a)). If this approach is adopted, the form of notice prescribed by the enacting State should provide a separate designated field for entering the "additional information". The enacting State should also specify the type of additional information to be provided and make its inclusion mandatory in the sense that it must be entered in the relevant field for a notice to be registered. If the required additional information is an identification number issued by the enacting State, it will also be necessary to address cases in which the grantor is not a citizen or resident of the enacting State, or for any other reason has not been issued an identification number. Subject to privacy considerations, the enacting State might, for example, provide that the number of the grantor's foreign passport or some other foreign official document is a sufficient substitute (on all these points, see Registry Guide, rec. 23 (a)(i), and paras. 167-169, 171, 181-183, 226, as well as Annex II, Examples of registry forms).

34. Subparagraph (d) appears within square brackets, as an indication of the duration of registration on an initial notice is required only if the enacting State adopts options B or C of article 14 (see paras. 53-55 below; see also Registry Guide, paras. 199-204). Subparagraph (e) also appears within square brackets, as an indication of the maximum amount for which the security right may be enforced is required only if the enacting State implements the approach set out in article 6, paragraph 3 (d), of the Model Law, which also appears within square brackets (see A/CN.9/914, para. 5).

Article 9. Grantor identifier

35. Article 9 is based on recommendations 59 and 60 of the Secured Transactions Guide (see chap. IV, paras. 68-74), as well as recommendations 24 and 25 of the Registry Guide (see paras. 161-183). It provides that the identifier of the grantor is the name of the grantor. It then sets out separate rules for determining the name of the grantor depending on whether the grantor is a natural person or a legal person or other entity.

36. If the grantor is a natural person, paragraph 1 provides that the grantor's name is the name that appears in the official document specified by the enacting State as the authoritative source. If not all grantors possess a common official document (e.g., an identity card or driver's licence), the enacting State will need to specify alternative official documents as authoritative sources and specify the hierarchy of authoritativeness among them (for examples of possible approaches, see Registry Guide, paras. 163-168).

37. As already noted (see para. 33 above), the enacting State may require the entry of a State-issued identity or other official number as additional information to assist in uniquely identifying a grantor. Instead of the name, the enacting State may decide to make this number a grantor identifier. Since the grantor identifier is the criterion used to search the registry record, this approach is only feasible if there is a reliable record or other objective source that searchers can consult to determine a person's official number, If this approach is adopted, it will also be necessary for the enacting State to address cases in which the grantor is not a citizen or resident of the enacting

State, or for any other reason has not been issued an identification number. The enacting State might, for example, provide that the number in some other foreign official document is a sufficient substitute provided again that the relevant number is accessible to searchers. Otherwise, the name of the foreign grantor will have to be used as the grantor identifier (see Registry Guide, paras. 168 and 169).

38. Paragraph 2 requires the enacting State to indicate which components of the name of a grantor who is a natural person must be entered in the notice. The enacting State will need to specify, for example, whether only the given and family name of the grantor is required or whether a middle name or initial, if any, must also be included. It will also need to address the scenario where the grantor's name consists of a single word, for example, by providing that that word should be entered in the family name field and by ensuring that the registry system is designed so as not to reject notices that have no information entered in the other name fields (see Registry Guide, para. 165).

39. Paragraph 3 requires the enacting State to address how the grantor's name is to be determined where the grantor's name has legally changed under applicable law after the issuance of the official document designated in paragraph 1 as the authoritative source of the grantor's name (for example, as a result of an application for a name change under change of name legislation; see Registry Guide, para. 164(f)).

40. Paragraph 4 provides that where the grantor is a legal person the name of the grantor is the name that appears in the relevant document, law or decree to be specified by the enacting State constituting the legal person (see Registry Guide, paras. 170-173).

41. Paragraph 5, which appears in square brackets, provides for the possibility that an enacting State may wish to require additional information pertaining to the grantor's status to be entered in a notice in special cases, such as where the grantor is subject to insolvency proceedings (see Registry Guide, paras. 174-179). If the enacting State adopts this approach, it must ensure that the prescribed form of notice contains a field to enter the relevant status information.

Article 10. Secured creditor identifier

42. Article 10 is based on recommendations 57(a) of the Secured Transactions Guide (see chap. IV, para. 81) and 27 of the Registry Guide (see paras. 184-189). It largely replicates the rules in article 9 for determining the identifier of the grantor. Unlike under article 9 (read together with art. 8, subpara. (a)), however, under article 10 (read together with art. 8, subpara. (b)), the registrant may enter the name of a representative of the secured creditor (e.g. a law firm or other service provider or an agent of a syndicate of lenders). This approach is intended to protect the privacy of the actual secured creditor and facilitate the efficiency of arrangements such as syndicated loans where there are multiple secured creditors who may change over time. This approach does not have a negative impact on the grantor, who would typically know the identity of the actual secured creditor from their dealings, or third parties, as long as the representative is authorized to act on behalf of the actual secured creditor (see Registry Guide, paras. 186 and 187). It should also be noted that, as the security right is created by an off-record security agreement, the entry of the name of a representative as the secured creditor on a registered notice does not make the representative the actual secured creditor.

Article 11. Description of encumbered assets

43. Article 11 is based on recommendations 63 of the Secured Transactions Guide (see chap. IV, paras. 82-86) and 28 of the Registry Guide (see paras. 190-192). The test for the adequacy of a description of the encumbered assets in a registered notice in paragraph 1 parallels the test for the adequacy of a description of the encumbered assets in a security agreement (see art. 9 of the Model Law). That said, the description in a registered notice need not be identical to the description in any related security

agreement so long as it reasonably allows identification of the relevant encumbered assets in accordance with the test in paragraph 1.

44. Paragraph 2 confirms that a description in a registered notice that refers to all of the grantor's movable assets or to all of the grantor's assets within a specified generic category (for example, all receivables owing to the grantor) satisfies the test in paragraph 1 that the description reasonably allow identification of the encumbered assets. It follows that a generic description will be sufficient even if any related security agreement only covers a specific asset within that broad generic category (for example, the description in the registered notice refers to all "tangible assets of the grantor", whereas the security agreement only covers a specific tangible asset). However, the effectiveness of the registration in this scenario is dependent on the authorization of the grantor pursuant to article 2; if the grantor only authorized a registration covering a specific asset, the registration will only be effective with respect to that asset. Moreover, the grantor is entitled, pursuant to article 20, paragraph 1, to compel the secured creditor to register an amendment notice that narrows the description of the assets in the registered notice to correspond to the encumbered assets actually covered by the security agreement unless the grantor separately authorized the secured creditor to register a broader description (see para. 8 above) and has not withdrawn that authorization.

45. The secured transactions laws of some States adopt special rules for describing specified classes of high-value assets that have a significant resale market alphanumerically (by a "serial number"). In States that adopt this approach, entry of the serial number in its own designated field is required in the sense of being necessary to preserve the priority of the security right as against specified classes of third parties that acquire rights in the asset. Enacting States that are interested in adopting this approach will need to revise the priority rules of the Model Law to specify the priority consequences of a failure to enter the relevant serial number and to revise the registry design and the registry-related provisions to accommodate serial-number-based registration and searching (for the rationale for, and the advantages and disadvantages of this, approach, see Registry Guide, paras. 131-134; for the consequences of a failure of entering the serial number or an error in entering the serial number, see Registry Guide, paras. 193 and 213; and for the registry design and registry provisions needed to implement this approach, see Registry Guide, para. 266). It should be noted that even in legal systems that do not adopt this approach, a registrant may choose to include the serial number in the description it enters in the notice as a convenient method of describing the encumbered asset in a manner that reasonably allows its identification (see Registry Guide, paras. 194 and 212). On the other hand, using the specific serial number as the description may be risky since any error would render the description insufficient whereas a more generic description (e.g. a description of the grantor's automobile by make and model) may reduce the risk of error.

46. There is no need to register an amendment notice to describe proceeds of an encumbered asset in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account (see art. 19, para. 1, of the Model Law). If the proceeds take any other form and are not already covered by the description of the encumbered assets in a registered notice, the secured creditor must register an amendment notice to add a description of the proceeds within a short period of time (e.g. 20-25 days) after they arise in order to preserve the third-party effectiveness and priority of its security right in the proceeds (see arts. 19, para. 2, and 32 of the Model Law). An amendment is necessary because otherwise a search result would not disclose the potential existence of a security right in the assets constituting the proceeds (see Registry Guide, para. 197).

Article 12. Language of information in a notice

47. Article 12 is based on recommendation 22 of the Registry Guide (see paras. 153-156; the Secured Transactions Guide includes a discussion of this matter in chapter IV, paras. 44-46, but does not include a recommendation). Paragraph 1 requires the information contained in a notice to be expressed in the language or

languages to be specified by the enacting State with the exception of the names and addresses of the grantor and the secured creditor or its representative. Typically, the enacting State will require registrants to use its officially recognized language or languages. As the names and addresses of the parties generally need not be translated (see para. 48 below) and the and other items of information, such as the period of effectiveness of the registration, required to be entered in a notice can be expressed by numbers, registrants will only need to translate the description of the encumbered assets. Where the description of the encumbered assets is not expressed in the required language, the registration of the notice would be ineffective as seriously misleading (see art. 24, para. 4).

48. Paragraph 2 requires all information in a notice to be in the character set prescribed and publicized by the Registry. Otherwise, the notice will be rejected as illegible under article 6, paragraph 1 (a) (for the same rule with respect to search requests, see art. 6, para. 2). Accordingly, where the names and addresses of the grantor and secured creditor or its representative are expressed in a language that uses a different character set than that prescribed by the Registry, they will need to be adjusted or transliterated to conform to the prescribed character set (see Registry Guide, para. 155).

Article 13. Time of effectiveness of the registration of a notice

49. Article 13 is based on recommendations 70 of the Secured Transactions Guide (see paras. 102-105) and 11 of the Registry Guide (see paras. 107-112). Paragraph 1 provides that the registration of an initial or amendment notice submitted to the Registry is effective only once the information in the notice is entered into the public registry record so that it is accessible to searchers (see the definition of the term "registry record" in art. 1, subpara. (l)); and paragraph 3 requires the Registry to record that date and time and to make this information available to searchers.

50. In view of the importance of the timing and order of registration to the third-party effectiveness and priority of a security right, paragraph 2 requires the Registry to enter the information into the registry record "without delay" and in the order in which it was submitted. The meaning of the words "without delay" depends in practice on the design of the registry system. However, if the system enables users to submit information in a notice directly to the Registry through electronic means of communication without the intervention of registry staff, those words will typically mean "with little or no delay" between the time when the information in a notice is submitted to the Registry and the time when it becomes available to searchers. But in systems that permit or require the use of paper notice forms, there will inevitably be some time lag since the registry staff must enter the information on the paper notice form into the registry record. Thus, in this case, the words "without delay" will mean "as soon as practically feasible".

51. Paragraph 4 deals with the time of effectiveness of the registration of a cancellation notice. Option A provides that the registration of a cancellation notice is effective once the information in the registered notices to which the cancellation notice relates is no longer publicly searchable. Option A should be adopted by enacting States that adopt option A or B of article 21, since these options require the Registry to remove information in a registered notice from the public registry record and archive it upon registration of a cancellation notice pursuant to option A of article 30. Option B provides that the registration of a cancellation notice becomes effective once the information in the registered notices to which the cancellation notice relates is entered into the registry record so as to be accessible to searchers. Option B should be adopted by enacting States that adopt option C or D of article 21 since these options require the Registry to retain the information in all registered notices, including cancellation notices, on the public registry record until the effectiveness of the registration lapses pursuant to option B of article 30.

52. Option A and option B of paragraph 5 require the Registry to record the date and time of effectiveness of the registration of a cancellation notice as determined by option A and option B of paragraph 4 respectively. Accordingly, enacting States that

adopt option A of paragraph 4 should adopt option A of paragraph 5, while enacting States that adopt option B of paragraph 4 should adopt option B of paragraph 5.

Article 14. Period of effectiveness of the registration of a notice

53. Article 14 is based on recommendations 69 of the Secured Transactions Guide (see chap. IV, paras. 87-91) and 12 of the Registry Guide (see paras. 113-121, 240 and 241). It offers enacting States a choice of three different approaches to the determination of the initial period of effectiveness (or duration) of the registration of a notice. If option A is adopted, an initial notice (and any associated amendment notice) is effective for the period specified by the enacting State. If option B is adopted, registrants are permitted to choose the desired period of effectiveness. If option C is adopted, registrants are likewise permitted to choose the period of effectiveness but only up to the maximum number of years specified by the enacting State.

54. Paragraphs 2 and 3 permit the period of effectiveness of a notice to be extended and re-extended before its expiry by the registration of an amendment notice. Paragraph 2 of option B permits the period of effectiveness to be extended at any time before its expiry, whereas paragraph 2 of options A and C permit an extension to be made only during the period specified by the enacting State (e.g. four to six months) before expiry of the current period of effectiveness. The reason for this difference is to prevent a registrant from undermining the maximum period of effectiveness specified by the enacting State under options B and C by extending the period of effectiveness of a registration at an earlier point. Under paragraph 4 of option A, the duration of the registration would be extended for the period specified by the enacting State as the period of effectiveness of an initial notice. Under paragraph 4 of option B or option C the registrant is permitted to choose the duration of the further period of effectiveness, but only up to the maximum number of years prescribed by the enacting State in the case of option C.

55. If option B or option C is adopted, the period of effectiveness of the registration must be included in a notice (see art. 8, subpara. (d)). States that adopt either of these options will also need to prescribe how registrants must enter the desired period of effectiveness in the notice. The notice form might be designed to enable registrants to simply enter the desired number of whole years or to permit registrants to enter or select the specific day, month and year on which the registration is to expire.

Article 15. Obligation to send a copy of a registered notice

56. Article 15 is based on recommendations 55 subparagraphs (c), (d) and (e) of the Secured Transactions Guide (see chap. IV, paras. 49-53) and 18 of the Registry Guide (see paras. 145-149). Paragraph 1 obligates the Registry to send a copy of the information in a registered notice to the person identified in the notice as the secured creditor without delay after the registration becomes effective. To avoid delay, the registry system should be designed to automatically generate and transmit the copy electronically to the secured creditor (see Registry Guide, para. 146). This enables the secured creditor to verify the correctness of the information in the registered notice and to alert it to the erroneous or unauthorized registration of an amendment or cancelation notice (for the effectiveness of the registration of amendment or cancellation notices not authorized by the secured creditor, see art. 21; see also Registry Guide, paras. 249-259; for the liability of the Registry for failure to send a copy of the information in a registered notice, see art. 32).

57. Paragraph 2 obligates the secured creditor to forward a copy of the information it receives from the Registry pursuant to paragraph 1 to the person identified in the notice as the grantor. The purpose of this requirement is to enable the grantor to take the steps necessary to correct the registry record if the registration was wholly or partially unauthorized by that person (see art. 20). The secured creditor must comply with this obligation before the expiry of the period specified by the enacting State after it receives a copy of the registered notice (e.g. 14 days). The copy must be sent to the grantor at its address set forth in the registered notice or at the grantor's new address if the secured creditor knows that the grantor has changed its address and

knows or could reasonably discover that address. Placing the burden of forwarding a copy of the registered notice to the grantor on the secured creditor rather than on the Registry is the result of a cost-benefit analysis and is intended to avoid creating an additional burden for the Registry which could negatively affect its efficiency (see Registry Guide, para. 149).

58. Paragraph 3 provides that non-compliance by the secured creditor with its obligation under paragraph 2 does not by itself affect the effectiveness of the registration. Paragraph 4 limits the secured creditor's liability for non-compliance to a nominal amount (to be specified by the enacting State) and any actual loss or damage caused by its non-compliance. Paragraph 4 leaves to the relevant law of the enacting State related matters, such as the standard of liability and the way in which the actual loss or damage is to be measured.

(A/CN.9/914/Add.3) (Original: English)

Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Paragraphs

Section D. Registration of an amendment or cancellation notice

Article 16. Right to register an amendment or cancellation notice

1. Article 16 is based on recommendations 73 of the Secured Transactions Guide (see chap. IV, paras. 110-116) and 19 (a), of the Registry Guide (see paras. 150 and 225-244). Paragraph 1 gives the person identified in an initial notice as the secured creditor the right to register a related amendment or cancellation notice at any time. In order to limit the risk of the registration of notices not authorized by that person, the registrant must satisfy the secure access requirements that were prescribed under article 5, paragraph 2 (see A/CN.9/914/Add.2, para. 26). To ensure that the person identified in the registered notice as the secured creditor (or another person acting on its behalf) is able to register subsequent amendment and cancellation notices, the secure access details should be communicated to the registrant at the time of registration of the initial notice or as soon as possible thereafter.

2. Paragraph 2 provides that, after an amendment notice changing the person identified in a registered notice as the secured creditor has been registered, only the current secured creditor of record is entitled to register an amendment or cancellation notice. Where the change in the secured creditor identifier results from an assignment of the secured obligation, the registry system should be designed to assign new secure access details to the new secured creditor so as to prevent the previous secured creditor from registering an amendment or cancellation notice (see A/CN.9/914/Add.2, para. 26). Where the change in the secured creditor identifier instead results simply from a change in the name of the secured creditor, no such precautionary step is needed since the secured creditor is still the same person.

Article 17. Information required in an amendment notice

3. Article 17 is based on recommendation 30 of the Registry Guide (see paras. 221-224; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 provides that an amendment notice must contain in the designated field the registration number assigned by the Registry to the initial notice to which the amendment relates (see art. 28, para. 1, and para. 56 below). The reason for this requirement is to ensure that the amendment notice will be associated in the registry record with the initial notice so as to be retrieved and included in a search result (see the definition of the term “registration number” in art. 1, subpara. (j), and art. 22, subpara. (b)).

4. Paragraph 1 (b) requires the amendment notice to set out the information to be “added or changed”. The term “change” includes the release of an encumbered asset or one of several grantors. Although this type of change amounts in effect to a cancellation of the registration as it relates to the relevant asset or grantor, it should be effected by registering an amendment notice and not a cancellation notice. A cancellation notice is to be used only when the purpose is to cancel the effectiveness of the registration of an initial notice and all related notices in their entirety (see the definitions of “amendment notice” and “cancellation notice” in art. 1, subparas. (b) and (c)).

5. Paragraph 2 makes it clear that an amendment notice may relate to more than one item of information in a registered notice. This means that a registrant need register only one amendment notice even if it wishes, for example, to add both a description of new encumbered assets and a new grantor. It follows that the form of amendment notice prescribed by the Registry must be designed to enable a registrant to change any and all items of information in an initial notice using a single form (see Registry Guide, Annex II, Examples of registry forms, II. Amendment notice).

Article 18. Global amendment of secured creditor information

6. Article 18 is based on recommendation 31 of the Registry Guide (see para. 242; the Secured Transactions Guide does not contain an equivalent

recommendation). It addresses the scenario where there is a change in the identifier or address, or both, of the person identified in multiple registered notices as the secured creditor as a result, for example, of its relocation, its merger with another company or the assignment of all its receivables to a new secured creditor. Its purpose is to make it possible for the secured creditor of record (option A) or the Registry on the application of that person (option B) to amend the relevant information in all the registered notices by the registration of a single global amendment notice.

7. To effectuate the amendment of secured creditor information in multiple notices through the registration of a single global amendment notice, the registry record must be organized in a manner that enables the retrieval of all registered notices in which a particular person is identified as the secured creditor. To avoid the risk of the registration of unauthorized global amendment notices, the Registry should institute the secure access requirements prescribed under article 5, paragraph 2, to ensure that the person requesting or effecting a global amendment is in fact the secured creditor of record (see A/CN.9/914/Add.2, para. 26).

Article 19. Information required in a cancellation notice

8. Article 19 is based on recommendation 32 of the Registry Guide (see paras. 243 and 244; the Secured Transactions Guide does not contain an equivalent recommendation). It requires a cancellation notice to contain in the designated field the registration number assigned by the Registry under article 28, paragraph 1, to the initial notice to which the cancellation notice relates. The registration number is the only item of information required to be included in a cancellation notice (see Registry Guide, Annex II, Examples of registry forms, III. Cancellation notice).

9. The inclusion of the registration number in a cancellation notice ensures that the cancellation notice extends to the information in all registered notices containing that number (see the definition of the term “registration number” in art. 1, subpara. (j)). To minimize the risk of the inadvertent registration of cancellation notices, the prescribed cancellation notice form should expressly indicate the effect of a cancellation (see Registry Guide, Annex II, Examples of registry forms, III. Cancellation notice; with respect to the effectiveness of a cancellation notice not authorized by the secured creditor, see paras. 19-27 below).

Article 20. Compulsory registration of an amendment or cancellation notice

10. Article 20 is based on recommendations 72 of the Secured Transactions Guide (see chap. IV, paras. 107 and 108) and 33 of the Registry Guide (see paras. 260-263). It should be read in conjunction with article 2 which requires the person identified as the grantor in a registered notice to authorize its registration.

11. Paragraph 1 (a) obligates the secured creditor to register an amendment notice deleting encumbered assets from the description in the registered notice if the grantor identified in the notice did not authorize the registration of a notice in relation to those assets and has informed the secured creditor that it will not do so. For example, the secured creditor may have registered an initial notice covering “all assets” of the grantor but the security agreement between the parties covers only a specific tangible asset and the grantor informs the secured creditor that it does not contemplate entering into any further security agreement. Even if the grantor separately authorized the registration of a notice covering “all assets”, paragraph 1 (c) obligates the secured creditor to amend the description in its registered notice if the grantor subsequently withdraws its authorization, provided that no security agreement covering those assets is concluded thereafter (since this would automatically constitute a new authorization under art. 2).

12. Paragraph 1 (b) addresses the scenario where the security agreement to which a registered notice relates is revised to release some of the initially encumbered assets from the security right. In this scenario, the secured creditor is obligated to register an amendment notice to delete the released assets from the description in the registered notice provided that the grantor did not authorize the registration of a notice

covering the released assets otherwise than by entering into the initial security agreement. Even if the grantor executed a separate agreement authorizing the secured creditor to make the registration, paragraph 1 (c) obligates the secured creditor to register an amendment notice deleting the released assets if the grantor subsequently withdraws that authorization, provided that the parties have not entered into a new security agreement covering the released assets.

13. Enacting States that implement article 8, subparagraph (e), will need to adopt paragraph 2 which requires a secured creditor to register an amendment notice reducing the maximum amount specified in a registered notice if: (a) the grantor only authorized the registration of a notice in the reduced amount; or (b) the security agreement to which the notice relates has been revised to reduce the maximum amount.

14. Paragraphs 3 (a) and 3 (b) obligate the secured creditor to register a cancellation notice where the grantor identified in a registered notice either did not authorize the registration and has informed the secured creditor that it will not do so, or subsequently withdrew its authorization and the parties did not enter thereafter into a security agreement. A cancellation notice must also be registered if the obligation secured by the security right to which the registered notice relates has been extinguished (see para. 3 (c)). It should be noted that, under article 12 of the Model Law, a security right is extinguished upon full payment or other satisfaction of the secured obligation, provided that there is no further commitment by the secured creditor to extend any further secured credit.

15. Paragraph 4 prohibits the secured creditor from charging any fee for complying with its obligations under paragraphs 1 (a), 1 (c), 2 (a), 3 (a) and 3 (b). These provisions require a secured creditor to amend or cancel a registration either because it was never authorized by the grantor or because the grantor's initial authorization was withdrawn owing to the failure of the parties to subsequently conclude a security agreement. In these circumstances, it is appropriate to impose the cost on the secured creditor.

16. To protect grantors against the risk of non-compliance by a secured creditor with its obligation under paragraphs 1, 2 and 3, paragraph 5 gives the grantor the right to send a formal written request to the secured creditor to register the appropriate amendment or cancellation notice. If the secured creditor does not comply with the request before the expiry of the period specified by the enacting State, paragraph 6 entitles the grantor to apply for an order compelling registration of the appropriate notice. If the person identified as the secured creditor in the notice is not the actual secured creditor but its representative, and the actual secured creditor is no longer contactable, the grantor should be entitled to send its request to the representative.

17. If the secured creditor does not comply with the grantor's request under paragraph 5 within the period of time specified by the enacting State, paragraph 6 entitles the grantor to apply for an order compelling registration of the appropriate notice. In order to ensure speedy and efficient relief for the grantor, it is suggested that a short period (e.g. 14 days) is appropriate. This is in line with the rationale underlying the requirement in paragraph 6 for the enacting State to establish a summary judicial or administrative procedure for obtaining the order. Depending on local considerations, the enacting State may decide to use an existing administrative or judicial summary procedure or it may decide to set up a new procedure administered, for example, by the Registrar or registry staff. As noted in the Registry Guide (see para. 262), while the process should be speedy and inexpensive, it should also incorporate appropriate safeguards to protect the secured creditor against an unwarranted demand by the grantor (for example, by requiring the relevant authority to notify the secured creditor of the grantor's application and give the secured creditor a reasonable opportunity to respond).

18. Once an order for registration has been issued pursuant to the procedure established by the enacting State under paragraph 6, paragraph 7 requires the Registry to register the appropriate notice "upon receipt of a request with a copy of the relevant order" (if the enacting State decides under para. 6 to designate a court or other external

body to administer the procedure) or "upon the issuance of the relevant order" (if the enacting State decides under para. 6 to vest the Registry with the authority to administer the procedure).

Article 21. Effectiveness of the registration of an amendment or cancellation notice not authorized by the secured creditor

19. Article 21 addresses the effectiveness of the registration of an amendment or cancellation notice where the registration was not authorized by the secured creditor of record. The options set out in article 21 are based on the discussion of the matter in the Registry Guide (see paras. 249-259).

20. An unauthorized registration of an amendment or cancellation notice may occur as a result of fraud or error by a third party or even by a member of the registry staff (for corrections of errors by the Registry, see art. 31). The issue is whether and to what extent conclusive effect should nonetheless be given to the unauthorized registration for the purposes of determining the third-party effectiveness and priority of the related security right as against a competing claimant. In choosing among these options, enacting States will need to decide whether the balance should favour reliability of the registry record for searchers including prospective secured creditors (options A and B), or protection of registered secured creditors against the risk of losing the third-party effectiveness or priority status of their security right (options C and D). It should be emphasized that regardless of which option is used the risk of the unauthorized registration of amendment or cancellation notices is greatly reduced by the requirement for the enacting State to prescribe secure access procedures for registering amendment and cancellation notices (see art. 5 and A/CN.9/914/Add.2, para. 26).

21. Under option A, the registration of an amendment or cancellation notice is effective whether or not it was authorized by the person identified as the secured creditor in the registered notice to which the amendment or cancellation notice relates.

22. Option B is a variation of option A. While recognizing the general effectiveness of an unauthorized amendment or cancellation notice, it preserves the priority of the security right to which the unauthorized registration relates as against the right of a competing claimant over whom the security right covered by that registered notice had priority prior to the unauthorized registration of the amendment or cancellation notice. This option is predicated on the rationale that such a claimant by definition could not have been prejudiced by relying on the unauthorized registration.

23. If an enacting State decides to adopt option A or option B, it will need to also implement option B of article 30 which obligates the Registry to remove information in a registered notice from the public registry record and archive it upon registration of a cancellation notice. It will also need to implement option A of article 13, paragraphs 4 and 5, dealing with the time of effectiveness of the registration of a cancellation notice.

24. Option C is at the opposite end of the spectrum from option A. It provides that the registration of an amendment or cancellation notice is ineffective, unless authorized by the secured creditor of record. Under this approach, a searcher will need to conduct off-record inquiries to verify whether the registration of an amendment or cancellation notice was in fact authorized by the secured creditor.

25. Option D is a variation of option C. It preserves the effectiveness of an unauthorized registration of an amendment or cancellation notice as against a competing claimant who acquired its right in reliance on a search of the registry record made after the registration of the amendment or cancellation notice, and who did not have knowledge that the registration was unauthorized when it acquired its right. This qualification differs from the qualification in option B above insofar as it requires the competing claimant to provide factual evidence that it actually searched and relied on the registry record prior to acquiring its right in order to prevail over the secured creditor whose registration was amended or cancelled without authority.

26. If an enacting State decides to adopt option C or option D, it will need to implement option B of article 30, which obligates the Registry to remove information in registered notices from the public registry record and archive it only upon the expiry of the period of effectiveness of the registration of the notice. Under option C or D, all amendment and cancellation notices need to remain in the public registry record for searchers to discover whom to contact to verify whether the amendment or cancellation was authorized. If all the relevant notices were instead removed from the public record upon registration of a cancellation notice, searchers would have no means of discovering from a search of the registry that a security right binding on them may potentially still exist.

27. Searchers may not necessarily appreciate that registered amendment and cancellation notices may not be legally effective. Accordingly, enacting States that implement options C or D may wish to include a note on search results advising searchers of the need to conduct off-record inquiries to verify whether the registration of an amendment or cancellation notice was authorized by the secured creditor of record.

Section E. Searches

Article 22. Search criteria

28. Article 22 is based on recommendation 54 (h) of the Secured Transactions Guide (see chap. IV, paras. 31-36) and 34 of the Registry Guide (see paras. 264-265). It sets out the two criteria according to which any person may conduct a search of the public registry record.

29. Under subparagraph (a), the first and principal search criterion is the identifier of the grantor. The identifier of the grantor is its name, determined according to the rules set out in article 9. If an enacting State decides to require "additional information" to be entered in a separate field to assist in uniquely identifying a grantor, this additional information neither constitutes a part of the name search criterion nor an alternative search criterion (see art. 8, subpara. (a)). Rather it will simply appear as additional information in a search result. Accordingly, search request forms should not be designed to require entry of any additional information.

30. Under subparagraph (b), the registration number assigned to an initial notice in accordance with article 28, paragraph 1, constitutes an alternative search criterion. A search by registration number gives secured creditors an efficient means of identifying and retrieving a registered notice for the purposes of registering an amendment or cancellation notice. Searches by registration number generally will not be conducted by third parties as they typically will not know the relevant registration number. In those registry systems that establish accounts for users, it may not be necessary to provide for indexing and searching according to registration numbers as the history of registrations is stored and easily accessible to the holder of that account.

31. If the enacting State decides to introduce the serial number of goods as a search criterion, it will need to list the serial number of the asset as an additional search criterion in this article. It will also need to design the registry system so that registered notices can be searched and retrieved by serial number. (see Registry Guide, para. 266, and A/CN.9/914/Add.2, para. 45).

32. To allow the registration of global amendment notices, as provided in article 18, the registry record must be organized to permit registered notices to be identified and retrieved by reference to the relevant secured creditor. For public policy reasons relating to privacy and confidentiality, the name or other identifier of the secured creditor should not be an available criterion for general public searching (see Secured Transactions Guide, chap. IV, para. 81 and Registry Guide, para. 267).

Article 23. Search results

33. Article 23 is based on recommendation 35 of the Registry Guide (see paras. 268-273; the Secured Transactions Guide does not contain an equivalent

recommendation). Paragraph 1 sets out the required content of search results provided by the Registry in response to a search request. The search result must first indicate the date and time when the search was performed.

34. Paragraph 1 does not adopt the approach followed in some States in which search results are required to include a "currency date" indicating that the search result includes only information contained in notices that were registered as of that date (as opposed to the actual date on which the search result was issued). Currency dates are only used in systems in which a registration is considered effective when submitted to the registry. Under the Model Law, a registration becomes effective only when the information in a notice submitted to the Registry has been entered into the registry record so as to be accessible to searchers (see art. 13, para. 1). Thus, the "currency date" is always the actual date and time of the search (see Registry Guide, para. 273).

35. With respect to the substantive content of the search result, paragraph 1 contemplates that an enacting State may adopt one of two options. Option A contemplates that the enacting State's registry system is designed to only retrieve notices that exactly match the identifier of the grantor entered by the searcher in a search request. Option B contemplates that the enacting State's registry system is designed to also retrieve notices that closely match the identifier of the grantor entered by the searcher. Option B builds on a certain degree of forgiveness for registrant error in entering the identifier of the grantor, The extent of close matches disclosed in States that adopt option B depends on the specific close-match search programme or logic used by the Registry. The enacting State should not implement a search logic that could potentially result in a long list of close matches since this would make it too difficult for a searcher to determine which, if any, of the registered notices that closely match the search criterion entered refer to the grantor that the searcher is inquiring about.

36. Option A should be read in conjunction with article 24, paragraph 1, which provides that an error by a registrant in entering the grantor identifier in a notice does not render the registration of the notice ineffective if the information in the notice would be retrieved by a search of the registry record using the grantor's correct identifier as the search criterion. Option B should be read in conjunction with article 24, paragraph 2, under which the registration of a notice that contains an error in the grantor's identifier might still be effective if the name that was entered by the registrant is a sufficiently close match to result in the notice being retrieved on a search using the grantor's correct identifier.

37. Paragraph 2 obligates the Registry to issue an official search certificate setting out a search result upon the request of a searcher. Paragraph 3 dispenses with the need to obtain an official search certificate, for example, for the purposes of subsequent disputes, by providing that 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. A written search result for this purpose would include a print-out of a search result performed electronically.

Section F. Errors and post-registration changes

Article 24. Registrant errors in required information

38. Article 24 is based on recommendations 58 and 64-66 of the Secured Transactions Guide (see chap. IV, paras. 66-74, and 82-97) and 29 of the Registry Guide (see paras. 205-220). Its overall aim is to provide guidance on when the effectiveness of a registration may be challenged owing to errors committed by registrants in entering the information in notices submitted to the Registry.

39. Paragraphs 1 and 2 address errors on the part of a registrant in entering the grantor identifier in a registered notice. Paragraph 1 provides that the effectiveness of the registration cannot be challenged if the information in the registered notice would be retrieved by a search of the public registry record using the grantor's correct

identifier (determined under art. 9) as the search criterion (see option A of art. 23, and para. 36 above). Paragraph 2, which appears in square brackets, should be adopted by enacting States that implement option B of article 23 under which search requests will also retrieve registered notices in which the grantor identifiers closely match the identifier entered by a searcher (see para. 36 above). In enacting States that adopt this option, paragraph 2 provides that an error on the part of a registrant in entering the grantor identifier does not render the registration ineffective if the information in the notice would still be retrieved as a "close match" by a search using the grantor's correct identifier "unless the error would seriously mislead a reasonable searcher." For example, the registered notice identifies the grantor as "Jack McDonald" and the correct name of the grantor is in fact "John Macdonald." If the erroneous notice is retrieved as a "close match" on a search using the correct name, the degree of discrepancy between the correct name and the close match in this example may be considered such as to constitute a seriously misleading error from the perspective of a reasonable searcher. Whether this is the case can only be decided on the particular facts and in the local context including the logic of the registry close match software.

40. Paragraph 4 deals with the impact of errors committed by registrants in entering the other items of information required to be set out in registered notices under article 8, notably errors in the description of the encumbered assets. It provides that an error does not make the registration ineffective unless it "would seriously mislead a reasonable searcher." This language incorporates an objective test in the sense that a person involved in a priority competition with the secured creditor challenging the effectiveness of the registration need not show that it was actually misled by the error. It is sufficient to show that a hypothetical reasonable searcher, including an insolvency representative, would have been misled.

41. Paragraphs 3 and 5 incorporate the general principle of severability. Thus, an error in entering the identifier of a particular grantor or the description of a particular encumbered asset that would render the registration ineffective under paragraph 1, 2 or 4 does not make the registration of the notice ineffective with respect to other grantors correctly identified or other encumbered assets correctly described in the registered notice.

42. Paragraphs 6 and 7, which appear within square brackets, provide special rules for determining the impact of errors on the effectiveness of a registration in two scenarios. Paragraph 6 addresses the scenario where the enacting State allows a registrant to select the period of effectiveness of the registration of a notice pursuant to article 14, option A or B (and art. 8, subpara. (d)). In this scenario, an error in the entry of the relevant information does not render the registration ineffective even if the error would be seriously misleading from the perspective of a hypothetical reasonable searcher. Rather, the registration will be treated as ineffective only as against a competing claimant who can establish that it was in fact misled by the error (see Registry Guide, paras. 215 and 217-220). Paragraph 7 addresses the scenario where an enacting State chooses to require a registrant to indicate the maximum amount for which a security right may be enforced pursuant to article 8, subparagraph (e). It provides that while an error in the maximum amount stated in an initial or amendment notice does not render the registration ineffective, the priority of the security right is limited to the maximum amount stated in the notice or in the security agreement, whichever is lower. This rule is consistent with the rationale for requiring the maximum amount to be stated in the security agreement and disclosed in any related registered notice (see A/CN.9/914/Add.2, para. 34).

43. As already observed (see A/CN.9/914/Add.2, para. 45, and para. 31 above), some States provide for the entry of a serial number for specified classes of high-value assets that have a significant resale market. In States that adopt this approach, entry of this identifier in its own designated field in a notice is required in the sense of being necessary to achieve the priority of the security right as against specified classes of competing third-party claimants. Enacting States that decide to adopt this approach will need to deal with the impact of errors in the serial number on the effectiveness of a registration for this purpose. In general, the same test should apply as for an error in the grantor's identifier. Accordingly, the registration would be

ineffective if the information in the registered notice would not be retrieved by a search of the public registry record using the prescribed serial number. However, enacting States implementing paragraph 2 ("the close match search logic") should not extend its application to searches against serial numbers as there is too great a likelihood that this may result in too lengthy a list of close matches.

Article 25. Post-registration change of grantor identifier

44. Article 25 is based on recommendation 61 of the Secured Transactions Guide (see chap. IV, paras. 75-77; see also Registry Guide, paras. 226-228). It addresses the impact of a post-registration change in the identifier of the grantor (i.e. its name under art. 9) on the effectiveness of the registration of a notice. Since the grantor's identifier is the principal search criterion (see art. 22, subpara. (a)), a search under the new identifier will not retrieve registered notices in which the grantor is identified by its old identifier. This poses a risk for third-party searchers that contemplate acquiring rights in the grantor's encumbered assets after the change of the grantor's identifier.

45. To address this risk, paragraphs 2 and 3 give the secured creditor a grace period to be specified by the enacting State after the change of identifier occurs to either register an amendment notice adding the new identifier of the grantor or make its security right effective against third parties by a method other than registration (on other methods, see arts. 18 and 25-27 of the Model Law). A grace period of 60 to 90 days is suggested to give the secured creditor a reasonable period of time to monitor and find out the change. If neither step is taken before the expiry of the grace period, the security right is subordinated to a competing security right that was made effective against third parties after the change (see para. 2 (a)), and a buyer who acquired its rights in the encumbered asset after the change will acquire them free of the security right (see para. 3 (a)).

46. Under paragraphs 2 and 3, the secured creditor may still register an amendment notice or otherwise make its security right effective against third parties even after the expiry of the grace period. However, it loses the benefit of the grace period with the result that its security right will be subordinated to a competing security right that was made effective against third parties after the change but before the relevant step was taken, even if the competing security right was made effective against third parties before the expiry of the grace period (see para. 2 (b)). A buyer to whom the encumbered assets is sold after the change but before the relevant step was taken likewise acquires its rights free of the security right even if the sale took place before the expiry of the grace period (see para. 3 (b)). Under paragraph 4, paragraphs 2 and 3 do not apply if the information in the notice referred to in paragraph 1 would be retrieved by a search using the new identifier of the grantor as the search criterion. As indicated in the footnote to paragraph 4, this provision is necessary only if the enacting State adopts article 23, option B, paragraph 1, under which the registry system is designed to disclose on search results information in notices in which the identifier of the grantor closely matches the identifier of the grantor entered by the searcher. In a "close match" system, the search result might still retrieve the relevant notice if the subsequent change in the grantor identifier is relatively minor (for example, if Acme Co. changes its name to Acme & Co).

47. As against competing claimants other than a competing secured creditor and a buyer whose rights are specifically protected by paragraphs 2 and 3, paragraph 1 confirms that the third-party effectiveness and priority of a security right that was made effective against third parties by registration is not affected by a post-registration change in the identifier of a grantor. Thus, even if the secured creditor does not register an amendment notice or make its security right effective against third parties by a method other than registration, it will still retain whatever priority it has under the Model Law against competing secured creditors and buyers whose rights arose before the change in the identifier of the grantor and as against other classes of competing claimants whether their rights arose before or after the change of the grantor's identifier (for example, the grantor's judgment creditors and insolvency representative).

Article 26. Post-registration transfer of an encumbered asset

48. Article 26 is based on recommendation 62 of the Secured Transactions Guide (see chap. IV, paras. 78-80; see also Registry Guide, paras. 229-232). It addresses the impact of a post-registration sale of an encumbered asset on the effectiveness of the registration of a notice in relation to a security right in that asset where the buyer acquires the asset subject to the security right under article 34, paragraph 1, of the Model Law. This creates a risk for third parties that acquire rights in the encumbered asset from the buyer since a search of the public registry record under the identifier of the buyer will not retrieve registered notices in which the grantor identifier is the name of the seller/grantor. This risk is analogous to that addressed in article 25 in relation to post-registration changes in the grantor identifier. Unlike article 25, article 26 does not provide a uniform rule. Rather, it gives enacting States the option to enact any one of three approaches.

49. The approach in option A is identical to that set out in article 25 for post-registration changes in the grantor identifier. Paragraphs 2 and 3 give the secured creditor a grace period to be specified by the enacting State after the sale by the grantor to either register an amendment notice adding the buyer as a new grantor or otherwise make its security right effective against third parties in order to preserve its priority against secured creditors and subsequent buyers who acquire their rights in the encumbered assets from the grantor's buyer (see paras. 2 (a) and 3 (a)). As under article 25, a grace period of 60 to 90 days is suggested in order to give the secured creditor a reasonable period of time to monitor and find out about the sale by the grantor. As under paragraph 1 of article 25, paragraph 1 of article 26 provides that the secured creditor's failure to take either of these steps before the expiry of the grace period, or at all, does not generally prejudice the third-party effectiveness and priority status of its security right. However, its security right will be subordinated to competing security rights created by the buyer from the grantor and made effective against third parties after the sale, and before the relevant step is taken (see para. 2 (b)). A subsequent buyer to whom the buyer from the grantor sells the encumbered asset during this same period also acquires its rights free of the security right (see para. 3 (b)).

50. The approach in paragraphs 1-3 of option B is similar to the approach in paragraphs 1-3 of option A, with the important qualification that the grace period under paragraphs 2 and 3 to register the amendment notice or otherwise make the security right effective against third parties begins only when the secured creditor acquires knowledge: (a) that the grantor has sold the encumbered asset; and (b) of the identity of the buyer, and not simply when the sale takes place, as under paragraphs 2 and 3 of option A. In view of this difference, a grace period of 15 to 30 days is suggested.

51. If there are successive sales of an encumbered asset before the secured creditor acquires knowledge of the sale and the identity of the buyer, paragraph 4 of option B provides that it is sufficient, to protect its rights under paragraphs 2 and 3 against intervening secured creditors and buyers, if the secured creditor registers an amendment notice adding the identifier of the most recent buyer of whose identity it has knowledge.

52. Paragraph 4 of option A and paragraph 5 of option B provide that a security right in intellectual property made effective against third parties by registration of a notice generally retains its third-party effectiveness and priority status including as against secured creditors and buyers who acquire their rights from a buyer to whom the grantor sold the intellectual property after the notice was registered. This approach reflects recommendation 244 of the Intellectual Property Supplement. The reason for this different approach in the intellectual property context is that, the risks posed for third-party searchers by the grantor's sale of intellectual property were outweighed by the burden that would be imposed secured creditors if they were required to register an amendment notice each time intellectual property was sold or made the subject of an exclusive licence assuming that an exclusive licence is treated as a sale under

intellectual property law (see Intellectual Property Supplement, rec. 244 and paras. 158-166).

53. Under option C, the third-party effectiveness and priority of a security right that is made effective against third parties by registration of a notice is not affected by a post-registration sale of an encumbered asset covered by the registered notice. The secured creditor retains whatever priority it otherwise has under the Model Law against all competing claimants, whether their rights arise before or after the sale. This option extends the approach to the impact of post-registration sales of encumbered intellectual property in paragraph 4 of option A and paragraph 5 of option B to all types of encumbered asset. Under this approach, potential secured creditors and buyers are expected to inquire into the chain of ownership of the asset they are interested in and then conduct searches against the identifier of both the immediate owner and any predecessors in the chain of title.

Section G. Organization of the Registry and the registry record

Article 27. The registrar

54. Article 27 is based on recommendation 2 of the Registry Guide (see para. 74; the Secured Transactions Guide does not contain an equivalent recommendation). Recognizing that these matters may be dealt with differently in each State, article 27 leaves it to the enacting State to specify in the law, regulation or other act by which it implements the Model Registry Provisions the authority responsible for the appointment and dismissal of the registrar, and for determining the registrar's duties and monitoring their performance.

55. While an enacting State may decide to have the day-to-day operations of the Registry carried out by either a private or public entity, the Registry and the registrar should always be subject to the ultimate direction of and accountable to the authority designated by the enacting State. Depending on local considerations, the public authority specified by the enacting State may be a governmental ministry responsible for the preparation of the secured transactions law, another public agency, or a department of a central bank (see Registry Guide, para. 77).

Article 28. Organization of information in the registry record

56. Article 28 is based on recommendations 15 and 16 of the Registry Guide (see paras. 127-130; the Secured Transactions Guide does not contain an equivalent recommendation). Paragraph 1 requires the Registry to assign a unique registration number to an initial notice and associate all registered amendment and cancellation notices that contain that number with the initial notice in the registry record. The reason for these requirements is to ensure that amendment and cancellation notices are linked to the related initial notice in the registry record so that the information in all related notices is disclosed on a search result (see the definition of the term "registration number" in art. 1, subpara. (j), as well as arts. 17, 19 and 22, subpara. (b)).

57. If paragraph 2 of option A is adopted, the enacting State must ensure that the registry system is designed so that search results will only retrieve information in registered notices that exactly match the grantor identifier entered by the searcher (see option A of art. 23, para. 1). If paragraph 2 of option B is adopted, the enacting State must ensure that the registry system is designed to also retrieve information in registered notices in which the grantor's identifier closely matches the identifier entered by the searcher (see art. 23, option B, para. 1).

58. Paragraph 3 of option A is intended for enacting States that permit a person to register a global amendment notice changing its identifier or address or both in all registered notices in which it is identified as the secured creditor (see option A of art. 18). Option B of paragraph 3 is intended for enacting States in which the global amendment must be effected by the Registry at the request of the secured creditor (see art. 18, option B).

59. Paragraph 4 is intended to ensure that the entire registration record relating to an initial notice remains intact. It provides that the registry record must be organized in a manner that preserves the information in all registered notices, notwithstanding the registration of an amendment or cancellation notice that purports to change the information contained in previously registered notices.

60. As already noted (see A/CN.9/914/Add.2, para. 26, and para. 2 above), article 5, paragraph 2 requires a person who submits an amendment or cancellation notice to satisfy the secure access requirements prescribed by the enacting State. It follows that the Registry must organize the registry record in a manner that facilitates the application of this requirement. The enacting State will also need to impose additional organizational obligations on the Registry should it decide to provide for: (a) registration and searching according to serial number (see A/CN.9/914/Add.2, para. 45, and para. 31 above); or (b) registration and searching according to a grantor identifier other than the name of the grantor (see A/CN.9/914/Add.2, para. 33).

Article 29. Integrity of information in the registry record

61. Article 29, paragraph 1, is based on recommendation 17 (a), of the Registry Guide (see para. 136; the Secured Transactions Guide does not contain an equivalent recommendation). It prohibits the Registry from amending or removing information in the registry record except as authorized in articles 30 and 31.

62. Article 29, paragraph 2, is based on recommendations 55 (f) of the Secured Transactions Guide (see chap. IV, para. 54), and 17 (b) of the Registry Guide (see para. 137). It obligates the Registry to ensure that the information in the registry record is preserved and may be reconstructed in the event of loss or damage. In practice, this obligation requires the Registry to create and maintain a backup copy of the registry record.

Article 30. Removal of information from the public registry record and archival

63. Article 30, option A, is based on recommendations 74 of the Secured Transactions Guide (see chap. IV, para. 109), as well as recommendations 20 and 21 of the Registry Guide (see paras. 151-152). It requires the Registry to remove information in registered notices from the public registry record once the period of effectiveness of the notice expires or a cancellation notice is registered. If the information in cancelled or expired notices were to remain publicly searchable, this might create legal uncertainty for third-party searchers, potentially impeding the ability of the grantor to grant a new security right in or deal with the assets described in the notice (see Registry Guide, para. 151). Option A should be enacted by States that adopt option A or B of article 21.

64. Article 30, option B, should be enacted by States that adopt option C or D of article 21. Paragraph 1 of option B requires the Registry to remove information in registered notices from the public registry record once the period of effectiveness of the registration of a notice expires. Unlike option A, paragraph 2 of option B requires the Registry to preserve all information in registered notices on the public registry record notwithstanding the registration of a cancellation notice. This is necessary since the registration of an amendment or cancellation notice is wholly or partially ineffective under article 21, option C or D, if it is not authorized by the secured creditor of record. Since the factual question of whether the secured creditor of record authorized the registration of a cancellation notice can only be answered by conducting off-record inquiries, it is necessary to preserve the information in the cancellation notices and all related registered notices on the public registry record so that searchers have the information needed to conduct those inquiries.

65. Paragraph 3 requires the Registry to archive the information in registered notices removed from the public registry record in a manner that enables the information to be retrieved in accordance with the search criteria set out in article 22. This is necessary since the information in notices removed from the public registry record

may need to be retrieved in the future, for example, in order to determine the time of registration or the scope of the encumbered assets described in the notice for the purposes of a subsequent priority dispute between the secured creditor and a competing claimant (see Registry Guide, para. 151).

66. As to the duration of the Registry's archival obligation, paragraph 3 leaves this decision to the enacting State (while cautioning that it should minimally be coextensive with the prescription period under local law for disputes arising in relation to a security agreement).

Article 31. Correction of errors made by the Registry

67. Article 31 addresses the effect of errors and omissions made by the Registry in two scenarios. The first is where the Registry makes an error or omission in entering into the public registry record information contained in a notice submitted for registration. The need to address this scenario arises in particular if the registry system implemented by a State allows the submission of notices in paper form as opposed to requiring all registrants to transmit the information in notices directly to the registry via electronic means. The second scenario addressed by article 31 is where the Registry erroneously removes from the registry record information contained in a registered notice. The need to address this second scenario arises even in systems in which notices may only be submitted directly to the Registry via electronic means.

68. Paragraph 1 of article 31 requires the Registry to takes steps to correct the error or restore the erroneously removed information without delay after discovering the error. Under option A, the Registry required to take the necessary corrective action and must then send to the secured creditor of record a copy of the notice it registered to correct the record. Under option B, the Registry is instead required to inform the secured creditor of record of the error so as to enable it to register the notice needed to correct the record. Nothing in this article precludes the secured creditor from registering an amendment notice to correct the error if it discovers it before the Registry does so or before it receives notification from the Registry.

69. Paragraph 2 addresses the impact of the Registry's error on the third-party effectiveness and priority status of the security right in the event of a competition with the right of a competing claimant which arose prior to the registration of the notice correcting the record referred to in paragraph 1. It offers four options which parallel the four options in article 21 with respect to the effectiveness of the unauthorized registration of an amendment or cancellation notice. The enacting State should adopt the option in article 31 that corresponds to the option it selects in article 21. Accordingly, a State that adopts article 21, option A, should adopt article 31, option A and so on.

Article 32. Limitation of liability of the Registry

70. Article 32 is based on recommendation 56 of the Secured Transactions Guide (see chap. IV, paras. 55-64; see also Registry Guide, paras. 141-144). It offers three options to an enacting State in dealing with the potential liability of the Registry for loss or damage caused by its errors or omissions. It should be noted that especially in a fully electronic system in which registration and search information is submitted directly by users via electronic means, the risk of loss or error being caused by the Registry is extremely low. Nonetheless the objective of all options is to limit the liability of the Registry and to thus avoid an increase in the cost of the registry services in the rare event where loss or damage can be attributed to acts or omissions of the Registry. The enacting State should coordinate article 32 with its relevant law on the liability of public authorities.

71. Option A leaves the issue of the liability of the Registry to other law of the enacting State. If liability is foreseen by that other law, option A restricts any right of recovery to the types of errors or omissions listed in paragraph 1. Thus, liability is limited to: (a) errors or omissions in a search result issued to a searcher (para. 1 (a)); (b) errors or omissions in a copy of information in a registered notice sent to a secured creditor under article 15 or the failure of the Registry to send a copy of a registered

notice as required by that article or article 31 (para. 1 (a) and (c)); and (c) the provision of false or misleading information to a registrant or searcher (para. 1 (d)). Paragraph 2 of option A limits the liability of the Registry for loss or damage caused by the acts or omissions specified in paragraph 1 to the maximum monetary amount specified by the enacting State (regardless of the maximum value of the encumbered assets or the obligation secured by those assets). To minimize the risk of Registry liability for providing misleading advice, the enacting State should ensure that registry staff are trained to restrict their advice to the technical aspects of using the registry system, and not the legal implications or effects or registration (see Registry Guide, para. 139).

72. The first part of paragraph 1 (b) of option A appears within square brackets as it limits any liability that the Registry may have under other law for errors or omissions in registered notices to the scenario where the Registry is responsible for entering into the registry record information submitted by a registrant in a paper notice. Accordingly, paragraph 1 (b) should only be adopted by an enacting State if its registry system permits the submission of notices to the Registry using paper forms.

73. Like option A, option B leaves to other law any liability that the Registry may have for loss or damage caused by an error or omission in the administration or operation of the Registry. Unlike option A, option B does not restrict any right of recovery that a person may have under other law to particular types of errors or omissions. But like paragraph 2 of option A, it limits the Registry's liability to the maximum amount specified by the enacting State.

74. Option C simply excludes any liability of the Registry for an error or omission in the administration or operation of the Registry.

Article 33. Registry fees

75. Article 33 is based on recommendations 54 (i) of the Secured Transactions Guide (see chap. IV, para. 37) and 36 of the Registry Guide (see paras. 274-280). The Secured Transactions Guide recommends, in particular, that registry fees, if any, should be set at a level necessary to recover the cost of establishing, operating and upgrading the registry system. The requirement to set any fees to be charged at a cost-recovery level applies to all services provided by the registry, and thus include, for example: (a) not only the registration of an initial notice but also the registration of amendment and cancellation notices; and (b) not only registration services but also search services. If the registry system were instead used as an opportunity for the enacting State to generate profit, registrants and searchers might be discouraged from using the registry services.

76. Thus, article 33 presents two options. Under paragraphs 1 and 3 of option A, fees may be charged for the provision of registry services in the amounts specified by the enacting State and the fee schedule must be publicized by the Registry. To ensure that these fees are based on cost recovery, paragraph 2 of option A entitles the authority responsible for the appointment of the registrar under article 27 to periodically modify the fee schedule.

77. If the registry system allows access by electronic means and through the submission of written notices and search requests, the enacting State might decide to charge a lower fee for the registration of notices and the processing of search requests transmitted directly to the registry via electronic means given that electronic registration or searching does not require the intercession of registry staff and therefore is less costly. This approach might also encourage users to shift to this more efficient method in preference to continuing to use paper forms.

78. To enhance the efficiency of the payment process for frequent users of registry services, paragraph 4 of option A authorizes the Registry to enter into an agreement with any person to establish a Registry user account for any purpose, including the payment of registry fees. This approach has the additional advantage of facilitating the identification of the registrant for the purposes of article 5 (see A/CN.9/914/Add.2, para. 25).

79. A variant of option A would be to limit the charging of fees to registrations and allow searches to be made free of charge. This variant would encourage and facilitate due diligence by potential secured creditors and buyers and thereby reduce risk and future disputes.

80. Another variant of option A would be for the enacting State to decide not to charge any fee for the registration of the types of amendment and cancellation notices contemplated by article 20. This variant would encourage the secured creditor to promptly register amendment and cancellation notices in the circumstances contemplated by article 20 and relieve grantors from the time and expense of having to initiate formal proceedings to force cancellations or amendments under that article.

81. For enacting States that enact option B or C of article 14 (allowing a registrant to select the duration of a notice), yet another variant of option A would be to charge fees on a sliding scale depending on the period selected by the registrant. This approach would have the advantage of discouraging registrants from selecting an inflated period out of an excess of caution (see Registry Guide, para. 277).

82. Option B provides that the Registry may not charge any fees for its services. Under this approach, the cost of establishing and operating the Registry will be covered by general State revenues. Option B may be attractive for enacting States that seek to encourage secured financing in general and the use of the Registry in particular. Like option A, option B could have several variants. For example, the enacting State may wish to offer free registration services for a limited start-up period in order to facilitate acclimatization to and use of the registry system.

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Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Paragraphs

Chapter V. Priority of a security right

A. General rules

Article 29. Competing security rights created by the same grantor

1. Article 29 is based on recommendation 76 of the Secured Transactions Guide (see chap. V, paras. 45-54). It addresses priority competitions between security rights created by the same grantor. Article 29 divides these priority competitions into three categories. Subparagraph (a) addresses priority competitions between security rights made effective against third parties by registration of a notice in the Registry. Subparagraph (b) addresses priority competitions between security rights made effective against third parties by a method other than registration of a notice in the Registry. Subparagraph (c) addresses priority competitions between a security right that is made effective against third parties by registration of a notice in the Registry and a security right that is made effective against third parties by another method (e.g. possession).

2. Subparagraph (a), addresses the most common situation, that is, priority competitions between security rights all of which were made effective against third parties by registration of a notice in the Registry. In that situation, priority is determined by the order of registration, regardless of the order of creation (provided that the competing security rights have actually been created when the priority competition arises). Subparagraph (a) provides a simple and easy-to-apply priority rule.

3. It should be noted that the first-to-register priority rule in subparagraph (a) applies even if one or more of the competing security rights had not been created at the time of registration (registration of a notice may precede creation of a security right; see art. 4 of the Model Registry Provisions) and, thus, was not effective against third parties at the time of registration (as a security right that has not yet been created cannot be effective against third parties).

4. The following example illustrates this aspect of the first-to-register priority rule in subparagraph (a). On Day 1, before entering into a security agreement and obtaining any credit, Grantor authorized SC 1 to register, and SC 1 registered, a notice listing Grantor as the grantor and describing the encumbered assets as “all present and future equipment of Grantor”. On Day 2, Grantor entered into a security agreement with SC 2 that created in favour of SC 2 a security right in the same assets (i.e. all of Grantor’s present and future equipment) and obtained credit from SC 2, and SC 2 registered a notice with respect to that security right. On Day 3, Grantor concluded a security agreement with and borrowed money from SC 1 and created in favour of SC 1 a security right in all of Grantor’s present and future equipment. In this case, the security right of SC 2 became effective against third parties before the security right of SC 1 (because SC 1’s security right could not become effective against third parties until it was created). Yet, as a result of the first-to-register rule in subparagraph (a) the time of registration of SC 1’s notice, rather than the later time on which SC 1’s security right became effective against third parties, is used to determine priority. Thus, the security right of SC 1 has priority over the security right of SC 2 because SC 1’s notice was registered before SC 2’s notice.

5. Ordering priority according to the time of registration as opposed to the time of creation of a security right promotes efficiency and fairness for three reasons. First, the time of registration of each notice is recorded by the Registry and set out in the search result (see arts. 13, para. 3, and 23, para. 1, of the Model Registry Provisions) and is therefore easily ascertainable by third-party searchers. In contrast, the time of creation of a security right depends on background facts that are not ascertainable by a search of the Registry, and are not otherwise publicly available.

6. Second, the results that follow from the application of the rule in subparagraph (a) are consistent with the expectations of prudent secured creditors. For example, assume that SC 2 is considering extending credit to Grantor, secured by a security right in Grantor’s equipment. If SC 2 searches the records of the Registry and

discovers that a notice has been registered that lists Grantor as the grantor and SC 1 as the secured creditor and that describes the encumbered asset as including Grantor's equipment, SC 2 would likely expect that the registered notice reflects an existing or contemplated security right in that equipment. Accordingly, if SC 2 decides to go forward with the transaction, it will be on the understanding that its security right may be subordinate to that of SC 1.

7. Third, the rule in subparagraph (a) enables a prospective secured creditor to determine the priority of its security right over competing security rights with a level of certainty that promotes the extension of secured credit. The reason is that, if the prospective secured creditor registers a notice with respect to its security right before it actually extends credit and finds no registered notice, it can enter into a security agreement and extend credit knowing that its security right will have first priority (unless any of the exceptions to the first-to-register rule applies).

8. Subparagraph (b) addresses priority competitions in which the competing security rights have all been made effective against third parties by a method other than registration of a notice in the Registry. This situation is not very common as for most types of encumbered asset it will not be possible for two different secured creditors to both be able to make their security rights effective against third parties by a method other than registration at the same time. This is because the only other method of achieving third-party effectiveness for most types of encumbered asset will be by the secured creditor taking possession of the encumbered asset, and two different secured creditors will not both be able to have possession of the same asset at the same time. Should a competition of this type nonetheless arise, priority is determined by the order of third-party effectiveness in accordance with the general priority rule of article 29. It should be noted that where more than one secured creditor can achieve third-party effectiveness at the same time by another means is by entering into a control agreement, where this method is available (see art. 2, subpara. (g)), and, in such a situation, different priority rules apply (see, for example, arts. 47, para. 3, and 51, para. 3).

9. Subparagraph (c) addresses priority competitions between a security right that is made effective against third parties by registration of a notice in the Registry and a security right that is made effective against third parties by another method (e.g. by possession of the encumbered asset). In this situation, the time of registration of the security right that is made effective against third parties by registration is compared to the time of third-party effectiveness of the competing security right, and priority is determined according to the order of registration or third-party effectiveness. As in the case of the rule in subparagraph (a), the time of registration of a registered security right is used to determine priority even if the security right is not created until after the notice is registered (see paras. 2-4 above). For example, assume that: (a) on Day 1, SC 1 registers a notice describing an asset (with Grantor's consent); (b) on Day 2, Grantor creates a security right in the asset to SC 2, and SC 2 takes possession of the asset; and (c) on Day 3, Grantor enters into a security agreement with SC 1 that creates a further security right in the asset in favour of SC 1. Even though SC 2's security right was created first, SC 1 will have priority, because its notice was registered before SC 2 took possession.

10. There may be cases in which a secured creditor has used more than one method to make its security right effective against third parties. For example, a secured creditor in possession of an encumbered asset may subsequently register a notice with respect to that security right in the Registry, or vice versa. In this situation, the earlier priority time (i.e. when the security right was first registered or made effective against third parties) continues to be used in applying the general priority rules in article 29, unless there is a "gap" during which the security right was neither effective against third parties nor the subject of a notice registered in the Registry (see art. 31 and para. 12 below).

Article 30. Competing security rights created by different grantors

11. Article 30 addresses priority competitions between security rights created by different grantors in the same encumbered asset. This situation can occur, for

example, if a grantor creates a security right in its equipment in favour of a secured creditor (SC 1 in the example given in para. 4 above) and then sells the equipment to a person that creates a security right in it in favour of a different secured creditor (SC 2). Article 30 provides that the general priority rules in article 29 apply in this situation as well, except as provided in article 26 of the Model Registry Provisions. Under options A and B of article 26 of the Model Registry Provisions, SC 2 may have priority if SC 1 did not preserve the third-party effectiveness of its security right as against secured creditors in the position of SC 2 by taking the steps provided for in one of those options.

Article 31. Competing security rights in the case of a change in the method of third-party effectiveness

12. Article 31 addresses situations in which there has been a change in the method of third-party effectiveness (which requires that a security right has been validly created under art. 6 and that one of the methods of third-party effectiveness, set out, for example, in art. 18, has been complied with). This may happen, for example where a secured creditor makes its security right effective against third parties by possession of the encumbered asset and subsequently registers a notice with respect to its security right. In such a case, for the purposes of applying the general priority rules in article 29, the priority of the security right is determined by the time when it initially became effective against third parties so long as there was no time thereafter during which the security right was not effective against third parties. So, if the secured creditor in this example registers before it returns possession of the encumbered asset to the grantor, its priority will date from the time when it assumed possession, not the time of the later registration.

Article 32. Competing security rights in proceeds

13. Article 32 is based on recommendation 100 of the Secured Transactions Guide (see chap. V, paras. 144-150). It addresses priority competitions between security rights in assets that are proceeds (for the definition of the term “proceeds”, see art. 2, subpara. (bb)). Situations in which a secured creditor has a security right in proceeds are quite common, particularly when the original encumbered asset is inventory or a receivable, as a grantor will frequently sell inventory or collect a receivable before satisfaction of the obligation secured by that asset. In such a case, under article 10, the security right continues in the proceeds that are derived from the sale of the inventory or the collection of the receivable, and the security right in the proceeds is effective against third parties if the conditions in article 19 are satisfied. Article 32 then determines the priority of that security right as against another security right in the same asset, whether that security right is over the asset as an original encumbered asset or as proceeds. Article 32 provides that the priority of the security right in the proceeds is the same as the priority of the security right in the original encumbered asset.

14. The following example illustrates the operation of article 32. On Day 1, Grantor creates in favour of SC 1 a security right in all of Grantor’s present and future inventory and SC 1 registers a notice with respect to that security right. On Day 2, Grantor creates in favour of SC 2 a security right in all of Grantor’s present and future receivables and SC 2 registers a notice with respect to that security right. On Day 3, Grantor sells some of its inventory on credit, generating a receivable. SC 1 has a security right in that receivable under article 10 because it is proceeds of the inventory in which SC 1 had a security right and its security right in the receivable as proceeds is automatically effective against third parties under article 19. SC 2 has a security right in that receivable as an original encumbered asset, because of its security right in present and future receivables. Under the priority rules in article 29, SC 1’s security right in the receivable has priority over SC 2’s security right in the receivable because the priority of SC 1’s security right in the receivable (as proceeds) is determined under article 32 by the time of registration of SC 1’s notice with respect to its security right in the inventory (as original encumbered assets). Thus SC 1’s priority in the receivable dates from Day 1, while SC 2’s priority in the receivable dates from Day 2 (for the

priority of a security right in proceeds of inventory subject to an acquisition security right, see art. 41).

Article 33. Competing security rights in tangible assets commingled in a mass or transformed into a product

15. Article 33 addresses priority competitions resulting from situations in which the original encumbered assets are commingled in a mass or transformed into a product (see Secured Transactions Guide, chap. V, paras. 117-124 and recs. 90 and 91). Under article 11, a security right in the original encumbered assets automatically extends to the mass or product and, under article 20, the security right in the mass or product is automatically effective against third parties.

16. Paragraph 1 of article 33 addresses the situation in which the competing security rights that extended to the mass or product were originally in the same encumbered asset. In this situation, the order of priority of the security rights in the mass or product is the same as the order of priority of the security rights in the original encumbered asset. For example, if SC 1 has a first-ranking security right in 100,000 litres of oil and SC 2 has a second-ranking security right in the same 100,000 litres of oil and the oil is then commingled with another 100,000 litres of oil in the same tank so that the mass comprises 200,000 litres of oil, under paragraph 1 of article 33, the security right of SC 1 will continue to rank ahead of the security right of SC 2 in relation to the commingled mass. Under article 11, paragraphs 1 and 2, however, the security rights of SC 1 and SC 2 are both limited to half of the oil in the tank (i.e. 100,000 litres).

17. Paragraphs 2 and 3 address the situation in which competing security rights that extended to the mass or product were originally in different encumbered assets. In this situation, paragraph 2 provides that the secured creditors share in the mass or product according to the ratio that the obligation secured by each of their security rights bears to the sum of the obligations secured by all those security rights. Paragraph 3 provides that the determination of the value of the obligations secured by the competing security rights is subject to the limitations on the value of the obligation that is set out in article 11, paragraphs 2 and 3.

18. The following example illustrates the operation of the limitations in paragraphs 2 and 3. SC 1 has a security right in flour worth €100 to secure a loan of €100 and SC 2 has a security right in yeast worth €20, also to secure a loan of €100. The flour is mixed with the yeast to make bread. Paragraph 2 starts by providing that SC 1 and SC 2 would share in the value of the bread 50/50 (as they were both owed the same amount, i.e. €100). Paragraph 3 overrides this, however, by capping the amount of SC 2's loan, for the purposes of this calculation, at the value of the yeast (i.e. €20), so that SC 2 will only be entitled to 1/6 of the value of the bread (20/120). If the bread is worth €120 (or more), then this will not matter, as there will be sufficient value for SC 1 to recover its €100, and for SC 2 to recover its €20, in full. If the value of the bread goes down to €60 (i.e. becomes insufficient to satisfy the secured claims in full), however, then SC 1 will be paid 5/6 of the value of the bread (i.e. €50) and SC 2 will be paid only 1/6 of the value of the bread (i.e. €10).

Article 34. Security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset

19. Article 34 is based on recommendations 79-82 of the Secured Transactions Guide (see chap. V, paras. 60-89). It determines the rights of a buyer or other transferee, lessee or licensee of an encumbered asset vis-à-vis a security right. Paragraph 1 states the general rule is that a security right in an encumbered asset that is effective against third parties continues to encumber the asset notwithstanding its sale or other transfer, lease or licence. Paragraphs 2-6 provide exceptions to this general rule.

20. Paragraph 2 provides that, if the secured creditor authorizes the sale or other transfer of the encumbered asset free of the security right, the buyer or other transferee acquires its rights in the asset free of that security right. This rule recognizes that a secured creditor is always free to voluntarily release its security right in an asset. In

practice, a secured creditor may be prepared to do this where: (a) the secured creditor and grantor have arranged for the proceeds of the sale or transfer to be remitted directly to the secured creditor in satisfaction of the secured obligation; or (b) the buyer or other transferee has agreed to assume the grantor's obligation to the secured creditor.

21. Paragraph 3 sets out a similar rule, for a situation where the secured creditor agrees that the grantor may lease or license the encumbered asset. It is stated differently than the rule in paragraph 2 (the rights of a lessee or licensee "are not affected by" the security right) because the secured creditor's authorization only entitles the lessee or licensee to enjoy undisturbed possession of the leased or licensed asset during the term of the lease or licence as opposed to acquiring ownership free of the security right as in the case of an authorized sale or other transfer.

22. Paragraph 4 provides that a buyer of a tangible asset that is sold in the ordinary course of business of the seller acquires its rights free of any security right created by the seller in that asset. It should be noted that the term "tangible asset" for the purposes of this rule excludes money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see art. 2, subpara. (ll)).What constitutes a sale in the ordinary course of the seller's business requires a fact-specific analysis. Thus, for example, the sale by the grantor of some of its inventory in accordance with its usual business practices would satisfy this condition, but a one-time sale of a used item of equipment may not. It should be noted that this rule applies only to buyers, and not for other transferees. This means that it would not apply to a person that takes an encumbered asset as a gift, rather than by purchasing it. It should be also noted that a buyer of an encumbered asset sold in the ordinary course of the seller's business only takes free of security rights granted by the seller. For example, if a person acquires an encumbered asset from the grantor outside the ordinary course of the grantor's business, that person is likely to acquire the asset subject to the security right. If that person then resells the asset in the ordinary course of its business, its buyer will not acquire the asset free of the security right, even though it was sold in the ordinary course of the seller's business, because the seller had not been the grantor of the security right. This situation will most likely arise in cases where the seller's business includes the resale of used assets. The buyer's only recourse in this situation will be under other law of the enacting State (e.g. a claim for rescission of the contract or for damages).

23. A buyer may be protected by paragraph 4 even if the buyer knew of the existence of the security right. The buyer will not be protected, however, if the buyer knew that the sale breached the secured creditor's rights under its security agreement with the grantor. If, for example, a buyer knows that the seller has entered into a security agreement that limits the grantor's authority to deal in its inventory, but does not know that the sale is in breach of that limitation, the buyer can acquire the asset free of the security right.

24. Paragraphs 5 and 6 bring about similar results to those in paragraph 4 in the case of leases of tangible encumbered assets and non-exclusive licences of encumbered intellectual property that are in each case leased or licensed by the grantor in the ordinary course of its business. As with paragraph 3, the formulation of paragraphs 5 and 6 differs from the formulation of paragraph 4, because, in the case of a lease or licence concluded in the ordinary course of the grantor's business, the effect of the exception is to entitle the lessee or licensee to enjoy undisturbed use of the leased or licensed asset during the term of the lease or license as opposed to its acquiring ownership of the relevant asset.

25. Paragraphs 7 and 8 state what is often referred to as the "shelter principle". Under this principle, once a buyer or other transferee, lessee, or licensee obtains rights in the encumbered asset free of (or unaffected by) a security right, subsequent buyers or other transferees also acquire their rights in the encumbered assets free of (or unaffected by) that security right.

26. Paragraph 9 protects a buyer or lessee of low-value consumer goods that are subject to an acquisition security right that was made effective against third parties

automatically under article 24 (and not, for example, by registration). In this situation, the buyer or lessee acquires its rights free of or unaffected by the security right. If a secured creditor wishes to avoid this risk, it should register a notice of its acquisition security right.

Article 35. Impact of the grantor's insolvency on the priority of a security right

27. Under article 35, a security right that is effective against third parties remains effective against third parties and retains its priority as against competing claimants notwithstanding the commencement of insolvency proceedings with respect to the grantor, except to the extent that the insolvency law to be specified by the enacting State gives superior priority to the rights of another claimant (e.g. the insolvency representative for the costs of the insolvency proceedings). This rule is extremely important in creating a legal environment that promotes the extension of secured credit, because a security right that is not recognized in insolvency proceedings, or that loses its priority because of the commencement of insolvency proceedings, is of little value to a prospective secured creditor.

Article 36. Security rights competing with preferential claims

28. Article 36 is based on recommendations 83, 85 and 86 of the Secured Transactions Guide (see chap. V, paras. 90-93 and 103-109). It provides a framework for the enacting State to implement the policy of these recommendations by requiring it to: (a) list in a clear and specific way any claims that will have priority over security rights; and (b) specify a cap on the amount of the claim given priority. This requirement is intended to ensure that secured creditors are aware of the existence of any preferential claims and their maximum amounts, and thus can take them into account before lending (for example, by deducting the potential amount of the preferential claims from the amount that they are prepared to lend based on the value of the encumbered assets on which they are relying). In specifying the preferential claims that have priority over a security right, the enacting State should also indicate whether these claims are given priority generally or only if insolvency proceedings involving the grantor are commenced (see Secured Transactions Guide, rec. 239).

29. Examples of claims that some States have determined should have priority over a competing security right include: (a) short-term claims of unpaid suppliers of goods; (b) rights of retention of unpaid creditors who have rendered services such as repair services with respect to encumbered assets; (c) claims of the grantor's employees for employment benefits; and (d) tax claims.

30. It should be noted that secured creditors typically require grantors to disclose the existence of preferential claims. However, if a grantor does not comply with this obligation the secured creditor has only an unsecured claim against the grantor for breach of contract, and a claimant listed by the enacting State in this article as having priority retains that priority to the extent stated in this article, despite the grantor's non-compliance.

31. It should also be noted that, some States require a notice of preferential claims to be registered in the Registry. In some of those States, the priority of a registered preferential claim is subject to the general first-to-register priority rule. This approach is useful only if the registered notice states the maximum amount of the claim and the scope of the grantor's assets that are subject to that claim so as to enable potential secured creditors to make an informed decision about whether to extend credit and, if so, on what terms. In other States, registered preferential claims have priority even over security rights that were previously registered or otherwise made effective against third parties. In those States, requiring registration of preferential claims is of limited value to secured creditors (see Registry Guide, paras. 46 and 51).

Article 37. Security rights competing with rights of judgment creditors

32. Article 37 is based on recommendation 84 of the Secured Transactions Guide (see chap. V, paras. 94-102). It determines priority as between a security right in an

encumbered asset and the right of a judgment creditor that has taken whatever steps are necessary to acquire rights in the grantor's assets under other law of the enacting State. Paragraph 1 gives priority to the right of the judgment creditor if the required steps are taken before the security right becomes effective against third parties. The enacting State should complete paragraph 1 by inserting the relevant steps, or a reference to the other law that specifies those steps. In some States, the relevant step may be registration of a notice of the judgment in the security rights registry. In other States, the relevant step may be seizure of the grantor's assets or service of a garnishment order on a person against whom the grantor has a claim for payment of money.

33. Paragraph 2 provides that the security right has priority over the right of the judgment creditor if the judgment creditor does not acquire rights in the encumbered asset before the security right becomes effective against third parties. The same rule applies in the rare situation in which the judgment creditor acquired its rights in the encumbered asset at the same time as the security right became effective against third parties (this may occur where the encumbered assets are future assets). This rule protects a secured creditor against the possibility that its security right might otherwise be subordinate to the right of a judgment creditor that did not exist at the time the secured creditor took the steps necessary to make its security right effective against third parties.

34. However, paragraph 2 limits the extent of the priority of the security right over the right of the judgment creditor to: (a) credit extended by the secured creditor before the expiry of a short period of time to be specified by the enacting State (e.g. 15 days) after the judgment creditor notifies the secured creditor that it has taken the steps described in paragraph 1; or (b) credit extended pursuant to an irrevocable commitment made before receipt of that notification to extend credit in a fixed amount or in an amount fixed pursuant to a specified formula. This rule prevents the secured creditor from exploiting its priority status by increasing the secured obligation even after the secured creditor acquires actual knowledge of the rights of the judgment creditor, while giving the secured creditor a short period of time to adjust to the existence of those rights.

Article 38. Acquisition security rights competing with non-acquisition security rights

35. Article 38 is based on recommendation 180 of the Secured Transactions Guide (see chap. IX, paras. 131, 136, 137, 143 and 146) and recommendation 247 of the Intellectual Property Supplement (see paras. 259-263). Two options are provided for the enacting State. Under both options, provided that the specified conditions are satisfied, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset including a prior non-acquisition security right that otherwise would have had priority over the acquisition security right under the general priority rules in article 29.

36. "Super-priority" for acquisition security rights is a feature of the law of most States, whether formulated as a specific priority rule as in the Model Law or, as is the case in many legal systems, as a necessary implication of ownership of the encumbered asset being retained by a seller or lessor under a retention-of-title sale or a financial lease agreement (under art. 2, subpara. (kk), a seller's or lessor's ownership rights under a retention-of-title sale or a financial lease agreement is a security right). Article 38 preserves this advantageous treatment of acquisition finance, extending it to credit supplied by bank lenders as wells as sellers and lessors.

37. Option A contains three "super-priority" rules. Which of the three rules applies will depend on the nature of the encumbered assets. The rule in paragraph 1 applies if the encumbered assets are equipment or its intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property that is primarily used or intended to be used by the grantor in the operation of its business; see art. 2, subpara. (l)). The rule in paragraph 2 applies if the encumbered assets are either inventory or its intellectual property equivalent (that is, intellectual property or rights of a licensee under a licence of intellectual property held by the grantor for sale

or licence in the ordinary course of the grantor's business; see art. 2, subpara. (q)). The rule in paragraph 3 applies if the encumbered assets are consumer goods or their intellectual property equivalent (that is, 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; see art. 2, subpara. (f)).

38. Under the "super-priority" rule in paragraph 1 of option A, an acquisition security right in equipment or its intellectual property equivalent has priority over a competing non-acquisition security right created by the grantor, provided that the secured creditor has possession of the equipment or a notice with respect to the acquisition security right is registered in the Registry before the expiry of a short period of time to be specified by the enacting State (e.g. 15-20 days) after either the grantor obtains possession of the equipment or the agreement for the lease or licence of the intellectual property is concluded. If the acquisition secured creditor has possession or registers a notice with respect to the acquisition security right before the expiry of the specified period, that security right will have super-priority over a competing non-acquisition security right even if notice of the non-acquisition security right had been registered or the non-acquisition security right had been made effective against third parties before the acquisition security right (this could happen, for example, where the prior security right covered future assets). Even though possession of the equipment by the secured creditor is an alternative to timely registration for the purposes of obtaining super priority, continued possession of the equipment by the secured creditor is unlikely to be used in practice as a basis for super-priority, as this would deprive the grantor of the use of the equipment in its business. It is likely that possession will be relied on in practice only during the gap between the conclusion of the security agreement and the grantor's assumption of possession of the equipment.

39. Under the super-priority rule in paragraph 2 of option A, additional requirements must be satisfied for an acquisition security right in inventory or its intellectual property equivalent to have "super-priority" over a competing non-acquisition security right. The acquisition security right will have priority if the secured creditor has possession of the inventory, or if two conditions are met before the grantor takes possession (in the case of inventory) or the agreement for sale or licence has been concluded (in the case of the intellectual property equivalent). First a notice with respect to the acquisition security right must be registered in the Registry. Second, a non-acquisition secured creditor that registered a notice with respect to encumbered assets of the same kind as the inventory (or its intellectual property equivalent) must have received a notice from the acquisition secured creditor. The notice must: (a) state that the acquisition secured creditor has or intends to acquire an acquisition security right; and (b) describe the relevant encumbered assets sufficiently to enable them to be reasonably identified. It should be noted that there is no grace period as in the case of equipment. It should also be noted that even though possession of inventory by the secured creditor is an alternative to the satisfaction of these two conditions for the purposes of obtaining super-priority, a secured creditor is unlikely to rely on its continued possession of inventory as a basis for super-priority, as this would deprive the grantor of the ability to sell the inventory in the course of its business. It is unlikely that possession will be relied on in practice only during the gap between the conclusion of the security agreement and the grantor's assumption of possession of delivery of the inventory.

40. There are two reasons for the different requirements for super-priority in the case of inventory or its intellectual property equivalent as compared to the conditions for super-priority in the case of equipment and its intellectual property equivalent. First, because inventory may "turn over" (i.e. be sold by the grantor) quickly and depreciate quickly, it would be inefficient for a financier extending credit that is to be secured by a non-acquisition security right in present and future inventory to have to wait for the expiry of a grace period before being certain that the grantor's inventory is not subject to an acquisition security right that will have super-priority. The requirement in paragraph 2 that the notice be registered before the grantor obtains possession of the encumbered asset addresses this concern. Second, inasmuch as new inventory can often be difficult to distinguish from old inventory, even a secured

creditor with a non-acquisition security right in future inventory that monitors the ongoing acquisition of inventory by the grantor will not always be able to easily determine that new inventory has replaced similar older inventory and may thus potentially be subject to an acquisition security right. The requirement that the acquisition secured creditor give advance notice to prior-registered non-acquisition secured creditors of its pending acquisition security right addresses this concern.

41. Paragraph 4 of option A contains two important clarifications about the advance notice to be sent to prior-registered non-acquisition secured creditors under paragraph 2 (b)(ii). These clarifications are designed to facilitate acquisition financing. First, the notice may cover acquisition security rights under multiple transactions between the same parties without the need to send a new notice in relation to each new transaction. Thus, for example, where a seller or lender is planning to engage in an ongoing series of financing arrangements with the grantor, a single notice is sufficient, provided that it sufficiently describes the assets to be covered by these ongoing transactions to enable them to be reasonably identified. Second, the notice suffices only in respect of encumbered assets that are acquired by the grantor before the expiry of a time period to be specified by the enacting State (e.g. five years), after that notice is received by the non-acquisition secured creditor. As a result, an acquisition secured creditor will need to send a new notice before the expiry of the specified time period if it wants to continue to enjoy the super-priority for its acquisition financing to the grantor.

42. Under the super-priority rule in paragraph 3 of option A, an acquisition security right in consumer goods or their intellectual property equivalent automatically has priority over a non-acquisition security right that is created by the grantor in the same encumbered asset and was previously made effective against third parties. As with all the rules in article 38, it is implicit that the acquisition security right will only benefit from super-priority if it is effective against third parties. This means, for example, that a security right in consumer goods, other than low-value consumer goods, will need to be made effective against third parties by registration or possession (see arts. 18 and 24). Once it becomes effective against third parties, the acquisition security right will have priority. A non-acquisition security right may have priority, however, if the acquisition secured creditor fails to register notice of its security right altogether (unless the low-value exemption in art. 24 applies).

43. Option B contains only two “super-priority” rules. The rule in paragraph 1 is identical to the rule in paragraph 1 of option A, except that, while paragraph 1 of option A applies only to acquisition security rights in equipment and its intellectual property equivalent, paragraph 1 of option B also applies to acquisition security rights in inventory and the intellectual property equivalent of inventory. The rule in paragraph 2 is identical to the rule in paragraph 3 of option A. Thus, the only difference between option A and option B relates to the steps that must be taken in order for an acquisition security right in inventory or in its intellectual property equivalent to have priority over a competing non-acquisition security right. Under the approach in option B, a non-acquisition secured creditor with a security right in future inventory of the grantor or its intellectual property equivalent will need to monitor the registry record if it wants to ensure, before extending new credit against new inventory or new intellectual property acquired by the grantor, that it is not the subject of an intervening acquisition security right which if registered before the expiry of the specified grace period will have super-priority. The approach in option A relieves the prior non-acquisition secured creditor from this monitoring burden, but imposes a more onerous registration and notification burden on the acquisition secured creditor.

44. The reference to possession by the secured creditor in paragraphs 1 (a) and 2 (a) of option A and paragraph 1 (a) of option B refers to the situation where the secured creditor has possession of the encumbered asset at the outset of the acquisition financing transaction, such as where the secured creditor is a seller or lessor. It does not refer to possession acquired by the secured creditor as a result of seizure in the context of enforcement upon the grantor’s default. Thus, an acquisition secured creditor that failed to register in time after the grantor obtained possession of the encumbered asset cannot obtain super-priority under this article by subsequently

taking possession of the encumbered asset in the context of enforcement or otherwise. Otherwise, an acquisition secured creditor could change its priority by commencing enforcement, a result that would introduce great uncertainty.

Article 39. Competing acquisition security rights

45. Article 39 is based on recommendation 182 of the Secured Transactions Guide (see chap. IX, paras. 173-178). It addresses priority competitions between acquisition security rights that are created by the same grantor in the same encumbered asset. This type of priority competition could occur in two situations. The first is where two lenders have each financed a part of the total acquisition price of the relevant asset. In this situation, priority is determined under paragraph 1 according to the general rule of priority in article 29. The second situation is where a lender advances part of the acquisition price of the encumbered asset (for example, by lending the money used by the grantor for an advance against the purchase price) with the balance of the acquisition price being financed by the supplier of the encumbered asset. In this second situation, paragraph 2 gives priority to the acquisition security right of the supplier over that of the lender, as long as it is made effective against third parties before the expiry of the period specified in article 38, paragraph 1 (b).

46. Paragraph 2 protects the supplier over the lender because credit transactions between suppliers and their customers are often entered into on a same day basis without any practical opportunity for the supplier to first check the Registry to determine whether a competing acquisition security right has been registered against the asset. Without being assured of super-priority for a limited period going forward, suppliers would be reluctant to extend secured credit to their customers and this in turn would mean that their customers would be denied access to this important alternative source of secured credit. It should be noted that this rule applies even where the encumbered asset is inventory or its intellectual property equivalent notwithstanding that, under paragraph 2 of option A, the secured creditor must register and give notice to prior-registered non-acquisition secured creditors before the grantor obtains possession of inventory or the agreement for the sale or licence of the intellectual property equivalent of inventory is concluded in order to obtain super-priority against the holder of a prior non-acquisition security right in the encumbered asset.

Article 40. Acquisition security rights competing with the rights of judgment creditors

47. Article 40 is based on recommendation 183 of the Secured Transactions Guide (see chap. IX, paras. 145-148). It provides that an acquisition security right that is made effective against third parties before the expiry of the period specified in article 38, subparagraph 1 (b) has priority over the rights of a judgment creditor that would otherwise have priority under article 37. Where the enacting State adopts option B of article 38, article 40 ensures that acquisition secured creditors enjoy the same grace period to preserve priority over the rights of intervening judgment creditors as is available to them to establish priority over the rights of non-acquisition secured creditors.

48. By way of illustration, assume that Grantor acquires an item of equipment from Seller on credit on Day 1 and creates in favour of Seller an acquisition security right in the item of equipment to secure its obligation to pay the balance of the purchase price. On Day 5 Seller registers a notice. In the meantime, on Day 3, Judgment Creditor obtains a judgment against Grantor and takes the steps specified in article 37, paragraph 1, to acquire rights in the item of equipment. Under the rule in article 37, paragraph 1, Judgment Creditor's rights would have priority over Seller's security right because Judgment Creditor obtained its rights before Seller's security right was made effective against third parties by registration of a notice. As a result of the operation of article 40, however, Seller's security right has priority over the rights of Judgment Creditor.

49. Where the acquisition security right covers inventory and the enacting State adopts option A of article 38, the rationale for the rule in article 40 is necessarily

different. This is so because paragraph 2 of option A of article 38 requires the acquisition secured creditor to register *before* the grantor obtains possession of inventory (or the agreement for the sale or licence of the intellectual property equivalent of inventory is concluded) in order to obtain super-priority against the holder of a prior *non-acquisition* security right. The rationale for giving superior protection against judgment creditors in this situation is the same as that which informs the priority rule in article 39. Because acquisition financing is often provided by suppliers as opposed to lenders, and because supplier financing is often concluded on a same-day basis, article 40 ensures that suppliers are not prevented in practice from entering into inventory financing arrangements for fear that a judgment creditor may in the coming days take the steps necessary to acquire rights in the relevant inventory so as to obtain priority under article 37.

Article 41. Competing security rights in proceeds of an asset subject to an acquisition security right

50. Article 41 is based on recommendation 185 of the Secured Transactions Guide (see chap. IX, paras. 158-172). Both option A and option B of article 38 provide that, if the specified conditions are satisfied, an acquisition security right has priority over a competing non-acquisition security right in the same encumbered asset even if the non-acquisition security right would have priority under the general priority rule in article 29. Article 41 determines whether that "super-priority" carries over to proceeds of the encumbered assets that are subject to the acquisition security right.

51. Under article 10, a secured creditor with a security right in an asset automatically has a security right in the identifiable proceeds of that asset; and, under article 19, that security right is effective against third parties if the conditions specified in that article are satisfied. Under article 32, the priority of a security right in proceeds that is effective against third parties under article 19 is the same as the priority of the security right in the original encumbered asset. Under this rule, a security right in proceeds of assets subject to an acquisition security right would have the same "super-priority" as the security right in the original encumbered asset. Article 41, however, limits the application of article 32 by restricting the "super-priority" to the proceeds of only certain types of asset subject to an acquisition security right (option A) or by not extending the "super-priority" to the proceeds at all (option B). Paragraph 1 of option A provides that the "super-priority" of an acquisition security right under article 38 generally carries over to the proceeds of those assets. This is subject, however, to the exception in paragraph 2 for proceeds of inventory or its intellectual property equivalent. Under subparagraph 2 (a), the "super-priority" does not carry over to proceeds of inventory or its intellectual property equivalent that is in the form of receivables, negotiable instruments or rights to payment of funds credited to a bank account. If the proceeds take any other form, subparagraph 2 (b) states that the acquisition security right in the proceeds will have "super-priority" if, before the proceeds arose, the non-acquisition secured creditor had previously registered a notice in the Registry with respect to a security right in an asset of the same kind as the proceeds and the non-acquisition secured creditor receives a notice from the acquisition secured creditor that states that it has or intends to obtain a security right in assets of that kind and that describes those assets sufficiently to enable them to be identified.

52. The reason why subparagraph 2 (a) does not to extend "super-priority" to proceeds of inventory (and its intellectual property equivalent) that take the form of receivables, negotiable instruments or rights to payment of funds credited to a bank account relates to the difficulty that would otherwise be faced by prior non-acquisition secured creditors with security rights in these types of assets as original encumbered assets. If the "super-priority" given to acquisition security rights were extended to those types of proceeds, potential secured creditors would be reluctant to extend credit on the basis of these types of assets as original encumbered assets for fear that their priority would be trumped by the security right of subsequent acquisition financiers in these types of assets as proceeds. The reason why subparagraph 2 (b) requires the acquisition secured creditor to send a notice to prior-registered non-acquisition secured creditors with a security right in the same kind of

assets as the proceeds where the proceeds take any other form is to alert them to the existence of its prior-ranking security right in this kind of assets as proceeds so that they can decide whether to extend further credit to the grantor on the security of those assets. The decision not to provide "super-priority" with respect to these payment rights reflects a policy decision to promote receivables financing and other form of financing based upon such payment rights.

53. Option B provides that the "super-priority" with respect to assets subject to an acquisition security right does not carry over to proceeds of those assets under any circumstances. Instead, the priority of the security right in the proceeds will be determined under the general priority rules in article 29. Option B avoids the need to make the sort of distinctions between types of proceeds required to be made in option A. As already explained (see para. 27 above), article 35 provides that a security right that is effective against third parties remains effective against third parties and retains the priority it had against competing claimants notwithstanding the commencement of insolvency proceedings by or against the grantor except to the extent that the enacting State's insolvency law provides otherwise. Article 35 applies equally to the special priority accorded to acquisition security rights (see Secured Transactions Guide, rec. 186).

Article 42. Acquisition security rights extending to a mass or product competing with non-acquisition security rights in the mass or product

54. Article 42 preserves the super-priority of an acquisition security right in an asset that later becomes part of a mass or product in a way that allows the acquisition security right to extend to the mass or product under article 11 as against a competing non-acquisition security right in the mass or product as an original encumbered asset. Article 42 is subject to article 38, meaning that the super-priority of the acquisition security right is conditional on compliance with the conditions for super-priority set out in that article.

Article 43. Subordination

55. Article 43 is based on recommendation 94 of the Secured Transactions Guide (see chap. V, paras. 128-131). Paragraph 1 allows a person to subordinate its security right to a competing claim over which it would otherwise have priority. Such subordination may take the form of a bilateral agreement between the party agreeing to subordinate its security right and the competing claimant that will benefit from that subordination. However, paragraph 1 provides that the beneficiary need not be a party to the subordination. Thus, the subordination may also take the form of a unilateral commitment (usually made to the grantor) by the party agreeing to a lower priority that it will not assert its priority against a specified competing claimant or a specified class of competing claimants.

56. Paragraph 2 makes it clear that subordination does not affect the rights of competing claimants other than the party agreeing to subordinate its priority and the beneficiary of that agreement. For example, assume that three secured creditors, SC 1, SC 2 and SC 3, have security rights in the same encumbered assets, securing claims of €50, €10 and €70, respectively. Assume further that the order of priority (highest to lowest) is SC 1, SC 2 and SC 3, and that SC 1 subordinates its claim to that of SC 3. Under the rule in paragraph 2, the effect of the subordination is that SC 3 will succeed to SC 1's priority status up to €50 and that SC 2's claim to the next €10 will not be affected.

Article 44. Future advances and future encumbered assets

57. Article 44 is based on recommendations 97-99 of the Secured Transactions Guide (see chap. V, paras. 135-143). It clarifies the operation of the priority rules in this chapter in relation to a security right that secures obligations arising after the conclusion of the security agreement (see art. 7) and in relation to encumbered assets that come into existence or are acquired by the grantor after the conclusion of the security agreement.

58. Paragraph 1 provides that the priority of a security right extends to all obligations it secures, regardless of when those obligations were incurred. Thus, a security right has the same priority over the right of a competing claimant whether the entire secured obligation was incurred at or before the creation of the security right or all or a portion of the secured obligation was incurred thereafter. This rule is subject, however, to the rule in article 37, under which a judgment creditor may have priority for advances made by the secured creditor after it has knowledge that the judgment creditor has taken the steps necessary to acquire rights in the encumbered asset and has had a short period of time (set out in art. 37) to adjust. This rule is also subject to the maximum sum specified in the registered notice should the enacting State decide to require a maximum sum to be set out in the security agreement and in the registered notice.

59. Paragraph 2 similarly provides that, when a security right has been made effective against third parties by the registration of a notice, the priority resulting from that registration under article 29 extends to all the encumbered assets described in the notice whether they were owned by the grantor at the time of registration or were acquired thereafter.

Article 45. Irrelevance of knowledge of the existence of a security right

60. Article 45 is based on recommendation 93 of the Secured Transactions Guide (see chap. V, paras. 125-127). It confirms that a secured creditor's knowledge or lack of knowledge of the existence of a competing security right at the time it acquired its own security right is not relevant to the operation of the priority rules in this chapter. The point is made explicit to emphasize that priority is determined only on the basis of those priority rules and difficult-to-prove subjective states of knowledge are irrelevant. Article 45 applies only to a secured creditor's knowledge of the existence of a competing security right. Under the Model Law, however, knowledge of facts relating to the security right may be relevant in other contexts. For example, a buyer of a tangible encumbered asset sold in the ordinary course of the grantor's business that has knowledge that the particular sale breaches the rights of the secured creditor under its security agreement with the grantor does not take free of the security right; on the other hand, mere knowledge of the existence of the security right does not disqualify the buyer from protection (see art. 34, para. 4).

B. Asset-specific rules

Article 46. Negotiable instruments

61. Article 46 is based on recommendations 101 and 102 of the Secured Transactions Guide (see chap. V, paras. 154-156). Differences between article 46 and recommendations 101 and 102 are of a drafting nature only; paragraph 1 deals with the priority between competing security rights in the same negotiable instrument, and paragraph 2 addresses the rights of a secured creditor with a security right in a negotiable instrument as against a buyer or other consensual transferee of the negotiable instrument.

62. Under paragraph 1, a security right in a negotiable instrument that is made effective against third parties by the secured creditor's possession of the negotiable instrument has priority over a security right in the same negotiable instrument that is made effective against third parties by registration of a notice, whether the secured creditor took possession before or after the notice was registered. This is consistent with the important role that possession plays in ensuring negotiability under the law relating to negotiable instruments.

63. Paragraph 2 provides similar protection to a buyer or other consensual transferee that obtains possession of a negotiable instrument as against a secured creditor with a security right in the instrument that was made effective against third parties by registration of a notice. First, under paragraph 2 (a), the buyer or other consensual transferee acquires its rights free of the security right if it qualifies as a protected holder or the like under its relevant law (the enacting State should insert the

appropriate term in para. 2 (a)). Second, under paragraph 2 (b), a buyer or other transferee that takes possession of the instrument and gives value for it without knowledge that the sale or other transfer violates the rights of the secured creditor under the security agreement also acquires its right in the instrument free of that security right. As with the rule in paragraph 1, this rule preserves the important role of possession in ensuring negotiability under the law relating to negotiable instruments.

64. Knowledge of the existence of a security right does not prevent a buyer or other consensual transferee of a negotiable instrument from acquiring its rights in the instrument free of the security right under paragraph 2 (b) (although such knowledge may prevent the buyer or other transferee from qualifying as a protected holder or the like and, thus, may prevent the buyer or other transferee from taking free of the security right under paragraph 2 (a)). Rather, only knowledge that the sale or other transfer violates the rights of the secured creditor under the security agreement prevents the buyer or other transferee from acquiring its rights in the instrument free of the security right under paragraph 2 (b). "Knowledge", as defined in article 2, subparagraph (r), means "actual knowledge". The reference to "good faith" that was included in recommendation 102 (b) of the Secured Transactions Guide has been deleted on the understanding that the absence of knowledge amounts essentially to good faith in this context (and because the concept of good faith is used in the Model Law only to reflect an objective standard of conduct).

Article 47. Rights to payment of funds credited to a bank account

65. Article 47 is based on recommendations 103-105 of the Secured Transactions Guide (see chap. V, paras. 157-163). It determines priority between competing security rights in a right to payment of funds credited to a bank account whether those rights to payment are original encumbered assets or are proceeds of a security right in other property. In this respect, it should be noted that, according to art. 19, para. 1, a security right in proceeds in the form of a right to payment of funds credited to a bank account is automatically effective against third parties if the security right in the original encumbered asset is effective against third parties. Article 47 includes special priority rules because a security right in a right to payment of funds credited to a bank account may be made effective against third parties by methods other than registration (e.g. by control). Thus, there is a particular need to address priority competitions between security rights to payment of funds credited to a bank account made effective against third parties by different methods (see Secured Transactions Guide, chap. V, para. 157).

66. Paragraphs 1-3, taken together, have the effect that a security right in a right to payment of funds credited to a bank account that is made effective against third parties by any of the methods provided for in article 25 has priority over a security right that is made effective against third parties by registration of a notice in the Registry under article 18. Under paragraph 1, a security right in a right to payment of funds credited to a bank account that is made effective against third parties by the secured creditor becoming the account holder has priority over all competing security rights in the same asset. Next in the order of priority, under paragraphs 2 and 3 are: (a) a security right created in favour of the deposit-taking institution; and (b) a security right made effective against third parties by the conclusion of a control agreement between the secured creditor, the grantor and the deposit-taking institution (for the definition of the term "control agreement", see art. 2, subpara. (g) (ii)). Under paragraph 4, priority between competing security rights created in favour of secured creditors who have all concluded a control agreement is determined by the order of conclusion of the control agreements. This approach facilitates secured transactions that rely specifically on rights to payment of funds credited to a bank account by relieving secured creditors that make their security rights effective against third parties under article 25 from the general obligation of searching the Registry and from the first-to-register priority rules in article 29 (see Secured Transactions Guide, chap. V, para. 158).

67. Under paragraph 5, except when the secured creditor has become the account holder, a security right in a right to payment of funds credited to a bank account is

subordinate to the deposit-taking institution's right under other law to set off its claims against the grantor against its obligation to the grantor with respect to the grantor's right to payment of funds from the bank account. The effect of this rule is to preserve the right of a deposit-taking institution to exercise its right of set-off that it has under other law.

68. Under paragraph 6, 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 so long as the transferee does not have knowledge that the transfer violates the rights of the secured creditor under the security agreement. A "transfer of funds" includes transfers by a variety of mechanisms, including by cheque and electronic means. The purpose of paragraph 6 is to preserve the free negotiability of funds.

69. Knowledge of the existence of a security right does not prevent a transferee of funds from a bank account from taking free of the security right. Rather, it is only knowledge that the transfer violates the rights of the secured creditor under the security agreement that prevents the transferee from taking free. "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". Paragraph 7 also preserves the rights of transferees of funds credited to a bank account under any other law specified by the enacting State.

Article 48. Money

70. Article 48 is based on recommendation 106 of the Secured Transactions Guide (see chap. V, para. 164). Its purpose is to preserve the negotiability of money. Thus, under paragraph 1, a transferee of encumbered money acquires its rights in the money free of the security right, unless it has knowledge that the transfer violates the rights of the secured creditor under the security agreement. "Knowledge", as defined in article 2, paragraph (r), means "actual knowledge". Paragraph 2 also preserves the rights of persons in possession of money under any other law specified by the enacting State.

Article 49. Negotiable documents and tangible assets covered by negotiable documents

71. Article 49 is based on recommendations 108 and 109 of the Secured Transactions Guide (see chap. V, paras. 167-169). It is intended to preserve the widely recognized practice under which rights to tangible assets that are covered (or represented) by a negotiable document are subsumed in the negotiable document with the result that persons that acquire rights in the document thereby also acquire rights in the assets covered by the document. Accordingly, under paragraph 1, a security right in a tangible asset that is made effective against third parties by possession of the negotiable document covering that asset has priority over a competing security right in the tangible asset that is made effective against third parties by any other means.

72. Paragraph 2 states an exception to that general rule. Except when the encumbered asset is inventory, it provides that the rule in paragraph 1 does not apply to a security right in a tangible asset that is made effective against third parties before the earlier of: (a) the time when that asset became covered by the negotiable document; or (b) the time of conclusion of the agreement between the grantor and the secured creditor in possession of the negotiable document so long as the asset actually became covered by the negotiable document before the expiry of a short period of time thereafter to be specified by the enacting State (e.g. seven days).

Article 50. Intellectual property

73. Article 50 is based on recommendation 245 of the Intellectual Property Supplement (see paras. 193-212). Its purpose is to clarify that the rule in article 34, paragraph 6, does not obviate other rights of the secured creditor in its capacity as an owner or licensor of the intellectual property that is the subject of the licence under other law relating to intellectual property to be specified by the enacting State. For

example, the Model Law does not affect any right that a licensor may have to terminate a licence agreement for non-compliance by the licensee (see Intellectual Property Supplement, paras. 23-25 and 196). This clarification is of particular importance because the concept of "ordinary course of business", used in article 34, paragraph 6, is a concept of commercial law and is not drawn from law relating to intellectual property and thus may create confusion in an intellectual property context. Typically, law relating to intellectual property does not distinguish in this respect between exclusive and non-exclusive licences and focuses rather on the issue of whether a licence has been authorized or not.

74. It should be noted that article 50 makes no reference to the rights of secured creditor in its capacity as a secured creditor under other law relating to intellectual property. This is so because, if the Model Law is in this respect inconsistent with law relating to intellectual property, the Model Law (including art. 50) would not apply (see art. 1, para. 3 (b)); and, if the Model Law (including art. 50) is not inconsistent with law relating to intellectual property and does apply, article 34 would generally apply to rights of a secured creditor under the Model Law without affecting the effectiveness of a security right in licensed intellectual property, its priority as against a competing claimant other than a non-exclusive licensee, or the post-default rights of a secured creditor under the Model Law that do not affect the rights of the licensee (see Intellectual Property Supplement, para. 203).

75. As a result, depending on the content of law relating to intellectual property, unless the secured creditor authorized the grantor to grant licences unaffected by the security right, the licensee may only take the licence subject to the security right, rather than free of it. This would mean that, if the grantor defaults, the secured creditor would be able to enforce its security right in the licensed intellectual property and sell or license it free of the licence. As a consequence, a person obtaining a security right from the licensee will only obtain a security right of limited value, as the encumbered licensed intellectual property may cease to exist if the licensor's secured creditor enforces its security right (following default by the licensor under its security agreement with the secured creditor).

Article 51. Non-intermediated securities

76. Article 51 covers security rights in non-intermediated securities. This is a type of encumbered asset not addressed in the Secured Transactions Guide, which excluded from its scope security rights in all types of securities (see rec. 4 (c)). Article 51 adjusts the general priority rules in article 29 in a manner similar to the special priority rules for security rights in negotiable instruments (for certificated securities) and rights to payment of funds credited to a bank account (for uncertificated securities).

77. For certificated non-intermediated securities, paragraph 1 provides that a security right that is made effective against third parties by the secured creditor's possession of the certificate has priority over a competing security right created by the same grantor that is made effective against third parties by registration of a notice in the Registry. This is parallel to the rule for negotiable instruments in article 46, paragraph 1 and similarly reflects the negotiable character of this type of encumbered asset (the term "certificated non-intermediated securities" is defined in art. 2, para. (d) in a manner that reflects its negotiable character).

78. For uncertificated non-intermediated securities, paragraph 2 provides that a security right that is made effective against third parties by registration in the books maintained for that purpose by or on behalf of the issuer has priority over a security right in the same securities that is made effective against third parties by any other method (e.g. by registration of a notice in the Registry). Depending on the applicable law (see art. 100), registration in the books of the issuer may take the form of a notation of the security right or an entry of the name of the secured creditor as the holder of the securities. The enacting State should specify the form of registration method that best fits its law. If that law provides for both forms of registration, both could be retained. This priority rule is similar to the rule for rights to payment of funds credited to a bank account in article 47, paragraph 1. The rationale for this rule is that

such registration in the books of the issuer fulfils a similar function to the secured creditor becoming the account holder of a bank account.

79. The priority rules in paragraphs 3 and 4 also apply only to uncertificated non-intermediated securities. They parallel the rules for security rights in rights to payment of funds credited to a bank account in article 47, paragraphs 3 and 4. Paragraph 3 gives priority to a security right that is made effective against third parties by the conclusion of a control agreement over a competing security right in the same securities made effective against third parties by another method (e.g. by registration of a notice in the Registry). As between competing security rights made effective against third parties by the conclusion of a control agreement, paragraph 4 awards priority in the order in which the control agreements were concluded (for the definition of the term "control agreement, see art. 2, subpara. (g)(i)).

80. Unlike article 46, paragraph 2, article 47, paragraphs 6 and 7, and article 49, paragraph 3, which provide a priority rule protecting transferees and then defer to other law that may provide them with better rights, paragraph 5 does not include a priority rule but instead defers to the law relating to the transfer of securities to be specified by the enacting State. The reason for this approach is that national law diverge widely with respect to the protection of holders of non-intermediated securities and the matter does not lend itself to unification at the international level. It should be noted that, if the enacting State neither has nor is prepared to introduce a law relating to the transfer of securities, it may not need to implement paragraph 5.

(A/CN.9/914/Add.5) (Original: English)

Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Paragraphs

Chapter VI. Rights and obligations of the parties and third-party obligors

1. Chapter VI deals with the pre-default rights and obligations of the parties and third-party obligors (chapter VII deals with the post-default rights and obligations of the parties). With the exception of articles 53 and 54 which are mandatory rules, the provisions of chapter VI are non-mandatory, and thus do not apply if the parties have agreed otherwise. This approach, which is based on the recommendations of the Secured Transactions Guide and the provisions of the Assignment Convention, is reflected as a general rule in article 3, paragraph 1, rather than specifically in the provisions of chapter VI.

Section I. Mutual rights and obligations of the parties to a security agreement

A. General rules

Article 52. Sources of mutual rights and obligations of the parties

2. Article 52 is based on recommendation 110 of the Secured Transactions Guide (see chap. VI, paras. 14 and 15), which in turn is based on article 11 of the Assignment Convention. Paragraph 1 is intended to reiterate the principle of party autonomy enshrined in article 3. Paragraph 2 is intended to give legislative strength to trade usages and practices, which may not be generally recognized in all States.

Article 53. Obligation of the party in possession to exercise reasonable care

3. Article 53 is based on recommendation 111 of the Secured Transactions Guide (see chap. VI, paras. 24-31). It sets out the mandatory law rule (see para. 1 above) that a grantor or secured creditor in possession of a tangible asset (which under the definition in art. 2, subpara. (ll), includes money, negotiable instruments, negotiable documents and certificated non-intermediated securities) must exercise reasonable care to preserve the asset. Whether a person other than the grantor and the secured creditor that is in possession of an encumbered asset is obliged to take reasonable care to preserve the encumbered asset is determined under other law.

4. What constitutes “reasonable care” in a given case depends upon the nature of an asset. Thus, it may mean something different with respect to equipment, inventory, crops or live animals. For example, precious metals may have to be kept in a vault and inventory in a warehouse, a cow has to be milked, a valuable musical instrument has to be played and a racing horse has to exercise. According to article 4, a person must exercise its rights and perform its obligations, including the obligation to preserve the value of the asset, in good faith and in a commercially reasonable manner.

5. Unlike recommendation 111 of the Secured Transactions Guide, on which it is based, article 53 refers only to the preservation of the asset, and not to the preservation of the asset’s value. This does not reflect a change of policy but is, rather, due to the fact that: (a) in most cases, physical preservation of a tangible asset would have the effect of preserving the asset’s value; and (b) in some cases, preservation of the asset’s value may go beyond the physical preservation of the asset and could place an undue burden on the person in possession. For example, a person in possession of certificated non-intermediated shares of a company may be required to exercise certain rights attached to the shares (e.g. the right to collect dividends or the right to vote), but should not be obliged to participate in an increase of the capital of an enterprise to preserve the value of the encumbered shares.

Article 54. Obligation of the secured creditor to return an encumbered asset

6. Article 54 is based on recommendations 112 and 72 of the Secured Transactions Guide (see chap. VI, paras. 35-39). It sets out a mandatory law rule (see para. 1 above) that, once a security right in an encumbered asset is extinguished, a secured creditor in possession of the asset must return it to the grantor or deliver it to a person designated by the grantor (in some jurisdictions, delivery to a person designated by the grantor may be viewed as a means of returning the asset to the grantor). Under article 4, the grantor is obliged to exercise the right to designate another person in good faith and in a commercially reasonable manner (e.g. by avoiding placing an undue burden on the secured creditor). In exercising its right to deliver the asset to the grantor or a person designated by the grantor, the secured creditor also must comply with the same standard. The same standard should apply to the question as to who should bear any additional cost incurred by the secured creditor. For example, any such additional cost may have to be borne by the debtor in the same way as costs of performance of the debtor's obligation under the credit and security agreement are normally payable by the debtor. It should be noted that where a security right in an encumbered asset is extinguished, and the security right had been made effective against third parties, not by possession, but by registration, the secured creditor is obliged to register an amendment or cancellation notice. This this issue is addressed in article 20, paras. 1, 2 and 3 of the Model Registry Provisions. The issue of when a security right is extinguished is addressed in article 12 of the Model Law.

7. Article 54 deals with a situation in which the secured creditor is in possession of an asset and therefore does not apply to receivables or other intangible assets because they cannot be the subject of physical possession (see art. 2, subpara. (z)). It therefore does not address the obligation of a secured creditor to withdraw any notification that it has given to the debtor of the receivable. However, the grantor is protected in this situation by article 59, paragraph 2, and article 79, paragraph 2 (b), which require the secured creditor to return to the grantor any surplus proceeds it receives. It should also be noted that the question of whether a secured creditor may agree with the grantor that the secured creditor has the right to dispose of encumbered non-intermediated securities and thus be obliged to return equivalent securities is a matter for other law.

Article 55. Right of the secured creditor to use and inspect an encumbered asset, and to be reimbursed for expenses

8. Article 55 is based on recommendation 113 of the Secured Transactions Guide (see chap. VI, paras. 50-65) and sets out a law rule, which the parties may vary or derogate from by agreement (see para. 1 above). Under paragraph 1 (a), a secured creditor in possession of an encumbered asset has the right to be reimbursed for reasonable expenses incurred to preserve it in accordance with article 53. Under paragraph 1 (b), a secured creditor in possession of an encumbered asset may make reasonable use of it and apply any revenues generated from the use to the payment of the obligation secured by the asset.

9. A rule of law relating to securities that entitles a secured creditor to use securities in its possession if the security agreement so provides should be read together with article 55. Their relationship would be a matter for the rules of the applicable law.

10. Finally, under paragraph 2, where an encumbered asset is in the possession of the grantor, the secured creditor has the right to inspect the asset. As this article is subject to the general standard of commercial reasonableness and good faith set out in article 4, the right to inspect may only be exercised at reasonable times and in a commercially reasonable manner. The application of this standard depends upon the circumstances. For example, in extreme cases, such as where the secured creditor has reason to believe that the physical condition of the collateral is in jeopardy or has been, or is about to be, removed from the State of its location, the secured creditor may be justified in demanding an immediate inspection.

Article 56. Right of the grantor to obtain information

11. Article 56 is intended to provide the grantor with the right to obtain information from a secured creditor as to the amount of the secured obligation or the assets encumbered at a certain point of time. This information may be necessary where the grantor is interested in obtaining credit against the security of assets that are already encumbered (and are subject to a notice registered against the grantor in the Registry) and the potential third-party creditor requests that information. The parties may vary or derogate from the rule set out in article 56 (see para. 1 above).

12. Under paragraph 1, the secured creditor is obliged to provide this information within a short period of time specified by the enacting State (e.g. 7 to 14 days) after receipt of the grantor's request. This obligation does not apply to an outright transfer of receivables by agreement, however, as the case of such an outright transfer there is no secured obligation.

13. Under paragraph 2, the grantor is entitled to one response free of charge during a short period of time specified by the enacting State (e.g. one year). Under paragraph 3, the secured creditor is entitled to require payment of a nominal fee for any additional response. The grantor should exercise this right and the secured creditor should perform this obligation in good faith and in a commercially reasonable manner (e.g. the grantor should avoid repeated and unnecessary requests, and the secured creditor should provide the information in a commercially reasonable way that can be readily understood). Other matters, such as the legal consequences of the secured creditor's failure to comply with a request for information or to give accurate information are left to other law (in the same way as breach of any of other obligations in this chapter is left to other law). The enacting State may wish to consider the question whether to extend this to information right to third-party creditors (e.g. judgment creditors).

B. Asset-specific rules

Article 57. Representations of the grantor of a security right in a receivable

14. Article 57 is based on recommendation 114 of the Secured Transactions Guide (see chap. VI, para. 73), which in turn is based on article 12 of the Assignment Convention. It provides that, unless otherwise agreed (see para. 1 above), when a grantor grants a security right in a receivable, the grantor is deemed to make various representations to the secured creditor at the time the security agreement is concluded. In particular, under paragraph 1, the grantor represents that it has not previously created a security right in the receivable in favour of another secured creditor, and that the debtor of the receivable will not have any defences or rights of set-off with respect to the receivable (i.e. that the grantor will fully perform the contract giving rise to the receivable and any other contract it has entered into with the debtor of the receivable).

15. Paragraph 2 reflects the generally accepted principle that, unless otherwise agreed (see para. 1 above), the grantor does not guarantee the solvency of the debtor of the receivable. As a result, the risk of debtor default is on the secured creditor, a fact that the secured creditor will take into account in determining whether to extend credit and on what conditions. Recognizing the right of the parties to financing transactions to agree on a different risk allocation, paragraph 2 allows the grantor and the secured creditor to agree otherwise. Such an agreement may be implicit or explicit. The question of what constitutes an implicit agreement is left to the applicable contract interpretation rules. In addition, it should be noted that such an agreement may refer to the solvency the debtor of the receivable at the time when the security agreement is entered or at the time when the receivable will become payable.

16. The representation that the grantor has the right to create a security right was not carried over from recommendation 114 of the Secured Transactions Guide into article 57, to avoid giving the impression that it applies to security rights created only

in receivables. As a result, the matter is left to general law. It should be noted, however, that even where an anti-assignment agreement is included in the contract giving rise to the receivable or other agreement between a grantor and the debtor of the receivable, the grantor still has rights in the receivable or the power to encumber it, and thus may create an effective security right in the receivable (see arts. 6, para. 1, and art. 13, para. 1).

Article 58. Right of the grantor or the secured creditor to notify the debtor of the receivable

17. Article 58 is based on recommendation 115 of the Secured Transactions Guide (see chap. VI, paras. 74 and 75), which in turn is based on article 13 of the Assignment Convention. It sets out a rule, which the parties may vary or derogate from by agreement (see para. 1 above). Paragraph 1 provides that, when a security right has been created in a receivable, either the grantor or the secured creditor has the right to notify the debtor of the receivable of the existence of the security right and send a payment instruction; however, once notification of the security right has been received by the debtor of the receivable, only the secured creditor may send a payment instruction. It should be noted that, under article 62, a notification or a payment instruction is effective only when received by the debtor of the receivable.

18. It should be noted that, while they may be included in the same document, a payment instruction is conceptually distinct from a notification. The former normally explains to the debtor of the receivable how it is to make payment and the latter typically informs the debtor of the receivable that it owes its obligations to a different person. For example: (a) a notification may contain no payment instruction (e.g. because the secured creditor may have obtained control of the grantor's bank account to which debtors of receivables have been instructed by the grantor to pay); (b) the parties may have agreed that no notification but only a payment instruction will be given (e.g. because the transaction involved is a non-notification factoring or undisclosed invoice discounting transaction); and (c) the secured creditor may need to change its payment instructions and thus there may be more than one payment instruction.

19. Paragraph 2 provides that a notification sent in breach of an agreement between the grantor and the secured creditor is nevertheless effective for the purposes of article 63. This means that the debtor of the receivable that pays in accordance with that notification is discharged (see paras. 29-36 below). However, article 58 does not affect any obligation or liability that the secured creditor may have under other law for sending a notification to the debtor of the receivable in breach of an agreement with the grantor.

Article 59. Right of the secured creditor to payment of a receivable

20. Article 59 is based upon recommendation 116 of the Secured Transactions Guide (see chap. VI, paras. 76-80), which in turn is based on article 14 of the Assignment Convention. Changes made are intended to clarify the text, but not to change its policy. Article 59, which the parties may vary or derogate from by agreement (see para. 1 above), reiterates the right that a secured creditor with a security right in a receivable has (as against the grantor) under article 10 to receive the proceeds of the encumbered receivable.

21. Paragraph 1 provides that, regardless of whether notification of the security right has been sent to the debtor of the receivable, the secured creditor is entitled to: (a) retain the proceeds of any full or partial payment of the receivable made to the secured creditor, as well as any tangible assets (such as inventory) returned to the secured creditor in respect of the receivable; (b) payment of the proceeds of any full or partial payment of any receivable made to the grantor (as well as any tangible assets returned to the grantor); and (c) payment of the proceeds of any full or partial payment of any receivable made to another person (as well as any tangible assets returned to that person) if the right of the secured creditor has priority over the right of that person.

22. Paragraph 2 provides that, unless otherwise agreed (see para. 1 above), the secured creditor has the right to collect the full amount of the encumbered receivable, but has to account for and return to the grantor any surplus remaining after payment of the secured obligation (art. 79, para. 2, contains a similar rule). In the case of an outright transfer of a receivable by agreement, however, under paragraph 2, the transferee may retain the full amount collected, as that will be the "value" of its right in the receivable.

Article 60. Right of the secured creditor to preserve encumbered intellectual property

23. Article 60 is based on recommendation 246 of the Intellectual Property Supplement (paras. 223-226). It reiterates the principle of party autonomy set out in article 3, paragraph 1 (which is based on rec. 10 of the Secured Transactions Guide) and parallels the rule in article 53 (which is based on rec. 111 of the Secured Transactions Guide and applies only to tangible assets) to ensure that, if so agreed with the grantor, the secured creditor would be entitled to exercise rights that are normally rights of the intellectual property right holder (e.g. to deal with authorities, renew registrations and pursue infringers, even before default, provided that it is not prohibited by law relating to intellectual property). This is important, as, if the grantor (the intellectual property right holder) failed to exercise these rights in a timely fashion, the value of the encumbered intellectual property could diminish, and this could negatively affect the use of intellectual property as security for credit.

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 61. Protection of the debtor of the receivable

24. Article 61 is derived from recommendation 117 of the Secured Transactions Guide (see chap. VII, para. 12), which in turn is based on article 15 of the Assignment Convention. Paragraph 1 sets out the general principle that the creation of a security right in a receivable does not affect the rights or obligations of the debtor of the receivable, unless the debtor of the receivable consents. So, for example, without the consent of the debtor of the receivable, the creation of a security right cannot change the payment terms of a contract giving rise to a receivable (e.g. the amount or the time of payment), alter the defences or rights of set-off that the debtor of the receivable may raise under the contract giving rise to the receivable or increase expenses in connection with payment of the receivable.

25. Whatever change is effected in the legal position of the debtor of the receivable as a result of the creation of a security right in the receivable, under paragraph 2 a payment instruction (whether given together with the notification or subsequently) may change the person, address or account to which the debtor of the receivable is required to make payment, as these changes do not affect the rights or obligations of the debtor of the receivable. However, a payment instruction may not change: (a) the currency in which the receivable is to be paid, as specified in the contract giving rise to the receivable; or (b) the State in which the payment is to be made, as specified in the contract giving rise to the receivable, to a State other than that in which the debtor of the receivable is located. This is because these changes would affect the debtor's rights and obligations. It should be noted that, unlike the Assignment Convention that includes in article 5, subparagraph (h), a rule of interpretation as to the location of a person for the purposes of the Convention, the Model Law includes in article 90 such a rule that applies only in the context of chapter VIII on conflict of laws. Thus, for example, the location of the debtor of the receivable referred to in paragraph 2 (b) should be understood in the light of other law of the enacting State.

Article 62. Notification of a security right in a receivable

26. Article 62 is based on recommendation 118 of the Secured Transactions Guide (see chap. VII, paras. 13-16), which in turn is based on article 16 of the Assignment Convention. It describes the requirements both for an effective notification of a security right in a receivable and for a payment instruction (which is conceptually distinct from a notification, see para. 18 above).

27. Under paragraph 1, a notification or a payment instruction is effective from the time when it is received by the debtor of the receivable, if it reasonably identifies the receivable and the secured creditor, and is in a language reasonably expected to inform the debtor of its contents. On this latter point, paragraph 2 makes it clear that the language of the contract giving rise to the receivable is always sufficient. Under paragraph 3, a notification (which may include a payment instruction or not) may relate not only to receivables in existence at the time the notification is given, but also may relate to receivables arising thereafter.

28. Paragraph 4 addresses a scenario where a receivable is the subject of multiple successive security rights (whether they secure payment or other performance of an obligation or are outright transfers; see art. 2, subpara. (kk)). The following example illustrates the operation of paragraph 4. A, to whom a receivable is owed, creates a security right in the receivable in favour of B. B then creates a security right in the receivable in favour of C. C then creates a security right in the receivable in favour of D. Notification to the debtor of the receivable relating to the security right created by C in favour of D will also constitute notification of the prior security rights created by A and B. The same result would arise if A transferred receivables to B, B then transferred them to C, and C thereafter transferred them to D. Notification to the debtor of the receivable relating to the outright transfer from C to D constitutes notification of the outright transfer from A to B.

Article 63. Discharge of the debtor of the receivable by payment

29. Article 63 is based on recommendation 119 of the Secured Transactions Guide (see chap. VII, paras. 17-20), which in turn is based on article 17 of the Assignment Convention. It sets out the rules dealing with the discharge of the debtor of the receivable by payment. It should be noted that the debtor of the receivable is discharged by payment in accordance with this article, even if payment is not made to the secured creditor that has priority. It should also be noted that this article and all articles of the Model Law with the exception of articles 72-82 apply also to outright transfers of receivables by agreement (see art. 1, para. 2).

30. Paragraph 1 embodies the basic principle that, until the debtor of the receivable receives notification of a security right in the receivable, it may be discharged by payment in accordance with the contract giving rise to the receivable. For example, where the contract is a sales contract, this means payment to the seller. However, under paragraph 2, once the debtor receives notification of a security right, it can only be discharged by paying either the secured creditor or another party, as instructed by the secured creditor in the notification or as subsequently instructed by the secured creditor in a written payment instruction received by the debtor. However, the rule in paragraph 2 is subject to a number of qualifications that are set out in paragraphs 3-8.

31. First, under paragraph 3, if the debtor of the receivable receives more than one payment instruction relating to a single security right (and, therefore, from the same secured creditor) in 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, as the last payment instruction will be the most recent (a payment instruction is conceptually distinct from notification; see para. 18 above).

32. Second, under paragraph 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. In this way, the debtor of the receivable, having received one notification of a security right, need not concern itself whether the grantor retained any right to create a second security

right and, if so, which notification should be complied with. This rule also reflects the fact that it is likely that the security right covered by the first notification will have priority over the subsequent security right under the Model Law's priority rules. As already noted (see para. 29 above), the debtor of the receivable is discharged even if the first notification does not relate to the security right with priority, since the debtor cannot be required to determine which security right has priority. In such a case, the secured creditor with a security right that has priority will have to claim the proceeds of payment from the creditor to whom the debtor made the payment.

33. Third, under paragraph 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. The following example illustrates the operation of paragraph 5. A, to whom a receivable is owed, creates a security right in the receivable in favour of B. B creates a security right in the receivable in favour of C. If the debtor of the receivable receives a notification from each of B and C, it will be discharged by paying C. The reason is that the last in such a series of successive secured creditors is most likely to be the person entitled to payment. One side effect of this rule, along with the rule in paragraph 4, is that the debtor of the receivable needs to be able to distinguish between multiple notifications relating to security rights granted by the same grantor (in which case the debtor of the receivable must pay in accordance with the first notification) and notifications of multiple subsequent security rights (in which case the debtor of the receivable must pay in accordance with the last notification). This matter is addressed in paragraph 8 (see para. 35 below).

34. Fourth, under paragraph 6, where the debtor of the receivable receives notification of a security right in a part of, or an undivided interest in, one or more receivables, the debtor has a choice. It is discharged by paying either in accordance with the notification or in accordance with paragraph 1 as if the debtor had not received the notification. However, if the debtor chooses the first of these alternatives, under paragraph 7, it is discharged only to the extent of the part or undivided interest paid.

35. Finally, under paragraph 8, if the debtor of the receivable receives notification from a person claiming to have a security right in the receivable and wants to make sure that that person is a secured creditor to whom payment will discharge the debtor of the receivable, the debtor of the receivable may request that person to provide, within a reasonable time, adequate proof of the creation of the security right. If the asserted security right was created by an initial or subsequent secured creditor, the adequate proof must include proof of the initial and subsequent security rights. If the person claiming to have a security right fails to provide the required proof, the debtor may pay as if it had not received the notification sent by that person. For this purpose, under paragraph 9, adequate proof includes any writing from the grantor that indicates that a security right has been created (e.g. a security agreement).

36. Paragraph 10 is intended to preserve any other ground for discharge based on payment to the person entitled to payment, as well as payment to a competent judicial or other authority, or to a public fund, under other law. For example, under paragraph 10, the debtor of the receivable is discharged if it pays the right person pursuant to a notification conforming with the requirements of the other applicable law but not with the requirements of articles 2 (y), 62 and 63, paragraphs 1-9. Similarly, the debtor of the receivable is discharged by making payment to a competent judicial or other authority, or to a public fund if so provided by the applicable law (e.g. where the debtor of the receivable receives notifications by different secured creditors and is not certain whom to pay in order to be discharged).

Article 64. Defences and rights of set-off of the debtor of the receivable

37. Article 64 is based on recommendation 120 of the Secured Transactions Guide (see chap. VII, para. 21), which in turn is based on article 18 of the Assignment Convention. Paragraph 1 (a) preserves, for the benefit of the debtor of the receivable, all defences and rights of set-off arising from the contract giving rise to the receivable,

including any other contract that was part of the same transaction, as if the security right had never been created and the claim were made by the grantor. Paragraph 1 (b) ensures that the debtor of the receivable can assert against the secured creditor any other right of set-off that was available to the debtor at the time it received notification of the security right. This means, however, that the debtor may not assert a right of set-off other than that set out in paragraph 1 (a) that arises subsequent to such notification. Under article 65, however, the debtor may agree not to raise the above-mentioned defences and rights of set-off against the secured creditor.

38. Consistent with article 13, paragraph 2, paragraph 2 of article 64 provides that paragraph 1 does not give the debtor of the receivable the right to raise against the secured creditor, as a defence or right of set-off, the breach of an agreement by the grantor that limits the grantor's right to create a security right in the receivable. Otherwise, the validation of a security right notwithstanding such an agreement, as provided in article 13, would be meaningless.

Article 65. Agreement not to raise defences or rights of set-off

39. Article 65 is based on recommendation 121 of the Secured Transactions Guide (see chap. VII, para. 22), which in turn is based on article 19 of the Assignment Convention. Paragraph 1 provides that the debtor of the receivable may agree, in a signed written agreement with the grantor, not to raise against the secured creditor the defences and rights of set-off that it could otherwise raise against that secured creditor under article 64. The secured creditor is entitled to invoke the benefit of such an agreement even though it is not a party to it.

40. Under paragraph 2, any modification to such an agreement must also be in a written agreement between the grantor and the debtor of the receivable that is signed by the debtor of the receivable. Such a modification is only effective as against the secured creditor if the secured creditor consents or, in the case of a receivable that has not been earned yet by performance, a reasonable secured creditor would consent (see art. 66, para. 2).

41. To avoid abuses, paragraph 3 provides that the debtor may not waive defences based on fraud committed by the secured creditor or on the debtor's incapacity (see art. 30 of the Bills and Notes Convention). Paragraph 3 does not prevent the debtor of the receivable (e.g. the buyer in a sales agreement) from waiving defences relating to fraud committed by the grantor (e.g. the seller). If the debtor of the receivable could not waive such defences, the secured creditor would have to conduct an investigation in this regard and this could result in uncertainty.

Article 66. Modification of the contract giving rise to a receivable

42. Article 66 is based on recommendation 122 of the Secured Transactions Guide (see chap. VII, paras. 23 and 24), which in turn is based on article 20 of the Assignment Convention. It addresses the impact of an agreement between the grantor of a security right in a receivable and the debtor of the receivable that modifies the terms of the receivable. The result depends on when the agreement is made. Under paragraph 1, if the agreement is concluded before the debtor receives notification of a security right in the receivable, it is effective against the secured creditor, but the secured creditor also enjoys any benefits derived from the agreement.

43. Under paragraph 2, even if the agreement is concluded after notification, it is also effective, even if it affects the secured creditor's rights provided that: (a) the secured creditor consents to it; or (b) the receivable has not been fully earned by performance and either the modification was provided for in the contract giving rise to the receivable or a reasonable secured creditor would consent to the modification. Otherwise, an agreement concluded after notification of the security right is not effective against the secured creditor. Paragraph 3 provides that paragraphs 1 and 2 do not affect any right of the grantor or secured creditor for breach of an agreement between them (such as an agreement that the grantor would not agree to any modifications of the terms of the receivable).

Article 67. Recovery of payments

44. Article 67 is based on recommendation 123 of the Secured Transactions Guide (see chap. VII, paras. 25 and 26), which in turn is based on article 21 of the Assignment Convention. It addresses the situation in which the grantor of a security right in a receivable (including the transferor in an outright transfer of the receivable by agreement) fails to perform its obligations under the contract giving rise to the receivable. The article insulates the secured creditor from liability in this situation, by providing that the debtor of the receivable may not look to the secured creditor for recovery of any amount that it has paid to either the grantor or the secured creditor. As a result, the sole recourse of the debtor of the receivable in such a situation is against the grantor and the debtor of the receivable bears the risk of the grantor's insolvency.

B. Negotiable instruments

Article 68. Rights as against the obligor under a negotiable instrument

45. Article 68 is based on recommendation 124 of the Secured Transactions Guide (see chap. VII, paras. 27-31). It is intended to preserve the rights of parties under the relevant law of the enacting State relating to negotiable instruments (to be specified by the enacting State in its enactment of this article). For example, if the enacting State's law is substantively identical to the Bills and Notes Convention: (a) the maker of a note is obliged to pay the secured creditor with a security right in the note only if the secured creditor is a holder of the note or has paid it; (b) the maker of a note is obliged to pay the secured creditor only when payment becomes due under the terms of the note; (c) if the secured creditor is a "protected holder" of a note, the defences that the maker of the note may raise against the secured creditor may be significantly limited. It should be noted that the reference in article 68 (as well as arts. 70 and 71) to other relevant law relating to negotiable instruments to be specified by the enacting State will be the law of the enacting State's law only if that law is the applicable law under the conflict-of-laws rules of chapter VIII.

C. Rights to payment of funds credited to a bank account

Article 69. Rights as against the deposit-taking institution

46. Article 69 is based on recommendations 125 and 126 of the Secured Transactions Guide (see chap. VII, paras. 32-37). It addresses the situation in which a security right is created in a right to payment of funds credited to a bank account.

47. Paragraph 1 (a) provides that the rights and obligations of the deposit-taking institution are unaffected by the security right, unless the institution consents. The rationale for protecting deposit-taking institutions in this manner is that imposing duties on such an institution or changing the rights and duties of the institution without its consent may subject that institution to risks that it is not in a position to manage appropriately unless it knows in advance what those risks might be, and to the risk of having to violate obligations imposed by other law, such as sanctions law (see Secured Transactions Guide, chap. VII, para. 33).

48. To safeguard the confidentiality of the relationship of a deposit-taking institution and its client that is imposed by regulatory or other law, paragraph 1 (b) also provides that the deposit-taking institution has no obligation to respond to requests from third parties for information (e.g. about the balance in the account, whether a control agreement exists or whether the account holder retains the right to dispose of funds credited to its bank account).

49. Paragraph 2 addresses situations in which the deposit-taking institution has a security right in the right to payment of funds credited to a bank account maintained at that institution and also has a right of set-off against that right to payment of funds.

The paragraph provides that the deposit-taking institution's right of set-off is not limited by the security right. Thus, if, under applicable law of set-off, the set-off rights are broader than the rights of a secured creditor under the Model Law, the deposit-taking institution may avail itself of those broader rights. The policy rationale for this rule is the need to protect the general operations of deposit-taking institutions and to preserve the rights of set-off that a deposit-taking institution may have under other law (see Secured Transactions, chap. VII, para. 34).

D. Negotiable documents and tangible assets covered by negotiable documents

Article 70. Rights as against the issuer of a negotiable document

50. Article 70 is based on recommendation 130 of the Secured Transactions Guide (see chap. VII, paras. 43-45). It provides that, when a secured creditor has a security right in a negotiable document, the rights of the secured creditor as against the issuer of the document or any person obliged on the document are determined by the law relating to negotiable documents of the enacting State (to be specified by the enacting State in its enactment of this article).

E. Non-intermediated securities

Article 71. Rights as against the issuer of a non-intermediated security

51. As already mentioned, the Secured Transactions Guide does not address security rights in any types of securities (see rec. 4 (c)). Thus, article 71 has no antecedent in the Secured Transactions Guide. In line with articles 68-70, it provides that the rights of a secured creditor holding a security right in non-intermediated securities as against the issuer of the securities are determined by other law of the enacting State (to be specified by the enacting State in its enforcement of this article).

Chapter VII. Enforcement of a security right

A. General rules

Article 72. Post-default rights

52. Article 72 is based on recommendations 133, 139, 141, 143, and 144 of the Secured Transactions Guide (see chap. VIII, paras. 10-12, 15-17, and 34 and 35). Paragraph 1 provides that, following the grantor's default, the grantor and the secured creditor may exercise any right they have under the provisions of chapter VII, other law or the security agreement, provided that, in the last two cases, that right is not inconsistent with the provisions of the Model Law. In denying effect to any inconsistent terms of the security agreement, this proviso indirectly operates to limit party autonomy in relation to enforcement (for an additional limit to party autonomy, see para. 55 below).

53. For the purposes of the Model Law, "default" is defined to mean the failure of the debtor to pay or otherwise perform the obligation secured by the security right and any other event agreed to by the parties in their security agreement as constituting "default" (see art. 2, subpara. (j)). It should be noted that the only one of the secured creditor's rights provided in this chapter that may be exercised before default is the right to collect an encumbered receivable (see art. 82, para. 2, and 83).

54. The Model Law adopts the policy that maximizing flexibility in enforcement is likely to increase the efficiency of the enforcement process (see Secured Transactions Guide, rec. 143 and chap. VIII, para. 34). Accordingly, paragraph 2 indicates that the exercise of one post-default right does not prevent the exercise of another post-default

right, except if the exercise of one right makes it impossible to exercise of the other right. For example, a secured creditor that obtains possession of an encumbered asset under article 77 with the initial intention of disposing of it under article 78 may thereafter propose to acquire it in satisfaction of the secured obligation under article 80, unless the secured creditor has already sold or agreed to sell the asset.

55. Paragraph 3 provides that, before default, neither the grantor nor the debtor (defined to include a secondary debtor such as a guarantor of the secured obligation; see art. 2, subpara. (h)) may waive unilaterally or vary by agreement its rights under this chapter. In the absence of this provision, a secured creditor with superior bargaining power could put pressure on them to waive or vary their rights before default in return for concessions in the security agreement (see Secured Transactions Guide, chap. VIII, paras. 16 and 17). After default, this is no longer an issue and thus the grantor or the debtor may waive or vary its rights under the provisions of this chapter.

56. With the exception of article 83, the provisions of this chapter do not apply to an outright transfer of receivables by agreement (see art. 1, para. 2). Consequently, the terms "encumbered asset", "grantor", "secured creditor", "security agreement" and "security right" in articles 72-82 should be read with this exclusion in mind.

Article 73. Methods of exercising post-default rights

57. Article 73 is based on recommendation 142 of the Secured Transactions Guide (see chap. VIII, paras. 18-20 and 29-33). Paragraph 1 provides that the secured creditor has a choice to exercise its post-default rights judicially (i.e. by application to a court or other authority vested with adjudicative power) or extra-judicially (i.e. without an application to a court or other authority). It should be noted that public notaries, bailiffs, sheriffs or other court enforcement officers typically assist in enforcement by a court or other authority but do not have adjudicative powers to resolve disputes and issue decisions binding on all parties.

58. There are a number of reasons why a secured creditor may prefer to exercise its post-default rights by application to a court or other authority. For example: (a) judicial or similar proceedings may not be efficient; (b) the secured creditor may wish to avoid having its extrajudicial actions subsequently challenged; (d) the secured creditor may anticipate that it will have to apply to a court or other authority anyway to recover an anticipated deficiency; or (d) the secured creditor may fear and wish to avoid a breach of public order (see Secured Transactions Guide, chap. VIII, paras. 32 and 33).

59. A secured creditor may instead elect to exercise its post-default rights extra-judicially because, for example, it fears that judicial proceedings may be too slow and costly, or less likely to produce an appropriate amount upon the disposition of the encumbered assets (see Secured Transactions Guide, chap. VIII, paras. 29 and 31).

60. Under paragraph 2, the secured creditor's judicial exercise of its post-default rights is subject to the provisions of this chapter and to the provisions that are specified for this purpose by the enacting State. As inefficient enforcement mechanisms are likely to have a negative impact on the availability and the cost of credit (see Secured Transactions Guide, chap. VIII, para. 29), paragraph 2 also refers to expeditious enforcement proceedings. Such proceedings may, for example, include proceedings involving only affidavit evidence, proceedings in which hearings are held, challenges are disposed of and decisions are rendered in as expeditious a manner as possible, and proceedings in which court decisions are executed without an official seizure or sale of assets (see Secured Transactions Guide, chap. VIII, para. 33).

61. Under paragraph 3, the extrajudicial exercise by the secured creditor of its post-default rights is governed by the provisions of this chapter. These provisions incorporate advance notice and other procedural protections for the grantor, the debtor and third parties whose rights may be affected. For example, under article 77, paragraph 2, the secured creditor may exercise its extra-judicial right to possession of the encumbered asset only if it has the grantor's advance written consent, notified the

grantor and any person in possession of the debtor's default and of its intent to obtain possession, and the person in possession does not object (see further para. 72 below).

62. Moreover, a secured creditor's extrajudicial exercise of its post-default rights is subject to the overarching obligation in article 4 to exercise those rights in good faith and in a commercially reasonable manner. In this respect, it should be noted that the Model Law does not preclude recourse to the assistance of a court or other authority at any time to resolve a dispute arising in relation to the extrajudicial exercise of a post-default right. To the contrary, under article 74, if the secured creditor does not comply with its obligations under this chapter, the grantor, any person with a right in the encumbered asset or the debtor (option A), or any person whose rights are affected by the non-compliance of another person with the provisions of the Model Law (option B) is entitled to apply for expeditious relief from the court or other authority specified by the enacting State.

Article 74. Relief for non-compliance

63. Article 74 is based on recommendation 137 of the Secured Transactions Guide (see chap. VII, para. 31). It addresses the availability of relief from a court or other specified authority in the case of a person's non-compliance with its obligations under the provisions of this chapter. It also requires the enacting State to specify the court or other authority to which the party seeking relief should apply and to provide also for expeditious forms of proceedings (see para. 60 above).

64. Two options are provided for the enacting State to choose between. The first option addresses non-compliance only by the secured creditor, and provides that relief may be sought by: (a) the grantor; (b) any other person with a right in the encumbered asset whose rights are affected by that non-compliance; or (c) the debtor. The second option is broader, addressing non-compliance by any person, and giving any person affected by that non-compliance the right to seek relief. It should be noted that a breach of the secured creditor's obligations under the provisions of this chapter would typically include a breach by persons acting on behalf of the secured creditor (such as representatives, employees or service providers). It should also be noted that the persons that may be affected include: (a) a competing claimant; (b) a guarantor of the secured obligation; or (c) a co-owner of an asset in which another co-owner has created a security right.

Article 75. Right of affected persons to terminate enforcement

65. Article 75 is based on recommendation 140 of the Secured Transactions Guide (see chap. VIII, paras. 22-24). Paragraph 1 entitles the grantor, any other person with a right in the encumbered asset or the debtor to terminate the enforcement process by paying or otherwise performing the secured obligation in full (this right is known in some jurisdictions as the right to "redeem" the encumbered asset). In practice, this right is likely to be exercised when the value of the encumbered asset is significantly higher than the amount of the obligation secured by the security right of the enforcing secured creditor. It should be noted that, unlike recommendation 140 of the Secured Transactions Guide, article 75 does not address the extinguishment of a security right, because this matter is addressed in article 12 of the Model Law.

66. Full payment, for the purposes of paragraph 1, includes payment of the reasonable cost of enforcement incurred by the secured creditor whose enforcement is sought to be terminated. If the party exercising the termination right challenges the reasonableness of the enforcing creditor's statement of its enforcement costs and enforcement was initiated by an application to a court or other authority, this dispute would be resolved by the relevant authority. In the case of extrajudicial enforcement, the party exercising the termination right may seek the assistance of a court or other authority specified in article 74 to determine whether the secured creditor's assertion that the cost of enforcement is reasonable.

67. Under paragraph 2, the right to terminate enforcement is extinguished once the relevant enforcement process has reached a point when the asset is no longer available

to be the subject of enforcement (see para. 69 below). Thus, this right cannot be exercised once the secured creditor has sold or otherwise disposed of, acquired or collected the encumbered asset, or entered into an agreement for the sale or other disposition of the encumbered asset. Otherwise, the finality of acquired rights would be undermined (see further paras. 90-93 below). Under paragraph 3, the right to terminate enforcement may still be exercised even after the secured creditor has enforced its security right by entering into a lease or licence agreement under article 78. However, the party exercising the termination right must respect the rights of the lessee or licensee under its agreement with the secured creditor whose enforcement has been terminated.

Article 76. Right of a higher-ranking secured creditor to take over enforcement

68. Article 76 is based on recommendation 145 of the Secured Transactions Guide (see chap VIII, para. 36). Paragraph 1 deals with a situation where a lower-ranking secured creditor or a judgment creditor has commenced enforcement. It entitles a secured creditor, whose security right has priority over that of the enforcing creditor ("higher-ranking secured creditor") to take over enforcement. The right of the higher-ranking secured creditor to take over enforcement, if it so wishes, is justified because of the potential impact of enforcement on its rights. In particular, if a subordinate creditor exercises its right to dispose of the encumbered asset judicially, the security right of the higher-ranking secured creditor will usually be extinguished (see art. 81, para. 1, and para. 90 below) and replaced by a right to priority of payment out of the proceeds realized by the subordinate creditor (see art. 79, para. 1 and para. 81 below); it therefore has an interest in controlling the enforcement process. If the subordinate creditor instead exercises its disposition right extra-judicially, the security right of the higher-ranking creditor will follow the asset into the hands of the transferee to whom the enforcing creditor disposes of the asset (see art. 81, para. 3, and para. 91 below), thereby potentially forcing the higher-ranking secured creditor to commence enforcement proceedings against that transferee.

69. As in the case of the right of termination in article 75, the right of the higher-ranking secured creditor to take over the enforcement process under this article must be exercised before the asset is sold or otherwise disposed of, acquired, or collected by the subordinate creditor or before the conclusion of an agreement by the subordinate creditor with a third party to dispose of the encumbered asset. This is so because, after that time, the asset is no longer available to be the subject of an enforcement process.

70. Under paragraph 2, the right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any of the methods provided in this chapter. This means that the higher-ranking secured creditor may elect to pursue a different enforcement right than that contemplated by the original enforcing creditor. It should be noted, however, that the exercise of this right is subject to the standard in article 4. Accordingly, the secured creditor is obliged to act in good faith and in a commercially reasonable manner, so that it should, for example, avoid incurring unreasonable additional enforcement costs.

Article 77. Right of the secured creditor to obtain possession of an encumbered asset

71. Article 77 is based on recommendations 146 and 147 of the Secured Transactions Guide (see chap. VIII, paras. 37-48 and 51-56) and applies only to tangible assets, as only tangible assets may be the subject of possession (for the definitions of the terms "tangible asset" and "possession", see art. 2, subparas. (ll) and (z)). Paragraph 1 provides a secured creditor with two options for obtaining possession of a tangible encumbered asset. First, the secured creditor may obtain possession of an encumbered asset by application to a court or other authority. Alternatively, the secured creditor may obtain possession extra-judicially, provided that the conditions set out in paragraphs 2 and 3 are satisfied. Regardless of whether it proceeds judicially or extra-judicially, the secured creditor's right to possession

under paragraph 1 is subordinate to the right of a person that has a superior right to possession (e.g. a lessee or licensee whose rights are not affected by a security right under art. 34, para. 3, or para. 5).

72. Under paragraph 2, the secured creditor's right to obtain possession extra-judicially is available only if all the conditions set out in that paragraph are met. These conditions are designed to protect the public interest in a peaceful enforcement process and to ensure that that the interests of the grantor or other person in possession are not unduly prejudiced. First, the grantor must have consented in writing to the secured creditor obtaining possession without resort to a court or other authority (typically, the secured creditor will obtain the grantor's consent in the security agreement). Second, the secured creditor must give the grantor and any person in possession of the encumbered asset notice of default and of the secured creditor's intent to obtain possession (the enacting State may wish to specify how much advance notice must be given and select a period that would be in line with the good faith and commercial reasonableness standard in art. 4). Third, and perhaps most important, the person in possession of the encumbered asset at the relevant time must not object to the secured creditor obtaining possession. Thus, the secured creditor must obtain the assistance of a court or other authority if the person in possession objects, even if that person is the grantor and even if the grantor has previously agreed to allow the secured creditor to obtain possession extra-judicially.

73. It should be noted, however, that a secured creditor is usually entitled to be reimbursed for its reasonable enforcements costs from the proceeds realized from a disposition of the encumbered asset. It follows that, as a practical matter, the person in possession is unlikely to raise unfounded objections if that person is the debtor or the grantor (as an unfounded objection will amount in effect to a breach of the credit or security agreement). If instead the person in the possession is a third party, an unfounded objection is also unlikely to be made since this may expose that person to liability to pay the additional costs incurred by the secured creditor in having to seek judicial assistance.

74. Paragraph 3 recognizes that even relatively short delays in giving the advance notice required by paragraph 2 can be economically wasteful if the encumbered assets are perishable or otherwise likely to decline speedily in value. Accordingly, paragraph 3 dispenses with the advance notice requirement in those cases.

75. Under paragraph 4, a lower-ranking secured creditor is not entitled to obtain possession of an encumbered asset that is in the possession of a higher-ranking secured creditor, unless otherwise agreed. The purpose of this provision is to ensure that the security right of a higher-ranking secured creditor that was made effective against third parties by possession does not cease to be effective against third parties and thus does not lose its priority status through the relinquishing of possession to the lower-ranking secured creditor. It should be noted that the lower-ranking secured creditor may exercise its right to dispose of the encumbered asset under article 78 without obtaining possession, for example, by selling it extra-judicially. The buyer in this situation will acquire its rights subject to the right of the higher-ranking secured creditor, but, as a practical matter, could obtain possession only by paying off the higher-ranking secured creditor (see art. 81). If the lower-ranking secured creditor instead exercises its disposition right judicially, the security right of the higher-ranking secured creditor will be extinguished, meaning that the buyer will be entitled to obtain possession. However, the higher-ranking secured creditor will be entitled to priority of payment out of the proceeds of the disposition (see art. 79). It follows that the lower-ranking creditor is unlikely to initiate judicially-supervised disposition proceedings unless the proceeds to be realised from the disposition of the encumbered asset are likely to be sufficient to satisfy both its claim and the amount owed to the higher-ranking secured creditor.

Article 78. Right of the secured creditor to dispose of an encumbered asset

76. Article 78 is based on recommendations 148-151 of the Secured Transactions Guide (see chap. VIII, paras. 48 and 57-60). Paragraph 1 provides that the secured

creditor may sell or otherwise dispose of, lease, or license an encumbered asset judicially or extra-judicially. Paragraph 2 provides that, if the secured creditor elects the former option it must act in accordance with the rules specified by the enacting State that determine the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

77. Paragraphs 3-8 deal with extrajudicial dispositions by the secured creditor. Under paragraph 3 provided that its actions are in conformity with the overarching obligation to act in good faith and in a commercially reasonable manner (see art. 4), the secured creditor is entitled to determine all aspects of the sale or other disposition, lease or licence, including: (a) the method, manner, time and place; and (b) whether to sell or otherwise dispose of, lease or license the encumbered assets individually, in groups or all together (see Secured Transactions Guide, chap. VIII, paras. 71-73).

78. Under paragraph 4, the secured creditor must give advance written notice of its intention to dispose of the encumbered assets extra-judicially to the grantor, the debtor, any person with a right in the encumbered asset that notifies the secured creditor in writing of those rights, any other secured creditor that registered a notice in the Registry and any other secured creditor in possession (see paras. 4 (a)-(d)). In the case of other persons with rights in the encumbered asset that notified the enforcing secured creditor of their rights or secured creditors that registered a notice in the Registry (see paras. 4 (b) and (c)), the enforcing secured creditor has to give notice to them at least a short period of time specified by the enacting State before the notice is sent to the grantor (e.g. one to five days to allow those other secured creditors to exercise their rights, for example to take over enforcement under article 76).

79. Paragraph 5 sets out the specific information that must be included in the notice and requires the enacting State to specify the period of advance notice (e.g. ten to fifteen days to give the grantor sufficient time to consider the proposal). Paragraph 6 requires the notice to be in a language that is reasonably expected to inform the recipient about its content and paragraph 7 provides that the language of the security agreement is sufficient to meet this standard.

80. Under paragraph 8, 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. “Recognized market” in this context means an organized market in which large volumes of similar assets are bought and sold between many different sellers and buyers, and accordingly one in which prices are set by the market and not negotiated between individual sellers and buyers. For example, a recognized market would include a stock exchange through which shares of publicly listed companies may be bought and sold at publicly-quoted prices. In contrast, shares in a privately held company are usually bought and sold in discrete transactions on the basis of individual negotiations between seller and buyer, and would not fall within the exception.

Article 79. Distribution of the proceeds of a disposition of an encumbered asset and debtor’s liability for any deficiency

81. Article 79 is based on recommendations 152-155 of the Secured Transactions Guide (see chap. VIII, paras. 60-64). It addresses the distribution of the proceeds of a sale or other disposition, lease or licence under article 78. If the secured creditor initiated the disposition by application to a court or other authority, paragraph 1 provides that distribution of the proceeds is determined by rules that must be specified by the enacting State, but the distribution must be in accordance with the priority rules of the Model Law. This requirement should be read in light of article 81, paragraph 1, which requires the enacting State to specify whether or not a buyer or other transferee in the context of a judicially-supervised disposition acquires the grantor’s right in the encumbered asset free of any other rights. Considering that paragraph 1 of this article requires secured creditors to be paid from the proceeds of a court-supervised disposition in their order of priority, it follows that the enacting State should specify in article 81, paragraph 1, that the transferee takes free of all security rights in the encumbered asset, including security rights having priority over the security right of the enforcing creditor (see para. 90 below).

82. Paragraph 2 addresses, the distribution of the proceeds of an extrajudicial sale or other disposition, lease or licence that is carried out by a secured creditor. Under paragraph 2 (a), the enforcing secured creditor is entitled to apply the proceeds in satisfaction of the obligation secured by its security right after first reimbursing itself for its reasonable costs of enforcement. Under paragraph 2 (b), any surplus must be paid to subordinate competing claimants that have notified the enforcing secured creditor of their claims, with any remaining balance then paid to the grantor. This is so because the rights of subordinate competing claimants in the encumbered asset are extinguished under article 81, paragraph 3. Alternatively, in order to relieve the enforcing creditor of having to determine the order of priority of competing claimants, paragraph 2 (c) entitles the enforcing secured creditor to pay the surplus to the judicial or other authority or fund specified by the enacting State for distribution in accordance with the provisions of the Model Law on priority. It should be emphasized that paragraph 2 (c) does not entitle higher-ranking creditors to payment from the proceeds. This is because, under article 81, paragraphs 3 and 4, the security right of a higher-ranking secured creditor is not extinguished by an extrajudicial disposition made by a lower-ranking secured creditor.

83. If the net proceeds of disposition are insufficient to satisfy the obligation secured by the security right of the enforcing secured creditor, paragraph 3 confirms that the debtor remains personally obliged to pay the deficiency. The Model Law does not address the question of whether the debtor's obligation may be reduced or extinguished if the secured creditor failed to comply with the provisions of this chapter governing dispositions or failed to exercise its post-default rights in good faith and in a commercially reasonable manner. Whether the debtor has a claim or counter-claim in these circumstances is a matter left to other law of the enacting State, including in particular its consumer protection law.

84. It should be noted that, in order for the provisions of paragraphs 2 and 3 to operate as intended, the secured creditor will need to provide an accounting of the disposition, specifying the amount of proceeds realized, how they were distributed and the amount of any surplus or deficiency.

Article 80. Right to propose the acquisition of an encumbered asset by the secured creditor

85. Article 80 is based on recommendations 156-159 of the Secured Transactions Guide (see chap. VIII, paras. 65-70). It applies to the enforcement of a security right in both tangible and intangible assets. Paragraph 1 entitles a secured creditor to make a proposal in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the obligation secured by its security right. Under paragraph 2, the secured creditor must send the proposal to the same categories of persons to whom advance notice of an intended extrajudicial disposition must be sent under article 78, paragraph 4 (see para. 78 above). In the case of other persons with rights in the encumbered asset that notified the enforcing secured creditor of their rights or secured creditors that registered a notice in the Registry (see paras. 2 (b) and (c)), the enforcing secured creditor has to give notice to those other secured creditors at least a short period of time specified by the enacting State (e.g. one to five days to allow those persons to exercise their rights before the proposal is sent) before the proposal is sent to the grantor.

86. Paragraph 3 sets out the required content of the proposal. Whether a proposal that contains erroneous information or omits required information would result in the secured creditor failing to acquire the encumbered asset would depend, by analogy to article 81, paragraph 5, on whether the error or omission materially prejudiced the rights of the persons entitled to receive the proposal (e.g. a substantial misstatement of the amount of the secured obligation would typically be viewed as resulting in material prejudice).

87. In the case of a proposal for the acquisition of an encumbered asset in full satisfaction of the secured obligation, paragraph 4 provides that the secured creditor acquires the encumbered asset so long as none of the persons to whom the proposal must be sent under paragraph 2 objects before the expiry of the period specified by

the enacting State after they receive the proposal (e.g. 10 to 15 days to allow sufficient time for the addressees of the proposal to consider whether they should object, although acquisition of the encumbered asset by the secured creditor would result in full satisfaction of the secured obligation and thus in their full discharge). If a timely objection is made, the secured creditor may not proceed further and may only enforce its security right by disposition under article 78 (or collection under art. 82 where the encumbered asset is a right to payment).

88. In the case of a proposal for the acquisition of an encumbered asset in partial satisfaction of the secured obligation, paragraph 5 provides that the secured creditor acquires the encumbered asset only if all of the persons to whom the proposal must be sent under paragraph 2 positively consent before the expiry of the period specified by the enacting State after they receive the proposal (e.g. 45 days to allow sufficient time for the addressees of the proposal to consider whether they should accept although the acquisition of the asset by the secured creditor would result only in partial satisfaction of the secured obligation and thus they would remain personally liable for the balance). The requirement of positive consent in this paragraph is intended to protect the debtor, since, as the secured obligation is only partially satisfied, it would remain liable for the balance of the obligation. It is also to protect any subordinate claimant whose rights would be extinguished under article 81 paragraph 3 (see para. 91 below). As in the case of an unsuccessful proposal under paragraph 3, if the secured creditor does not obtain positive consent, it may only enforce its security right by disposition under article 78 (or collection if the encumbered asset is one of the rights to payment set out in art. 82).

89. Paragraph 6 entitles the grantor to request the secured creditor to make a proposal under paragraph 1. If the secured creditor agrees, paragraphs 1-5 apply in the same manner as if the secured creditor had been the one to initiate the proposal process. In other words, this provision is merely facilitative in nature since the formal proposal process remains the same even where it is initially triggered by a request from the grantor to the secured creditor.

Article 81. Rights acquired in an encumbered asset

90. Article 81 is based on recommendations 160-163 of the Secured Transactions Guide (see chap. VIII, paras. 74-81). It addresses the rights acquired by a buyer or other transferee, or a lessee or licensee, pursuant to a disposition under article 78. Paragraphs 1 and 2 address judicially-supervised dispositions and require the enacting State to specify: (a) in the case of a sale or other transfer, whether or not the transferee acquires the encumbered asset free of any rights; and (b) in the case of a lease or licence, whether or not the lessee or licensee remains entitled to use the encumbered asset during the term of the lease or licence. As already noted (see para. 81 above), article 79, paragraph 1, requires the distribution of the proceeds of a judicially-supervised sale or other disposition, lease or licence to be made in accordance with the priority rules of the Model Law. This requirement means that all secured creditors are entitled to share in the proceeds in order of priority. It follows that the enacting State should specify in paragraphs 1 and 2 that a buyer or other transferee acquires the encumbered asset free of, and a lessee or licensee is entitled to the benefit of the lease or licence unaffected by, any security rights (including security rights ranking higher in priority to that of the enforcing secured creditor).

91. Paragraphs 3 and 4 take a different approach in the case of an extrajudicial sale or other disposition, lease or licence of an encumbered asset. Under paragraph 3, a buyer or other transferee acquires the grantor's right in the encumbered asset free of the security right of the enforcing creditor and the rights of any subordinate competing claimants, but subject to the rights of secured creditors that have priority over the rights of the enforcing secured creditor. The enacting State may wish to consider providing that the rule in article 81, paragraph 3, applies also in the case of the acquisition of an encumbered asset by the secured creditor (see Secured Transactions Guide, rec. 161, second sentence).

92. Paragraph 4 similarly provides that a lessee or licensee is entitled to the benefit of the lease or licence during its term except as against creditors that have priority

over the rights of the enforcing creditor. The reason for the difference in approach is that higher-ranking secured creditors are not entitled to share in the proceeds of an extrajudicial enforcement initiated by a subordinate creditor (see art. 79, para. 2, and para. 82 above). It follows that a buyer or other transferee will discount the price it is willing to pay for the encumbered asset by the value of any prior-ranking security rights and a lessee or licensee will discount the amount of the rental payments it is willing to pay to address the risk that its right of use may be disrupted if the higher-ranking secured creditor elects to enforce its security right.

93. Paragraph 5 provides that the rights acquired by a buyer or other transferee, or a lessee or licensee under paragraphs 3 and 4 of this article are affected by the enforcing creditor's failure to comply with the requirements of this chapter only if two conditions are satisfied. First, they must have had knowledge of the violation, and second, the breach must have materially prejudiced their rights.

B. Asset-specific rules

Article 82. Collection of payment

94. Article 82 is based on recommendations 169-171, 173 and 175 of the Secured Transactions Guide (see chap. VIII, paras. 93-98, 102-108, 111 and 112). It provides secured creditors with an additional enforcement right where the encumbered asset is a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security. Paragraph 1 entitles the secured creditor to collect payment directly from the relevant obligor after default, as an alternative to selling or otherwise disposing of the encumbered asset under article 78. Under paragraph 2, with the agreement of the grantor, the secured creditor may exercise its right to collect even before default. Under paragraph 3, a secured creditor that collects under paragraph 1 or 2 has the benefit of any personal or property right that secures or supports payment of the encumbered asset (such as a guarantee or a stand-by letter of credit; see art. 14).

95. Paragraph 4 limits the secured creditor's right of collection if the encumbered asset is a right to payment of funds credited to a bank account and the security right was made effective against third parties solely by registration. In this situation, the secured creditor is entitled to collect (or otherwise enforce, for example, through a sale under art. 78 or through a proposal under art. 80) only if it obtains a court order or the deposit-taking institution consents. Paragraph 4 does not limit a secured creditor's right of collection where its security right was made effective against third parties by a method other than registration; that is: (a) automatically by the security right being created in favour of the deposit-taking institution itself; (b) by the conclusion of a control agreement between the deposit-taking institution, the grantor (account holder) and the secured creditor; or (c) by the secured creditor becoming the account holder, a method that requires the consent of the institution (see art. 25). The objective of this approach is to exempt deposit-taking institutions from having to respond to a request for payment sent by a person that asserts to have a security right in a right to payment of funds credited to the grantor's account unless the institution has actively consented to the creation of that security right (see Secured Transactions Guide, chap. VIII, para. 107).

Article 83. Collection of payment by an outright transferee of a receivable

96. Article 83 is based on recommendations 167-168 of the Secured Transactions Guide (see chap. VIII, paras. 99-101). It provides that, in the case of an outright transfer of a receivable, the transferee is entitled to collect the receivable at any time provided that payment has become due. It should be noted that the overarching obligation of good faith and commercial reasonableness in article 4 also extends to the collection of receivables by an outright transferee. As a practical matter, where the receivable is transferred outright without recourse, the transferor cannot by definition be prejudiced by the failure of the transferee to act in good faith and in a

commercially reasonable manner in exercising its collection right. However, the standard in article 4 is a general one and would still apply to protect the obligor on the receivable as well as a prior-ranking creditor even in the case of an outright transfer without recourse.

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Note by the Secretariat: draft guide to enactment of the UNCITRAL Model Law on Secured Transactions

ADDENDUM

Contents

Chapter VIII. Conflict of laws

Introduction

1. Chapter VIII of the Model Law states the rules for determining the substantive law applicable to the issues dealt with in the other chapters. These rules are generally referred to as the conflict-of-laws rules. In a State that has enacted the Model Law, a court or other authority will use the conflict-of-laws rules of chapter VIII to determine which State's substantive law will govern issues such as the creation, effectiveness against third parties, priority and enforcement of a security right, as well as the mutual rights and obligations of the grantor and the secured creditor and the rights and obligations between third-party obligors and secured creditors. The substantive law indicated by the conflict-of-laws rules may be that of the enacting State or the law of another State.

2. It should be noted that, in the event of judicial proceedings in a State, a court or other authority in that State will typically apply: (a) the substantive law of its own legal system to characterize a transaction (e.g. whether it is a secured transaction in a strict sense or a different kind of transaction such as a retention-of-title sale) or a related issue (e.g. whether it is a priority or enforcement issue) for the purpose of selecting the appropriate conflict-of-laws rule; (b) the conflict-of-laws rules of its own legal system to determine which State's law is applicable to the substance of the dispute; and (c) the substantive law of the State whose law is applicable according to the conflict-of-laws rules of the forum State (for a more elaborate discussion of the role of conflict-of-laws rules, see Secured Transactions Guide, chap. X, paras. 1-13). For example, if a State enacts the Model Law and a court in that State characterizes a transaction as a secured transaction in accordance with the Model Law, it would use the rules in chapter VIII to determine which State's substantive law rules should apply, and then apply those rules.

3. The application of the conflict-of-laws rules in chapter VIII are not conditional on a prior determination that a particular case presents an international element. Thus, whenever a conflict-of-laws rule in this chapter refers to the law of a State, that reference should not be refused on the ground of the absence of true "internationality". Otherwise, courts might disregard a conflict-of-laws rule in this chapter by deciding that the case is not sufficiently international on the basis of discretionary criteria that are not part of the conflict-of-laws rules.

4. With the exception of article 84, the conflict-of-laws rules in this chapter are mandatory (see art. 3, para. 1). Thus, the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right, as well as to the effect of a security right on a third-party obligor, cannot be selected by the parties through a choice-of-law clause. This is because security rights are property (*in rem*) rights and thus affect third parties (see art. 3, para. 2). Allowing the parties to a security agreement to select the applicable conflict-of-laws rule where the selection has third-party effects would also defeat one of the main purposes of the conflict-of-laws rules, which is to identify the State whose substantive law is to apply in the event of a priority dispute among competing claimants. For example, if there is a priority dispute between secured creditor X and secured creditor Y, it would be impossible for third parties to ascertain the law applicable to the resolution of the dispute if each of X and Y were permitted to choose in their security agreement a different governing law for the ranking of their respective security rights. By contrast, article 84 expressly provides for the possibility of the choice of the applicable law by the parties. This is because article 84 addresses only the mutual rights and obligations of the grantor and secured creditor arising from their security agreement and, accordingly, has no effect on the rights of third parties.

A. General rules

Article 84. Mutual rights and obligations of the grantor and the secured creditor

5. Article 84 is based on recommendation 216 of the Secured Transactions Guide (see chap. X, para. 61). Following the approach of international texts such as the Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles"), article 84 states that the law chosen by the parties to a security agreement is the law applicable to their mutual rights and obligations arising from their agreement (subject only to the limitations set out in article 93). As already mentioned (see para. 4 above), matters relating to the property aspects of secured transactions are outside the scope of article 84. The parties cannot select the law that is to govern these matters. Other matters, such as the ability of the parties to choose different laws for different aspects of their contractual relationship or to modify their choice of law, are left to other conflict-of-laws rules of the enacting State (see, for example, art. 2 (2) and (3) of the Hague Principles).

6. In the absence of a choice of law by the parties, article 84 refers to the law governing the security agreement as determined by the conflict-of-laws rules generally applicable to contractual obligations. This law may be, for example, the law of the State: (a) which is most closely connected to the security agreement (e.g. the State in which a security agreement is entered into and performed, and in which both parties are located); (b) in which the characteristic performance of the agreement is to be made (e.g. the delivery of the goods in a sales agreement or the extension of credit in a credit agreement); or (c) in which the security agreement is entered into.

Article 85. Security rights in tangible assets

7. Article 85 is based on recommendations 203-207 of the Secured Transactions Guide (see chap. X, paras. 28-38). It deals with the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset (for the law applicable to the enforcement of such a security right, see art. 88, subpara. (a)). The term "tangible asset" is defined to refer generally to all types of tangible movable asset and to include money, negotiable instruments, negotiable documents and certificated non-intermediated securities (see art. 2, subpara. (ll); see also Secured Transactions Guide, chap. X, para. 26).

8. Paragraph 1 states the general rule that the law applicable to these issues is the law of the State in which the encumbered asset is located (the "*lex situs*" or the "*lex rei sitae*"; for the meaning of the term "location", see art. 90; for the relevant time for determining location, see art. 91). The *lex situs* rule for tangible assets is subject to five exceptions that are set out in articles 85, paragraphs 2 to 4, 98 and 100.

9. The first exception provides that, if a tangible asset located in a State is covered by a negotiable document in the possession of a secured creditor in another State, the priority of the security right over the asset covered by that document will be determined by the law of the State in which the document is located, and not by the law of the State in which the asset covered by that document is located (see art. 85, para. 2). Unlike recommendation 206, on which paragraph 2 is based, which referred to priority as against "a competing security right", to cover all priority conflicts (e.g. as against a judgment creditor), paragraph 2 refers to priority "as against the right of a competing claimant".

10. The second exception points to the law of the State in which the grantor is located for an asset of a type which may be ordinarily used in more than one State in the course of its normal use, that is, a "mobile asset" (see art. 85, para. 3). This exception refers to the ordinary use of assets of this type and not to their actual use. For example, where a motor vehicle ordinarily crosses national borders, the rule will apply to a particular motor vehicle even if it is actually operated only in one single State.

11. The third exception deals with a tangible asset (other than a mobile asset) in transit or to be exported (see art. 85, para. 4). A security right in a tangible asset located in a State which is in transit or destined to be moved to another State may be created and made effective against third parties under the law of the State of its ultimate destination, if the asset reaches that destination within the period of time to be specified by the enacting State (e.g. within 45-60 days after the putative creation of the security right to allow sufficient time for the asset to reach its destination). It should be noted that: (a) if the asset does not reach the intended destination within the period specified, the rule in paragraph 4 will not apply; and (b) under the rule in paragraph 1, a secured creditor may also take the necessary steps to create and make the security right effective against third parties under the law of the State in which the asset is actually located at the time such steps are taken. It should also be noted that paragraph 4 is a conflict-of-laws rule of the enacting State only and whether the security right will be treated as validly created and made effective against third parties in the State of the ultimate destination of the asset depends on the law applicable under the conflict-of-laws rules of that State.

12. The fourth exception is contained in article 98 and is only a partial exception. It applies only to the third-party effectiveness of a security right by registration in certain types of tangible and intangible asset. However, it does not alter the law applicable to other matters under the primary rule in article 85; questions of priority as against competing claimants, for example, will continue to be determined by the law of the State in which the asset is located (see paras. 44 and 45 below).

13. The fifth exception is contained in article 100. It refers matters relating to a security right in certificated securities to laws other than the law of the State in which the certificate is located (see paras. 49-58 below).

Article 86. Security rights in intangible assets

14. Article 86 is based on recommendation 208 of the Secured Transactions Guide (see chap. X, paras. 39-47). It states the general conflict-of-laws rule for the creation, effectiveness against third parties and priority of a security right in an intangible asset. The applicable law is that of the State in which the grantor is located (for the meaning of "location", see art. 90; for the relevant time for determining location, see art. 91). This rule is subject to several exceptions.

15. The first exception relates to the priority of a security right in a receivable arising from a sale or lease of, or secured by, immovable property (see art. 87). The other exceptions relate to a security right in rights to payment of funds credited to a bank account (see art. 97), intellectual property (see art. 99) and uncertificated non-intermediated securities (see art. 100).

Article 87. Security rights in receivables relating to immovable property

16. Article 87 is based on recommendation 209 of the Secured Transactions Guide (see chap. X, para. 54). It deals with the priority of a security right in a receivable arising from a sale or lease of immovable property or secured by immovable property as against the rights of competing claimants. Article 87 is an exception to the general rule of article 86 and refers that matter to the law of the State under whose authority the immovable property registry is maintained. However, article 87 applies only if the right of a competing claimant is registrable (but not necessarily registered) in the relevant immovable property registry. This means that, for a person to determine the law applicable to the priority of its security right in these circumstances, it needs to find out whether the receivable arises from a sale or lease of or is secured by immovable property. Even if a person does not find that out, the law applicable will still be the law provided in article 87.

Article 88. Enforcement of security rights

17. Article 88 is based on recommendation 218 of the Secured Transactions Guide (see chap. X, paras. 64-72). Subparagraph (a) deals with the law applicable to the enforcement of a security right in a tangible asset, as defined in article 2, subparagraph

(ll). It refers to the law of the State in which the asset is located at the time of commencement of enforcement. The rule in subparagraph (a) is subject to one exception. The enforcement of a security right in certificated non-intermediated securities is referred to the law indicated in article 100 (which applies to both certificated and uncertificated securities).

18. It should be noted that enforcement may involve several distinct actions (e.g. notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) and these actions may take place in different States. For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State. A similar issue arises in the less frequent case where enforcement takes place in different States because the asset has been moved to another State after commencement of enforcement. In each case, the applicable law will be the law of the State of the location of the relevant asset at the time the first enforcement action is taken.

19. Under subparagraph (b), the law applicable to the enforcement of a security right in an intangible asset (with the exception of a right to payment of funds credited to a bank account, intellectual property and uncertificated non-intermediated securities; see arts. 97, 99 and 100) is the law of the State whose law governs priority of the security right (see art. 86). The main advantage of this approach is that the creation, third-party effectiveness, priority and enforcement of a security right in an intangible asset are referred to one and the same law (see Secured Transactions Guide, chap. X, para. 69).

Article 89. Security rights in proceeds

20. Article 89 is based on recommendation 215 of the Secured Transactions Guide (see chap. X, paras. 55-60). It refers the creation of a security right in proceeds to the law of the State whose law governs the creation of the security right in the original encumbered assets, and the third-party effectiveness and priority of a security right in proceeds to the law of the State whose law governs those matters in the case of a security right in original encumbered assets of the same kind as the proceeds. The following example illustrates how article 89 operates. The original encumbered asset is inventory located in State A. The inventory is subsequently sold, and the purchase price is paid by a funds transfer to a bank account held with a deposit-taking institution in State B. Under paragraph 1, the law applicable to the question of whether the secured creditor automatically acquires a security right in the right to payment of the funds credited to the bank account as proceeds of the original encumbered inventory will be the law of the location of the inventory at the time of the creation of the security right in the inventory (see art. 91, para. 1 (a)). Under paragraph 2, the law applicable to the third-party effectiveness and priority of the security right in the right to payment of the funds credited to the bank account as proceeds will be the law that would be applicable to a security right in the right to payment of the funds credited to the bank account as an original encumbered asset (see art. 97).

21. It should be noted that this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad-based right in proceeds (including, for example, civil and natural fruits; see art. 2, subpara. (bb)) whereas the law governing third-party effectiveness and priority recognizes a narrower right in proceeds. It should also be noted that article 89 is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to enforcement. Article 88 deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.

Article 90. Meaning of "location" of the grantor

22. Article 90 is based on recommendation 219 of the Secured Transactions Guide (see chap. X, paras. 73 and 74). It provides that: (a) if a grantor has a place of business, it is located in that State; (b) if a grantor has a place of business in more than one

State, it is located in the State in which the grantor's central administration is exercised; and (c) if a grantor does not have a place of business, the grantor is located in the State in which the grantor has his or her habitual residence. The term "place of business" is understood as the place in which the grantor has an activity (and not necessarily commercial activities). Thus, a legal person without any commercial activities (e.g. a foundation) is located in the State in which it is exercising its activities. It should be noted that, if an individual has a habitual residence in one State and a place of business in another State, that individual is located in the latter State even if the transaction pursuant to which the security right is created is for personal, family, or household purposes unrelated to the individual's commercial activities.

23. It should also be noted that the State in which a grantor that is a legal person has its central administration is not necessarily the State in which that legal person has its statutory seat (or registered office). Thus, if the grantor is a legal person formed under the law of State A with its statutory seat in that State but has in State B a place of business where its senior management is based, then the grantor is located in State B. As a result of this approach, for example, the creation, third-party effectiveness, priority and enforcement of a security right in a receivable is referred to a single law that, as a matter of fact, is relatively easy to determine and is most likely to be the law of the State in which the main insolvency proceeding with respect to the grantor would take place (as insolvency proceedings are typically referred to the law of the State in which the insolvent person has the centre of its main interests and that State is generally interpreted to be the State in which that person has its central administration). This approach minimizes the risks of inconsistencies between the law governing the insolvency proceeding *(lex fori concursus*) and the substantive law applicable to a security right, as the two laws will be the law of one and the same State.

Article 91. Relevant time for determining location

24. Article 91 is based on recommendation 220 of the Secured Transactions Guide (see chap. X, paras. 75-78). It deals with the situation where the applicable law is determined by reference to the location of the asset or the grantor, and that location changes from one State (State A) to another (State B). In such a situation, the applicable law may change.

25. Paragraph 1 (a) establishes that the creation of a security right remains governed by the law of the location of the asset or of the grantor at the time of the creation of the security right even if there is subsequently a change of location. This means that, if the security right was validly created under the law of State A when the asset or the grantor was located there, the law of State A will continue to apply and, as a result, the security right will continue to be held to have been effectively created even after the move of the asset or the grantor to State B whether or not the creation requirements of the law of State B have been satisfied. However, for third-party effectiveness and priority issues, paragraph 1 (b) provides that the applicable law will be that of the location of the asset or the grantor "at the time when the issue arises". This is the time of the occurrence of the event that creates the need to determine the law that would be applicable to third-party effectiveness or priority.

26. For example, if an insolvency proceeding commences in State B in respect of the grantor that is located in State A at the time of the creation of a security right in a receivable, the law applicable to the effectiveness of the security right will be the law of State B if at the time of commencement of the insolvency proceeding the grantor is located in State B (see art. 86). As a result, for the security right to be treated as being effective against the insolvency representative either in State A or in State B, the third-party effectiveness requirements of the law of State B must have been fulfilled prior to the commencement of the insolvency proceeding. Another example is where a tangible asset is seized by a judgment creditor. The question of the respective priority of the secured creditor and the judgment creditor arises at the time of the seizure (which will be "the time when the issue arises"). This is so in each example even if the security right had been made effective against third parties under the law of State A at the time the asset or the grantor was located in State A.

27. Paragraph 2 constitutes an exception to the general rules of paragraph 1. In the event of a priority dispute between a security right that is created and made effective against third parties and the rights of all competing claimants that have been created and made effective against third parties in the State of the initial location, the priority dispute will be resolved under the law of that State (State A in the example).

Article 92. Exclusion of *renvoi*

28. Article 92 is based on recommendation 221 of the Secured Transactions Guide (see chap. X, para. 14). Its purpose is to exclude the doctrine of *renvoi* and provide greater certainty with respect to the determination of the applicable law by avoiding the complications arising from this doctrine. Under the doctrine of *renvoi*, when the conflict-of-laws rules of a State (State A) refer an issue to the law of another State (State B), that law would include the private international law rules of State B. However, the conflict-of-laws rules of State B may refer that issue to the law of another State (State C). In that case, a court in State A would need to resolve the priority dispute using the law of State C (and not the law of State B). However, this could result in circularity, create uncertainty as to the applicable law and be contrary to the expectations of the parties. For those reasons, article 92 excludes *renvoi* (for an exception, see art. 95).

Article 93. Overriding mandatory rules and public policy (*ordre public*)

29. Article 93, which is based on recommendation 222 of the Secured Transactions Guide (see chap. X, para. 79) and article 11 of the Hague Principles, states generally recognized principles of private international law. Under paragraphs 1 and 3, the forum court is not prevented from applying the overriding mandatory law provisions of the law of the forum State and may exclude the application of a provision of the law applicable under the provisions of this chapter if it is manifestly incompatible with fundamental notions of public policy of the forum State.

30. To illustrate how the rules in paragraphs 1 and 3 will operate, assume that the law of the forum (State A) prohibits dealings in certain types of asset (such as an asset which is the proceeds of criminal activities or is the subject of international sanctions) and that the law of the State whose law is applicable under the provisions of this chapter (State B) does not contain such a mandatory law prohibition. In such a case, a court in State A may refuse to recognize a security right created in such an asset under the law of State B even though the law of State B does not contain the same prohibition. Similarly, even if there is no statutory prohibition in State B at the time when a security right is created in a "cultural object", the forum court (State A) may set aside a provision of the law of State B that allows the creation of a security right in cultural objects as being manifestly incompatible with the public policy of State A.

31. Under paragraphs 2 and 4, the forum court (if it is allowed to do so under its law) may refuse to recognize and enforce a security right that has been effectively created and made effective against third parties under the applicable law (even if the applicable law is the law of the forum itself), if the creation of the security right would be manifestly incompatible with the public policy of another State (e.g. a State that has a close connection with the situation). For example, a law firm located in the forum State (State A) may wish to assign receivables arising from its legal services and the law of State A allows this assignment. However, the client is located in another State (State B) and, for reasons of public policy (confidentiality of lawyer-client relationship), the law of State B prohibits the transfers by a law firm of its receivables arising from legal services. In this case, the law of State A may allow a court in State A to take the public policy of State B into account in determining whether the assignment is valid.

32. Paragraph 5 is intended to make clear that the rules in paragraphs 1-4 may also be relied upon by an arbitral tribunal, although, unlike a court, it does not operate as part of the judicial infrastructure of a specific legal system. Under paragraph 5, an arbitral tribunal may be required to take into account the public policy and the overriding mandatory provisions of a State other than the State whose law is applicable (e.g. the State in which the arbitration takes place or the State in which

enforcement of any award is likely to take place). Paragraph 5 also requires an arbitral tribunal to determine whether it is required or entitled to take into account the public policy or the overriding mandatory provisions of another law, having regard (in particular) to the agreement of the parties, the designated or deemed seat of the arbitration, any institutional rules applicable to the arbitration, and the potentially controlling influence of State courts applying local arbitration legislation (see commentary to article 11 (5) of the Hague Principles).

33. Under paragraph 6, the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority of a security right and apply its own third-party effectiveness and priority provisions or those provisions of another State. This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in article 23, paragraph 2, article 30, paragraph 2, and article 31 of the Assignment Convention, as well as in article 11, paragraph 3, of the Hague Securities Convention.

Article 94. Impact of commencement of insolvency proceedings on the law applicable to a security right

34. Article 94 is based on recommendation 223 of the Secured Transactions Guide (see chap. X, paras. 80-82). It provides that an insolvency court in the enacting State must in principle respect the law applicable to security rights under its conflict-of-laws rules. However, nothing in article 94 restricts the application of the law of the State in which insolvency proceedings are commenced (*lex fori concursus*) to matters such as the avoidance of fraudulent or preferential transactions, the treatment of secured creditors, the ranking of claims and the distribution of proceeds (see rec. 31 of the Insolvency Guide).

Article 95. Multi-unit States

35. Article 95 is based on recommendations 224-227 of the Secured Transactions Guide (see chap. X, paras. 83-87) and partly on article 37, first sentence, of the Assignment Convention. Its purpose is to deal with the law applicable where the State whose law is applicable to an issue under the provisions of this chapter has two or more territorial units, each of which has its own substantive law, and possibly its own conflict-of-laws rules. In such a case, subparagraph (a) provides that a reference to the law of a multi-unit State is in principle a reference to the law applicable in the relevant unit (as determined under the other provisions of this chapter). For example, in the case of a security right in a receivable created by a grantor located (in the sense of having its central administration) in territorial unit A, the law applicable to that security right is in principle the law of territorial unit A (see arts. 86 and 90).

36. However, under subparagraph (b), if the internal conflict-of-laws rules of the multi-unit State or, in the absence of such rules, of the territorial unit to which subparagraph (a) points, refer security rights to the law in force in another territorial unit of that State, the substantive law of that other unit will apply. In the above mentioned example, if territorial unit A has a conflict-of-laws rule under which the law applicable is the law of the grantor's location defined as the place of the grantor's statutory seat and that place is in territorial unit B, the substantive law of territorial unit B will apply. It should be noted that subparagraphs (a) and (b) also apply where the forum State is the State whose law is applicable under the provisions of this chapter.

37. Thus, subparagraph (b) is a deviation from the general rule on the exclusion of *renvoi* (see art. 92). The purpose of the exception is to ensure that, where the applicable law is that of a unit of a multi-unit State, a forum court outside that multi-unit State will apply the substantive law of the same unit as a forum court in that multi-unit State would do under its internal conflict-of-laws rules. As a result, the deviation from the rule excluding *renvoi* is limited to internal *renvoi*, which should not materially affect certainty as to the applicable law (see Secured Transactions Guide, chap. X, para. 85).

38. As a result, for example, where the conflict-of-laws rules of this chapter refer to the law of the location of the asset or the grantor, the forum court is required under the provisions of this chapter to examine the internal conflict-of-laws rules in effect in the territorial unit of the location of the grantor or the encumbered asset. 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 (see art. 37 of the Assignment Convention), but in this article there would be no declaration and the forum court would have to determine the applicable law under the conflict-of-laws rules in effect in the multi-unit State or, in the absence of such rules, in the territorial unit to which subparagraph (a) will point.

B. Asset-specific rules

Article 96. Rights and obligations between third-party obligors and secured creditors

39. Article 96 is based on recommendation 217 of the Secured Transactions Guide (see chap. X, paras. 62 and 63) and article 29 of the Assignment Convention. Its purpose is twofold. First, the conflict-of-laws rules dealing with the law applicable to the third-party effectiveness or enforcement of a security right do not apply to the effectiveness or enforcement of a security right against a debtor of a receivable, an obligor under a negotiable instrument or an issuer of a negotiable document; they are not considered "third parties" for the purposes of the rules on third-party effectiveness and priority of a security right, as they are not competing claimants. Second, the law applicable to these issues is the law governing the legal relationship between the grantor and the relevant debtor of the receivable, or the relevant obligor under the instrument or the issuer of the document; the same law also applies to the question of whether any of the latter may assert that their agreement with the grantor prohibits or limits the grantor's right to create a security right in the relevant receivable, instrument or document. For example, in the case of a receivable arising from a sales contract, the law chosen by the seller/grantor and the buyer/debtor of the receivable to govern the sales contract will apply to the matters covered by article 96.

Article 97. Security rights in rights to payment of funds credited to a bank account

40. Article 97 is based on recommendation 210 of the Secured Transactions Guide (see chap. X, paras. 49-51). While a right to payment of funds credited to a bank account is in the generic sense a receivable of the customer against the deposit-taking institution, article 97 departs from the general conflict-of-laws rule on the law applicable to intangible assets (see art. 86). Two options are offered to the enacting State for the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the deposit-taking institution and the secured creditor.

41. Under option A, the applicable law is that of the State of the location of the branch (or office) of the deposit-taking institution with which the account is maintained. It should be noted that a branch (or office) of a deposit-taking institution may be considered as being located in a particular jurisdiction irrespective of whether the institution offers its services through physical offices or only through an online connection accessible electronically by customers. In this regard, it should be noted that a deposit-taking institution must generally have a physical presence or legal address in a jurisdiction in order to be allowed by the relevant regulatory authorities to maintain bank accounts in that jurisdiction. Under this approach, certainty and transparency with regard to the applicable law would be enhanced, as the location of the relevant branch could easily be determined in a bilateral relationship between a deposit-taking institution and its client. In addition, such an approach would reflect the normal expectations of parties to current banking transactions. Moreover, this approach would result in the law governing a security right in a right to payment of

funds credited to a bank account being the same as that applicable to regulatory matters (see Secured Transactions Guide, chap. X, para. 49).

42. Under option B, the applicable law is the law designated in the account agreement as governing the issues that are the subject of article 97 or, in the absence of a designation of a law for these issues, the law designated by the parties to the account agreement as the law governing that agreement. Under this approach, the applicable law would meet the expectations of the parties to the account agreement. A potential lender would be able to ascertain the law provided in the account agreement, as the grantor (the account holder) would normally supply information on the account agreement to obtain credit from the lender relying on the funds credited to the account (see Secured Transactions Guide, chap. X, para. 50). To be effective for conflict-of-laws purposes, a designation must refer to the law of a State in which the deposit-taking institution is regularly engaged in the business of maintaining bank accounts. It should be noted that the State whose law is so designated may be different than the State in which the grantor's bank account is maintained.

43. If the applicable law cannot be determined as described in the preceding paragraph, option B provides for a series of rules along the lines of the default rules contained in article 5 of the Hague Securities Convention, which the enacting State may wish to insert in this article, if it decides to adopt option B of article 97. For example, the enacting State may wish to consider inserting the following text as paragraph 3 of option B: "If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to the following rules: (a) If it is expressly and unambiguously stated in a written bank account agreement that the relevant deposit-taking institution entered into through a particular office, the law applicable is the law of the State in which that office is located; (b) If the applicable law is not determined under subparagraph (a), the applicable law is the law of the State under whose law the relevant deposit-taking institution is incorporated or otherwise organized at the time the written bank account agreement is entered into or, if there is no such agreement, at the time the bank account was opened; (c) If the applicable law is not determined under either subparagraph (a) or subparagraph (b), the applicable law is the law of the State in which the relevant deposit-taking institution has its place of business, or, if the relevant deposit-taking institution has more than one place of business, its principal place of business, at the time the written bank account agreement is entered into or, if there is no such agreement, at the time the bank account was opened".

Article 98. Third-party effectiveness of a security right in certain types of asset by registration

44. Article 98 is based on recommendation 211 of the Secured Transactions Guide (see chap. X, para. 34). This article is an exception to the conflict-of-laws rules on the third-party effectiveness of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security (but article 98 does not apply to uncertificated non-intermediated securities). Under articles 85, 97 and 100, the effectiveness against third parties of a security right in any of these assets is governed by the law of a State which may be different from the State of the location of the grantor. However, under article 98, if the State of the location of the grantor recognizes registration of a notice as a method of third-party effectiveness for a security right in the types of asset covered in article 98, then the law applicable to third-party effectiveness by registration is the law of the State in which the grantor is located.

45. Therefore, with respect to these types of asset, a secured creditor may rely on the law of the location of the grantor to make its security right effective against third parties by registration, even if for these types of asset the applicable law might be different under the other conflict-of-laws rules of this chapter. However, if the priority rules of the applicable law are based on the priority rules of the Model Law, achieving third-party effectiveness by registration would only yield a lower-ranking priority in the case of a priority conflict with a competing secured creditor who achieved third-party effectiveness, for example, by possession in the case of a negotiable instrument

(see art. 46, para. 1), by the secured creditor becoming the account holder in the case of a right to payment of funds credited to a bank account (see art. 47, para. 1) or by possession in the case of a negotiable document or a certificated non-intermediated security (see arts. 49, para. 1, and 51, para. 1, respectively). However, the security right would have priority over the right of: (a) the grantor's insolvency representative or the general body of creditors (subject to the applicable insolvency law; see arts. 35 and 36); and (b) judgment creditors, if registration took place before a judgment creditor took the steps required to acquire a right in the encumbered assets (see art. 37, para. 1).

Article 99. Security rights in intellectual property

46. Article 99 is based on recommendation 248 of the Intellectual Property Supplement (see paras. 284-337). The effect of paragraph 1 is the following. If intellectual property is protected in a particular State, the law of that State will apply to the requirements to be met for the security right in that intellectual property to be considered as having been created and made effective against third parties, and as having priority over the rights of competing claimants. It should be noted that even with respect to intellectual property protected under an international convention the *lex protectionis* is the law of the State party to the Convention under which the intellectual property is protected. For example, with respect to types of intellectual property that are subject to registration in a national, regional or international intellectual property registry (for example, patents and trademarks), the *lex protectionis* is the law of the State (including the rules promulgated by regional or international organizations) under whose authority the registry is maintained (see Intellectual Property Supplement, para. 297). It should also be noted that a security right may be created in intellectual property or rights under a licence agreement (e.g. the licensor's right to royalties or the licensee's right to use the licensed product; see Intellectual Property Supplement, paras. 89-112).

47. Paragraph 2 provides for an alternative way to create and make effective against certain third parties a security right in intellectual property. Under paragraph 2, the secured creditor may also rely for these purposes on the law of the State in which the grantor is located. The principal benefit of paragraph 2 is that a security right in a portfolio of intellectual property rights protected under the laws of different States may be created and made effective against third parties under a single law. An equally important benefit of paragraph 2 is that, if the security right has been made effective against the grantor's insolvency representative under the law of the State in which the grantor is located, an insolvency court in the enacting State will recognize the security right even if the third-party effectiveness requirements of all States in which the intellectual property is protected have not been fulfilled.

48. Paragraph 3 refers enforcement issues to the law of the State in which the grantor is located. This rule allows for the same law to be applied to all enforcement steps, even if they take place in different States, because it is unlikely that the grantor's location (in particular the place of its central administration) would change between any of those steps. In the rare case where there would be such a change, it is assumed that a court would refer to the law of the State in which the grantor is located at the time of commencement of the enforcement (see art. 88). It should be noted that the enforcement of the security right against persons other than the grantor (e.g. the licensor of the intellectual property, if the grantor is a licensee) is outside the scope of this article.

Article 100. Security rights in non-intermediated securities

49. Article 100 introduces one general conflict-of-laws rule for security rights in equity securities and another for security rights in debt securities, without distinguishing between certificated and uncertificated or between traded and non-traded securities. Both of these rules refer all issues (i.e. the creation, third-party effectiveness, priority, enforcement and effectiveness against the issuer of a security right) to a single law. This approach provides greater certainty in the determination of the applicable law.

50. For non-intermediated equity securities, paragraph 1 designates the law of the constitution of the issuer as the law applicable to all issues. The term "equity" is not defined in the Model Law but it should be understood as referring to participation rights in the capital of the issuer. For a corporation or a similar legal person, equity securities consist of the shares in its capital. Similarly, for an entity which is not a legal person under its constitutive law (such as a general partnership in many States), equity securities consist of the rights of the persons (e.g. the partners) who are entitled to receive upon the liquidation of the entity the residual value of its assets after payment of its liabilities.

51. The law of the constitution of the issuer is the law under which it has been formed. For a corporation, this is relatively easy to ascertain; it is the law under which it has been incorporated. For a partnership, it is the law under which the partnership has been created. In federal States where the issuer may be constituted either under a federal law or a law of one of its territorial units, the Model Law does not provide specific criteria on the determination of the territorial unit which will be considered as the issuer's law where the issuer's law is a federal law and the law on secured transactions is that of a territorial unit. However, applying by analogy article 95, the internal conflict-of-laws rules of the federal State (or of the territorial unit which is the forum) should determine the territorial unit's law to be applicable to the issues falling under article 100 where all or some of these issues are not dealt with by the federal law of the constitution of the issuer.

52. For non-intermediated debt securities, paragraph 2 refers all issues to the law governing the securities. The law governing debt securities is the law selected by the parties as the law governing their contractual rights and obligations arising from these securities. In the absence of such a choice of law (which would be extremely rare for debt securities), the forum will determine the applicable law under its own conflict-of-laws rules. The Model Law does not deal with the question of whether the parties may select a governing law which has no connection with the issuance of the securities. This matter is left to the conflict-of-laws rules on contractual obligations of the forum State.

53. The term "debt securities" is not defined in the Model Law. The notion of debt is however well understood in most legal systems and denotes a payment obligation. In the context of debt securities, the obligation is generally to make payment of a sum of money. Bonds and debentures are debt securities, to the extent they come under the definition of securities in article 2, subparagraph (hh).

54. The distinction between equity and debt securities should be based on their characterization under corporate or enterprise law, and not under accounting or other law. Thus, preferred shares (i.e. shares that entitle the holder to a fixed dividend, whose payment takes priority over that of common share dividends) are treated as equity securities if they are so considered under the corporate or enterprise law of the issuer's State even if under accounting or other rules of that State they are classified as liabilities. Likewise, subordinated debt securities (e.g. debt payable only after satisfaction of obligations owing to certain creditors) are treated as debt securities if they are so considered under the corporate or enterprise law of the issuer's State even if they are viewed as equity securities under accounting, regulatory or other law.

55. The concept of "debt securities" raises the following two questions: (a) the characterization of convertible debt securities; and (b) the effect of that characterization on the law applicable to a security right in that type of security. Convertible debt securities are debt securities that are convertible into equity securities at the option of their holder or issuer or upon the occurrence of a specified event.

56. Convertible debt securities should be characterized as debt securities because they constitute payment obligations as long as they are not converted into equity. This means that upon their issuance and until conversion, the law governing these securities will be the law applicable to the creation, third-party effectiveness, priority, enforcement and effectiveness against the issuer of a security right in such securities. The characterization of convertible debt securities for the purposes of article 100 may,

however, change if and once they are converted into equity. The connecting factor then becomes the law of the constitution of the issuer. Therefore, upon being converted into equity, the law applicable to a security right in convertible debt securities will be the law of the State under which the issuer has been constituted.

57. A consequence of the change from the law governing the securities to the issuer's law is that a security right in debt securities made effective against third parties under the law governing the securities might become ineffective against third parties after the change. Article 23 addresses the impact of a change in the applicable law and article 91 addresses a change in the connecting factor. However, strictly speaking, article 23 is not applicable to a change in the nature of non-intermediated securities; and article 91 only deals with the situation where the connecting factor is the location of the asset or the grantor. The enacting State may thus wish to draw from articles 23 and 91 and adopt rules dealing with the change on the basis of principles similar to those underlying articles 23 and 91.

58. With respect to certificated equity or debt non-intermediated securities, article 98 introduces an exception to the general conflict-of-laws rules of article 100. If the law of the State in which the grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in certificated non-intermediated securities, the law of that State is also the law applicable to the third-party effectiveness of the security right in this type of asset by registration (see paras. 44 and 45 above).

Chapter IX. Transition

Introduction

59. The introduction of any new law requires fair and efficient transition rules (see Secured Transactions Guide, chap. XI, paras. 1-3). This is the purpose of this chapter. First, it provides that the law formerly governing rights that fall within the scope of the new law (the "prior law"; see art. 102, para. 1 (a)) is repealed (see art. 101). Second, it provides for the general application of the new law to all security rights (see art. 102, para. 2), including extant security rights that were created by a security agreement concluded while the prior law was still in force ("prior security rights"; see art. 102, para. 1 (b)), but continue to exist, perhaps for extensive periods of time, after the new secured transactions law (the "new law") enters into force. Third, it preserves the exceptional application of prior law in circumstances where no new third-party rights are implicated (see arts. 103-105). Fourth, it provides a transition period for the holders of prior security rights to comply with the third-party effectiveness requirements of the new law (see art. 106). Finally, it sets a date on which the new law goes into effect (see art. 107).

Article 101. Amendment and repeal of other laws

60. The Model Law provides a comprehensive legal framework to govern security rights in the types of asset within its scope under article 1, replacing rather than merely supplementing the prior law. Accordingly, paragraph 1 requires the enacting State to list the laws to be repealed upon entry into force of the new law under article 107. The way in which the repeal is effectuated will depend on the form of the prior law. Where the prior law is set out in a free-standing statute or combination of statutes, it can be repealed in its entirety. Where the prior law is contained in statutes that also address other topics, the enacting State must specify which provisions are to be retained or amended. Where all or part of the prior law is based on judicial opinions (as may be the case, for example, in common law systems), the effect of the new secured transactions law typically will be to override the prior case law without the need for the enacting State to take any explicit repealing measures.

61. Secured transactions law interacts with many other laws such as, for example, civil procedure, judgment enforcement, insolvency, property and taxation laws. These other laws may contain provisions that refer to or are premised on the enacting State's

prior law. Accordingly, paragraph 2 requires the enacting State to amend these provisions to the extent needed to align them with the terminology and the provisions of its new law.

62. It should be noted that, like the other articles of the Model Law, article 101 takes effect only when the new law enacting the Model Law enters into force according to article 107. Accordingly, until that date, the provisions listed for repeal or amendment in this article remain in effect.

Article 102. General applicability of this Law

63. Paragraph 1 of this article defines two terms used in this chapter. Paragraph 1 (a) defines the term "prior law" to mean the law that applied to "prior security rights" (see para. 64) before the entry into force of the new law. This definition makes it clear that the applicable prior law is the law designated by the conflict-of-laws rules of the enacting State as those rules existed before the entry into force of the new law. It follows that the applicable law may be: (a) the law of the enacting State or of another State; and (b) a different law than that which would apply under the conflict-of-laws rules of the Model Law if the enacting State's prior conflict-of-laws regime used a different connecting factor. It should be noted that, even though it is expressed in the singular, the term "prior law" refers to all relevant sources of the applicable prior substantive law wherever they may be reflected (e.g. in a civil or commercial code, a special statute, case law or a combination of any of these sources of law).

64. Paragraph 1 (b) defines "prior security right" (a term referred to in the definition of the term "prior law"; see para. 63 above) as a right created by an agreement entered into before the entry into force of the new law that the new law treats as a security right. For example, a seller's or lessor's retention-of-title right would be a prior security right because it is characterized as such under the functional concept of security right adopted by the Model Law (see art. 2, subpara. (kk)) even if prior law treated it as an ownership right. It should be noted that a security right in future assets acquired by the grantor after the new law enters into force would be a prior security right if it was provided for in an agreement entered into before the entry into force of the new law even though the creation requirements of the new law are not satisfied (see art. 104, para. 2). This presupposes that prior law permitted the creation of a security right in future assets; if it did not, then no prior security right could exist.

65. Paragraph 2 is based on recommendation 228 (second sentence) of the Secured Transactions Guide (see chap. XI, paras. 7-12). It states that, upon its entry into force under article 107, the new law applies, as a general rule, to all security rights within its scope, including prior security rights. This general rule ensures that the enacting State enjoys the economic benefits of the new law with immediate effect and avoids the complexity and conflict that would result from attempting to apply discrete laws to prior and new security rights.

66. The transition to any new legal regime requires that attention be paid to ensuring that extant rights are appropriately accommodated. To this end, paragraph 2 also provides that the general applicability of the new law to prior security rights is subject to the other provisions of this chapter. These other provisions preserve the exceptional application of prior law to prior security rights where no third-party rights are affected (see art. 104), or where the rights of a holder of a prior security right and competing claimants have already vested (see arts. 103 and 106); they also provide a transition period for the holders of prior security rights to conform to the third-party effectiveness requirements of the new law (see art. 105).

Article 103. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

67. Article 103 is based on recommendation 229 of the Secured Transactions Guide (see chap. XI, paras. 13-16). It introduces two exceptions to the general rule in article 102, paragraph 2, that the new law applies to all security rights within its scope, including prior security rights. Paragraph 1 provides for the continued application of prior law to a matter with respect to a prior security right that is the subject of judicial

or arbitral proceedings commenced before the new law entered into force (except enforcement proceedings separately addressed in para. 2).

68. Paragraph 2 provides that, if enforcement of a prior security right is commenced before the entry into force of the new law, the secured creditor may continue enforcement in accordance with prior law (what constitutes "enforcement" under prior law would need to be assessed by reference to prior law), or may choose to enforce its security right in accordance with the new law (what constitutes "enforcement" under the new law is addressed in chapter VII of the Model Law). Paragraph 2 applies if "any step" has been taken to enforce a prior security right before the entry into force of the new law. Thus, for example, if the secured creditor has already obtained possession of an encumbered asset in accordance with prior law when the new law enters into force, it may choose to dispose of the encumbered asset and distribute its proceeds under the prior law or proceed as to those matters under the new law notwithstanding paragraph 1.

69. Paragraph 2 applies to all disputes arising with respect to a prior security right, whether between the secured creditor and the grantor, the secured creditor and a competing claimant, or the secured creditor and a person liable, for example, on a receivable or negotiable instrument. It should be noted that prior law applies only to the matter that is the subject of judicial or arbitral proceedings commenced before the new law enters into force; under the general rule in article 102, paragraph 2, the new law applies to a separate matter that is the subject of proceedings commenced after the new law enters into force even if it relates to the same security agreement.

Article 104. Applicability of prior law to the creation of a prior security right

70. Article 104 is based on recommendation 230 of the Secured Transactions Guide (see chap. XI, paras. 17-19). It sets out an exception to general applicability of the new law to prior security rights under article 102, paragraph 2. Paragraph 1 provides that prior law determines whether a right that was created under an agreement entered into before the new law enters into force that would be a security right under the new law was indeed created effectively. Paragraph 2 confirms that a prior security right that was effectively created under prior law remains effective between the parties after the new law enters into force even if the requirements for creation under the new law are not satisfied. This approach avoids the retroactive invalidation of prior security rights that were created in conformity with the law applicable to them when they were created. It also dispenses with the need for the secured creditor to obtain the cooperation of the grantor to take whatever additional steps may be necessary to conform to the creation requirements of the new law. Such cooperation may not be forthcoming from a grantor that has already received all the credit intended to be secured by the prior security right.

71. The creation requirements of the new law are relatively minimal (see art. 6). Consequently, it will rarely be the case that a security right created in conformity with prior law would not in any event also conform with the creation requirements of the new law. An example of a possible exception would be a prior security right created in accordance with a rule of prior law that allowed the creation of a security right by means of an oral agreement even in the absence of possession of the encumbered asset by the secured creditor. In this example, paragraph 2 would preserve the effectiveness of the prior security right between the parties even though the new law requires a written security agreement signed by the grantor (see art. 6, para. 3).

Article 105. Transitional rules for determining the third-party effectiveness of a prior security right

72. Article 105 is based on recommendation 231 of the Secured Transactions Guide (see chap. XI, paras. 20-22). It introduces a qualified exception to the general applicability of the third-party effectiveness requirements of the new law to prior security rights under article 102, paragraph 2. Under paragraph 1, a prior security right that was made effective against third parties under prior law remains effective against third parties for a transitional period specified by the enacting State after entry into force of the new law even if the conditions for third-party effectiveness under the

new law have not been satisfied The transitional period expires at the earlier of the time when the third-party effectiveness of the security right would have ceased under prior law (see para. 1 (a)) or the time when the transitional period would expire (see para. 1 (b). It should be noted that the transitional period could, for example, be one to two years to allow secured creditors to familiarize themselves with the new law and take the steps required by the new law to make their security rights effective against third parties (for the time required for the new law to enter into force and the relevant considerations to be taken into account in determining that time, see para. 83 below).

73. The following example illustrates the operation of paragraph 1. A prior security right took effect against third parties under prior law on the conclusion of the security agreement without the need for the creditor to register or take any other additional step such as possession. The effect of paragraph 1 is to preserve the third-party effectiveness of the prior security right for the purposes of the new law after it comes into force until the expiration of the period specified in paragraph 1 (b) (e.g. one to two years). If instead the applicable prior law required public registration for third-party effectiveness, and the holder of the prior security right duly registered, but the registration period under prior law would have expired six months after the new law comes into force, paragraph 1 (a) would apply with the result that the third-party effectiveness of the prior security right would be preserved only for a period of six months after the new law enters into force.

74. A security right that would cease to be effective against third-parties under the rule in paragraph 1 may continue to be effective against third parties if the secured creditor takes the appropriate steps under the new law to achieve third-party effectiveness. Most often, this result will be accomplished by registering a notice with the Registry. The secured creditor's ability to do so is aided by paragraph 4, which provides that a prior written agreement creating the prior security right constitutes sufficient authorization for registration of the notice.

75. Under paragraph 2, the third-party effectiveness of a prior security right that would otherwise cease to be effective against third-parties under paragraph 1 is preserved if the secured creditor takes the appropriate steps under the new law to achieve third-party effectiveness before the expiration of the relevant transition period in paragraph 1. In that event, the prior security right is treated as continuously effective against third parties from the time when it was first made effective against third parties under prior law. It follows that the time of third-party effectiveness under prior law will be treated as the relevant time for determining the priority of the security right against competing claimants for the purposes of the priority rules of the new law that turn on the time of third-party effectiveness.

76. Paragraph 3 addresses the situation where the requirements of the new law for third-party effectiveness are not satisfied until after the expiration of the transition period in paragraph 1, leaving a gap between the expiration of third-party effectiveness under paragraph 1 and the achievement of third-party effectiveness under the new law. In that case, paragraph 3 provides that the security right is effective against third parties only from the time it is made effective against third parties under the new law. It follows that the priority of the prior security right, for the purposes of the rules of the new law that determine priority by reference to the time of third-party effectiveness, will date only from that time.

77. A prior security right typically will be made effective against third parties under the new law by registration of a notice in the Registry (see art. 18). The Model Law requires the grantor's authorization for registration but provides that the conclusion of a written security agreement constitutes sufficient authorization without the need for an express authorization clause (see art. 2 of the Model Registry Provisions). In line with this rule, paragraph 4 confirms that a written agreement between a grantor and a secured creditor creating the prior security right constitutes sufficient authorization even if the agreement was concluded before the entry into force of the new law.

78. Paragraph 5 makes explicit a point that is implicit in paragraph 2. It provides that, if a prior security right that was made effective against third parties under prior law by registration remains continuously effective against third parties under paragraph 2, the priority rules of the new law that depend on the time of registration are to be applied using the time of registration under prior law. This clarification was thought to be helpful to cover cases where the registration venue specified by the prior law is different than the Registry established under the new law (see art. 28 of the Model Law).

Article 106. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

79. Article 106 provides an exception to the general rule in article 102, paragraph 2, that the new law applies to all security rights, including prior security rights. Under the circumstance described in article 106, the priority of a prior security right as against competing claimants is determined by application of prior law.

80. Application of the priority rules of prior law appropriately respects the settled expectations of secured creditors and competing claimants when no change has occurred other than the new law entering into force and when the priority competition does not involve rights of new competing claimants that arose after the new law became effective. Accordingly, paragraph 1 makes the application of prior law subject to the caveat that the priority status of the prior security right and the rights of competing claimants must not have changed since the entry into force of the new law.

81. Paragraph 2 provides guidance on when the priority status of a prior security right has changed within the meaning of paragraph 1 so as to instead require application of the priority rules of the new law in accordance with the general rule in article 102, paragraph 2. The effect of paragraph 2 is to make the priority rules of the new law applicable if the prior security right: (a) was created under prior law but was not made effective against third parties under prior law but only under the new law (see para. 2 (b)); or (b) it was made effective against third parties under prior law but continuity of third-party effectiveness was not preserved before the expiration of the transition period set out in article 105, paragraph 1 (see para. 2 (a)).

Article 107. Entry into force of this Law

82. Article 107 is based on recommendation 228 of the Secured Transactions Guide (see chap. XI, paras. 4-6). It requires the enacting State to specify the date when, or the mechanism according to which, the new law will enter into force. The Model Law does not recommend a particular date or mechanism, leaving this matter to the enacting State. The location of this article and its precise formulation will also depend on whether the new law is contained in a new stand-alone statute or incorporated into a general civil or commercial code.

83. In determining when the new law will enter into force, careful consideration should be given both to obtaining the economic benefits of the new law as soon as possible and to minimizing disruptions that may be caused by significant changes in secured transactions practice resulting from the new law. Inasmuch as the new law will have been chosen because it is an improvement over the prior law, the new law should come into force as soon as is practical. However, some lead time is necessary in order to, inter alia: (a) publicize the existence of the new law; (b) enable the establishment of the Registry (or adaptation of an existing registry to the registry system required by the new law) and ensure that it is fully operational; (c) educate participants in the secured transactions system about the effect of the new law and the transition from the prior to the new law and enable them to prepare, for example, for compliance with new rules and the use of new registration and security agreement forms; and (d) educate other affected constituents, for example, buyers, lessees, judgment creditors, and insolvency representatives, on the impact of the new law on their rights. For example, the new law may enter into force on a specific date or a few months (e.g. 6 to 12 months) after a specific date, or on the date to be specified by a decree once the Registry becomes operational.

VI. FUTURE WORK

A. Note by the Secretariat on the work programme of the Commission

(A/CN.9/911)

[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). This Note has been prepared to assist the Commission's consideration of its overall work programme and planning of its activities at this fiftieth session.

2. This Note considers both legislative development and activities designed to support the effective implementation, use and understanding of UNCITRAL texts. This Note also introduces possible future work in various areas of UNCITRAL activity.

3. The Commission may wish to consider its work programme and activities taking into account the progress reports of its Working Groups and reports from the Secretariat noted below, and the conclusions reached at its forty-ninth session under this agenda item (A/71/17, paras. 343-373). The Commission also has before it several draft texts for consideration and possible adoption. 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. Documents for the current Commission session are available at www.uncitral.org/uncitral/commission/sessions/50th.html.[1] They include:[2]

(a) Progress reports of the Commission's Working Groups:

A/CN.9/895 and A/CN.9/900 — Report of Working Group I (MSMEs) on the work of its 27th and 28th sessions (Vienna, 3-7 October 2016; New York, 1-9 May 2017)

A/CN.9/896 and A/CN.9/901 — Report of Working Group II (Arbitration and Conciliation) on the work of its 65th and 66th sessions (Vienna, 12-23 September 2016; New York, 6-10 February 2017)

A/CN.9/897 and A/CN.9/902 — Report of Working Group IV (Electronic Commerce) on the work of its 54th and 55th sessions (Vienna, 31 October-4 November 2016; New York, 24-28 April 2017)

A/CN.9/898 and A/CN.9/903 — Report of Working Group V (Insolvency Law) on the work of its 50th and 51st sessions (Vienna, 12-16 December 2016; New York, 10-19 May 2017)

A/CN.9/899 and A/CN.9/904 — Report of Working Group VI (Security Interests) on the work of its 30th and 31st sessions (Vienna, 5-9 December 2016; New York, 13-17 February 2017)

(b) Draft texts for consideration and possible adoption by the Commission, and comments by States thereon:

A/CN.9/914 and Add.1-6 — Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

A/CN.9/920 — Draft Model Law on Electronic Transferable Records with Explanatory Notes

A/CN.9/921 and addenda — Compilation of comments by States and international organizations on the draft Model Law on Electronic Transferable Records with Explanatory Notes

A/CN.9/922 — Note by the Secretariat on proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission

(c) Reports on other events and from the Secretariat:

A/CN.9/905 — Note by the Secretariat on technical cooperation and assistance

A/CN.9/906 — Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

A/CN.9/907 — Bibliography of recent writings related to UNCITRAL's work

A/CN.9/908 — Note by the Secretariat on coordination activities

A/CN.9/909 — Note by the Secretariat on status of conventions and model laws

A/CN.9/910 — Note by the Secretariat on activities of the UNCITRAL Regional Centre for Asia and the Pacific

A/CN.9/912 — Note by the Secretariat on legal developments in the area of procurement and infrastructure development

A/CN.9/913 — Note by the Secretariat on possible future legislative work on security interests and related topics

A/CN.9/915 — Note by the Secretariat on possible future work in the field of dispute settlement: concurrent proceedings in international arbitration

[1] Titles and symbols of the documents referred to are current as at the date of submission of this Note, but are subject to change. Further documents may also be issued, and, if so, will be available at the UNCITRAL weblink indicated.

[2] Working Group III has not met since the 49th Commission session.

A/CN.9/916 — Note by the Secretariat on possible future work in the field of dispute settlement: ethics in international arbitration

A/CN.9/917 — Note by the Secretariat on possible future work in the field of dispute settlement: reforms of investor-State dispute settlement (ISDS)

A/CN.9/918 and addenda — Investor-State Dispute Settlement Framework, Compilation of comments

A/CN.9/923 — Proposal from CMI for possible future work on issues related to the judicial sale of ships

A/CN.9/924 — Note by the Secretariat on possible future coordination and technical assistance work on security interests and related topics

5. Background documents from the Commission's forty-ninth session are available at www.uncitral.org/uncitral/en/commission/sessions/49th.html. The Commission may wish to refer to the following documents in particular:

A/CN.9/878 — Work programme of the Commission — Note by the Secretariat

A/CN.9/880 — Settlement of commercial disputes: Possible future work on ethics in international arbitration

A/CN.9/881 — Concurrent proceedings in international arbitration

A/CN.9/890 — Settlement of commercial disputes: presentation of a research paper on the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration as a possible model for further reforms of investor-State dispute settlement

A/CN.9/891 — Legal Issues Related to Identity Management and Trust Services

A/71/17 — Report of the Commission's forty-ninth session (especially paras. 343-373)[3]

II. Summary of current activities and proposals for future work programme

A. Legislative development

1. Current legislative programme

6. Table 1 below sets out legislative development currently under way in the Commission's Working Groups, and the envisaged completion dates of the texts concerned.

Table 1
Current legislative activities[4]

Topic	*Report and document references*	*Envisaged completion date*
MSMEs (WG I)		
Preparation of legislative guide on simplified business entities	A/CN.9/WG.I/WP.99 and Add.1 and A/CN.9/895	Ongoing
Preparation of legislative guide on best practices in business registration	A/CN.9/WG.I/WP.101 and A/CN.9/900	Ongoing
Dispute settlement (WG II)		
Enforcement of settlement agreements resulting from international conciliation/mediation	A/CN.9/896 and A/CN.9/901	Estimated 2018 or beyond

[3] Background documents from the Commission's earlier sessions are available at www.uncitral.org/uncitral/commission/sessions/[ordinal number].html.

[4] Working Group III has not met since the 49th session.

Topic	*Report and document references*	*Envisaged completion date*
Electronic commerce (WG IV)		
(i) Electronic transferable records	A/66/17, para. 238; A/CN.9/897	Estimated 2017
(ii) Electronic single window facilities	A/66/17, para. 240	Ongoing
(iii) Contractual aspects of cloud computing	A/71/17, para. 235; A/CN.9/902	Ongoing
(iv) Legal issues related to identity management and trust services	A/71/17, para. 235; A/CN.9/902	Ongoing
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 group's members in the period approaching insolvency	A/CN.9/691 A/65/17, para. 259(b) A/CN.9/829	Since text overlaps with work on topic (i), finalization related to progress with that topic.
(iii) Model law on recognition and enforcement of insolvency-related judgments	A/69/17, para. 155 A/CN.9/829	Ongoing
(iv) Insolvency of MSMEs	A/69/17, para. 156; A/71/17, para. 246	Starting spring 2017
Security Interests (WG VI)		
Preparation of a draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions	A/CN.9/914 and Addenda 1-6	2017

7. As noted above, the following draft texts will be presented for consideration and possible adoption at this Commission session:

A/CN.9/914 and Add.1-6 — Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions

A/CN.9/920 — Draft Model Law on Electronic Transferable Records with Explanatory Notes

A/CN.9/921 and addenda — Compilation of comments by States and international organizations on the draft Model Law on Electronic Transferable Records with Explanatory Notes

A/CN.9/922 — Note by the Secretariat on proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission

Progress of Working Groups

8. 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.

MSMEs (Working Group I)

9. At its twenty-seventh session (Vienna, 3-7 October 2016), Working Group I continued its exploration of the legal issues surrounding the simplification of

incorporation, and considered a draft legislative guide on a simplified business entity (A/CN.9/WG.I/WP.99 and Add.1). It completed its consideration of the commentary and recommendations in respect of the first 13 of the 27 recommendations in the text. The Working Group also heard a short presentation of working paper A/CN.9/WG.I/WP.94 of the French legislative approach known as an "Entrepreneur with Limited Liability" (or EIRL), which represented a possible alternative legislative model applicable to micro and small businesses.

10. At its twenty-eighth session (New York, 1-9 May 2017), the Working Group commenced its deliberation of the draft legislative guide on key principles of a business registry (A/CN.9/WG.I/WP.101) from 1 to 5 May, and from 8 to 9 May continued with its discussion of the draft legislative guide on a simplified business entity (A/CN.9/WG.I/WP.99/Add.1). The Working Group also heard a short presentation of working paper A/CN.9/WG.I/WP.102 by the delegation of Italy proposing possible future work in support of MSMEs on contractual networks.

Dispute settlement (Working Group II)

11. In line with the mandate received from the Commission, the Working Group commenced work on the topic of enforcement of settlement agreements at its sixty-third session, with the aim of identifying relevant issues and developing possible solutions, including the possible preparation of a convention, model provisions or guidance text, on the basis of notes by the Secretariat. At its sixty-fifth and sixty-sixth sessions (Vienna, 12-23 September 2016; New York, 6-10 February 2017, respectively), the Working Group considered the scope of a possible instrument, form requirements of settlement agreements, as well as the main features of an enforcement procedure and defences to enforcement, on the basis of draft provisions included in notes prepared by the Secretariat (A/CN.9/WG.II/WP.198, and A/CN.9/WG.II/WP.200 and its addendum, respectively). At its sixty-sixth session, the Working Group agreed that the Secretariat should prepare draft model legislative provisions complementing the UNCITRAL Model Law on International Commercial Conciliation and a draft convention, both addressing enforcement of international settlement agreements resulting from conciliation.

Electronic commerce (Working Group IV)

12. At its fifty-fourth session (Vienna, 31 October-4 November 2016) the Working Group finalized its work on the preparation of a Model Law on Electronic Transferable Records and requested the Secretariat to revise the draft Model Law on Electronic Transferable Records and explanatory materials contained in document A/CN.9/WG.IV/WP.139 and its addenda to reflect the deliberations and decisions at that session and transmit the revised text to the Commission for consideration at its fiftieth session. The Working Group recalled that UNCITRAL practice was to circulate the text as recommended by an UNCITRAL working group to all Governments and relevant international organizations for comment. It was noted that the same practice would be followed with respect to the draft Model Law, so that the comments would be before the Commission at its fiftieth session (A/CN.9/897, para. 20).

13. At its fifty-fifth session (New York, 24-28 April 2017) the Working Group considered legal issues related to identity management and trust services as well as contractual aspects of cloud computing in order to report back to the Commission so that it could make an informed decision at a future session, including on the priority to be given to each topic.

14. At its forty-fourth session, in 2011, 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 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. In that respect, the Secretariat has regularly contributed to the preparation by UN/ESCAP of a Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific, which has been adopted on 19 May 2016, and is now contributing to its

promotion as well as to developing the tools for its implementation (see A/CN.9/905, para. 27).

Insolvency (Working Group V)

15. At its fiftieth and fifty-first sessions (Vienna, 12-16 December 2016; New York, 10-19 May 2017, respectively), the Working Group continued its deliberations on (a) a draft legislative text to facilitate the cross-border insolvency of multinational enterprise groups; and (b) a draft model law on the recognition and enforcement of insolvency-related judgments. A draft commentary and recommendations on the obligations of directors of enterprise group companies in the period approaching insolvency is well-developed, but finalization depends upon progress with topic (a), as the solutions developed with respect to the conduct of enterprise group insolvencies will have an impact upon the nature of the obligations of directors of relevant group members and the steps that might be required to discharge those obligations. Work on the insolvency of MSMEs commenced at the fifty-first session, with a preliminary discussion of how the work should be approached (see A/CN.9/903).

Security Interests (Working Group VI)

16. At its thirtieth and thirty-first sessions (Vienna, 5-9 December 2016, and New York, 13-17 February 2017, respectively), the Working Group adopted the draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions (A/CN.9/899 and A/CN.9/904), and, at its thirty-first session, decided to submit it to the Commission for consideration and adoption at its fiftieth session (A/CN.9/904, para. 135). At that session, the Working Group also noted with appreciation the draft programme of the Fourth International Colloquium on Secured Transactions, which was scheduled to take place in Vienna from 15 to 17 March 2017 and that a report of the Colloquium would be submitted to the Commission for its consideration of future work in the area of secured transactions and related topics at its fiftieth session (A/CN.9/904, para. 136).

2. Future legislative programme

17. At its forty-sixth session, the Commission underscored the importance of a strategic approach to the allocation of resources inter alia to legislative development, in the light of the increasing number of topics referred to UNCITRAL for consideration (A/68/17, paras. 294-295). The Commission has 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).

18. The Commission has 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.).[5]

19. Table 2 below sets out proposals for future work by the Commission, annotated to show whether the work is mandated or possible future work. "Mandated future work" is planned legislative development, i.e. work in respect of which the Commission has provided a mandate to a Working Group. Items denoted as "possible future work" are topics proposed to the Commission, which the Commission may wish to consider. The final column of the table identifies areas in which a proposal may involve issues of another subject area relevant to UNCITRAL.

[5] At its forty-sixth session in 2013, the Commission confirmed that it would consider whether to refer proposals for future work to a Working Group by reference to four considerations: first, whether the Commission is satisfied that the topic is likely to be amenable to harmonization and the consensual development of a legislative text; second, whether the scope of a possible future text and the policy issues for deliberation are clear; third, whether there exists a sufficient likelihood that a proposed legislative text would enhance the law of international trade; and, fourth, whether proposed work would duplicate work undertaken by other law reform bodies. A/68/17, paras. 303 and 304.

20. The Commission may wish to consider the items set out in Table 2, the more detailed descriptions in the paragraphs following that table and the other documents referred to in this section when setting its work programme for the year to the Commission session in 2018. The Commission may also recall that further proposals seeking legislative mandates for other subject areas may be made at the current session, by States and/or international organizations.

Table 2
Summary of mandated and possible future legislative activity

Subject area	*Proposal*	*Document reference*	*Mandated/possible future work*	*Other relevant subject areas*
Dispute Settlement (WG II)	Concurrent proceedings in the field of investment arbitration	Paras. 21-22 below A/CN.9/881	Possible	–
	Code of ethics in international arbitration	Paras. 23-24 below A/CN.9/880	Possible	
	Possible reform of investor-State dispute settlement	Para. 25-26 below A/CN.9/880	Possible	
Electronic commerce (WG IV)	Mobile commerce	Para. 27 below A/70/17, para. 358	Possible	MSMEs
Security Interests (WG VI)	Contractual Guide on Secured Transactions Uniform law text on intellectual property licensing Finance to micro, small and medium-sized enterprises (MSMEs) Contractual issues of concern to MSMEs Warehouse receipt financing Secured transactions and alternative dispute resolution	Para. 32 below A/71/17, paras. 124-125	Mandated	Arbitration, MSMEs

Dispute settlement

Concurrent proceedings

21. 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. [6] At its forty-seventh session, in 2014, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area and that that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration. [7] At its forty-eighth session, in 2015, 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. [8] At its

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 131-133 and 311.
[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 126-127 and 130.
[8] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 143-147.

forty-ninth session, in 2016, the Commission had before it a note by the Secretariat outlining the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings in international arbitration and possible future work in that area (A/CN.9/881).[9] After discussion, the Commission agreed that the Secretariat should continue to further develop possible work that could be undertaken with regard to concurrent proceedings as mentioned in section IV of document A/CN.9/881, for consideration by the Commission at a future session.[10]

22. Accordingly, the Commission will have before it a note by the Secretariat on the topic (A/CN.9/915).

Code of ethics

23. At its forty-eighth session, in 2015, 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. There was general interest in the topic, which could be explored taking into account the wide range of issues and approaches.[11] At its forty-ninth session, in 2016, the Commission considered a note by the Secretariat, which outlined the concept of ethics in international arbitration as well as existing legal frameworks on ethics and posed some questions to be considered before possibly engaging in future work in that area (A/CN.9/880). After discussion, the Commission requested the Secretariat to continue exploring the topic in a broad manner, 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 on the various possible approaches.[12]

24. Accordingly, the Commission will have before it a note by the Secretariat on the topic further exploring the concept of ethics in international arbitration, identifying existing legal frameworks, and raising questions with regard to the topic as an item for possible future work by the Commission (A/CN.9/916).

Possible reform of investor-State dispute settlement

25. At its forty-eighth session, in 2015, 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 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("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 Centre 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. At its forty-ninth session, in 2016, the Commission considered a note providing a short overview of a research study on whether the Mauritius Convention on Transparency could provide a useful model for possible reforms in the field of investor-State dispute settlement, conducted within the framework of a research project of CIDS (A/CN.9/890). After discussion, the Commission requested the Secretariat to review how the project described in document A/CN.9/890 might be best carried forward, if approved as a topic of future work at the forthcoming session of the Commission, taking into consideration the views of all States and other stakeholders, including how this project might interact with other initiatives in this area and which format and processes should be used. In so doing, the Secretariat was requested to conduct broad consultations.

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[9] Ibid., *Seventy-first Session*, *Supplement No. 17* (A/71/17), paras. 175-181.
[10] Ibid., para. 181.
[11] Ibid., *Seventieth Session, Supplement No. 17* (A/70/17), paras. 148-151.
[12] Ibid., *Seventy-first Session*, *Supplement No. 17* (A/71/17), paras. 182-186.

26. Accordingly, the Commission will have before it a note by the Secretariat resulting from the consultations (A/CN.9/917) and compilation of comment from governments (A/CN.9/918 and addenda). The Commission will also have before it an additional report from CIDS, addressing the selection and appointment of members of international courts and assignment of individual cases to members.

Electronic commerce

27. At its forty-eighth session, in 2015, the Commission instructed the Secretariat to conduct preparatory work on identity management and trust services, cloud computing and mobile commerce, including through the organization of colloquiums and expert group meetings, for future discussion at the Working Group level following the current work on electronic transferable records. Working Group IV at its fifty-fifth session (New York, 24-28 April 2017) has started considering legal issues related to identity management and trust services as well as contractual aspects of cloud computing (see above, para. 13).

Procurement and infrastructure development

28. At its forty-eighth session, the Commission considered possible future work on the topics of suspension and debarment in public procurement and of public-private partnerships (PPPs) respectively. As regards suspension and debarment, the Commission at its forty-ninth session instructed the Secretariat to continue to monitor developments on the topic and to report periodically thereon to the Commission.[13]

29. As regards PPPs, the Commission decided at its forty-ninth session that the Secretariat should consider updating, where necessary, all or parts of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects,[14] involving experts, and report thereon.[15]

30. A Note by the Secretariat on legal developments in the area of procurement and infrastructure development provides the requested reports (A/CN.9/912).

Security Interests

31. As table 1 indicates, a draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions was completed and submitted by Working Group VI to the Commission for consideration and adoption at the present session. (As to the possible future legislative work on security interests and related matters, see document A/CN.9/913.)

32. As to the topics of a contractual guide on secured transactions, a uniform law text on intellectual property licensing, finance to micro, small and medium-sized enterprises (MSMEs), contractual issues of concern to MSMEs, warehouse receipt financing and secured transactions and alternative dispute resolution, the Commission may wish to consider them in the context of its consideration of document A/CN.9/913 on the possible future legislative work on security interests and related matters.

B. Current and possible future activities to support the adoption and use of UNCITRAL texts

33. The reports available to this fiftieth 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 listed in paragraph 4(c)

[13] A/71/17, para. 361.
[14] A/71/17, para. 362.
[15] A/71/17, paras. 359-360 and 362.

above. At this fiftieth session, the Commission will have before it a note by the Secretariat on status of conventions and model laws (A/CN.9/909).

34. 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 requested the Secretariat to continue with those activities to the extent that its resources permit (A/70/17, para. 365). At this fiftieth session, the Commission will have before it a note by the Secretariat on activities of the UNCITRAL Regional Centre for Asia and the Pacific (A/CN.9/910).

35. As regards technical assistance activities, the Commission will have before it a note by the Secretariat on technical cooperation and assistance (A/CN.9/905), a Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/906) and a Bibliography of recent writings related to UNCITRAL's work (A/CN.9/907).

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

36. At its forty-ninth session, the Commission recalled its instruction to the Secretariat to commence preparations for a Congress to commemorate UNCITRAL's fiftieth anniversary. The Congress will take place during the first week of this fiftieth session, from 4-6 July 2017.

37. The Congress is entitled "Modernizing International Trade Law to Support Innovation and Sustainable Development". The Commission may recall that, in the Addis Ababa Action Agenda, States endorsed "the efforts and initiatives of the United Nations Commission on International Trade Law, 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."[16] The Congress will examine how trade law reform and innovation based on UNCITRAL's modern, fair and harmonized rules, can contribute to the 2030 Agenda for Sustainable Development, will emphasize the value of development-supporting work in a technical, non-politicized forum, and will examine the potential of UNCITRAL to propose legislative solutions to obstacles to cross-border commerce.

38. Information about the Congress, including the draft programme as it is developed, is available on the UNCITRAL website, at www.uncitral.org/uncitral/en/commission/colloquia/50th-anniversary.html.

39. The Secretariat will provide an oral report on the proceedings at the Congress at this session of the Commission, and written proceedings will be published at a later date. The Secretariat will bring to the attention of the Commission for its eventual consideration any proposals for future work in UNCITRAL arising as a result of the Congress.

[16] Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), A/RES/69/313.

B. Note by the Secretariat on possible future work in procurement and infrastructure development

(A/CN.9/912)

[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 fiftieth session. It addresses two possible areas of legislative development: suspension and debarment in public procurement, and public-private partnerships.

II. Suspension and debarment in public procurement

2. At its forty-eighth session, the Commission agreed on the importance of suspension and debarment in supporting the effective implementation of a public procurement law and in fighting corruption, noting that UNCITRAL Model Law on Public Procurement[1] did not provide any procedural rules for the process.[2] In light of considerable variations among suspension and debarment systems in practice, as regards the objectives, procedures and outcomes, the Commission considered that legislative development in UNCITRAL in this area was not presently feasible, but that developments towards convergence were such that the item should be retained on its agenda.[3]

3. The Commission also instructed the Secretariat to continue to monitor developments on the topic and to report periodically thereon to the Commission.[4]

4. The Secretariat has reviewed materials and recent training and other knowledge dissemination activities, which indicate growing efforts to promote greater procedural consistency, transparency in practice, and fairness in suspension and debarment procedures, indicating ongoing progress towards convergence in some areas (as reported to the Commission in 2016).[5]

5. Nonetheless, there remain significant divergence in policy and practice on key parameters for a suspension and debarment system, including on the appropriateness of flexibility in sanctions. For example, some systems permit deferred prosecution or non-prosecution agreements, under which suppliers are permitted to make reparation for their sanctionable conduct without prosecution and formal sanction. The benefits

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[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 192 and annex I, available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.
[2] A/70/17, para. 362. See, also, A/CN.9/889, paras. 2-9.
[3] Ibid.
[4] A/71/17, para. 361.
[5] A/CN.9/889, para. 6.

of such systems, akin to some self-cleaning mechanisms, include that rehabilitation and improved conduct have long-term benefits for the system as a whole, avoid the potential negative impacts on overall market competition, and can also avoid some of the challenges involved in securing convictions and in cross-system recognition of sanctions. On the other hand, some commentators report that the deterrent effect of sanctions regimes and fight against corruption have been compromised, that transparency and fairness of the procedures to conclude the agreements may be lacking. It is also reported that some countries are motivated to protect large and influential domestic companies from convictions and reputational damage that could jeopardize their future bidding for international contracts and collateral economic and social consequences, without paying due regard to the governance implications.[6]

6. The Commission may therefore consider that the position remains as reported in 2016: legislative development in UNCITRAL in this area is not presently feasible, but the importance of the topic and moves towards indicate that the item should be retained on its agenda.

III. Public-private partnerships (PPPs)

7. At its forty-eighth session, and in light of the acknowledged importance of public-private partnerships (PPPs) for development and in the context of the Sustainable Development Goals, the Commission decided that the possibility of developing a legislative text on PPPs would be kept on the Commission's agenda, and instructed the Secretariat to follow the topic to advance preparations should the Commission decide to undertake work in this area.[7]

8. The Secretariat reported to the Commission in 2016 on areas of policymaking focus of other bodies active in PPPs, primarily the World Bank and regional development banks, the United Nations Economic Commission for Europe (UNECE) and the Organization for Economic Cooperation and Development and at the national level. The topics considered included procurement in PPPs, the terms of the project agreement, and post-award disputes.[8]

9. In light thereof, the Commission decided that the Secretariat should consider updating where necessary all or parts of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects,[9] involving experts.[10]

Consideration of possible updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

10. In order to assess the likely extent of necessary updates to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the Secretariat has held consultations with experts in policy, law reform and practice in PPPs, on the provisions of the Legislative Guide and the accompanying Legislative Recommendations and Model Legislative Provisions (together, the PFIPs texts).[11] The review considered the main topics contained in those documents (Introduction; General legislative and institutional framework; Project Risks and Government Support; Selection of the concessionaire; Construction and operation of infrastructure — legislative framework and project agreement; Duration, extension and termination

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[6] See, for example, Majtan, Roman. The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes. Geo. Wash. Int'l L. Rev. 45 (2013): 291; Grasso, Costantino. Peaks and Troughs of the UK Deferred Prosecution Agreement: The Lesson Learned from the First-Ever DPA between the SFO and ICBC SB PLC; (2016). Out of court, out of mind: do deferred prosecution agreements and corporate settlements fail to deter overseas corruption, Corruption Watch UK, available at http://www.cw-uk.org/wp-content/uploads/2016/03/Corruption-Watch-Out-of-Court-Out-of-Mind.pdf.

[7] A/70/17, para. 363.

[8] A/CN.9/889, paras. 10-19.

[9] A/70/17, para. 362.

[10] A/71/17, paras. 359, 360 and 362.

[11] The UNCITRAL Legislative Guide (with Legislative Recommendations) and its Model Legislative Provisions on PFIP are available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

of the project agreement; Settlement of disputes and Other areas of law). The experts also took note of the conclusions held at two Colloquia considering the PFIPs texts held in May 2013 and March 2014 (both of which had recommended revisions to the PFIPs texts),[12] and the Commission's consideration thereof.[13]

11. The consultations starting in September 2016 were conducted through written exchanges, virtual meetings and two in-person meetings, one held in Washington, D.C., on 5-7 December 2016 (contemporaneously with the Global Forum on Law, Justice and Development, which considered various aspects of PPPs),[14] and one held in Vienna, on 6 and 7 March 2017.

12. The main conclusion of the experts is that most of the recommendations of the PFIPs texts reflect good policy and practices, and remain relevant. However, limited revisions to update the PFIPs texts are considered necessary, in order to take account of developments in practice since the existing Legislative Guide was issued in 2000. First, the term "public-private partnerships" has become the term generally used to describe the arrangements considered in the PFIPs texts, and should be used to replace "privately-financed infrastructure projects". In addition, referring to PPPs would avoid confusion with the "Private Financing Initiative" in the United Kingdom of Great Britain and Northern Ireland and also allow the importance of service delivery through PPPs to be placed on a par with the infrastructure development that precedes service delivery.

13. Secondly, objectives and requirements of the United Nations Convention against Corruption[15] should be fully reflected in the PFIPs texts, given the extent of ratification of that text.[16] The requirements, contained in articles 9(1) and 9(2) on public procurement and public financial management respectively, are that systems be based on principles of transparency, competition and objectivity in decision-taking. It is recommended that the PFIPs texts should be expanded as regards good governance throughout the life cycle of PPPs, and recent developments should be considered, for example those encouraging greater transparency in PPPs through open contracting and open data as well as transparency in procurement procedures.

14. The experts also agreed that an earlier instruction from the Commission to the Secretariat to consolidate the PFIPs texts should be implemented as part of the updating process. The PFIPs texts, as and when updated, should therefore present commentary, legislative guidance, legislative recommendations and model legislative provisions, as appropriate, on each aspect of PPPs covered. Legislative recommendations should form the central scoping provisions (and could be integrated in laws governing PPPs at the national level), but commentary on issues of implementation and use would be necessary to ensure the legal framework functioned as intended, and so should be included (reflecting the approach of the existing PFIPs texts). Thus updated PFIPs texts would take the form of a single Legislative Guide containing all guidance, recommendations and model provisions.

15. The other key conclusions of the review are set out in the following paragraphs.

16. First, and noting that the main objective of an updated Legislative Guide would be to assist legislators to establish an enabling legislative framework for PPPs, the text should be expanded as regards the institutional requirements for the effective

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[12] Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013), A/CN.9/779, paras. 73-85, available at www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html; and Possible future work in Public-Private Partnerships (PPPs) Report of the UNCITRAL colloquium on PPPs, A/CN.9/821, available at http://www.uncitral.org/uncitral/commission/sessions/47th.html.

[13] See A/68/17, paras. 329-331; A/69/17, paras 255-260.

[14] See http://www.globalforumljd.org/events/2016/law-justice-and-development-2016-law-climate-change-and-development.

[15] Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

[16] See https://www.unodc.org/documents/treaties/UNCAC/Status-Map/UNCAC_Status_Map_Current.pdf.

implementation of that framework (as provided in many modern PPPs laws).[17] In this context, the review concluded that the assumption in the existing PFIPs texts that the enacting State has appropriate institutional structure and capacity should be removed, and guidance should be included on both structure and capacity.

17. More generally, the extent of implementation guidance should be considered on a topic-by-topic basis, should focus on the legal and policy recommendations, and should not seek to provide a comprehensive user manual. For example, if an updated Legislative Guide recommends that a central PPPs agency or body be required to carry out readiness assessments, it should explain what is understood by readiness assessments. However, detailed practical advice on readiness assessments — a topic included by several organizations providing practical and capacity-building advice — [18] would not be included.

18. Secondly, additional discussion of key terms such as "value for money" and "sustainability", key features of the projects covered should be included. In this regard, the challenges of defining PPPs were noted, and the updated Legislative Guide should provide guidance on setting the scope of the projects for which the legal framework is designed, rather than seeking to define PPPs themselves.

19. Third, the review concluded, in light of practical experience and the requirements of the United Nations Convention against Corruption noted above, that more articulate recommendations for procedures and roles for project planning and preparation should be included. However, the review in this regard drew a distinction between infrastructure planning and administrative procedures to evaluate the quality of possible projects, identifying their intended and likely socioeconomic objectives and impact, and prioritization among projects, and PPPs planning and preparation.

20. While PPPs planning and preparation should be integrated into a national or regional infrastructure planning and public financial management processes, general administrative procedures will generally not feature in a law governing PPPs. Consequently, detailed commentary on such general administrative procedures should not be included in an updated Legislative Guide. Guidance on the importance of appropriate standards and linkages between these procedures and PPPs should, on the other hand, be provided.

21. The focus in an updated Legislative Guide should therefore be to address the steps to be taken once a PPP is a possible delivery model for a project (that is, the Guide would assume that the project is already identified as a worthwhile project). The guidance will focus on the steps involved to decide whether a proposed project would be viable as a PPP. The recommendations should focus on ensuring clarity in roles and responsibilities, and the criteria to be followed in taking the decisions involved. The approvals process is generally an iterative one involving, at a minimum, a public authority that would conduct the project and central authorities that provide the ultimate approvals. Methodologies to identify the suitability of a project as a PPP should be included, with requirements for a comparison with other delivery mechanisms at both the individual project level and at the level of government resource allocations, issues raised in the existing PFIPs texts but for which expanded guidance is recommended. In this regard, the review noted concerns that many existing systems in this area are not effective, and there is evidence of distortions in insufficiently rigorous processes designed to secure authorization for a PPP.

22. Other significant issues in the planning process include requirements for analyses of whether the long-term provision of services for which infrastructure is constructed can be assured; that is, can the services be provided at a price that will allow the private sector to develop and operate the project (whether with or without a subsidy); whether appropriate risk transfer is achievable; of the long-term financial implications of the project as PPP, including capital and operating financial requirements, fiscal and public debt implications, affordability, and appropriate

[17] See Comparison of Country PPP Laws with UNCITRAL PFIPs Instruments, report by Crown Agents, available at http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2014-papers.html.

[18] Such as those identified in para. 6 above.

accounting for liabilities. Some of these elements are addressed in the existing PFIPs texts, and the review concluded that the existing guidance be consolidated and expanded, in a new chapter to address project preparation.

23. Third, the review recommended that all revisions should be grounded in current practices from all regions, for example on the emerging use of market consultations, and planning tools, which can assist in enhancing project quality and in preventing unnecessary changes in contract terms (concerns were expressed about recent examples of contract renegotiations only 12-18 months after contract signature). On the other hand, new tools for accommodating necessary changes during the period of project operation have emerged and should be considered.

24. Fourth, the review concluded that the scope of the revised Legislative Guide should remain focused on infrastructure-based PPPs with a public service element; any new models of such PPPs introduced should be based on successful experiences, and novel forms of PPP such as project alliancing should not be addressed, because there is a lack of broad-based experience that would allow UNCITRAL to build consensus on universally-acceptable recommendations and guidance, and also reflecting the limited scope of the instructions from the Commission.

25. As regards drafting issues, the review recommended a simpler style and presentation, and simplifying references to the constituent elements of a legal framework. Unnecessary reference to sector-specific issues should be removed, though some general recommendations in the updated Legislative Guide might be adapted for or applicable to individual sectors.

26. The review is now looking at individual chapters of the existing PFIPS texts in detail, starting with Chapter I of the existing Legislative Guide and associated Legislative Recommendations and Model Legislative Provisions. This Chapter addresses the general enabling environment (including country- or region-wide planning), the functions of PPPs-related institutions and interaction with other branches of government. The initial sections of Chapter I, as proposed to be updated based on the above recommendations, are annexed to this Note, so as to provide an example of the format an updated Legislative Guide may take.

27. A table of concordance with the existing PFIPs texts for this extract appears below.

Legislative Guide on PFIPs (2000) **Chapter and Main Topic Reference**	**Proposed Revised Legislative Guide on PPPs** **Chapter and Main Topic Reference**
Chapter I — General legislative and institutional framework	**Chapter I — General framework for PPPs**
A. General Remarks	A. General remarks
B. Constitutional legislative and institutional framework 1. General guiding principles for a favourable constitutional and legislative framework a. Transparency b. Fairness c. Long-term sustainability 2. Constitutional law and privately financed infrastructure projects 3. General and sector specific legislation Includes: Legislative Recommendation 1 and Model Legislative Provision 2	B. Legal and institutional framework for PPPs 1. Objectives of a PPPs legal framework a. Sustainability b. Value for money c. Participation d. Competition e. Integrity f. Transparency g. Fairness and public confidence 2. The legal framework for PPPs a. General remarks b. Interaction with other areas of law

	c. Sector specific legislation Includes: Model Legislative Provision 1 (Preamble)
C. Scope of authority to award concessions 1. Authorized agencies and relevant fields of activity 2. Purpose and scope of concessions Includes: Legislative Recommendations 2-5 and Model Legislative Provisions 3 and 4	C. Scope of the legal authority for PPPs 1. PPP projects to be addressed 2. Definition of PPPs 3. Scope of authority to enter into PPPs Includes: Model Legislative Provisions 2 and 3
	D. The institutional framework for PPPs

IV. Conclusions and next steps

28. The review indicates that updating the PFIPs texts is both feasible and achievable within current resource constraints. The Secretariat proposes to hold a further Colloquium on PPPs in the autumn of 2017, in order to allow proposals to update the Chapters of the existing PFIPs texts to be considered in an open and inclusive forum.

29. A further report and recommendations will be presented to the Commission for its consideration in 2018.

Annex

Proposed updated Chapter I, Sections A-D, of the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects

Notes:

1 This draft consolidates the Legislative Guide, Legislative Recommendations (LRs) and Model Legislative Provisions (MLPs);

2 Italicised text in square brackets refers to sources and may be excluded from the final text.

CHAPTER I. General framework for PPPs

A. General Remarks

1. The establishment of an appropriate and effective legal framework is a prerequisite to creating an environment that fosters public-private partnerships for infrastructure development and the provision of services to the public. For countries where such a legal framework already exists, it is important to ensure that the law is sufficiently flexible and responsive to keep pace with developments. This chapter deals with general issues and objectives that domestic legislators are advised to consider when setting up or reviewing the legal framework for public-private partnerships for infrastructure development.

B. Legal and institutional framework for PPPs

1. Objectives of a PPPs legal framework

2. A statement of objectives sets out the policy objectives in a law and supporting elements of the PPPs legal framework, therefore provides useful orientation for users, and can also provide guidance in the interpretation and application of the law.

3. Ensuring that PPPs are concluded using a transparent, objective and competitive process, principles underlying article 9 of the United Nations Convention against Corruption (New York, 31 October 2003),[19] will also ensure the integrity of the process and may also support the sustainability of a PPP (as projects may otherwise be vulnerable to cancellation when governments change).

4. It is recommended that such a statement be included in the form of a preamble to the law. In States in which it is not the practice to include preambles, a statement of objectives can be incorporated in the body of the provisions of the Law.

5. It should be noted that such a statement does not create substantive rights or obligations for the parties — these arise under procedures in the law itself.

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[19] United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

Model Legislative Provision 1

Preamble

WHEREAS the [Government] [Parliament] of ... considers it desirable to regulate public-private partnerships so as to promote the following objectives in infrastructure development and the provision of associated services to the public:

(a) Achieving long-term sustainability of infrastructure and security in the delivery of services to citizens;

(b) Maximizing value for money;

(c) Fostering and encouraging the participation of the private sector;

(d) Promoting competition for public-private partnership contracts;

(e) Promoting integrity, transparency, fairness and public confidence in the processes concerned.

Be it therefore enacted as follows:

[*The objectives set out in the Model Legislative Provision are drawn from article 9 of the United Nations Convention against Corruption, the UNCITRAL Model Law on Public Procurement and the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects.*]

Commentary on objectives of a PPPs legal framework

(a) Sustainability

6. Recalling the scope of this [Guide] and the context of infrastructure development [cross references], it is clear that an important objective of the PPPs legal framework is to ensure the long-term provision of public services, high quality in infrastructure, and economic, environmental and social sustainability. Inadequate arrangements for the operation and maintenance of public infrastructure severely compromise these objectives and can result directly in reduced service quality and increased costs for users.

7. This [Guide] addresses the role of the legislative framework in ensuring that the various public authorities involved in the governance and operation of PPPs have the legal authority and institutional capacity to undertake the various tasks entrusted to them throughout the planning and operational phases of PPPs.

[*sources include PFIPs Legislative Guide*]

(b) Value for money

8. Value for money means an objective assessment of the extent to which a PPP optimizes the use of resources to achieve the intended impact of the project concerned, and can include:

(a) The optimal relationship between the cost, time and other resources, and the quality of the subject matter of the project;

(b) Delivering the required level of services at a lower level of cost, time and other resources, without reducing the quality of those services, than would otherwise have been the case;

(c) Delivering a better-than-required level of services or achieving a better return on investment in the project for the cost, time and other resources than would otherwise have been the case.

[*Various sources, including P3s Legislative Resource Guide*]

(c) Participation

9. As regards participation in the process of awarding PPPs contracts, private entities will take part where they are confident that their offers will be objectively

assessed, and that the procedures are fair and transparent (both as regards the procurement process and the operation phase of the project, as reflected in the contractual arrangements therefor).

[*To be completed regarding bankability and related issues*]

[*Drawn from Guide to Enactment of the Model Law on Public Procurement*]

(d) Competition

10. Competition for PPPs contracts (meaning that potential investors and private entities engage in a rigorous contest for the opportunity to be awarded the PPPs contract) can reduce overall costs and other resource demands, can increase the productivity of infrastructure investment, can enhance responsiveness to the needs of the customers and thus obtain better quality of public services. Competition has the potential both to improve value for money in PPPs and to increase the likelihood of achieving the intended outcome of the project concerned. Competition is also one of the principles that the United Nations Convention against Corruption requires to be enshrined in a national system for procurement [references to be added].

11. Promoting potential investors' and private entity participation in PPPs is a key prerequisite for competition for the contracts concerned. The procurement procedures recommended in this [Guide] recognize, however, that in the context of the complex infrastructure projects at issue, competition is best assured by limiting the number of participants. This apparently paradoxical situation arises because the costs of participating in the procedure are high — unless the private entities assess their chances of winning the ultimate contract as reasonable, they will be unwilling to participate. Consequently the procurement procedures recommended in this [Guide] start with a process to identify a limited number of high-quality potential partners.

[*To be completed regarding exclusivity*]

[*Various sources, including Guide to Enactment of the Model Law on Public Procurement*]

(e) Integrity

12. Integrity involves both the avoidance of corruption and abuse and the notion of all participants in a PPPs project acting ethically and fairly, avoiding conflicts of interest. It requires the overall system for PPPs to be devoid of institutionalized discrimination or bias against any particular group of private entities or potential investors, and that the application of the rules of the legal framework on PPPs does not bring results contrary to the objectives of the system.

13. Officials in public authorities will exercise considerable commercial discretion in concluding and operating PPPs, and accordingly a code of conduct for their activities is recommended in this [Guide] [cross reference]. Integrity may be further enhanced by linking this code of conduct with applicable general standards of conduct for civil servants and any further provisions addressing integrity and prevention of corruption in other national laws and regulations.

[*Drawn from Guide to Enactment of the Model Law on Public Procurement*]

(f) Transparency

14. A transparent legal framework is characterized by clear and readily accessible rules and by efficient procedures for their application. Transparent laws and administrative procedures create predictability, enabling private entities and potential investors to estimate the costs and risks of their participation and thus to offer their most advantageous terms. They also set out the rules regarding provision of services to citizens and the means by which public service providers and their customers may protect their rights.

15. Transparent laws and administrative procedures may also foster openness through provisions requiring the publication of administrative decisions, including, when appropriate, an obligation to state the grounds on which they are based and to

disclose other information of public relevance. They also help to guard against arbitrary or improper actions or decisions by the public authority or its officials and thus help to promote confidence in a country's infrastructure development programme. Consequently, transparency is also one of the principles that the United Nations Convention against Corruption requires to be enshrined in a national system for procurement [references to be added].

16. Transparency of laws and administrative procedures is of particular importance where foreign investment is sought, since foreign companies may be unfamiliar with the country's practices for the award of infrastructure projects.

17. Transparency is a tool that allows the necessary exercise of discretion in the PPPs process in the operation of the infrastructure and in the delivery of services to citizens in changing circumstances, limits that discretion where appropriate, allows the exercise of discretion to be monitored and, where necessary, challenged. It is considered a key element of promoting accountability for the actions or decisions taken. It is thus a critical support for integrity and for public confidence in the system, as well as a tool to facilitate the evaluation of the system and projects against their desired outcomes.

18. This [Guide] recommends five key aspects of transparency in procurement of PPPs projects: the public disclosure of the legal framework; the publication of opportunities; the prior determination and publication of the key terms of the project against which offers are to be assessed; the visible conduct of the process according to the prescribed rules and procedures; and the existence of a system to monitor that these rules are being followed and to enforce them if necessary.

[*To be completed regarding transparency regarding socioeconomic objectives, budgets, open contracts and open data in the operation phase*]

[*Drawn from PFIPs Legislative Guide and Guide to Enactment of the Model Law on Public Procurement*]

(g) Fairness and public confidence

19. The PPPs legal framework is both the means by which Governments regulate and ensure the provision of public services to their citizens and the means by which public service providers and their customers may protect their rights. A fair legal framework takes into account the various (and sometimes possibly conflicting) interests of the Government, the public service providers and their customers and seeks to achieve an equitable balance between them. The private sector's business considerations, the users' right to adequate services, both in terms of quality and price, the Government's responsibility for ensuring the continuous provision of essential services and its role in promoting national infrastructure development are but a few of the interests that deserve appropriate recognition in the law.

20. Public confidence will also be enhanced where enforcement of the rules is clearly visible, and transgressions appropriately punished. This [Guide] therefore recommends procedures for such enforcement.

[*Drawn from PFIPs Legislative Guide and Guide to Enactment of the Model Law on Public Procurement*]

2. The legal framework for PPPs

(a) General remarks

21. The establishment of an appropriate and effective legal framework is a prerequisite to creating an environment that fosters the participation of the private sector in PPPs. A law governing PPPs typically embodies a political commitment, provides specific legal rights and may represent an important guarantee of stability of

the legal and regulatory regime, all of which are needed to facilitate private investment in PPPs. [*To be completed regarding instability in practice*]

22. The provisions in this [Guide] are designed both to allow countries to draft a Law governing PPPs where none presently exists, or to assess an existing legal framework against a framework reflecting international good practice.

23. An effective law governing PPPs will establish general principles for the basic policy, institutional and regulatory framework under which PPPs will be concluded and operated. Such a law is designed to provide all the essential principles and procedures for the conclusion and operation of PPPs. It is not intended to be a comprehensive guide, either in terms of setting out all detailed rules and procedures necessary to regulate the contractual relationships concerned, or in terms of rules and procedures applicable to particular sectors of the economy.

24. The overall system enabling PPPs will generally comprise the primary law, secondary regulations or decrees, internal rules, and guidance, drawing on the policy choices made for the system overall. When drafting a law governing PPPs, countries will need to ensure that the primary law precisely defines the obligations imposed and rights conferred and is sufficiently adaptable to PPPs in practice, recalling that not all situations are foreseeable. The legal and administrative tradition in a country will have significant bearing on drafting style, but a balance should be struck between law that is sufficiently clear and unambiguous and law that is sufficiently adaptable. Excessive delegation of interpretation to practitioners or the judiciary is undesirable in that it will foster uncertainty and inconsistent outcomes. Consequently, this [Guide] contains Model Legislative Provisions for those aspects of PPPs in which there is clearly-established international good practice and consensus on appropriate standards of conduct, and in areas in which there is evidence that absence of rules may lead to attempts to circumvent the principles on which it is based, the provisions are relatively detailed.

25. More detailed rules that can avoid uncertainty and ambiguity in how the primary law may operate in practice can be set out in supporting regulations and internal rules, which have the significant advantage of possible amendment as experience is gained without requiring new Parliamentary approvals as amendments to primary laws require. This flexibility, however, is appropriate provided that the main principles and procedures are set out in the primary law, so that they cannot themselves be amended without public scrutiny.

26. Countries using this [Guide] to draft their general enabling legislation for PPPs will therefore need to supplement its provisions through additional rules and regulations, supported by guidance and other capacity-building tools, to ensure appropriate governance and to promote integrity in the system.

27. As a matter of good practice, countries wishing to engage in PPPs should also set a national PPP policy to provide direction on the use of PPPs. A PPPs policy should also be set in a manner consistent with national and other governmental infrastructure plans (discussed further in [cross reference]). These policies will themselves refer to or include processes for planning, prioritization and project preparation, discussed in [new Chapter II].

28. Such policies, along with rights and obligations expressed in rules (primary law, secondary or delegated legislation and other rules and regulations) will support transparency and accountability where they are publicly available. While a primary law generally comes into force only upon publication, other rules and policies are not always subject to the same restriction. The law governing PPPs should therefore set out the authorities responsible for issuing rules, regulations and also national and any other statements of policy (see Model Legislative Provision number […]).

29. Laws require institutions to implement the rules and procedures they contain; institutions are also required to implement the policies and practices supporting the legal framework. In the PPPs context, the institutions can take the form of a body (e.g. a PPP authority/PPP Unit) or combination of administrative functions. In either case, the body or function should be authorized to address PPPs throughout their life-cycle.

Administrative functions include promoting PPP awareness, identifying opportunities for projects and liaising with central authorities, ensuring that PPPs are considered as possible forms of project deliver as and when appropriate. More detailed discussion of these and other functions and practical examples of structures in some existing systems, are found in […] of this [Guide].

30. In some countries, the State has an explicit duty to ensure the provision of services to its citizens and residents, and there may be restrictions on the extent to which the duty can be delegated to the private sector especially as regards major services such as health, justice and policing. Any such restrictions should be accurately reflected in the law on PPPs. In some cases, a contractual solution such as specially-created public entities or special purpose vehicles may provide a solution, in which case, the general legal framework for PPPs should enable such a possibility. This situation is to be distinguished from decisions that some services — such as clinical services at hospitals, guarding services at prisons — should be retained by the public sector, either as a policy matter or because private companies do not have the capacity to provide those services. Again, the law governing PPPs should set out all relevant restrictions.

(b) Interaction with other areas of law

31. The general legal framework for PPPs will also interact with other areas of the legal framework in the country concerned.

32. Chapter VII of the existing PFIPs Legislative Guide will be included here, addressing:

- Promotion and protection of investment
- Property law
- Security interests
- Intellectual property law
- Rules and procedures on compulsory acquisition of private property
- Rules on government contracts and administrative law
- Private contract law
- Company law
- Tax law
- Accounting rules and practices
- Environmental protection
- Consumer protection laws
- Insolvency law
- Anti-corruption measures
- International agreements:
- Membership in international financial institutions
- General agreements on trade facilitation and promotion
- International agreements on specific industries

33. Other issues to be included: potential overlap with PPPs and other laws; restrictions through regulatory function; land ownership restrictions; the interaction of tariffs as provided in other laws and the PPP legal framework [notably, addressing the need for a MLP and guidance on coordination between the tariff regulator and the public entity letting the project is needed to ensure long-term sustainability.]

(c) Sector-specific legislation

34. Legal provisions to enable PPPs create a framework for providing uniform treatment of issues that are common to such partnerships in different infrastructure

sectors but is normally not suitable to address all the particular requirements of different sectors. Even in countries that have adopted a general law governing PPPs addressing cross-sectoral issues, supplementary sector specific laws allow the legislator to formulate rules that take into account the market structure in each sector.

35. [Sector-specific laws should be expressly subordinate to a general law governing PPPs, so as to permit any inconsistencies to be clearly resolved in favour of the generally-applicable rule.]

36. Sector-specific laws may also establish a framework for the regulation of individual infrastructure sectors, thus allowing the development of national regulatory capacity. Effective laws will set parameters for the exercise of discretion by the regulator, but should not unnecessarily restrict the ability of parties to a PPP to determine their contractual relationship.

C. Scope of the legal authority for PPPs

37. The scope of the legal framework for PPPs should be clear both as regards which authorities may use the law to engage in PPPs and which projects are considered as PPPs under the law. The enabling provisions to such effect will require a definition of PPPs, and of the parties to PPPs projects to be concluded under the law — that is, of both the public authority and private entity. Model Legislative Provision 2 defines the scope of a law governing PPPs based on this Guide, as further explained in the following paragraphs.

1. PPP projects to be addressed

38. The recommendations in this [Guide] apply to PPPs for construction, maintenance, repair, refurbishment, modernization and/or expansion and operation of public infrastructure facilities and systems and the provision of services in connection therewith, through a contractual relationship (that is, with defined contractual obligations, shared risks and where payment is based on performance, as further explained below). While the infrastructure need not be physical infrastructure and may comprise, for example, communications systems, the scope of the provisions of this [Guide] does not extend to other forms of partnership between the public and private sectors, where the government does not have an interest in the provision of services, to concessions for oil and gas, mining or infrastructure, or to contractual arrangements as project alliancing or outsourcing. Nonetheless, many of the governance recommendations are transferable to such other projects and to projects in specific sectors.

39. The nature of the private participation includes investment in public infrastructure. The questions of ownership of the infrastructure and the nature of the public interest in that infrastructure are discussed in [cross reference — to cover direct and indirect public interest]. The nature of the services to be provided, including the public authority's responsibility for delivery of those services, is discussed in [cross reference].

40. Model Legislative Provision 2 limits the scope of the PPP projects in the legal framework to the infrastructure-based projects, as described. Governments wishing to expand the scope of a law governing PPPs may wish to expand the scope of the legal framework accordingly and revise the phrase "with respect to any infrastructure facilities and systems" when enacting this provision.

2. Definition of PPPs

41. An enabling provision for the conclusion of PPPs projects requires a definition of the projects covered. PPPs can be described as mutually beneficial contractual arrangements, in which resources are contributed by both the public and private partners (including provision of private finance, professional and other knowledge, expertise, and skills on the one hand, and granting of rights, such as rights over land and to exclusive operation of infrastructure on the other).

42. The contractual arrangements generally include:

(a) Obligations on the private entity to design, finance, build or rehabilitate infrastructure, to maintain and operate the infrastructure concerned and to provide defined services for a specified period;

(b) Obligations on the public authority to provide access to assets and the rights and permits necessary for the performance of the private party's obligations;

(c) The allocation of risk among the parties (including financing and construction risks, and risks associated with ensuring of accessibility of or demand for the infrastructure and the associated services, among others); and

(d) A payment mechanism based on performance criteria for service provision and in some cases the satisfactory operation/quality of the infrastructure, with remuneration being provided by the public authority or by the end users (or a combination of both). Where the payment mechanism consists of the right to charge a price for the use of the facility or premises or for the service or goods it generates, the PPP is a concession; in other cases, it is a publicly-funded PPP. PPPs may be exclusively publicly-funded, or concessions alone, or include a combination of both payment mechanisms. A discussion of these project types is set out in [cross reference — to include commentary on the relative frequency of those types].

43. It is recommended that PPPs are permitted to be concluded only in accordance with the provisions of the law governing PPPs, which should include:

(a) A planning and preparation process as set out in the law governing PPPs, and in other relevant laws, which includes assessments of the social, economic and other impact of the proposed project, and comparative assessments of the available project delivery mechanisms;

(b) A contract planning process that addresses the contractual arrangements set out in the preceding paragraph, provides for the control and ownership of infrastructure throughout the life of the PPP, and includes commercial terms that appropriately balance the interests of both parties, taking into account the anticipated length of the contract, the time necessary for the private entity to amortize all costs and make a reasonable profit, an adjustment mechanism for changes in circumstances and [other];

(c) A default procurement method that is competitive, with limited exemptions as set out in the law; and

(d) Provisions for termination of the contract at the expiry of the term, such as that the infrastructure is transferred in good operating condition to the public authority, generally without compensation (unless the contract provides otherwise).

44. While some of the above features would also apply to public procurement of infrastructure, it is clear that PPPs are neither merely traditional procurement nor, on the other hand, a privatization mechanism. The interaction between PPPs and other laws in a country is discussed in [cross reference].

45. The definition of a PPP clearly cannot include all the above descriptive elements. It is recommended that the constituent elements of a PPP as set out in Model Legislative Provision 2 be included in the definition, referring to the necessary steps to conclude and operate a PPP under the law.

3. Scope of authority to enter into PPPs

46. Possible investors, private parties, investors and others will not participate in PPPs projects unless they are confident that they are dealing with persons with the authority to engage in PPPs and the procedures to conclude them. The phrase "engage in PPPs" refers to the entire life-cycle of a PPP.

47. It is therefore recommended that the PPPs legal framework should establish a general authority for any public authority to enter into a PPP, to avoid the practical difficulties of keeping a positive or negative list system up to date. Model Legislative Provision 2 includes an option for countries to exclude specific sectors or entities

should they so choose. In some systems, this authority may exist outside the PPPs legal framework, in which case the provision when enacted should make appropriate cross-references.

48. The process to conclude a PPP and operate the project involves negotiations to conclude the terms, to enter into the PPPs contract, and amend the PPPs contract and associated contracts where modifications are needed. If any of these functions again exists outside the PPPs legal framework, which may be the case where some functions reside in a central body, appropriate cross-references will be needed, unless the PPPs legal framework is to supplement the general position (in which case additional provision may be needed).

49. Clearly, a definition of "public authority" for the purpose of a law governing PPPs is needed. The wording of the definition should be tailored to reflect the governmental structure in the country concerned and whether or not central authorities, sub-central authorities and others are to be permitted to engage in PPPs. If a positive list approach is taken, care is needed to ensure it is comprehensive, and the degree of centralization in a country should be reflected appropriately where PPPs are limited to central authorities.

50. The definition of a public authority in Model Legislative Provision 2 refers to authorities at any level of government, unless the bracketed language is included, in which case central government authorities may enter into PPPs (or national authorities in federal systems), but provincial, local or other sub-central government authorities will be excluded.

51. In addition, the definition of public authority can be extended to certain entities or state-owned enterprises that are not considered part of the government, if a country wishes to allow those bodies to engage in PPPs. Relevant considerations from this perspective include:

(a) [Whether the Government provides substantial public funds to the entity, or a guarantee or other security to secure payment or supports the entity's obligations under the PPP contract;

(b) Whether the entity is managed or controlled by the Government or whether the Government participates in the management or control of the entity;

(c) Whether the Government grants to the entity an exclusive licence, monopoly or quasi-monopoly for its operations;

(d) Whether the entity is accountable to the Government or to the public treasury in respect of its profitability; and

(e) Whether the entity is engaged in projects in partnership with an international donor.]

[*Source: Guide to Enactment of the Model Law on Public Procurement*]

[*To be completed regarding whether PPPs would be engaged in by SOEs or similar entities and possible conflicts of interest in vertical PPPs*]

Model Legislative Provision 2

[A public authority [of the [national Government]] [save [a list of exceptions can be included]] may enter into a public-private partnership with respect to any infrastructure facilities and systems in this State in accordance with the provisions of this law.]

Related definitions

[An infrastructure public-private partnership is a contractual arrangement between a public authority and a private entity for the construction, maintenance, repair, refurbishment, modernization and/or expansion and operation of infrastructure facilities and systems in which the public authority has an interest, and the provision of services in connection therewith, under which the remuneration provided to the

private entity is based on performance of the obligations undertaken by that private entity.]

[A public authority is any department, agency, organ or other unit, or any subdivision or multiplicity thereof [of the [national Government]]]

[A private entity is a body corporate organised under the laws of this or another State.]

[*Various sources*]

Exclusivity

52. Another important issue concerns the nature of the rights vested in the private partner, in particular whether the right to provide the service is exclusive or whether the private partner will face competition from other infrastructure facilities or service providers. Exclusivity may concern the right to provide a service in a particular geographical region or embrace the whole territory of the country; it may relate to the right to supply one particular type of goods or services to one particular customer or to a limited group of customers. [*Examples to be revised*]

53. The decision whether or not to grant exclusivity rights to a certain project or category of projects should be taken in the light of the scope for competition and whether there is a natural monopoly.

54. It is desirable therefore to deal with the issue of exclusivity in a flexible manner.

55. [*To be completed. Some experts recommend a default provision in favour of exclusivity, but others consider that exclusivity is not critical, and is subordinate to the policy priority of providing the best services to users. Location also to be reviewed.*]

56. [*Reflecting the overall approach to exclusivity, the guidance will address whether or not the law or standard or individual contracts or a combination thereof may restrict exclusivity; the cross-border context; how to link termination rights and compensation and exclusivity can be terminated only in the public interest; the nature of exclusivity (geographical, sectoral etc.); scope for competition in different sectors; the technical or commercial viability of a project without exclusivity*.]

57. [*Also to be completed as regards whether the contract or underlying legal principles should permit adaptation of the service to benefit the users without amounting to a renegotiation; whether exclusivity should give way to clauses or provisions addressing pacta sund servanda vs. rebus sic stantibus, i.e. amounting to the restoration of an economic equilibrium.*]

[Model Legislative Provision 3

A public-private partnership shall grant an exclusive right to a private entity to operate infrastructure facilities and systems in all or a defined subdivision of this State [save …]].

D. The institutional framework for PPPs

58. [*This section will address the general institutional framework for PPPs, including the need for institutions to create an attractive, predictable and transparent environment; the linkages between PPPs planning and planning for infrastructure development in an economy; issuing policy and practical guidance on such matters as possible projects, infrastructure plans and priorities, addressing obstacles e.g. consultations on land use, standard procedures and documents; disseminating best practices, and capacity-building.*

59. *This section will contain explanations of roles and criteria for decision-taking, using examples of common solutions, giving suggestions but not mandatory requirements, reflecting the wide variation in PPPs authorities, PPPs Units and other bodies found in practice. For example, a Ministry of Finance is likely to have overall*

decision-taking authority, will give approval and set rules, and will check compliance; sectoral ministries will address sectoral and other technical issues.

60. *This section will also address governance issues in institutions, such as avoiding conflicts of interest, administrative coordination and hierarchies.*

61. *Existing guidance on licences and permits, on sectoral regulators in this Chapter of the PFIPS Legislative Guide will be incorporated in a new Chapter II, to address the principles and procedures governing individual project planning and implementation*].

C. Note by the Secretariat on possible future legislative work on security interests and related topics

(A/CN.9/913)

[Original: English]

Contents

I. Introduction

1. At its forty-third session, in 2010, the Commission considered a note by the Secretariat entitled "Possible future work on security interests" (A/CN.9/702 and Add.1), and decided to entrust Working Group VI with the preparation of a text on registration of security rights in movable property.[1] At that session, the Commission also decided to retain on its future work programme the following topics: (a) security rights in non-intermediated securities; (b) a model law on secured transactions; and (c) a text dealing with the rights and obligations of the parties to secured transactions.[2] The Commission also requested the Secretariat to prepare a study on intellectual property licensing.[3]

2. At its forty-sixth session, in 2013, the Commission adopted the UNCITRAL Guide on the Implementation of a Security Rights Registry.[4] At that session, the Commission considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/WG.VI/WP.55 and Add.1-4), and entrusted Working Group VI with the preparation of a model law on secured transactions.[5]

3. At its forty-seventh session, in 2014, the Commission considered a note by the Secretariat entitled "Draft Model Law on Secured Transactions: Security Interests in Non-Intermediated Securities" (A/CN.9/811), and agreed that the draft model law on secured transactions prepared by Working Group VI should also cover security rights in non-intermediated securities.[6]

4. At its forty-eighth session, in 2015, the Commission agreed that a draft guide to enactment of the draft model law on secured transactions should be prepared and referred that task to Working Group VI.[7] At that session, 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, and 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.[8]

5. At its forty-ninth session, in 2016, the Commission considered notes by the Secretariat entitled "Draft Model Law on Secured Transactions" (A/CN.9/884 and Add.1-4) and "Draft Model Law on Secured Transactions: compilation of comments" (A/CN.9/886, A/CN.9/887 and Add.1), and adopted the UNCITRAL Model Law on Secured Transactions.[9] At that session, the Commission had before it a note by the Secretariat entitled "Draft Guide to Enactment of the draft Model Law on Secured Transactions" (A/CN.9/885 and Add.1-4), and agreed to give Working Group VI up to two sessions to complete its work and submit the draft Guide to Enactment to the Commission for final consideration and adoption at its fiftieth session, in 2017.[10]

6. At that session, noting its earlier decisions (see paras. 1 and 4 above), the Commission also considered its possible future work on security interests and agreed that a contractual text on secured transactions and a text on intellectual property

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[1] *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.
[2] Ibid.
[3] Ibid., para. 273.
[4] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 191.
[5] Ibid., para. 194.
[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 163.
[7] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 216.
[8] Ibid., para. 217.
[9] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 119.
[10] Ibid., para. 122.

licensing should be retained on its future work programme.[11] The Commission also decided that the following topics should be added on its future work programme: (a) micro-finance; (b) contractual issues relating to micro-enterprises (e.g. transparency issues); (c) warehouse receipt financing; and (d) alternative dispute resolution ("ADR") and secured finance.[12] The Commission agreed all those issues should be 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.[13]

7. In accordance with the decision of the Commission at its forty-ninth session (see para. 6 above), the Secretariat organized the Fourth International Colloquium on Secured Transactions in Vienna from 15 to 17 March 2017. The purpose of the colloquium was to obtain the views and advice of experts with regard to possible future work on security interests and related topics. Approximately 100 experts from governments, international organizations and the private sector participated in this three-day event and the discussions thereof provided a basis for this note by the Secretariat. The papers submitted for the international colloquium are available on the UNCITRAL website and selected articles will be published in the Uniform Law Review in coordination with the International Institute for the Unification of Private Law ("Unidroit"). The considerations and conclusions reached at the Colloquium with respect to possible future legislative work are summarized below. The considerations and conclusions reached at the Colloquium with respect to possible future coordination and technical assistance work are summarized in document A/CN.9/919.

II. Possible future legislative work topics

A. Contractual issues

1. Introduction

8. The panel that discussed contractual issues considered a text that would provide guidance to parties to secured transactions as to the issues that should be addressed in a security agreement and ways in which those issues should be addressed based on generally acceptable international best practices. Discussion was based on the assumption that the UNCITRAL Model Law on Secured Transactions (the "Model Law") was in effect in all relevant jurisdictions and focused on a typical simple security agreement, leaving aside conflict-of-laws issues.

2. Desirability

9. In the discussion that followed, some doubt was expressed as to whether there was a need for a contractual guide that would provide guidance to parties or whether UNCITRAL would be the most appropriate body to prepare such a contractual guide with sample security agreements. However, there was broad support for the suggestion that the text to be prepared could take the form of an addendum to the draft Guide to Enactment of the Model Law with interpretation or another form (e.g. a practice guide). In this connection, it was noted that the draft Guide to Enactment of the Model Law was mainly addressed to legislators. Thus, the suggestion was made that the draft Guide to Enactment could be expanded or supplemented to provide guidance to users (such as judges, arbitrators, parties to transactions, practitioners, and academics) of the Model Law and the Registry it envisages. The view was widely shared that, without such guidance, parties may not be able to use the Model Law to their benefit. Empirical evidence suggests, for example, that, even in States that have adopted modern secured transactions law, lenders that are not familiar with financing practices relating to movable property, such as inventory and receivables financing, keep requiring mainly immovable property as security for credit. Where the vast majority of immovable property is owned by a small percentage of the population of a State, this means that, despite the

[11] Ibid., para. 124.
[12] Ibid., para. 125.
[13] Ibid.

adoption of a modern secured transactions law, credit is not available to the sector of the economy that needs it the most, that is, small and medium-size enterprises ("SMEs").

3. Feasibility

10. The following paragraphs briefly summarize panel considerations with respect to the issues that should be addressed and ways in which those issues could be addressed in a text to be prepared by the Commission.

(a) Types of secured transaction enabled by the Model Law

11. The text could explain the special characteristics and advantages of the types of secured transaction made possible by the Model Law (e.g. inventory and equipment acquisition financing, inventory and receivables revolving loan financing, factoring and forfaiting, securitization, term loan financing, credit secured by transfer of title). The text could also discuss which provisions of the Model Law and exactly how they made possible these types of secured transaction.

(b) Pre-contractual issues

12. The text could discuss the goals of secured creditor and grantor, as well the necessary initial documents (e.g. secured creditor's non-binding indication of interest, proposal letters with sample forms, valuation of proposed collateral, and secured creditor's binding letter of commitment stating the amount of the loan, interest rates and fees).

(c) Due diligence

13. The text could discuss due diligence issues (e.g. search certificates with sample forms, perfection certificates, essential information about the grantor and the proposed collateral with sample forms, searches in secured transactions and other specialized registries, and searches about judgements and tax liens).

(d) Clear and simple drafting

14. The text could explain the benefits of clear drafting (e.g. to avoid disputes, ensure that parties understand the terms of the deal, use terms that correspond to the Model Law, take into account the experience and sophistication of the parties) and simple drafting (e.g. to avoid the use of legalistic words, long sentences and long paragraphs, use easy-to-read fonts, give examples of ineffective drafting).

(e) Party autonomy and mandatory provisions in the Model Law

15. The text could discuss article 3, paragraph 1, of the Model Law that enables parties to adapt their agreement to their needs, giving examples of particular articles of the Model Law which the parties may derogate from or vary by agreement (e.g. the definition of default under art. 2, subpara. (j) and the waiver of post-default rights after default under art. 72, para. 3). The text could also explain the mandatory provisions of the Model Law that are not subject to party autonomy giving examples (e.g. general standard of conduct of the parties under art. 4 and the conflict-of-laws provisions in arts. 85-107)

(f) Sample security agreement

16. The text could include sample security agreements based on widely acceptable international best practices. The text could also explain the key provisions of such a sample security agreement (e.g. identification of the parties, creation of a security right, description of the collateral and the secured obligation, representations concerning the grantor and the collateral, events of default, and post-default remedies).

(g) Closing the deal

17. The text could discuss issues relating to the closing of the deal (e.g. pre-filing, post-closing confirmatory search, certificates, and disbursement of funds).

(h) Post-closing monitoring

18. The text could discuss issues relating to post-closing monitoring of the grantor and the collateral (e.g. change in grantor identifier, change in State of location of the grantor or tangible collateral, and change in the value of collateral).

(i) Third-party effectiveness and registration

19. The text could provide sample forms for making the security right enforceable against third parties by methods other than registration. It could also provide model forms and guidance for preparing and submitting the appropriate notice forms to a registry to make the security right effective against third parties by registration.

4. Conclusions

20. The Commission may wish to consider whether a text should be prepared to provide guidance to users of the Model Law as to how to best benefit from the Model Law and the Registry it envisages. This text could take the form of a guide to enactment, part II, of the Model Law. Alternatively, this text could take the form of a practice guide, such as the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which provides information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases, or the UNCITRAL Notes on Organizing Arbitral Proceedings, which are designed to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings.

B. Transactional and regulatory issues

1. Desirability

21. There are matters external to the secured transactions law that can play a major role in determining whether a State has vibrant and well-functioning secured credit markets that further the overall goal of an efficient and effective secured transactions law to increase the availability of credit at lower cost by the use of movable property as security for obligations. These matters include “capacity-building” in particular among lenders and the development of regulatory standards appropriate for secured credit.

22. Capacity-building among lenders means the development by lenders of the practical ability to utilize the tools provided by modern secured transactions law to engage efficiently and profitably in credit transactions with reduced risk of loss from default. It is generally recognized that providing a State with a modern secured transactions law like that recommended by the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”) and exemplified in the Model Law does not automatically result in lenders in particular having the practical tools to extend credit in a meaningful way. Rather, lenders often do not embrace transactions newly made possible on a profitable basis by secured transactions law reform until the creditors have the practical capacity to use the new legal rules effectively. Thus, law reform without such capacity-building may not be effective in achieving its goal.

2. Feasibility

23. The following paragraphs briefly summarize panel considerations with respect to the issues that should be addressed and ways in which those issues could be addressed in a text to be prepared by the Commission.

(a) Valuation of collateral and explanation of basic terms

24. The text could discuss issues relating to the valuation of collateral (e.g. by professional appraisers). The secured credit bargain creates a legal right. But the amount of protection against loss that the bargain provides is determined by the value of the collateral and, in particular, by its value in the context in which the collateral is likely to be disposed of. Thus, determining how much risk of loss is reduced by collateral requires expertise in estimating the amount that would likely be received upon its disposition. The text could also explain terms, such as "borrowing base" to determine how much to lend, particularly in the context of revolving credit facilities and a changing mass of collateral. When debt is revolving and the collateral consists of a fluctuating mass of property with too many items to efficiently evaluate each one separately, determining the maximum amount to be borrowed can be complex. Secured lenders in such transactions develop expertise in concepts such as defining a borrowing base and the development of formulas to determine how much can be safely loaned against the collateral (e.g. lender will extend credit against 70 per cent of the face amount of "qualifying receivables").

(b) Administration of secured loans

25. The text could discuss issues such as account keeping and monitoring of the grantor and the collateral. Secured creditors need to trust, but also verify. Thus, they need to develop expertise in audit matters related to collateral, including continued existence, quantity, condition, and fluctuations in value.

(c) Extrajudicial repossession, disposition and distribution of proceeds of collateral

26. As extrajudicial enforcement of security rights may be unknown in a State that enacts the Model Law, the text could explain the extrajudicial exercise of post-default rights and in particular the protection of the grantor and third-party rights and the use of alternative dispute resolution methods. The text could also explain the notices to be given in the context of extrajudicial enforcement of a security right and provide sample forms. The text could also discuss secondary markets for the sale of collateral, including electronic platforms and their advantages and disadvantages.

(d) Collection of receivables

27. The text could discuss issues that require additional capacity such as collection of collateral in the form of receivables (or other rights to the payment of money, including debt securities). For example, collection from the debtor of a receivable requires different skills than repossessing and disposing of a piece of equipment, as: (a) debtors of receivables often do care about the identity of the creditor; (b) it can be difficult to find the debtor of a receivable; and (c) it may be necessary to use historical data or information about the debtors of receivables to place a value on receivables at time of transaction.

(e) Investment in legal capacity

28. The text could also discuss legal capacity as modern secured transactions law is complex, and the exercise of rights is governed by complex rules. It could also discuss additional legal expertise needed in related areas of law, particularly insolvency law.

(f) Enhancing access to credit and financial stability

29. The text could discuss coordination between the Model Law and capital requirements under the Basel Accords issued by the Basel Committee on Banking Supervision ("BCBS"), as without understanding the relevant issues (e.g. about eligible collateral under the Basel Accords), lenders may not be prepared to lend or may lend only a higher cost to borrowers. The approach in regulatory law reflects the assumption that secured creditors may be unable to swiftly liquidate movable property collateral because of the limited availability of secondary markets and the fact that security rights are often subordinated to competing claims (such as privileged claims).

These considerations do not take into account that secured transactions law reforms increase legal certainty and market transparency.

3. Conclusions

30. Law reform alone is likely to be insufficient to fully generate the goals of modern secured transactions law. Rather, increased availability of credit at lower cost is more likely to follow if creditors and regulators are conversant with the benefits of the adoption of such reforms and develop the capacity to enter into and manage transactions that the reforms make possible and to regulate the soundness of bank creditors entering into such transactions. Moreover, implementation of such reforms is necessarily a task whose characteristics will depend to a significant extent on State-specific factors. Thus, the Commission may wish to consider whether a text should be prepared to address these transactional and regulatory issues. This text could take the form of a guide to enactment, part III, of the Model Law or a practice guide (see para. 20 above). Regulatory law issues could be addressed in cooperation with the relevant regulatory authorities, such as the BCBS.

C. Finance to micro-businesses

1. Desirability

31. Micro-businesses are a vital part of the world economy (i.e. over 90 per cent of all businesses). They are also particularly critically important in developing economies, and, therefore, devoting special attention to the special characteristics arising from their financing is desirable. The importance of micro-businesses was made clear by statistics prepared by the World Bank Group and was confirmed by those members of the panel working in this area in various parts of the world.

32. There are many issues arising from the financing of micro-businesses which do not necessarily arise in relation to the financing of larger businesses (including SMEs). Even where micro-businesses have access to credit, this is often from non-regulated non-bank financial institutions that are subject to limited supervision; and it is preferable if these micro-businesses are drawn into the regulated lending market. This is not only convenient from the perspective of monitoring a relevant part of the credit market in developing economies, but also because the regulation and control of these micro-businesses will help include them in the formal sector of the economy. This improves the chances of access to credit and increases the likelihood of good investment and lending decisions.

33. Most micro-businesses are unlikely to have immovable property to use as collateral. Thus, in order for them to have access to the regulated lending market, micro-businesses need to be able to offer other types of collateral. In addition, micro-businesses are often required to provide personal guarantees, from the entrepreneur himself or herself if the corporate form is used, as well as from family, friends and other entrepreneurs. A number of special situations arise as a consequence of this practice. The amount of collateral available is usually very limited and its type different to that often provided by larger businesses. Legal issues arise from the fact that the business and any guarantors are likely to be individuals. The fact that the amounts lent are very small may also have consequences concerning the cost of the transaction and the behaviour of lenders, both at time of the origination and during the lifecycle of the credit.

34. These factors lead to various issues arising in relation to the operation of the Model Law. These include the method used for the various notifications required by the Model Law, many issues relating to enforcement and debt recovery generally, including the complexity of the enforcement procedure, which is not particularly suitable for individuals, and very small loans and the way in which guarantees from individuals work in conjunction with secured lending. Thus, there is a need to consider and explain how secured transactions (under the Model Law) generally work for micro-businesses, and perhaps have some special rules to address the issues mentioned (see further paras. 39 and 40 below).

35. Furthermore, the small size of the micro-business puts the trader in a poor bargaining position vis-a-vis financiers. This often creates problems of over-collateralization, an area where both banking supervision and regulation need to be involved if a solution is to be reached. It also can lead to abusive interest rates, especially concerning default interest rates. The small size of micro-businesses also makes the introduction of special rules in case of insolvency advisable.

2. Feasibility

36. The following paragraphs briefly summarize panel considerations with respect to the issues that should be addressed and ways in which those issues could be addressed in a text to be prepared by the Commission.

(a) Special features of micro-businesses and financing of micro-businesses

37. The specific features of micro-businesses and the issues arising from their financing is one of the issues that would need to be discussed. Micro-businesses are usually either individual traders or small family businesses, and loans are usually of low value, whether term loans or revolving facilities. The types of finance available (unsecured or secured by proprietary security rights or personal guarantees), and the types of collateral available would also need to be discussed.

(b) Types of micro-finance transaction

38. The various types of transaction that are particularly suitable for micro-businesses, and the ways in which traditional financing structures would need to be adapted should be discussed. Possible structures include inventory-based lending, the special requirements for receivables financing for micro-businesses and the use of cash collateral, currency and bank accounts, as well as personal guarantees.

(c) Notifications

39. There are a number of situations in which the Model Law requires notification to be sent to the grantor (e.g. Registry Provisions, art. 15, para. 2, and Model Law, art. 77, para. 2 (b), art. 78, para. 4 and art. 80, para. 2 (a)). Apart from article 15, paragraph 2 of the Model Registry Provisions, which specifies that the notice is to be sent to the registered address of the grantor unless the secured creditor knows of a more recent address, the Model Law does not specify in detail to where notification should be sent. This is particularly true in the enforcement provisions. When the grantor is a company, it will have a registered office to which a notice can be sent, and the secured creditor can be reasonably sure that the grantor will receive it or will not be able to deny that it has received it. When the grantor is an individual, particularly a sole trader, its address may well change reasonably frequently and the secured creditor will not necessarily know about this change. The same is true of an individual's e-mail address (if electronic notification is permitted). For secured creditors to be sure that notifications will be effective, which will affect their decision to extend secured credit to individual traders, it would be desirable to develop a simple system where the means of notification are captured at the inception of the transaction, the individual then has a duty to update and the enforcement consequences flow from notification having been given to the to last address stored on the system. A written template of how to achieve this would be most useful. It should be borne in mind that notification is part of the balancing of interests between the ability of a creditor to enforce effectively (and out of court) and the protection of a debtor, and this balance may be different where the debtor is an individual trader or guarantor.

(d) Enforcement

40. A number of issues relating to enforcement arise where a business is very small, particularly where it is an individual trader, or where an individual gives a guarantee. For example, it is first necessary to consider the protection of personal assets on enforcement. In addition, the out-of-court remedies provided in the Model Law may be too complicated and costly for very low-value loans. In relation to enforcement of

security rights securing very small loans, a simplified out-of-court procedure may be needed with some protection for the debtor built in. Moreover, it may be necessary to move towards a "small claims" court model to facilitate enforcement by means of pre-designed templates with limited access to appeal, and/or to consider the use of Alternative Dispute Resolution (whether physical or online) as alternatives to court proceedings.

(e) Personal guarantees

41. Personal guarantees, which are often given by family, friends or mutualized organizations of micro-businesses, raise issues of protection of the guarantor, such as problems raised by household insolvency and the coordination of insolvency proceedings. It would be necessary to consider whether there should be special rules in relation to personal guarantees, and, in particular, in relation to their interaction with secured lending.

(f) Regulatory capacity issues

42. Inequality of bargaining power often leads to unfair terms in loan and security agreements. Thus, unfair terms, such as high default interest rates, unfair termination clauses and definitions of events of default, should be discussed together with ways in which their unfairness could be addressed. The regulation of bank behaviour in relation to lending to micro-businesses would also need to be discussed. Problems here include the fact that the very small size of loans reduces incentives on lenders to do a proper risk assessment, paving the way for the over-collateralization of the loans facilitated by the drastic inequality in bargaining power. Practice also shows that deficient monitoring and inefficient reactions in case of distress of the loan take place, in particular, the common practice of the "evergreening" of the loans. "Evergreening" causes problems from both sides of the lending process. Banks refinance almost blindly, without previously assessing the viability of the borrower (and hence of the likelihood of future repayment), which has the consequence of undermining the veracity of balance sheets of banks. On the other hand, this failure by creditors to enforce loans because their small size makes enforcement too expensive has a detrimental effect on micro-businesses as interest continues to accrue, making the loan virtually impossible to repay.

43. Possible solutions to these problems include more reliable information on which credit can be properly assessed (through efficient credit reporting systems), better monitoring practices and more efficient distribution of tasks within financial institutions, adequate implementation of the regulatory framework concerning non-performing loans, and perhaps even a redesign of enforcement mechanisms, which should be made cheaper, quicker and easier (see para. 40 above).

3. Conclusions

44. To address the issues identified above, the Commission may wish to consider preparing a text that would: (a) explain the application of the Model Law to security interests in movable assets of a micro-business; (b) include model rules on issues, such as notifications to be given under the Model Law and enforcement; (c) include commentary and perhaps rules on personal guarantees; and (d) discuss legal capacity, transactional capacity and regulatory capacity, addressing the points outlined above. The form of work could be determined by the Working Group and different aspects of work can be addressed in various ways. For example, security interests created by micro-businesses could be addressed in model rules to be added to the Model Law and the commentary on those rules could be added to the Guide to Enactment of the Model Law. Other issues, such as personal guarantees, could be addressed in model rules or in a legislative or practice guide (see paras. 20 and 30 above). Any future work may need to be coordinated with other work of the Commission (e.g. on simplified incorporation or insolvency of micro-businesses). Regulatory law issues could be addressed in cooperation with the relevant regulatory authorities, such as the BCBS (see para. 30 above).

D. Warehouse receipts

1. Desirability

45. Warehouse receipts have many commercial uses, including to facilitate sales and distribution of commodities and to allow businesses to secure credit. Warehouse receipt financing allows producers (exporters) and global traders (importers) of agricultural commodities or other assets to access loans using warehouse receipts issued against assets deposited in warehouses as collateral. As several studies have shown, warehouse receipts are underutilized in international trade as a tool for gaining access to credit because of the lack of enabling legislation.[14] A primary barrier to the use of warehouse receipts financing is a lack of enabling legislation.[15] Another problem is the risk of fraud associated with warehouse receipts financing. However, an integrated and properly supervised system of electronic warehouse receipts can provide more security against fraud and mismanagement than paper-based systems. Moreover, warehouse receipts that are issued in electronic and negotiable form may lead to the establishment of commodity exchanges, thereby providing greater liquidity to producers, distributors and lenders.

46. One economic sector that suffers greatly from a lack of access to reasonably priced credit and the unavailability of warehouse receipts is agriculture. A number of international organizations, including the International Bank for Reconstruction and development (the "World Bank"), the European Bank for Reconstruction and Development (the "EBRD"), the Food and Agriculture Organization (the "FAO") and the Organization of American States (the "OAS") have examined and proposed mechanisms to address these challenges, such as by facilitating adoption of warehouse receipts laws. At the moment, no international or regional organization has adopted a model law on warehouse receipts, resulting in a lack of harmonization and ad hoc approaches. The absence of a model framework presents challenges, particularly for cross-border supply-chain transactions.

47. UNCITRAL has developed modern instruments, including the UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), to facilitate the use of transportation documents and bills of lading in particular, issued both in paper and electronically. Thus far, UNCITRAL has not addressed warehouse receipts and in particular non-negotiable warehouse receipts.

48. Various laws often pose impediments to the utilization of assets, such as growing crops, as collateral for loans. The Model Law seeks to ameliorate these challenges, both at the pre- and post-harvest stage. For the post-harvest stage, it provides clear and modern rules on the utilization of negotiable documents, including warehouse receipts, as collateral for loans. However, given its nature, it defers to the domestic law to determine a number of issues, including: (a) which documents are negotiable; (b) who may issue warehouse receipts; (c) what are the rights and duties of parties to a warehouse receipt; and (d) what are the rights of buyers of warehouse receipts and products covered by them. A significant majority of economies, especially in States with developing economies, lack any warehouse receipt legislation or have legislation that is outdated.

49. Furthermore, both the Model Law and the Secured Transactions Guide were prepared against the background of negotiable instruments and negotiable documents issued in paper form. Under these texts, a security right in negotiable instruments or

[14] See, for example, *Access to commodity finance by commodity-dependent countries,* Note by the UNCTAD Secretariat, United Nations Doc. TD/B/C.1/MEM.2/10 (2010), 9-10; OAS Inter-American Juridical Committee, *Principles for Electronic Warehouse Receipts for Agricultural Products*; APEC Secretariat, *Regulatory Issues Affecting Trade and Supply Chain Finance*, 2015, 13-14; World Bank Group, A Guide to Warehouse Receipts Financing Reform: Legislative Reform (2016); FAO and EBRD, Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends (2015).

[15] OAS Principles, supra. No.14, at 6; APEC Economic Committee, *Report on Workshop on Supply Chain Finance and Implementation of Secured Transactions in a Cross-Border Context*, August 20-21, 2016 (APEC doc 2016/SOM3/EC/040) at 4.

negotiable documents can only be made effective against third parties by registration or by possession; and possession is defined to mean "actual possession of the tangible asset". No reference is made to the fact that "control" has become the primary mechanism for outright transfers and third-party effectiveness of security rights in "electronic assets", especially warehouse receipts which are increasingly issued electronically. The Secured Transactions Guide points out that "in view of the particular difficulty of creating an electronic equivalent of paper based negotiability", if an enacting State "wishes to address this matter [it] will need to devise special rules".[16] No such rules are provided in the Model Law or the Secured Transactions Guide. Nonetheless, the Secured Transactions Guide notes that the failure to address electronic negotiable documents of title "should not be interpreted as discouraging the use of electronic equivalents of paper negotiable instruments or negotiable documents".[17] And the draft Guide to Enactment of the Model Law notes that "the enacting States may wish to consider whether to include in their enactment of the Model Law an article along the lines of recommendation 12 [Electronic communications] of the Secured Transactions Guide".[18]

50. The draft Model Law on Electronic Transferable Records provides a general framework for the issuance and transfer of electronic records, including electronic warehouse receipts. But it does not address many aspects typically regulated by warehouse receipts and secured transactions laws, such as the priority rights of a person in control of an electronic warehouse receipt as against competing claimants. Neither the draft Model Law on Electronic Transferable Records nor the Model Law on Secured Transactions explain how a security right in inventory might automatically flow into the related electronic warehouse receipt or into the proceeds involving an electronic negotiable invoice generated from the sale of that inventory.

2. Feasibility

51. The work done so far by other organizations mentioned above is a good indication of the likelihood that the Commission could successfully prepare a text on warehouse receipts (e.g. in the form of a model law). Expected participation of these international organizations in this project would ensure a quality product that could be immediately deployed in reform projects and within a relative short timeframe. For the security right aspects, this text could build on the principles, recommendations and model provisions enshrined in the UNCITRAL texts on security rights, and for the provisions addressing transferability of electronic warehouse receipts on the work of UNCITRAL in the area of electronic transferable records. In determining the feasibility of the proposed project, the Commission may wish to take into account the following issues:

(a) Clear definitions of key concepts and terms, including the warehouse receipt;

(b) Information required in a warehouse receipt;

(c) The form in which a warehouse receipt may be issued;

(d) Negotiable and non-negotiable warehouse receipts;

(e) Fundamental duties of warehouse operators;

(f) Responsibility for loss of or damage to stored goods;

(g) Irregularities, misdescription in and over-issue of warehouse receipts;

(h) Transfers of warehouse receipts, by negotiation, assignment, control or otherwise;

(i) Rights of transferees of warehouse receipts;

(j) Rights of buyers of goods covered by warehouse receipts;

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[16] UNCITRAL Legislative Guide on Secured Transactions, 459, footnote 13.
[17] Ibid., chap. I, para. 121.
[18] A/CN.9/914, para. 66.

(k) Substitution and removal of goods from the warehouse;

(l) Termination of storage;

(m) Third-party effectiveness of security rights in electronic warehouse receipts;

(n) Third-party effectiveness of security rights in non-negotiable warehouse receipts;

(o) Warehouseman's lien and its enforcement; and

(p) Transitional matters.

52. The Commission may also wish to consider giving the mandate to a working group to examine and provide guidance on additional aspects of warehousing, either for inclusion in the text to be prepared or in a separate text (e.g. a guide to enactment, if the text to be prepared takes the form of a model law), such as:

(a) Licensing of warehouses;

(b) Regulation of warehouses;

(c) Insurance and bonding of warehouses;

(d) Maintenance of adequate reserves; and

(e) Maintenance of accounting records.

3. Conclusions

53. The Commission may wish to consider preparing a text on warehouse receipts. This text could provide, inter alia, a modern general framework for the issuance and transfer of warehouse receipts, the duties and rights of issuers and holders of warehouse receipts, and the allocation of losses in case of a shortage in the tangible assets covered. The proposed text could also address the use as collateral for credit of warehouse receipts that are not negotiable documents and especially the third-party effectiveness of security rights in electronic warehouse receipts. Any work on the subject should be conducted in consultation with other international organizations that have been involved in supply chain and warehouse receipt finance, especially the United Nations Conference on Trade and Development ("UNCTAD"), Unidroit, the FAO, the EBRD, the OAS and the World Bank.

E. Intellectual property licensing

1. Desirability

54. The panel that dealt with intellectual property licensing first discussed the need for a uniform law text on intellectual property licensing due to its growing importance in world commerce. The panel pointed to: (a) studies from 1998 to 2013, according to which the index of global exports in goods grew by about 20 per cent, but royalty payments for intellectual property more than quadrupled over the same period; and (b) studies from 1990 to 2009, according to which the share of developing countries in global technology payments doubled from approximately 13 per cent to 26 per cent.

55. However, the panel noted a gap in the law with respect to contractual matters. While some intellectual property laws contain a few provisions addressing contract terms, there is no general commercial law directed specifically to intellectual property licensing. Instead, contracting parties must rely on a general intellectual law merchant based on ad hoc rules and practices that often require specialized knowledge and experience. This causes increased transaction costs and barriers to international trade, and puts small and medium-size enterprises at a disadvantage.

56. The panel referred to studies that show the benefits that States derive from increased intellectual property commerce. These benefits include: (a) superior access to finance and venture capital; (b) higher quality utilization of national human capital; (c) increased local inventive activity; (d) better access for local firms to technology:

and (e) streamlined and enhanced access for the public to creative content. Realizing these benefits also requires legal support for commercial transactions in intellectual property, e.g. "licensing." The lack of a general commercial law text specially crafted to the unique needs of intellectual property licensing constitute a barrier to realization of these benefits.

57. The panel also referred to other specialized texts that address distinctive commercial transactions. A premier example is the United Nations Convention on Contracts for the International Sale of Goods (the "CISG"). Other texts mentioned are the Model Law, the Cape Town Convention on International Interests in Mobile Equipment, and the Unidroit Principles of International Commercial Contracts. It was mentioned that, unfortunately, none of these instruments are specifically tailored to the unique requirements of intellectual property licensing.

58. The panel noted that the Model Law applies also to transactions in which intellectual property (including licence royalties) is used as collateral for credit. It was pointed out that it would be a natural outgrowth of the Commission's work to also provide a uniform text for commercial contracts for the use of intellectual property. The panel concluded that a project on intellectual property licensing would be highly desirable for world commerce and a natural adjunct to the Commission's other work.

2. Feasibility

59. To establish the feasibility of the preparation of a uniform law text on intellectual property licensing, the panel then discussed a range of commercial issues that arise in typical intellectual property licensing contracts and ways in which they could be usefully addressed. These issues include the following:

(a) Scope of work: the proposed text should address intellectual property licensing issues that could be addressed with non-mandatory law rules that the parties could vary or derogate from, with the understanding that the text is not intended to alter provisions of intellectual property law;

(b) Definitions and rules of interpretation: terms, such as "assignment", "licence", "exclusive", "scope", "use", and other terms that would appear in the text, would need to be defined; also reference would need to be made to the general obligation of good faith and reasonable conduct;

(c) Contract formation: the question would need to be addressed whether there should be any special rules for the formation of an intellectual property licensing contract apart from a State's general contract law rules on matters, such as written form and contract formation by electronic means; in this regard, it may be useful to review the Unidroit Principles of International Commercial Contracts;

(d) Contract interpretation: a number of questions would need to be addressed, including whether: (i) the parties may agree to limit interpretation solely to the terms of a written instrument; (ii) if the written instrument is ambiguous, it is then proper to look to the conduct of the parties; (iii) a contract should be interpreted by neutral rules or whether there should be a rule in favour of one party (e.g. an author); and (iv) it is necessary to address interpretation of terms that call for successive performances, or that require performance to the satisfaction of the other party;

(e) Implied terms: the text would need to address the question whether an intellectual property licensing contract should be deemed to include implied terms, such as an implied representation about ownership or control of the intellectual property by the licensor, or a duty of cooperation, or mutual obligations to act in good faith;

(f) Obligations and their performance: it may be necessary to address the general obligations of the parties (e.g. the licensor to enable use and the licensee to use according to the terms of the licence and pay royalties) and their performance;

(g) Transfer of rights and acceptance of duties: it may be necessary to address transfers of intellectual property rights by a licence agreement and transfers of

contractual rights, for example, by an assignment of a right to payment, and to distinguish acceptance of duties from a transfer of rights;

(h) Breach of contract and remedies: it may be necessary to address situations that would constitute breach of an intellectual property licensing contract and the relevant remedies (e.g. whether exact or substantial performance is required, whether a distinction would need to be made between a breach that allows ending the contract and one that only allows damages, the measure and type of damages); and

(i) Conflict-of-laws issues: the law applicable to an intellectual property licensing contract may also need to be discussed and in particular whether the parties may choose it and, if so, what matters may be covered by the law chosen by the parties.

3. Conclusions

60. The Commission may wish to consider whether a text should be prepared on intellectual property licensing or whether the matter should be retained on its future work agenda for further consideration at a future session on the basis of a note to be prepared by the Secretariat within existing resources (the same approach may be followed with respect to any issue with respect to which the Commission may not be ready to decide whether it should undertake any work). Any future work may be undertaken in cooperation with relevant international governmental organizations, such as the World Intellectual Property Organization ("WIPO") and international non-governmental organizations.

F. Alternative dispute resolution in secured transactions

1. Desirability

61. The panel that dealt with ADR in secured transactions agreed that ADR, including arbitration, mediation and conciliation (whether conducted physically or online), should be available for the resolution of disputes arising with respect to security agreements or security rights (these are post-default disputes typically arising during enforcement of a security right). The panel also agreed that ADR is particularly important where court proceedings are inefficient, as problems, such as inordinate delays and cost, are bound to have a negative impact on the availability and the cost of credit.

62. However, laws differ on the extent to which such disputes may be resolved by arbitration. In addition, it is not clear that, where such disputes are resolved by arbitral proceedings, the rights of third parties are fully addressed in the case of enforcement of a security right in an asset. Moreover, while mediation or conciliation should in principle be possible, as it does not involve a binding decision, it is not clear that it could be used as an alternative to judicial proceedings in the enforcement of a security right. Mediation or conciliation could reduce the workload of courts and help parties achieve a balanced solution that both protects their rights and the rights of third parties, and makes low-cost credit available.

63. Article 3, paragraph 3, of the Model Law provides that "nothing in this Law affects any agreement to use alternative dispute resolution", thus referring the issue of arbitrability to other applicable law. Thus, the Model Law does not address the issue of arbitrability.

64. In addition, article 73 of the Model Law provides that a secured creditor may exercise its post-default rights by application to a court or other authority to be specified by the enacting State, or without such an application. The draft Guide to Enactment explains that "other authority" means an authority vested with adjudicative powers by a State (see A/CN.9/914/Add.5, para. 57). So, it seems that an arbitral tribunal would not qualify as such an authority. However, enforcement without application to a court or other authority may in principle include enforcement by arbitration, even though the matter is not expressly addressed in the Model Law or the draft Guide to Enactment.

65. Moreover, the Model Law includes a number of provisions dealing with the rights of third-parties with rights in an encumbered asset that may be affected by the enforcement of a security right. More concretely: (a) article 74, option B, permits any third party to seek relief for non-compliance by the enforcing secured creditor with the provisions of the chapter on enforcement; (b) article 75, paragraph 1, permits any third party to terminate enforcement; (c) article 76, paragraph 1, permits a higher-ranking secured creditor to take over enforcement; (d) article 77, paragraph 2, requires the enforcing secured creditor to give notice of default to any third party in possession of an encumbered asset and permits any such third party to prevent the out-of-court re-possession of the encumbered asset by the secured creditor; (e) article 78, paragraph 4, requires the enforcing secured creditor to give notice to third-party creditors of its intention to dispose of an encumbered asset out of court; (f) article 79, paragraph 2, requires the secured creditor to follow certain rules in distributing the proceeds of an out-of-court disposition of an encumbered asset; and (g) article 80, paragraph 2, requires the enforcing secured creditor to send the proposal for the acquisition of an encumbered asset to third-party creditors.

66. Moreover, where a person in possession objects to the out-of-court re-possession of an encumbered asset by the secured creditor, the secured creditor may seek to resolve the dispute by an ADR mechanism. For example, if the issue is not explicitly stated in other law as an issue with respect to which arbitration is not allowed, the grantor and the secured creditor may agree to arbitrate, as long as third-party rights are not affected; and mediation or conciliation (whether physical or online) should in principle be possible, if the parties agree, since by definition mediation or conciliation do not result in a binding decision and in particular third-party rights are not affected.

2. Feasibility

67. Like any other agreement, a security agreement creates rights and obligations for the parties, the grantor and the secured creditor. So, in principle the parties could agree to resolve any dispute arising in that regard by arbitration. If the arbitral award orders the debtor to pay and the secured creditor attempts to enforce the award by seizing the encumbered asset, the rights of third parties with rights in the encumbered asset should be protected.

68. For example, article 68 of the Model Inter-American Law on Secured Transactions deals with the issues of arbitrability as it provides that: “Any controversy arising out of the interpretation and fulfilment of a security interest may be submitted to arbitration by the parties, acting by mutual agreement and according to the legislation applicable in this State” (no reference is made though to mediation or conciliation).

69. Article 78 of the Colombian secured transactions law goes further and provides that: “If the parties so decide, any controversy that arises with respect to the creation, interpretation, perfection, performance, enforcement and liquidation of a security interest can be subject to conciliation, arbitration, or any other alternative dispute resolution mechanism, according to national legislation and applicable international treaties and conventions”. However, it should be made clear that parties to secured transactions may be allowed to commence arbitration when they wish and be trusted that they would not skip negotiations, mediation or conciliation if these dispute-resolution methods carry a realistic hope of success (i.e. multi-tiered dispute resolution clauses may not be suitable in all cases).

70. In the case of judicial enforcement of a security right, the protection of rights of third-party creditors is a matter of the law governing judicial enforcement. In the case of out-of-court enforcement, this protection should be addressed in secured transactions law along the lines set out above (see para. 65 above).

3. Conclusions

71. The Commission may wish to consider whether a model rule along article 68 of the Model Inter-American Law on Secured Transactions or article 78 of the

Colombian secured transactions law should be prepared and added to the Model Law, and whether commentary on that model rule should be included in the draft Guide to Enactment. The model rule could require parties to seek a resolution of an enforcement-related dispute first by negotiation and then by mediation or conciliation. The parties could be allowed to go to a court or other authority only if negotiation, mediation or conciliation does not produce a solution within a reasonable period of time and unless the parties agree at any time to go to arbitration. The commentary could discuss all these options and in particular the use of ADR to resolve disputes arising in the context of the enforcement of a security right. In this context, the commentary could highlight in particular the ways in which third-party rights are protected under the Model Law in the case of out-of-court enforcement of a security right. Such work could be undertaken by a working group that would include experts in both secured transactions law and dispute settlement law. Any work could be undertaken in coordination with any work undertaken by the Commission on dispute settlement and issues relating to ADR and insolvency.

G. Real estate financing

72. In the context of the general discussion that took place at the close of the Colloquium, the suggestion was made that the Commission should prepare a text on real estate financing. In support, it was stated that States interested in reforming their secured transactions law needed guidance also with respect to real estate financing. In opposition, it was pointed out that real estate financing law was generally well developed and did not lend itself to unification at the international level.

D. Note by the Secretariat on possible future work in the field of dispute settlement: concurrent proceedings in international arbitration

(A/CN.9/915)

[Original: English]

Contents

I. Introduction

1. 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.[1] At its forty-seventh session, in 2014, the Commission considered whether to mandate its Working Group II (Dispute Settlement) to undertake work in the field of concurrent proceedings in investment arbitration, based on a note by the Secretariat, briefly outlining the issues at stake (A/CN.9/816, Addendum). The Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts and other organizations working actively in that area and that that work should focus on treaty-based investor-State arbitration, without disregarding the issue in the context of international commercial arbitration.[2] At its forty-eighth session, in 2015, the Commission considered a note by the Secretariat in relation to concurrent proceedings in investment arbitration (A/CN.9/848). It requested the Secretariat to report to the

[1] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 129-133 and 311.
[2] Ibid., *Sixty-ninth session, Supplement No. 17* (A/69/17), paras. 126-127 and 130.

Commission, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[3]

2. In accordance with that request, at its forty-ninth session, in 2016, the Commission had before it a note by the Secretariat outlining the causes and impact of concurrent proceedings, existing principles and mechanisms to address concurrent proceedings in international arbitration and possible future work in that area (A/CN.9/881).[4] After discussion, the Commission agreed that the Secretariat should continue to further develop possible work that could be undertaken with regard to concurrent proceedings as mentioned in section IV of document A/CN.9/881, for consideration by the Commission at a future session.[5]

3. Accordingly, the purpose of this note is to provide additional information on work that could be undertaken by the Commission.[6] In line with a suggestion at the forty-ninth session of the Commission, the note addresses not only concurrent but also, where relevant, successive proceedings, thus encompassing the full range of

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[3] Ibid., *Seventieth session, Supplement No. 17* (A/70/17), para. 147.

[4] Ibid., *Seventy-first session*, *Supplement No. 17* (A/71/17), paras. 175-181.

[5] Ibid., para. 181.

[6] This note is based mainly on the following documentation: *Consolidation of Proceedings in Investment Arbitration: How can multiple proceedings arising from the same or related situations be handled efficiently*, Gabrielle Kaufmann-Kohler, Laurence Boisson de Chazournes, Victor Bonnin, Makane Moïse Mbengue, Final Report of the Geneva Colloquium (22 April 2006); *Contract claims et clauses juridictionelles des traités relatifs à la protection des investissements*, Pierre Mayer, Lalive lecture, 22 May 2008; *Parallel Proceedings in Investor-State Treaty Arbitration: Responses for Treaty-Drafters, Arbitrators and Parties*, Robin F. Hansen, The Modern Law Review, Vol. 73, No. 4, July 2010; *Multiple Proceedings, New Challenges for the Settlement of Investment Disputes*, Gabrielle Kaufmann-Kohler, Contemporary Issues in International Arbitration and Mediation — The Fordham Papers 2013; The International Law of Investment Claims, Zachary Douglas, 2009; *Parallel Proceedings in International Arbitration*, Bernardo M. Cremades and Ignacio Madalena, Arbitration International Vol. 24., No. 4 (2008); *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Hanno Wehland, Oxford International Arbitration Series (2013); *Concurrent Proceedings in Investment Disputes*, IAI Series No. 9 (E. Gaillard and D. Reich, eds., 2014); *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Herbert Smith Freehills and SMU School of Law Asian Arbitration Lecture (24 November 2015); *Le concours de procedures arbitrales dans le droit des investissements*, Emmanuel Gaillard, Mélanges en l'honneur du Professeur Pierre Mayer, LGDJ Lextenso Editions, October 2015; *Recent Developments on the Doctrine of Res Judicata in International Arbitration from a Swiss Perspective: A Call for a Harmonized Solution*, Nathalie Voser & Julie Raneda, ASA Bulletin, Vol. 33, No. 4, (December 2015); *The Regulation of Parallel Proceedings in Investor-State Disputes*, Hanno Wehland, ICSID Review, Vol. 31, Issue 3 (October 2016); *Parallel Proceedings in Investment Arbitration*, Giovanni Zarra G. Giappichelli Editore and Eleven International Publishing (2016); *Abuse of Process in International Arbitration*, Emmanuel Gaillard, ICSID Review Vol. 32, Issue 1 (2017); *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency*, David Gaukrodger, OECD Working Papers on International Investment, 2013/03; *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, David Gaukrodger, OECD Working Papers on International Investment, 2014/02; *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, David Gaukrodger, OECD Working Papers on International Investment, 2014/03; UNCTAD Series on International Investment Agreements, II, 2014; and UNCTAD World Investment Report (2015). In addition, this note builds on the discussions at the expert group meeting organized by the Secretariat and hosted by the French Ministry of Foreign Affairs and International Development in January 2016.

instances comprising multiple proceedings.[7] This note focuses mainly on the issue as it arises in investment arbitration.[8]

II. Possible future work

A. Summary of issues and purpose of work

4. Concurrent proceedings in international arbitration may result from different factors such as the involvement of multiple parties located in different jurisdictions in an investment or a contractual arrangement, the existence of multiple legal bases or causes for claims, as well as the availability of multiple forums and the lack of coordination among those forums.

5. In investment arbitration, concurrent proceedings may result from mainly two types of situation. The first type is where different entities within the same corporate structure have a right of action against a State or state-owned entity in relation to the same investment, with regard to the same State measure and for the benefit of substantially the same interests.[9] Each entity may have the possibility to commence arbitration proceedings under a different treaty, in addition to bringing claims under the dispute resolution mechanism provided for in an investment contract. In short, one might have various parties, claiming in various forums and under different sources of law, yet seeking substantially the same relief for the same measure. Given the large number of investment treaties, the participants in an investor-State relationship (i.e. the foreign company investing in a host State and the shareholders of various nationalities) may be governed by multiple treaties. Even if the investing company and its shareholders are protected under the same treaty, their ability to file separate claims could result in the formation of multiple tribunals hearing essentially the same claim. It may be noted that investors do not necessarily have the choice to bring their claims in proceedings before a single forum as there may not be a single forum with jurisdiction over all of the claims.

6. The second type is where a measure by a State has an impact on a number of investors which are not related.[10] States have developed policies favouring foreign investments, thereby increasing the occurrence of dealings with a wide range of investors. When a State takes a measure which potentially affects a number of investors, it may be faced with multiple claims from those unrelated investors in relation to that measure. In addition, States or state-owned entities when concluding agreements with investors sometimes use standard contracts with similar provisions. A change of a State or state-owned entities' policy impacting those provisions may affect a whole range of contracts concluded with different investors. While issues of law and fact raised in those proceedings will generally be common to all the claimants, it is foreseeable that decisions rendered by separate tribunals may yield different outcomes.

7. The multiplicity of proceedings may result in a State having to defend several claims in relation to the same measure, with possibly the same economic damage at stake, leading to a duplication of efforts, additional costs, procedural unfairness and potentially contradictory outcomes (see A/CN.9/848, para. 13). Concurrent proceedings involving entities within the same corporate structure (referred to in para. 5 above) give rise to a risk of multiple recovery of the same damage and may create

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[7] *Official Records of the General Assembly, Seventy-first session, Supplement No. 17* (A/71/17), para. 180.

[8] At the forty-ninth session of the Commission, it was considered whether work should focus on investment and/or commercial arbitration, and it was suggested that a distinction should be made if work were to be undertaken. It was generally felt that there was a more pressing need for work to focus on concurrent proceedings in investment arbitration. It was also mentioned that concurrent proceedings in commercial arbitration deserved a similar level of attention (see *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 180).

[9] See A/CN.9/881, paras. 7, 11, 12, 14-16, 19 and 20(i).

[10] See A/CN.9/881, paras. 8 and 20(ii).

dissatisfaction among users of investment treaty arbitration, thus undermining predictability more generally.

8. The existing principles and mechanisms that could be applicable to prevent, or limit the impact of, concurrent proceedings include the doctrines of lis pendens and res judicata, consolidation, and coordination mechanisms in investment treaties (see section III of document A/CN.9/881). However, the possible application of the doctrines of lis pendens and res judicata is limited. Furthermore, the complexities of the investment protection framework make consolidation and coordination sometimes difficult to apply to concurrent proceedings in a treaty arbitration context. While almost all national legal/judicial systems have developed solutions to avoid the co-existence of concurrent proceedings and conflicting outcomes, at present there is no solution aimed at resolving that issue in international arbitration.

9. The purpose of undertaking work on concurrent proceedings as they occur in investment arbitration would be to provide a more predictable framework for coordinating concurrent proceedings in the interest of investors and States, and to promote procedural and cost efficiency, reliability and legitimacy of the process, while respecting parties' rights in resolving disputes (see A/CN.9/881, paras. 18-22). The work could consist in designing appropriate mechanisms for addressing some of the negative consequences of concurrent proceedings and recurring problems, such as contradictory and irreconcilable decisions and awards.

B. Guidance to arbitral tribunals

10. When the Commission considered briefly the possible form of work on the issue of concurrent proceedings at its forty-ninth session, in 2016, support was expressed for providing guidance to arbitral tribunals faced with concurrent proceedings, for example, on utilizing inherent powers provided in article 17 of the UNCITRAL Arbitration Rules and similar provision in other rules.[11]

11. Guidance to arbitral tribunals could be developed so as to form part of the procedural legal framework. Indeed, investment treaties, arbitration rules and arbitration law rarely include guidance to arbitral tribunals on the matter. In such a case, and when the parties to the dispute have also not agreed on how to address concurrent proceedings, an arbitral tribunal might have to render a final decision on the merits without taking any measures, for example, coordinating with other tribunals.

12. Guidance to arbitral tribunals could also be provided in the form of a soft law instrument including a list of options and methodology for the tribunal to deal with concurrent proceedings, providing the tribunal flexibility to assess which option would be most appropriate in the case at hand. Such a soft law instrument could provide arbitral tribunals with possible measures or actions they could take within the framework of their procedural powers. It could also clarify why an arbitral tribunal should take certain measures even when the existence of concurrent proceedings was not perceived as detrimental by the parties. The work could also highlight the limitations, given the role of parties' consent to arbitration and its relationship to a tribunal's authority to decide matters.

1. Stay of Proceedings

13. Once an arbitral tribunal is constituted and its jurisdiction established, the tribunal has inherent powers which could be exercised to prevent or limit the impact of concurrent proceedings. For instance, a tribunal, after having ascertained to have jurisdiction, might, in certain circumstances, exercise discretion to suspend the proceedings until the decision of another court or tribunal is rendered, and it could do so by application of various principles, including efficiency and fairness in the administration of justice, and deference to the work of other courts or tribunals..

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[11] *Official Records of the General Assembly, Seventy-first session*, *Supplement No. 17* (A/71/17), para. 179.

Possible work

14. In that context, work could consist in the preparation of an instrument determining circumstances in which arbitral tribunals could or ought to stay proceedings. Work could expand on providing information to arbitral tribunals on (i) their power to temporarily stay/suspend proceedings as part of a tribunal's inherent authority to conduct the proceedings in line with the requirements of justice and efficiency; and (ii) the legal basis and criteria that could guide tribunals in exercising their discretion in this regard. Considerations of good faith, the finality of decisions, the timing of proceedings, and the ability of a forum to fulfil its judicial function would be elements to be taken into account.

15. Work could also address circumstances where an arbitral tribunal decides to stay the proceedings to await the outcome in a parallel action, and whether it should then accord due consideration to the decision rendered in the other forum or justify any deviation in this regard. More generally, work could also focus on guiding arbitral tribunals to consider how the various forums relate one to the other, such as whether following the application of certain rules, the decision of one forum would be taken into account by others.

16. In relation to successive proceedings, work could focus on whether an arbitral tribunal could, in the exercise of its discretion, take previous proceedings as well as the resulting award into account when deciding, for instance, whether a party could and should have raised a matter or claim in a previous proceeding, and if so, whether the party should subsequently be barred from bringing the matter or claim in the current proceedings. Arbitral tribunals could be encouraged to assess a case in the context of the overall circumstances of the parties' dispute.

2. Abuse of process

17. A ground upon which an arbitral tribunal could dismiss abusive claims is the prohibition of abuse of process, a generally recognized international law principle.

18. In the context of concurrent proceedings, the prohibition of abuse of process is most likely to become relevant and find application where an investor has already obtained a decision on the merits in one forum but continues to pursue the same claim in another forum. Abuse of process may also arise where a claimant makes or restructures its investment in order to raise a claim against the host State at a time where the dispute is foreseeable but has not occurred yet.[12]

19. The principle of abuse of process would allow for an arbitral tribunal to determine situations where concurrent proceedings are acceptable and those that are not. A situation where multiple proceedings are necessary to obtain adequate remedies and are unavoidable must be distinguished from a situation where an investor seeks to take advantage of the general lack of coordination of proceedings for the purpose of maximising its chances of success.

Possible work

20. Work could be undertaken in order to elaborate further on the principle of abuse of process, and to provide guidance on how an arbitral tribunal could determine situations where there is an abuse of process. Also, work could aim at clarifying the criteria for an arbitral tribunal to apply this principle so as to prevent concurrent proceedings from arising in the first place.

3. Information-sharing

21. Arbitral tribunals may be encouraged to seek information from one another in case of concurrent proceedings or to request disputing parties to inform the arbitral

[12] See case law where that matter was considered: Pac rim, Decision on the Respondent's Jurisdictional Objections (n 9), para. 2.41; Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case N0. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015).

tribunal of any other related proceedings. In that context, arbitral tribunals could also seek whether parties would be willing to have their disputes heard in a single forum.

22. In that respect, it may be noted that information-sharing may gain pace in light of the trend favouring transparency in treaty-based investor-State dispute settlement. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration have been referred to in a number of treaties concluded since the date of their coming into force, in April 2014.[13] It is also foreseeable that transparency will progressively be applied in the context of arbitration commenced under investment treaties concluded before April 2014, once the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration comes into effect.[14]

Possible work

23. Work could include listing the various initiatives that are available to arbitral tribunals as well as their limits and issues that might be encountered, for example, conflicts with confidentiality obligation with regard to sharing of information.

4. Other forms of coordination

24. Attention of arbitral tribunals could be drawn to other forms of coordination, particularly where concurrent proceedings are unavoidable, for instance in situations mentioned in para. 6 above. These other forms of coordination would include holding joint hearings or presenting a common set of evidence.

Possible work

25. Work could focus on providing arbitral tribunals with a list of possible tools for managing such situations, with the aim of preventing unnecessary delays and costs related to double or multiple fact-finding endeavors, and avoiding duplicative written and oral submissions.

26. The work could also take the form of a protocol to be used by parties as part of their agreement to arbitrate. It could cover various elements which would permit coordination, and possibly consolidation.

5. Ordering consolidation, when admissible

27. Consolidation involves the aggregation of two or more claims or pending arbitrations into one proceeding. Consolidation requires a basis, whether in law or in a contract (including institutional rules) and it is usually based on parties' consent. Subject to a reasonable assessment of fairness, due process and efficiency, consolidation can be an effective tool to reduce or avoid concurrent proceedings.

Possible work

28. While work could focus on providing mechanisms to allow for consolidation of concurrent proceedings, such work would be of limited use if it does not include the possible cooperation among arbitral institutions administering such proceedings. In addition, as consolidation is based on parties' consent, work should address ways to take account of possible concerns of the parties. For example, an investor may oppose consolidation if it would be required to disclose sensitive business information to its co-claimants.

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[13] Information on the status of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration can be found on the Internet at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.

[14] Information on the status of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration can be found on the Internet at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

6. Lis pendens, res judicata, and *forum non conveniens*

29. In a domestic litigation setting, if there are two concurrent court proceedings, various doctrines have been developed to prevent them or limit their impact. For instance, in a civil law system, a court would apply the lis pendens rule, and the judge seized with the second proceeding will likely stay the proceedings until a decision is made by the judge seized with the first proceeding. In common law systems, remedies of *forum non conveniens* (and anti-suit injunctions) may be used. If one of the two proceedings is concluded with a judgment, the res judicata rule would likely apply.

Possible work

30. In the context of international arbitration, work may consist in providing guidance to arbitral tribunals on the principles of lis pendens and res judicata, even if their application might be limited (see A/CN.9/881, paras. 24-28). This work could complement the 2006 final reports of the International Law Association (ILA) on lis pendens and on res judicata in international commercial arbitration, which provided that arbitral awards should have conclusive and preclusive effects in further arbitral proceedings to promote efficiency and finality of international commercial arbitrations and that such effects need not necessarily be governed by national law but may be governed by transnational rules to be developed (recommendations 1 and 2).[15]

31. The res judicata effect in international arbitration gives rise to complex issues, in particular as different laws may come into play to govern the application of res judicata (the law of the place of the previous arbitration; the law of the place of the subsequent arbitration; the law governing the merits of the dispute), and res judicata has different scopes in different legal systems. Work in this field could also be developed to provide a more harmonized approach to the notion of res judicata.

7. Connexity or related action defense

32. Another tool known in litigation is the application of the connexity or related action defense.[16] This notion is broader than the doctrine of res judicata as it is not limited by the triple identity test. An example of this mechanism can be found in the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter) which sets out a discretionary rule for "related actions", allowing for concentration of related or connected disputes in one forum.[17] Article 30.3 provides that "actions are deemed to be related where they are so connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings." Under the Brussels Regulation, a court other than the court first seized of an action may stay its proceedings if a related action is already pending in another EU Member State and await the outcome of that related action before rendering its decision. Under certain circumstances, it may even decline jurisdiction if the law of the first court allows consolidation of the actions.

Possible work

33. Work could be undertaken on the feasibility of designing a similar mechanism in the context of international arbitration.

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[15] See International Law Association on Recommendations on lis pendens and res judicata and arbitration, Seventy-Second International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006.

[16] *Multiple Proceedings in International Arbitration: Blessing or Plague?*, Gabrielle Kaufmann-Kohler, Herbert Smith Freehills and SMU School of Law Asian Arbitration Lecture (24 November 2015).

[17] Article 30(1) and (2) provide that: "1. Where related actions are pending in the courts of different Member States, any court other than the court first seized may stay its proceedings. 2. Where these actions are pending at first instance, any court other than the court first seized may also, on application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof."

C. Provisions in investment treaties

34. Some investment treaties contain provisions aimed at preventing the occurrence of concurrent proceedings or limiting their impact (see section III. C of document A/CN.9/881). Concurrent proceedings could be tackled through different provisions in investment treaties, as briefly outlined below.

35. Work could be undertaken to call attention of States to the different types of treaty provisions available to address the matter.

1. Definition of investors

36. The definitions of the terms "investor" or "investment" in investment treaties determine which investors are protected and are able to bring claims against host States (see A/CN.9/848, paras. 8 and 9). Liberal definitions of "investor" and investment" contained in many treaties extend protection to indirect investments made through one or more corporate entities.

37. Treaty provisions have been drafted to prevent abusive use of an investment treaty by prohibiting claims by investors who engage in "treaty shopping" or "nationality planning" through "mailbox" companies that channel investments but do not engage in any real business operations in the host State.[18] There are different ways to define protected investors or investments with the aim of limiting possibilities of multiple claims, such as referring to criteria of "substantial business activity" and defining its meaning, and the nationality of the company's ultimate controller.[19]

38. Also, some investment treaties contain provisions that set out the level of indirect ownership that is required for a shareholder to acquire standing under the investment treaty. Such clarity is meant to reduce parallel proceedings in situations where the same parties (related by control) initiate proceedings under different treaties in relation to the same State measure.

39. Attention of States could be called to various options in investment treaties, such as (i) providing the level of indirect ownership required for an investor to acquire standing under an investment treaty; (ii) prohibiting claims by investors where the company itself is pursuing a remedy in a different judicial forum; (iii) permitting a submission of a claim by an investor only if the investor and the local company withdraw any pending claim and waive their rights to seek remedy before other forums; and (iv) limiting forum selection options to claims that have not yet been asserted elsewhere.

2. Preventing abuse of process

40. Treaty provisions on prohibiting abuse of process could provide the necessary mechanisms to allow arbitral tribunals to dismiss abusive claims and thus encourage investors to agree on a single forum for the resolution of their claims. If investment treaties are drafted providing a clear criteria on which concurrent proceedings will be regarded as abusive (see paras. 17-20 above), they could limit concurrent proceedings to those that are legitimate and enable disputing parties to have a clear understanding of those situations.[20]

3. Compensation mechanism, and notion of reflective loss

41. Treaty provisions on the compensation mechanism (including the allocation of costs) could also have an effect on limiting the impact of concurrent proceedings.[21]

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[18] UNCTAD World Investment Report (2015), Chapter IV.

[19] Ibid.

[20] See *The Regulation of Parallel Proceedings in Investor-State Disputes*, Hanno Wehland, ICSID Review Vol. 31, Issue 3 (October 2016).

[21] See for instance, UNCTAD Series on International Investment Agreements, II, 2014; see also OECD, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, 2014/02, David

42. Regarding the specific notion of reflective loss, recent OECD working papers and intergovernmental discussions at OECD have highlighted the importance of the distinction between direct and reflective loss in considering concurrent claims in investment arbitration. [22] In claims brought under investment treaties, arbitral tribunals have found that shareholders are entitled to recover for reflective loss. In contrast, domestic law systems generally bar shareholder claims for reflective loss, both for corporate law reasons and procedural reasons, including the desire to promote judicial economy by reducing the number of cases necessary to address the injury, consistency, predictability, the avoidance of double recovery, and fairness to defendants. Only the directly-injured company can claim. OECD works indicate that acceptance of claims for reflective loss is an important aspect of concurrent claims in investment arbitration.

43. Intergovernmental discussions at OECD have preliminarily concluded that, while reflective loss claims raise significant policy issues, there does not appear to be any strong policy rationale for the general acceptance of reflective loss claims under investment treaties.

4. Consolidation

44. Provisions on consolidation are also increasingly found in investment treaties (see A/CN.9/881, paras. 32-34). There are two types of provisions on consolidation. [23] The first is a restatement of the general rule that consolidation is possible, if all of the concerned parties agree. The purpose of such provisions is to draw attention of the disputing parties to the possibility of consolidation, without necessarily providing the mechanism for consolidation. The second type permits yet limits consolidation to where there is a "question of law or fact in common" (for example, NAFTA Article 1126.2), or where common questions "arise out of the same events or circumstances" (for example, article 10.25 CAFTA-DR). Article 1117 of NAFTA specifically calls for consolidation of actions by different shareholders for claims made on behalf of a locally incorporated entity. The guidance provided to arbitral tribunals in certain investment treaties is that the tribunal must rule in the interest of fair and efficient resolution of the claims when considering whether to consolidate. These clauses usually set out a very detailed consolidation mechanism. Under the second type of provisions, any disputing party to the related, ongoing proceedings can request the consolidation of proceedings. This request triggers a process that involves the establishment of a consolidation tribunal.

45. Consolidation may also be carried out under applicable institutional arbitration rules. However, it is usually not possible to consolidate proceedings which have started under different arbitration rules and/or administered by different arbitration institutions. Consolidating claims based on different underlying treaties can prove difficult because they may contain differing substantive obligations, as well as diverging time limits, procedural obligations and dispute settlement forums. It is interesting to note that a recent treaty allows for consolidation across dispute settlement mechanisms (see article 9.29 of the EU-Singapore Free Trade Agreement). [24]

Gaukrodger; *Investment Treaties and Shareholder Claims: Analysis of Treaty Practice*, OECD Working Papers on International Investment, 2014/03, David Gaukrodger.

[22] Shareholders' reflective loss is incurred as a result of injury to "their" company, typically a loss in value of the shares; it is generally contrasted with direct injury to shareholders' rights, such as interference with shareholders' voting rights; Gaukrodger, D. (2013), "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", OECD Working Papers on International Investment, 2013/03; Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02; Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice", OECD Working Papers on International Investment, 2014/03.

[23] UNCTAD Series on International Investment Agreements, II, 2014.

[24] Article 9.29 (5) provides that: "The consolidating tribunal shall conduct its proceedings in the following manner: (a) unless all disputing parties otherwise agree, where all the claims for which a consolidation order is sought have been submitted to arbitration under the same dispute settlement

5. Other treaty provisions

46. Various mechanisms have been developed over time in investment treaties to tackle this issue. Certain investment treaties provide for additional coordination or concentration mechanisms. For instance, the requirement that the claimant waives or terminates any other proceedings — also referred as "no U-turn" approach — is found in many recent investment treaties; the so-called, "fork-in-the-road" clauses offer the investor a choice between the host State's domestic courts and international arbitration; once the choice is made, it is final.

47. The usefulness of such clauses in the context of concurrent proceedings is limited as they apply only if the disputes are identical (same parties, same interests, and same legal basis). For example, such provisions would not preclude separate claims by majority and minority shareholders.

III. Concluding remarks

48. The Commission may wish to consider whether work should be undertaken on providing information on available tools, as suggested in section B above, to arbitral tribunals faced with concurrent proceedings. This may involve developing further certain principles of subsidiarity and of abuse of process.

49. At the forty-ninth session of the Commission, it was suggested that concrete examples of existing mechanisms or provisions in investment treaties and possible models to be followed could be provided, supplementing the work already done by other organizations.[25] The Commission may wish to consider whether attention of States should be directed to available mechanisms in investment treaties, as briefly outlined in section C above, to avoid the concurrent proceedings from occurring in the first place, or to limit their impacts.

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mechanism, the consolidating tribunal shall proceed under the same dispute settlement mechanism; (b) where the claims for which a consolidation order is sought have not been submitted to arbitration under the same dispute settlement mechanism: (i) the disputing parties may agree on the applicable dispute settlement mechanism available under Article 9.16 (Submission of Claim to Arbitration) which shall apply to the consolidation proceedings; or (ii) if the disputing parties cannot agree on the same dispute settlement mechanism within thirty days from the request made pursuant to paragraph 3, the UNCITRAL arbitration rules shall apply to the consolidation proceedings."

[25] *Official Records of the General Assembly, Seventy-first session*, *Supplement No. 17* (A/71/17), paras. 178 and 179.

E. Note by the Secretariat on possible future work in the field of dispute settlement: ethics in international arbitration

(A/CN.9/916)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, 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 the conduct of arbitrators, their relationship with those involved in the arbitration process, and the values that they were expected to share and convey.[1] After discussion, the Commission requested the Secretariat to explore the topic in a broad manner, including in the field of both 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.[2]

2. At its forty-ninth session, in 2016, the Commission considered a note by the Secretariat, which outlined the concept of ethics in international arbitration as well as existing legal frameworks on ethics (A/CN.9/880). The note also posed some questions to be considered by the Commission before possibly engaging in future work in that area. After discussion, the Commission requested the Secretariat to continue exploring 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 on the various possible approaches.[3]

3. In accordance with that request, the purpose of this note is to explore the concept of ethics in international arbitration, to identify existing legal frameworks, and to raise questions with regard to the topic as an item for possible future work by the Commission.[4] This note is limited to exploring ethics of arbitrators, and does not

[1] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 148.
[2] Ibid., para. 151.
[3] Ibid., *Seventy-first Session, Supplement No. 17* (A/71/17), paras. 182-186.
[4] The Commission may wish to note that the Secretariat consulted, among others, with the International Council for Commercial Arbitration (ICCA) for the preparation of this note.

address other participants in the arbitration process, such as counsel, experts, or third-party funders.

II. Existing legal frameworks and possible future work

A. Existing legal frameworks on ethics in international arbitration

4. With the expansion of international arbitration, a variety of texts on ethics have been developed by various actors, including local bar associations, arbitral institutions and international organizations. Ethical standards have been either formulated in a stand-alone text, or included in national legislation on arbitration, in arbitration rules, in guidelines and, more recently, in investment treaties as a complement to investor-State dispute settlement provisions. Some texts have a binding effect, whereas others are meant to provide general guidance. State court decisions on challenge to arbitrators as well as on setting aside or enforcement of arbitral awards are also relevant as such decisions often constitute a last resort review of the arbitrators' conduct, thereby providing a source of information on the application of ethical standards.

1. National legislation

5. The UNCITRAL Model Law on International Commercial Arbitration ("Model Law on Arbitration" or "Model Law") has been enacted in a large number of jurisdictions[5] and its articles 12 and 13 on grounds for challenge and challenge procedure shed light on the conduct expected of arbitrators. Article 12 imposes on each arbitrator a continuing duty to disclose to the parties circumstances that are likely to give rise to justifiable doubts as to his or her impartiality or independence.[6] The Model Law also makes it clear that arbitrators cannot be challenged for reasons other than those mentioned in article 12(2).[7] Article 12(2) pursues two additional objectives. The first is to reinforce party autonomy in the choice of arbitrators by providing that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he or she does not possess qualifications required by the parties. The second is to prevent parties from abusing the trust of their opponents by engaging in contradictory behaviour. That objective is achieved by forbidding a party from challenging an arbitrator appointed by it, or in whose appointment it has participated, on the basis of circumstances known to that party at the time of the appointment.

6. The procedure applicable to challenges to arbitrators is addressed in article 13 of the Model Law, which sets out a two-stage procedure. In a preliminary phase, challenges are handled by the arbitral tribunal, according to either a procedure agreed to by the parties or the default procedure set out in article 13(2). Challenges that have

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[5] The list of jurisdictions which have enacted legislation based on the Model Law on Arbitration can be found on the Internet at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[6] Article 12(1) of the Model Law on Arbitration provides: "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him."

[7] Article 12(2) of the Model Law on Arbitration provides: "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made". The *travaux préparatoires* indicate that proposals were made to delete the word "only" in article 12(2) but it was considered preferable to retain that word to clearly emphasize that possible additional grounds for challenge provided for in domestic law should not apply in the context of international commercial arbitrations (see *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), paras. 116-119).

not been successful at that preliminary phase may subsequently be brought to a court or competent authority, whose decision on the matter is final.

7. The Model Law has also influenced jurisdictions that have yet to enact legislation based on it. Accordingly, national arbitration laws usually have provisions that address disclosures by, and challenges to, arbitrators. In addition, certain national arbitration laws impose specific obligations on arbitrators, for example, when arbitrators have knowledge about criminal wrongdoing by the parties.

2. Arbitration rules

8. Most arbitration rules include general principles on impartiality and independence of the arbitrators and detailed rules on the procedure for challenging an arbitrator. For instance, the UNCITRAL Arbitration Rules (as revised in 2010) deal with disclosure by, and challenge of, arbitrators in articles 11 to 13. An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence in accordance with article 12(1). If the other party does not agree or the arbitrator does not withdraw voluntarily, the party challenging the arbitrator may seek a decision on the challenge by the appointing authority. Institutional arbitration rules contain similar provisions, sometimes with slight variations.[8]

9. In the investor-State dispute settlement context, article 14 of the ICSID Convention, for example, requires arbitrators and conciliators to be "persons of high moral character and recognized competence (…) who may be relied upon to exercise independent judgment". This requirement is supplemented by filing a declaration of independence at the beginning of the proceedings, as provided for under ICSID Arbitration Rule 6(2). Article 57 of the ICSID Convention further provides a mechanism by which a party may seek disqualification of an arbitrator by showing "a manifest lack of the qualities required (...)".

3. Guidance texts

10. In line with the provisions found in national legislation and arbitration rules, standards addressing the question of professional ethics and conflicts of interest have been developed by international organizations referring to the principle that arbitrators have a continuing obligation to remain impartial and independent.[9]

11. Recently, a number of arbitral institutions have established codes of conduct for arbitrators. Some of these codes are general moral guidelines, while others cover specific situations that occur during arbitration.

4. Case law

12. As mentioned above, the Model Law on Arbitration, including its articles 12 and 13, has been enacted in a number of jurisdictions. The Model Law, however, does not define terms such as "justifiable doubt", "impartiality", "independence", and thus State courts have used their respective standards to interpret those notions.

13. National courts have developed jurisprudence regarding arbitrator's obligations, specifically on the impartiality and/or independence requirements, and the level of proof required to establish a violation. The 2012 Digest of Case Law on the Model Law on Arbitration provides an analysis of the relevant court decisions.[10] Courts have highlighted the mandatory nature of impartiality and independence. Some decisions have underlined that there should be objective circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator for a

[8] For instance, the Arbitration Rules of the ICC International Court of Arbitration in effect as of 1 March 2017 refer to "an alleged lack of impartiality or independence".

[9] For instance, the American Arbitration Association/American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes (2004), the Code of Professional and Ethical Conduct of the Chartered Institute of Arbitrators (2009), the IBA Guidelines on Conflicts of Interest in International Arbitration (2014).

[10] See 2012 UNCITRAL Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, available on the Internet at: http://www.uncitral.org/uncitral/en/case_law/digests.html.

challenge to be successful. For example, the notion of "justifiable doubts" has sometimes been interpreted to require a showing of objective facts that a reasonable, well-informed person would regard as constituting a bias on the part of the arbitrator. Some jurisdictions require a real manifestation of bias before an arbitrator can be removed. In certain jurisdictions, an analysis of circumstances that may affect the arbitrator's judgment and raise reasonable doubts in the mind of the parties as to the arbitrator's independence and impartiality is required.[11]

14. Decisions by courts with regard to article 36 of the Model Law on Arbitration on grounds for refusing recognition and enforcement of arbitral awards may also be relevant in relation to the interpretation of ethical standards. Article 36, which mirrors article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"), does not include provisions that specifically address arbitrators' ethical obligations. Hence, in order to challenge the arbitrator's conduct, parties must argue that the arbitrator's conduct violates one of the exceptions for enforcing the award. Under article 36, the two provisions that are most often invoked are that the non-disclosure of information by the arbitrator caused the tribunal to not be constituted in compliance with the parties' agreement or the law at the place of arbitration (article 36(1)(a)(iv)) or that the arbitrator's conduct violated the public policy of the enforcement jurisdiction (article 36(b)(ii)). Parties have also argued that the arbitrator's alleged partiality prevented the party from presenting its case (article 36(1)(a)(ii)) or that the conduct of the arbitrator was outside the scope of the arbitrator's power (article 36(1)(a)(iii)).[12]

15. The most common basis for claims under the New York Convention has been that the alleged misconduct violates the public policy of the enforcement jurisdiction. However, these defences to enforcement presented on the basis of article V(2)(b) of the New York Convention have been rarely successful. Courts have sometimes underlined that the conduct of the arbitrator was not covered by public policy and that the party should have raised the matter during the arbitral proceedings.[13]

16. There have been a number of cases in different jurisdictions, in which parties have challenged arbitrators based on their past or existing experience, including as arbitrator or counsel. This matter is sometimes referred to as issue conflict. Issue conflict, also described as "inappropriate predisposition",[14] has been raised in cases where parties allege that an arbitrator's past publications or participation in prior awards indicate a lack of impartiality (see also below, para. 23).[15] In different circumstances, parties have challenged arbitrators based on their service as counsel either for or against one of the parties or in previous disputes involving issues that are related to the pending dispute. Courts have rendered divergent decisions on the matter. Some decisions sustain the challenges and note that the issue can pose legitimacy concerns for the arbitral process. Others have adopted the opinion that having a dual role as arbitrator and counsel is a common and acceptable practice in international arbitration.[16] The case law reviewed by the Joint ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration indicated "reluctance on the part of decision makers in investor-State cases to sustain challenges involving claims of three types of alleged inappropriate predisposition: (i) past publications, (ii) past advocacy as counsel and (iii) participation in prior awards, absent unusual circumstances".[17]

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[11] Ibid.

[12] Ibid.

[13] Relevant case law available on the Internet at: http://www.newyorkconvention1958.org.

[14] See ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No. 3, 17 March 2016, available on the Internet at: http://www.arbitration-icca.org.

[15] Ibid.

[16] Ibid., paras. 128-133. See also 2012 UNCITRAL Digest of Case Law on the UNCITRAL Model Law on International Commercial Arbitration, available on the Internet at: http://www.uncitral.org/uncitral/en/case_law/digests.html.

[17] ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No. 3, 17 March 2016, available on the Internet at: http://www.arbitration-icca.org, para. 151.

5. Code of ethics in investment treaties

17. Some recently concluded investment treaties contain a code of conduct for arbitrators acting in investor-State dispute settlement arising under that treaty, thereby complementing the provisions of the applicable arbitration rules (see above, paras. 8 and 9).[18] Those codes usually address the standards of conduct for arbitrators (and other persons), their duties in the conduct of the arbitration, the disclosure obligations and the obligations of confidentiality.[19] They usually do not provide for sanctions, other than the right of both parties to demand replacement of the arbitrator.

B. Possible approaches for future work

18. Two possible approaches could be considered for future work on ethics: the first being the preparation of a substantive code of ethics seeking to provide harmonization and clarity, for instance with regard to the disclosure and challenge procedures; and the second being the preparation of guidelines on relevant and applicable ethical standards.

1. Possible topics for a code of ethics for arbitrators

(a) Impartiality and independence

19. Impartiality and independence are the core elements of integrity and ethical conduct of arbitrators. Arbitrators are expected to avoid direct and indirect conflicts of interest. Such conflicts usually result in the lack of impartiality or the lack of independence. Impartiality means the absence of bias or predisposition towards parties. Lack of impartiality would arise, for instance, if an arbitrator appears to have prejudged some matters in favour of one of the parties. Independence usually relates to the business, financial, or personal relationship of an arbitrator with a party to the arbitration, and lack of independence usually derives from problematic relations between an arbitrator and a party or its counsel. Standards on ethics usually provide that ethical duties remain applicable throughout the duration of the arbitral proceedings.

20. A code of ethics would state that all arbitrators have to be independent and impartial, and comply with the same ethical standards. It could further explain how that key principle articulates with party autonomy on which arbitration is founded, achieving a proper balance between party autonomy and impartiality.

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[18] See, for instance the European Union-Singapore Free Trade Agreement (Annex 15-B, Code of Conduct for Arbitrators and Mediators, version as of May 2015); and Canada-European Union Comprehensive Economic Trade Agreement (CETA) (Annex 29-B, Code of Conduct for Arbitrators and Mediators).

[19] The following provides a brief introduction of the structure and matters covered in the CETA Code of Conduct: The first section of the Code states the fundamental principle that "[e]very candidate and member shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved." The second section addresses the disclosure obligations for arbitrator candidates. The third section requires arbitrators to perform their obligations thoroughly and expeditiously and to ensure that their assistants and staff comply with the provisions of the code. The fourth section focuses on the independence and impartiality requirement of arbitrators. It states that arbitrators shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party, or fear of criticism. Arbitrators shall not accept any benefit that would interfere or appear to interfere with her or his duties. Arbitrators may not allow financial, business, professional, family, or social relationships or responsibilities to influence her or his conduct or judgment. The fifth section requires former arbitrators to avoid actions that may create the impression that they were biased in carrying out their duties or that they derived benefits from the arbitral decision. The sixth section requires arbitrators to maintain any information of the proceedings, or acquired during the proceedings, confidential and prohibits using such information for personal gain or for adversely affecting others' interests. The seventh and eighth sections focus on expenses and mediators, respectively.

21. Sources sometimes differ concerning terminology. Regarding legislative texts, the UNCITRAL Model Law uses both the terms "independence" and "impartiality".[20] The 1996 English Arbitration Act refers to the duty to be "impartial."[21] The Swiss Federal Statute on Private International Law uses the term "independence".[22] Courts and institutions have often used the terms "impartiality" and "independence" interchangeably, and their meanings have further developed through application.

22. A code of ethics could seek to address specific situations, to the extent this would be feasible. For instance, it is sometimes difficult to delineate information and knowledge that may have an impact on the impartiality and independence of the arbitrator, and to draw the line between acceptable knowledge and unacceptable knowledge that could lead to partiality or lack of independence.

23. In this regard, the report of the ASIL-ICCA Task Force on Issue Conflicts in Investor-State Arbitration notes that formal 'bright line' rules regulating inappropriate prejudgment are unnecessary and would be counterproductive. The Task Force noted that its review of case law suggested that "it is not likely to be fruitful to try to articulate hard and fast rules about time periods triggering disclosures, blanket endorsements or preclusions of certain types of activities", due to the highly fact-dependent nature of the outcomes in challenge cases.[23] The 2004 AAA/ABA Code of Ethics draws the line by distinguishing between views on general issues and views on specific factual or legal points. The Code states: "A prospective arbitrator is not necessarily partial or prejudiced by having acquired knowledge of the parties, the applicable law or the customs and practices of the business involved. Arbitrators do not contravene this Canon if, by virtue of such experience or expertise, they have views on certain general issues likely to arise in the arbitration, but an arbitrator may not have prejudged any of the specific factual or legal determinations to be addressed during the arbitration."[24]

(b) Disclosure obligations

24. The obligation of impartiality and independence is usually accompanied by a requirement that the arbitrator shall disclose circumstances, past or present, that could give rise to justifiable doubts as to his or her impartiality or independence. It is then for the arbitrator to declare that the disclosed circumstances do not affect, in his or her opinion, his or her independence and impartiality.[25] Most national laws and arbitral rules have adopted objective standards for disclosure.

25. Investment treaties may contain additional requirements regarding disclosure in the context of investor-State dispute settlement, specifying, for instance, that the arbitrators shall disclose any financial interest in the proceeding or in its outcome, and in any other proceedings that involve issues that may be decided in the case for which the arbitrator is under consideration.[26]

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[20] UNCITRAL Model Law on International Commercial Arbitration, Article 12.

[21] Arbitration Act 1996, Chapter 23, provision 24 (1)(a).

[22] Swiss Federal Statute on Private International Law, Chapter 12, Article 180(c).

[23] See ICCA, Report of the ASIL-ICCA Joint Task Force on Issue Conflicts in Investor-State Arbitration, The ICCA Reports No. 3, 17 March 2016, para. 183, available on the Internet at: http://www.arbitration-icca.org.

[24] AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Comment to Canon 1.

[25] See, for instance, the model statement of independence contained in the Annex to the UNCITRAL Arbitration Rules (as revised in 2010) which gives an indication as to the elements that would be required to be disclosed: "Attached is a statement made pursuant to article 11 of the UNCITRAL Arbitration Rules of (a) my past and present professional, business and other relationships with the parties and (b) any other relevant circumstances."

[26] See, for instance, Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Annex 29-B, Code of Conduct for Arbitrators and Mediators, Section on "Disclosure obligations", para. 4.

26. Specific requirements are also sometimes found in guidance texts on ethics,[27] such as that a prospective arbitrator shall disclose personal or business relationships with "any person known to be a potentially important witness in the arbitration".[28]

27. It is questionable whether arbitrators have a duty to investigate potential conflicts of interest. Some courts have found that arbitrators can be deemed impartial if they do not have knowledge about a certain conflict and that arbitrators do not have the duty to investigate unknown facts. Other courts have found that since standards for impartiality also include possible perceptions of bias, arbitrators should investigate potential conflicts of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 7(d) states that "(f)ailure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries."

28. Disclosure standards and disqualification standards are generally not the same. The scope of the matters that should be disclosed is generally broader than the scope of matters that would constitute a basis for disqualification. Not all information that should be disclosed would result in disqualification. Conversely, even if the information would not disqualify an arbitrator, it may nonetheless have to be disclosed. The disqualification standards provide a basis to determine whether an arbitrator is not sufficiently impartial to serve in a dispute.

29. For example, the Model Law on Arbitration makes a distinction between information that must be disclosed and information that must be disclosed under the disqualification standard. Article 12(1) on disclosure states that arbitrators should disclose any circumstances "likely to" give rise to justifiable doubts as to the arbitrator's impartiality or independence. Article 12(2) on disqualification, on the other hand, refers to "existing circumstances" that give rise to justifiable doubts as to an arbitrator's impartiality and independence. Having the disclosure standard cover a broader scope helps to avoid situations in which information may otherwise be benign if it were not inadvertently discovered later.

30. In the same vein, the explanation to the IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 3(c) states that: "… a failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue."

(c) Other obligations possibly relevant to ethics of arbitrators

Fairness and diligence, confidentiality

31. Requirements of fairness and diligence, as well as provisions on confidentiality can be found in national legislation and arbitration rules which, in substance, usually oblige the arbitrator to: (i) perform his or her duties with fairness and diligence, thoroughly and expeditiously during the course of the proceeding;[29] and (ii) keep non-public information confidential, and not use any information to gain a personal advantage, or to affect the interest of others.

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[27] See for instance, the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes; and the IBA Guidelines on Conflict of Interest in International Arbitration which indicate specific relationships that should be disclosed (the Red List in the IBA Guidelines shows circumstances that give rise to a conflict of interest; some circumstances in the Red List may be waived upon disclosure; the Orange List shows circumstances where a candidate has a duty to disclose and, after the disclosure, the parties are assumed to have waived their concerns after a period of thirty days; the Green List shows situations where there is no appearance of conflict from an objective viewpoint and the arbitrator has no obligation to disclose).

[28] See for instance the Code of Ethics for an Arbitrator, Singapore International Arbitration Centre 2.2 (a).

[29] See, for instance, article 17 (1) of the UNCITRAL Arbitration Rules (as revised in 2010), as well as their Annex (which provides that any party may consider requesting from the arbitrator a statement confirming that "on the basis of the information presently available, that arbitrator can devote the time necessary to conduct the arbitration diligently, efficiently and in accordance with the time limits in the Rules.").

Professional qualifications

32. In addition to the requirements of impartiality and independence, professional qualifications are also sometimes mentioned as part of ethical standards. For example, Article 14(1) of ICSID states that arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

Nationality

33. In investor-State arbitration, there is the general presumption against appointing a chairperson or sole arbitrator who would share the nationality of one of the parties, unless the parties agree to do so. Article 39 of the ICSID Convention states that "[t]he majority of the arbitrators shall be nationals of States other than the Contracting State Party to the dispute and the Contracting State whose national is a party to the dispute […]"[30] Parties may waive this requirement by agreement. A similar principle can be found more generally in international arbitration. For instance, article 6(7) of the UNCITRAL Arbitration Rules (as revised in 2010) provides that "[t]he appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties".

Involvement of arbitrators in settlement

34. As underlined in the UNCITRAL Notes on Organizing Arbitral Proceedings (2016),[31] different legal systems have different views on whether arbitrators should refrain from encouraging the parties to settle. Some legal systems require judges and arbitrators to aid parties in reaching a settlement. The process of encouraging settlement, however, may involve ex parte communications with the parties, which may compromise the arbitrator's impartiality. The IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 4(d), provides that arbitrators may assist the parties in reaching a settlement if the parties consent to do so.

(d) Challenge procedure — Non-compliance with ethical standards

35. The typical measure to address non-compliance with ethical standards after the appointment of an arbitrator is the resignation and/or replacement of the arbitrator. Almost all national arbitration laws and arbitration rules contain provisions on procedures for challenging arbitrators who do not comply with the standards therein including ethical standards. They also include safeguards aimed at preventing abuse of the challenge procedures, as dilatory tactics, by parties.

36. Generally, parties have to challenge an arbitrator as soon as they become aware of relevant information. Parties cannot wait and assert the challenge when they find the award unfavourable. If parties fail to raise a challenge within a stipulated period of time, then the party is deemed to have waived the right to challenge.

2. Preparation of guidelines on existing ethical standards

37. At the forty-ninth session of the Commission, it was highlighted that different ethical norms and standards might be applicable, and there was currently no clear guideline for determining how they interrelated or which would prevail in a given situation. In that light, it was suggested that one possible form of work could be to address the interrelationship of multiple norms and standards providing guidance on which ethical standards would be applicable.[32]

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[30] ICSID Rules of Procedure for Arbitration Proceedings, Chapter IV, Article 39.

[31] See Note 12 of the UNCITRAL Notes on Organizing Arbitral Proceedings (2016), available on the Internet at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2016Notes_proceedings.html

[32] *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), para. 184.

38. Different approaches could be envisaged, for instance, providing guidance to determine whether and when the ethical standards are applicable, while noting the limits of application of such standards, since arbitrators are likely to come from different jurisdictions and would thus be subject to different ethical standards.

39. Work could be undertaken to provide clarity regarding the interrelationship among ethical rules (i) of the arbitrator's home jurisdiction, (ii) of the jurisdiction in which the arbitration is being held (both the legal seat and physical venue), (iii) provided for in the applicable law, (iv) of the arbitral institutions, and (v) contained in soft law standards agreed to by the parties or set by the arbitral tribunal.

III. Questions in relation to possible future work

40. With the development of international arbitration and the variety of sources and texts on ethics, no guidance has been provided on which approach arbitrators should adopt, for instance whether arbitrators dealing with international arbitration may disregard their home jurisdictions' ethical rules in favour of international texts. As noted by the Commission at its forty-eighth session, arbitral tribunals could be bound by more than one ethical standard depending on the nationality of the arbitrators, affiliation with bar associations, as well as the place of arbitration.[33] Therefore, multiple norms may apply at the same time, without any clear indication on which shall prevail in case of conflict.

41. The expansion of international arbitration has also resulted in the diversification of parties involved in the arbitration process. As such, their perspectives on ethics or conduct of arbitrators may differ significantly and what one expects may sometimes be at odds with the expectations of others from another jurisdiction or with the general practice in international arbitration. The increased complexity of recent disputes involving multiple parties and complicated transactions lead to new and more subtle questions. While there seems to be a general agreement about the fundamental ethical standards of international arbitration, in practice, the assessment of compliance with such standards may be carried out quite differently depending on the texts deemed applicable, and depending also on whether assessment is made by the arbitrators themselves, the parties, the arbitral institutions or national courts. Increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to ethics and conduct of arbitrators.

42. In addition, while the standards described above in section II contain statements of principle, they usually lack explanatory contents about their practical implications.

43. In that light, the Commission may wish to consider the following questions:

(a) Whether there is a need for a harmonized and authoritative source on ethics in international arbitration, or whether guidance on articulation among the possible applicable ethical standards would be more appropriate;

(b) Whether existing instruments sufficiently define the scope of disclosure and the disqualification process;

(c) Whether the purpose of undertaking work in the field of ethics in international arbitration would be to reduce any identified uncertainty and inconsistency in the existing ethical standards, and their application; if so, whether a new instrument should cover any or all of (i) persons concerned (in addition to the arbitrators), (ii) content of ethical standards (limited to impartiality and independence, or expanded to encompass other obligations), (iii) methods and extent of disclosure, (iv) challenge procedures, (v) effect of breach of ethical standards, and (vi) enforcement mechanisms (how should ethical rules be enforced and by whom (arbitrators, parties, institutions, others)?);

(d) Whether the consequences of non-compliance with ethical standards are addressed in sufficient detail in existing instruments; if this is considered not to be

[33] Ibid., para. 150.

the case, whether working on a compilation and digest of case law would be a possible way forward.

44. Ethical standards in investor-State arbitration and in commercial arbitration largely address the same obligations with some variation. The Commission may wish to consider whether any work on the topic should encompass both commercial and investor-State arbitration, or deal with them separately.

F. Note by the Secretariat on possible future work in the field of dispute settlement: reforms of investor-State dispute settlement (ISDS)

(A/CN.9/917)

[Original: English]

Contents

I. Introduction

1. At its forty-eighth session, in 2015, 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.[1] 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.[2]

2. In relation to investor-State arbitration, the Commission noted that the current circumstances posed a number of challenges and proposals for reform 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 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency" or "Mauritius Convention") 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), a joint research centre of the Graduate Institute of International and Development Studies and the University of Geneva Law School. In that light, the Secretariat was requested to report to the Commission at a future session with an update on that matter.[3]

3. Pursuant to that request, at its forty-ninth session, in 2016, the Commission had before it a note providing an update on the study conducted within the framework of a research project of CIDS and a short overview of its outcome (A/CN.9/890). The

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[1] For presentations made at the forty-eighth session of the Commission by the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), the International Centre for Settlement of Investment Disputes (ICSID), The Permanent Court of Arbitration (PCA), and the Energy Charter Secretariat, see *Official Records of the General Assembly, Seventieth Session, Supplement No. 17* (A/70/17), paras. 269-274.

[2] Ibid., para. 268.

[3] Ibid.

Commission expressed its appreciation to the Secretariat and to CIDS for the research conducted.

4. At that session, the Commission heard an oral presentation of the CIDS research study (referred to below as the "CIDS report"),[4] which sought to provide a preliminary analysis of the issues that would need to be considered if a reform of the investor-State dispute settlement (also referred to as "ISDS") regime[5] were to be pursued at a multilateral level. It was pointed out that the CIDS report considered two different options in-depth: (i) a permanent international dispute settlement body providing direct access to private parties and State parties alike for investment related matters, and (ii) an appeal mechanism for investor-State arbitral awards. It was highlighted that the final part of the CIDS report addressed possible means for States to incorporate those options into their existing and future investment treaties. The conclusion reached regarding existing investment treaties was that, although not the only model that could be envisaged for that purpose, a convention modelled on the Mauritius Convention on Transparency with certain adaptations could effectively extend new dispute settlement options to existing investment treaties.

5. After discussion, the Commission requested the Secretariat to review how the project described in document A/CN.9/890 might be best carried forward, if approved as a topic of future work at the forthcoming session of the Commission, taking into consideration the views of all States and other stakeholders, including how this project might interact with other initiatives in this area and which format and processes should be used. In so doing, the Secretariat was requested to conduct broad consultations.[6]

6. Accordingly, the Secretariat circulated a questionnaire to States and regional economic integration organizations. The replies to the questionnaire are reproduced in document A/CN.9/918 and its addenda.

7. The Secretariat organized jointly with the CIDS a meeting with a view to consulting experts from governments and inter-governmental organizations.[7] Meetings are also planned for the purpose of collecting views from investors.[8] In addition, the Secretariat attended or monitored conferences where the matter was discussed.[9]

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[4] The CIDS report is available on the Internet at: http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[5] The term "investor-State dispute settlement ("ISDS") regime" is used in this note to refer generally to the use of arbitral tribunals established under the Rules of UNCITRAL, ICSID or other arbitral institutions, to solve a dispute between an investor and a State. While investor-State arbitration provisions show variations across different investment treaties, they normally provide for the following features: (i) the claimant-investor may bring a claim directly against the respondent-State; (ii) the dispute is heard by an arbitral tribunal constituted to hear that particular dispute; and (iii) disputing parties, including the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal.

[6] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 187-194.

[7] The meeting was held under the auspices of the Swiss Government; the agenda and the presentations made during the meeting are available on the Internet at: http://www.cids.ch/events-2/past-events/634-2/.

[8] The meetings, including with the Organization for Economic Cooperation and Development (OECD) and the International Chamber of Commerce are scheduled to be held after the date of submission of this note.

[9] For instance, 5th Asia Pacific ADR Conference, Seoul, Republic of Korea, 12-13 October 2016; King's College London, Workshop on "Multilateral Investment Tribunal", London, United Kingdom of Great Britain and Northern Ireland, 21 October 2016; United Nations International Law Week, Panel on "Reforming Investor-State Dispute Settlement System: the Way Forward", New York, United States of America, 24 October 2016; UNCITRAL's 50 Years, Global Standards for Rule-based Commerce, New Delhi, India, 28-29 November 2016; EU/Canada High Level Experts Meeting, Geneva, Switzerland, 13 December 2016; Vienna Arbitration Days, "Repositioning Arbitration", Vienna, Austria, 24-25 February 2017; and the Joint UNCITRAL-LAC Conference, Ljubljana, Slovenia, 4 April 2017.

8. In order to assist the Commission in its further consideration of the matter, this note provides an insight on the consultation process undertaken by the Secretariat regarding possible reforms of the ISDS regime. The Commission may wish to note that it will also have before it an additional report from the CIDS, addressing the selection and appointment of members of international courts and assignment of individual cases to members.

II. Possible reforms of investor-State dispute settlement (ISDS)

A. Rationale for reforms

Current ISDS regime and criticisms

9. During the consultation process, key elements of the current ISDS regime and its origin were underlined. In particular, it was recalled that the ISDS regime had been developed to allow a foreign national (whether an individual or a company) to bring a claim directly against a sovereign State, in a significant break from traditional mechanisms which were essentially founded on the institution of diplomatic protection. Importantly, the ISDS regime resulted in the "de-politicization" of investment disputes and effectively removed the risk of such disputes escalating into inter-State conflicts.[10]

10. Also, the ISDS regime was created within the broader context of the development of investment treaties as a means to enhance confidence in the stability of the investment environment. A growing number of investment treaties have been concluded by States over the last decades and more than 3,000 investment treaties are currently in force. In parallel, there have been a growing number of ISDS cases. According to the information collected by UNCTAD, there are currently 767 known ISDS cases, with 62 new known treaty-based cases initiated in 2016.[11] Over time, States have become more familiar with the current ISDS regime, and have organized themselves to better respond to investors' claims. The current ISDS regime has therefore been, and continues to be, widely used for solving disputes in a neutral and flexible manner between investors and States.

11. However, the current ISDS regime has recently attracted strong and growing criticisms in various parts of the world. Concerns are diverse, but generally relate to the method of appointing arbitrators, and the impact of such methods on arbitrators' independence and impartiality; the lack of coherence of a system based on decisions made by tribunals constituted to hear a specific case (also referred to as "ad hoc" tribunals), and the lack of corrective mechanisms (i.e., the lack of appropriate control or review mechanisms); the length and costs of the proceedings; and the lack of transparency.[12]

12. During the consultation process, it was reiterated that criticisms of the current ISDS regime in essence reflect concerns about the democratic accountability and legitimacy of the regime as a whole. While States themselves have established that regime and, therefore, their consent ensures its legitimacy under international law, this may not necessarily be how States and/or their constituencies perceive it.[13]

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[10] See also the CIDS report, paras. 8-14, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[11] The Commission may wish to note that UNCTAD developed an online tool which provides comprehensive information on investment treaties, as well as on ISDS, available on the Internet at: http://investmentpolicyhub.unctad.org/IIA and http://investmentpolicyhub.unctad.org/ISDS.

[12] See also the CIDS report, para. 22, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[13] Ibid., paras. 15-23.

13. In that context, it was underlined that the public perception of any reform process was key to its success, and that communication should be handled adequately should any reform project be undertaken at a multilateral level.

Reform of the dispute settlement regime versus reform of the substantive investment protection standards

14. Comments were made during the consultation process that an inclusive approach might be necessary, requiring not only a reform of the ISDS regime but also of the substantive rules of investment protection. On that matter, suggestions were made that a phasing approach would be preferable in order to make progress. A reform focusing as a first step on ISDS was seen as more likely to be successful. Consideration of the substantive standards would most probably entail a different and more complicated process, and give rise to controversies on which and how substantive protection standards should be reformed.

15. As highlighted by commentators, it can be expected that a reform of the existing ISDS regime, in particular if it were to establish a permanent dispute settlement body and/or an appellate body, would bring more coherence as compared to the current system of ad hoc arbitral tribunals. On that point, the CIDS report highlights that even so, no absolute uniformity would be achieved, because the substantive standards on investment would continue to be anchored in different investment treaties. However, consistency would be reached in the application of the same investment treaty and of different investment treaties with identical or nearly identical wordings. Furthermore, even when applying differently worded provisions in investment treaties, it would be expected that a permanent dispute settlement body's and/or appellate body's pursuit of consistency would be greater as a natural consequence of the in-built elements of tradition, continuity and collegiality, which are inherent in permanent bodies as opposed to ad hoc bodies.[14]

Questions for consideration

16. The Commission may wish to note the following questions that might require further consideration regarding the rationale for a reform of the current ISDS regime:

(i) What would be the aim of a reform (for instance, to address legitimacy concerns, lack of consistency in decision-making, lack of a review mechanism, methods for appointing arbitrators, arbitrators' independence and impartiality, and/or length and cost of the procedure); what elements to preserve from the current ISDS regime (for instance, neutrality i.e. distance of the adjudicators from politics and from business interests; enforceability of the decisions; and the manageability and workability of the process);

(ii) Whether to proceed with a reform of the ISDS regime in conjunction with, or separately from, a reform of substantive investment standards;

(iii) Whether a reform should aim at making adjustments to the current ISDS regime (see paras. 17 to 28 below), whether such adjustments would be feasible and would be sufficient to respond to the legitimacy concerns that have been expressed (see para. 11 above);

(iv) If establishing a permanent international dispute settlement body would be the preferred choice for a reform (see paras. 29-57 below), what would be the articulation between the new body and the current ISDS regime.

[14] Ibid., para. 73.

B. Options for reforms

1. Adjustments to the current ISDS regime

(a) Characteristics of the current ISDS regime

17. Many observed during the consultation process that there is currently a legal framework in place to deal with investment disputes unlike in the mid-sixties when the International Centre for Settlement of Investment Disputes (ICSID) was created, and the investment arbitration framework was still being developed. Therefore, it was mentioned that any reform of ISDS should address its articulation with such framework. The current ISDS framework is characterized by the use of arbitral tribunals established ad hoc to solve a dispute between an investor and a State under the arbitration rules of UNCITRAL, ICSID or of other arbitral institutions. Under that framework, both disputing parties, i.e. the claimant-investor and the respondent-State, play an important role in the selection of the arbitral tribunal. Awards rendered by the arbitral tribunals are final and binding, and can be set aside under the annulment procedure provided for by the ICSID Convention for ICSID awards, and according to setting aside procedures at the place of arbitration for non-ICSID awards. ICSID awards can be enforced through a self-contained system provided for in the ICSID Convention, and non-ICSID awards can be enforced under available instruments, mainly the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958, New York) ("New York Convention"). The ICSID Convention as well as the New York Convention have been widely ratified.[15]

18. In light of the criticisms to the current ISDS regime (see para. 11 above), some adjustments have been recently implemented. New transparency standards have been adopted by ICSID in 2006, and UNCITRAL in 2013.[16] The Mauritius Convention on Transparency, open for signature since March 2015 and due to enter into force in October 2017, aims at applying the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") to investment treaties concluded before the coming into force of these Rules in April 2014. The Rules on Transparency have been incorporated in almost all investment treaties concluded since their coming into force.[17] It is foreseeable that the transparency standards will allow for a better understanding of the interpretation given by arbitral tribunals to investment standards, and will over time have the effect of enhancing consistency of decisions made by arbitral tribunals.

19. Further means to address criticisms to the current ISDS regime include the possible set-up of a stand-alone appellate body, as well as adjustments regarding the appointment procedures and ethical requirements for arbitrators.

(b) Possible adjustments

(i) Questions regarding the setting up of a stand-alone appellate body

20. A reform option which would consist in the creation of an appellate body would result in the current ISDS regime maintaining most of its basic features, while being complemented with an appeal mechanism. A standing or at least semi-permanent appellate body as opposed to ad hoc arbitral tribunals would pursue coherence and consistency across separate investment treaties. That is the reason why an appeal mechanism is often cited as a possible response to demands for greater

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[15] 161 States are party to the ICSID Convention and 157 States are party to the New York Convention.

[16] In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") together with a new article 1(4) of the UNCITRAL Arbitration Rules (as revised in 2010). The Rules on Transparency, which came into effect on 1 April 2014, comprise a set of procedural rules that provides for transparency, and for accessibility to the public of treaty-based investor-State arbitration.

[17] The status of the Mauritius Convention and the Rules on Transparency is available on the Internet at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html and http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.

consistency in the decisions of investor-State arbitral tribunals, as well as legal correctness.[18]

21. Despite the fact that most arbitration regimes emphasize the finality of the awards thus prohibiting appeals, there are nonetheless examples of institutional arbitration regimes that provide for appellate review of arbitral awards.[19] As reported in the responses to the questionnaire circulated by the Secretariat to States and regional economic integration organizations, under some national arbitration laws, parties may agree on a two-level arbitration process, and there is no suggestion that the presence of an appeal makes the process different from arbitration.[20] This reform option would therefore not be completely alien to the current arbitration system.

22. During the consultation process, it was mentioned that there are challenges associated with setting up an appellate body to review the decisions of ad hoc tribunals. Two risks associated with the presence of an appeal mechanism have in particular been identified. First, if appeals were possible, they might become the norm, as States and investors who have lost a case would most probably file an appeal, be it only for reasons of internal accountability. Second, appeal may lead to a duplication of the arbitral process itself in terms of duration, cost, and complexity. This could prove detrimental for States and investors with limited resources.

23. Another matter that would deserve consideration is the relationship between an appellate body and the ICSID Convention, which excludes any appeal or other remedy, except for those provided for in the Convention itself (Article 53).

24. The Commission may wish to consider the following matters with regard to the establishment of an appellate body:

(i) Whether a single appellate body should be created to hear appeals against awards irrespective of the rules applied, and the extent to which this would be feasible; how to endow jurisdiction to the appellate body;

(ii) The composition of the appellate body: for instance, how should adjudicators of the appellate body be appointed; what procedures should be used to avoid conflicts of interest; what role should the disputing parties play, if any, in selecting the adjudicators or designing the procedures;

(iii) Grounds for appeal: in particular, should the grounds for appeal encompass both (clear/serious/manifest) errors of law and errors in the finding and/or assessment of facts, or alternatively be restricted to such errors of law; what should the standard of review be (i.e. should there be any measure of deference or a de novo review); whether there should be any remand power of the appellate body to the arbitral tribunal and, if so, how should it be delineated;

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[18] See the CIDS report, paras. 189 and 283; also, the CIDS report notes in its para. 188 the following: "It is to be expected that even in the absence of a multilateral regime of substantive investment protection, a single multilateral Appeal Mechanism would 'develop a body of legally authoritative general principles' which would transcend the single IIA at issue. The Appeal Mechanism's broader 'vision' on certain issues (does MFN apply to dispute settlement? what are the limits of fair and equitable treatment (FET) clauses? is an expropriation rendered unlawful by mere lack of payment of compensation?, just to name a few) would likely permeate the regime [of investment treaties] beyond the specificities of a particular treaty."; the CIDS report is available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[19] See, for instance, Arbitrators' and Mediators' Institute of New Zealand (AMINZ) (2009), Arbitration Appeal Rules (2009); American Arbitration Association (AAA) (2013), Optional Appellate Arbitration Rules; JAMS (2003), Optional Arbitration Appeal Procedure; International Institute for Conflict Prevention and Resolution (CPR) (2015), Arbitration Appeal Procedure; European Court of Arbitration (ECA) (2015), Arbitration Rules, Article 28; in the commodity sector, see the Grain and Feed Trade Association (GAFTA) (2014), Arbitration Rules No. 125, Articles 10-15; in sport-related matters, "[a]n appeal may be filed with Court of Arbitration for Sport (CAS) against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned"; see CAS Code, R47(2).

[20] See A/CN.9/918, and its Addenda.

(iv) Whether the decisions of the appellate body would be binding on the disputing parties only or whether a principle of law stated in the decisions of the appellate body would constitute a precedent;

(v) The relationship of the appellate body with existing annulment mechanisms;

(vi) Specific enforcement issues in relation to the creation of an appellate body to supplement the existing ISDS regime; and

(vii) Whether the seat of the appellate body would differ from that of the arbitration of first instance; in the affirmative, what criteria would be used to determine the choice of seat.

(ii) Questions regarding alternative methods for appointing arbitrators and code of conduct

Appointment of arbitrators

25. Consultations have shown that one of the main criticisms to the existing ISDS regime relates to the appointment of arbitrators by the parties, the lack of diversity in the appointment of arbitrators and the absence of transparency in the appointment process. A further possible adjustment to the current ISDS regime could consist in setting up a new mechanism for appointing arbitrators, which would come closer to a court system where the disputing parties do not choose the adjudicators.[21]

26. Possible options for setting up a new appointment procedure system under the current ISDS regime could be envisaged. For example, whether the parties could agree to refer to a pre-established group of arbitrators under article 37 of the ICSID Convention and its Additional Facility Rules and whether article 6 of the UNCITRAL Arbitration Rules and its system of designating and appointing authorities could allow for adjustments to the appointment process are elements for further consideration.

27. A question raised during the consultations was whether a procedure whereby parties would not have the right to appoint the arbitrators would still qualify as arbitration for enforcement purposes under existing instruments. On that matter, the CIDS report highlights that the most important element in qualifying a procedure as arbitration is that recourse to the procedure is based on an agreement between the State and the investor. That consent usually encompasses the acceptance of the arbitrators' selection method provided for in the applicable instrument.[22]

Code of conduct

28. Recently concluded investment treaties have included a code of conduct for arbitrators, in order to ensure respect of high ethical and professional standards. It may be noted that such codes define procedures to follow in order to ensure that any situation that could give rise to real or perceived conflicts of interest would be fully disclosed. Such codes also include concrete steps to determine whether a conflict of interest could arise or has arisen. The Commission may wish to note that the preparation of a code of conduct is also one of the items on its agenda for consideration as possible future work (see document A/CN.9/916).

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[21] The appointment process of arbitrators in the current system is based on party autonomy. Regarding appointment of arbitrators in relation to specific arbitration cases, the norm is party appointment coupled with a default appointing mechanism. Reports show that parties appoint arbitrators in 75 per cent of cases under the Rules of ICSID, and that the default mechanism whereby an institution will appoint the arbitrator is mainly used for the appointment of the presiding arbitrator. As reported by the Permanent Court of Arbitration at The Hague ("PCA"), a list procedure is sometimes used for the appointment of arbitrators when the UNCITRAL Arbitration Rules apply; see presentations made during the consultations at the joint CIDS – UNCITRAL meeting on 2 and 3 March 2017, available at http://www.cids.ch/events-2/past-events/634-2/.

[22] See the CIDS report, paras. 81-99, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

2. Setting up of an international investment court

29. A more radical option for reform would consist in the creation of an international investment court, which would be a permanent body, composed of tenured (or semi-tenured) members tasked with resolving investment disputes. Based on past and recent developments,[23] that option for reform has also been explored during the consultation process. It would consist in the establishment of a truly multilateral dispute settlement mechanism, resulting in the creation of an international investment court (also referred to as "international tribunal for investments" or "international dispute settlement body"). Such a court would generally be established through a founding legal instrument, the statute (referred to below as the "statute"), to which States would become party.

30. Such an international investment court could either be based on a two-tier adjudicative system with a built-in appeal or without one. The presence of a built-in appeal in that scenario must not be confused with the setting up of an appellate body mentioned above in paras. 20 to 24, which addresses the creation of an appeal mechanism for awards rendered in the current ISDS regime. The setting up of an international investment court would constitute a departure from the current ISDS regime. In short, an international investment court would bring key features of domestic and international courts to the settlement of investment disputes. A multilateral process to set up such a court would aim at ensuring coherence of the reform efforts, and address the fragmentation of the current regime.

31. During the consultation process, the following views were expressed by some regarding the establishment of an international investment court:

(i) An international investment court should (a) handle disputes arising under both existing and future investment treaties; (b) provide for transparency; (c) strike a proper balance between the protection of investors and the preservation of governments' right to regulate; and (d) provide for an efficient mechanism to solve disputes; in that context, a built-in appeal mechanism was seen as more efficient taken into consideration the public policy issues usually addressed in those cases, even if it could prolong the proceedings;

(ii) An international investment court might need to include (a) mechanisms for ensuring early dismissal of unfounded claims; (b) a possibility for encouraging parties to solve their dispute through mediation; and (c) a mechanism to cater for possible counter-claims by respondents; in that context, it was mentioned that such a court should permit consolidation of cases, and allow to better manage the relationship between procedures at the domestic level

[23] The last decade has evidenced strong debate on, and repeated calls for, the creation of permanent bodies within the investment treaty regime, both in the form of an appeal mechanism and in the more radical replacement of ISDS with a permanent dispute settlement body: See generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIA II*, p. 192; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap, Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 8; See also generally UNCTAD (2014), *Investor-State Dispute Settlement: A Sequel, Series on Issues in IIAs II*, p. 194; UNCTAD (2013), *Reform of Investor-State Dispute Settlement: In Search of a Roadmap Special issue for the Multilateral Dialogue on Investment*, International Investment Agreement Issues Note, No. 2, p. 9. The most significant of these proposals include attempts by the International Centre for Settlement of Investment Disputes (ICSID) [see ICSID Secretariat (2004*)*, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, p. 5] and the Organization for Economic Co-operation and Development (OECD), as well as the programmatic language contained in a number of investment treaties [see, for instance, Canada-Korea Free Trade Agreement, 1 January 2015, (Annex 8-E)], and the pioneering innovations towards the creation of permanent investment bodies in recent investment treaties [see, for instance, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) (Chapter 8 Section F); or the European Union-Vietnam Free Trade Agreement (Chapter 8.II Section 3)]; Both the EU-Canada Comprehensive Economic Trade Agreement (CETA) and the EU-Vietnam Free Trade Agreement foresee setting up a permanent multilateral mechanism and contain a reference to it.

and remedies that can be obtained through international proceedings, thereby limiting instances of concurrent proceedings.[24]

32. During the consultation process, the main elements of an international investment court were considered. They include questions regarding adjudicators, review mechanisms, enforcement, and costs of its establishment and operation.

(a) Questions regarding adjudicators

33. The consultations covered the questions of composition and structure of an international investment court with the purpose to review in more detail issues relating to the appointment of adjudicators, and ethical and nationality requirements. In the following, a distinction should be made between the way adjudicators are elected as members of an international investment court and the way those adjudicators are appointed or assigned to a panel to decide a specific dispute.

34. During the consultations, it was underlined that the selection process of adjudicators should be transparent, rigorous, susceptible of being clearly monitored by all stakeholders in order ensure legitimacy and gain public confidence. The election and appointing process ought to take account of the independence and impartiality of the adjudicators, their nationality, as well as of the possibility of investors' input or involvement in the election and appointment process (see para. 36 below). Additional features to be considered in that process include the expertise and experience of the adjudicators, as well as the geographical and gender balance. A matter highlighted during the consultations was that in order to ensure their integrity, the elected and appointed adjudicators should generally be restricted from conducting other ISDS-related activities which could raise conflict of interest issues.

35. The criteria to determine the overall number of adjudicators at the international investment court include the expected number of cases,[25] and the need to ensure proper representation of various legal systems and States Parties. Costs and infrastructure are also salient issues that will have a practical impact on the workability of an international investment court (see paras. 51-57 below).[26]

36. Questions were raised whether only States would participate in the election process or whether a consultation with business organizations, i.e. organizations representing the interest of the investors should be considered in order to avoid that only or mainly "pro-State" adjudicators are selected, in particular if the system were to be funded by States entirely. It was underlined that States were both hosting investments and home State of investors, and would therefore take account of the interests of both when electing adjudicators.

37. Regarding the assignment of disputes to adjudicators, two different models were discussed. Under a first model, a roster of adjudicators would be formulated, from which the disputing parties could choose to constitute the tribunal or panel. That approach would keep some features of party autonomy. Under the alternative model, the disputing parties would have no say in the constitution of the panel hearing their dispute.

38. The Commission will have before it a report from CIDS providing information on the matter, including examples from existing international bodies regarding the number of judges composing such bodies,[27] the various nomination and selection

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[24] The Commission may wish to note that the question of concurrent proceedings in investment arbitration is a topic on its agenda for possible future work (see A/CN.9/915).

[25] ICSID provided the following information: there are currently around 70 new ICSID cases per year, 34 per cent of the cases being discontinued before an award is rendered and the average length of a case is 3 years.

[26] The various elements to consider regarding the term of office of an adjudicator are discussed in the CIDS report (see para. 170), available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[27] For instance, the European Court of Human Rights (47 judges), the European Court of Justice (28 judges), the International Tribunal on the Law of the Sea (21 judges), the International Court of

processes,[28] the term of an adjudicator's office (and the possibility of re-election),[29] number of adjudicators on a panel[30] and methods of assigning cases.

39. The Commission may wish to consider the following matters with regard to adjudicators of an international court:

(i) The election process of adjudicators of an international investment court (whether they should be elected by States or through a different mechanism possibly involving some consultation/participation of investors); the number of adjudicators of an international investment court including where a roster is maintained;

(ii) The number of adjudicators for a panel or division; appointment methods for adjudicators to a particular panel or division (whether there should be a roster from which disputing parties can choose);

(iii) Whether there should be any nationality restrictions;

(iv) The mechanism that could be envisaged to account for increasing membership of the international investment court.

(b) Questions regarding review mechanisms

40. Consultations also covered the question of control mechanisms in respect of decisions to be made by an international investment court, in particular annulment and appeal, and the alternative options, such as preliminary rulings, *en banc* determinations and consultation mechanisms. It was generally considered that a review mechanism should aim at striking a balance between the need for an efficient dispute settlement mechanism and the protection of the correctness of the decision-making.

41. According to some views expressed during the consultations, annulment is a control mechanism typically associated with arbitration, but if an international investment court were to be set up as a permanent body, then a control mechanism akin to an appeal could be more appropriate and might more likely contribute to addressing the criticisms of the current ISDS regime.

42. Regarding a built-in appeal mechanism, questions that would require careful consideration include whether the review should be limited to review of issues of law, or also encompass the assessment of the facts, and what the standard of review should be. An appeal system could have different purposes, including ensuring correctness of the decisions, legitimacy of the system, and consistency of decisions. A number of recurrent issues under treaties could also be addressed systematically through an appeal mechanism.

43. During the consultation process, alternative means to ensure the correctness and consistency of decisions were presented, mainly: (i) preliminary rulings, (ii) "en banc" determinations, and (iii) consultations mechanisms.[31] The preliminary ruling procedure addresses inconsistency ex ante, rather than ex post, as is the case with

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Justice (15 judges), the Iran-United States Claims Tribunal (9 arbitrators), the Appellate Body of the World Trade Organization (7 members).

[28] For instance, nomination by contracting States (International Tribunal on the Law of the Sea), or by other constituencies (International Court of Justice).

[29] For instance, the European Court of Human Rights (9 years, non-renewable), the European Court of Justice (6 years, renewable once), the International Tribunal on the Law of the Sea (9 years, renewable), the International Court of Justice (9 years, renewable once), the Appellate Body of the World Trade Organization (4 years, renewable once).

[30] For instance, chambers of 15 to 17 judges at the International Court of Justice; chambers of 7 or 17 judges at the European Court of Human Rights; chambers of 3, 5 or 15 judges at the European Court of Justice; chambers of 3 or the full tribunal of 9 arbitrators at the Iran-United States Claims Tribunal; the Appellate Body of the World Trade Organization, composed of 7 members, sits in formations of 3, but exchanges views on cases among all members and benefits from strong institutional support in the preparation of the decisions (see also para. 175 of the CIDS report).

[31] See also the CIDS report, paras. 125-137, available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

appeals. However, it was felt that preliminary rulings would be useful to ensure consistency, but would not be sufficient to fix correctness of the decisions. It was suggested that preliminary rulings could be combined with other review mechanisms, such as appeal or annulment. Other mechanisms include transferring a particular case from a division to the plenary tribunal for final determination. Several domestic legal systems provide for such mechanisms when issues of coherence and consistency of the law are at stake.[32]

44. The Commission may wish to note that the CIDS report contains analyses of the usual control options, annulment and built-in appeal (with relevant questions, such as the appellate tribunal's composition, the grounds of appeal and standards of review, the effect of the appellate decision, and the binding nature of the decision). It also considers the alternatives to a built-in appeal system.[33]

45. Specific questions on annulment and appeal as well as alternative systems of control include the following:

(i) What are the main purposes and usefulness of control mechanisms;

(ii) Regarding annulment, whether annulment would be better conducted through a self-contained built-in system; if so, what are the procedural aspects to be considered, including grounds for annulment;

(iii) Regarding built-in appeal, how would an appeal mechanism interact with annulment (if provided for); when and under what conditions could a request for appeal be filed; what would be the grounds for appeal (in particular, should the grounds for appeal encompass both (clear/serious/manifest) errors of law and errors in the finding and/or assessment of facts, or alternatively be restricted to such errors of law; what should the standard of review be (i.e. should there be any measure of deference or a de novo review; which decisions could be appealed); whether there should be any remand power of the appellate body to the arbitral tribunal and, if so, how should it be delineated;

(iv) Regarding alternatives, what mechanisms may be considered; which of them would best serve the purpose; how would these alternative mechanisms relate to the annulment of awards; how could they best be applied to the new regime.

(c) Questions regarding enforcement

46. Enforcement of the decisions of an international investment court is essential to ensure the effectiveness of the system. Two different situations have been considered: enforcement of a decision of an international investment court in the territory of a State that consented to its statute, and enforcement in States not party to the court's statute.

47. With regard to enforcement of decisions of an international investment court in the territory of a State that would have consented to its statute, there are two possible options. The first option would be to provide in the statute a special enforcement regime, for instance obliging a Contracting State to recognize a decision of the international investment court as binding and enforce the obligations arising therefrom as if it were a final judgment of its courts. A second option would be to provide that decisions of the international investment court are enforceable pursuant to the New York Convention, under which States would retain some control over the decision through the grounds for non-recognition and non-enforcement as provided for in article V of the Convention.[34]

48. States not party to the statute would not be bound by any enforcement regime provided therein. There is currently no uniform regime for the enforcement of judgments of international courts, and in most States, there is currently no statutory

[32] Ibid., para. 132.
[33] Ibid., paras. 105-137.
[34] CIDS report, para. 140.

basis or judicial mechanism for enforcing such judgments.[35] Therefore, enforceability of decisions by an international investment court would largely depend on whether its decisions would fall within the scope of the New York Convention.[36]

49. The CIDS report addresses in detail the question of enforcement of decisions of an international investment court.[37] It discusses whether a permanent dispute settlement body would qualify as a "permanent arbitral body" under the New York Convention, either under the "ordinary meaning" of article I(2) of the New York Convention or under an "evolutionary interpretation" of the phrase which would take account of developments in international law and arbitration since 1958. When discussing whether the process under an international investment court would qualify as "arbitration", the consensual basis of the adjudicator's jurisdiction was identified as a key criterion, which would be met with regard to the new dispute resolution process (see para. 27 above). Further, it seems established that "delocalized" awards, in particular those made under the ICSID Convention, can be enforced under the New York Convention regime when recognition/enforcement is sought in a non-ICSID Contracting State.

50. The questions that would deserve preliminary consideration regarding that matter are as follows:

(i) Whether the statute of an international investment court should include a specific enforcement regime;

(ii) How could decisions of an international investment court be enforced in States that would not be party to its statute; in particular, what would be the role of domestic courts in enforcing decisions of the international investment court;

(iii) If the international investment court would not have a specific enforcement regime, what would be required so that its decisions could be enforceable under the New York Convention; would a built-in appeal mechanism affect the enforceability of the decisions of an international investment court through the New York Convention.

(d) Questions regarding costs

51. During the consultation process, a number of considerations underpinning the financing of an international investment court or a stand-alone appellate body discussed in the CIDS report were outlined. While the features of the court and the appellate body would determine the financial resources required, it would mostly be the case that the financial resources available would determine the design and structure of the court and appellate body.

52. At the current stage, it is not possible to come up with an estimate figure due to the possible variations and uncertainty about how a new system would operate.[38] The underlying objective of the reform, the scope and legal basis of the disputes, key functions of the system, whether the system would attempt to replace existing mechanisms or co-exist, the number of disputes expected to be handled, working language and provisions of other dispute resolution services are some of those variations, which could have an impact on the budget structure of the system.

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[35] See A/CN.9/915 and Addendum, responses to question 6.

[36] CIDS report, para. 143.

[37] CIDS report, paras. 138-164.

[38] During the consultation process, some figures relating to the International Tribunal for the Law of the Sea (ITLOS) and the World Trade Organization (WTO) Appellate Body were provided, which provided a comparison on (i) the number of judges or members; (ii) budget allocated for the remuneration of the judge or members; (iii) budget and the structure (including the number of staff members) of the Registry and the Secretariat; (iv) the governing body (Meeting of the States Parties (UNCLOS) or the Dispute Settlement Body) and the entity providing secretariat services to that body; (v) location of the premises and relevant arrangements with the host country; (vi) number of State members contributing to the budget and key contributing States. Comparison with ITLOS and the WTO Appellate Body might not be as relevant as those institutions only dealt with inter-State disputes. Presentations on the topic are available on the Internet at http://www.cids.ch/events-2/past-events/634-2/.

53. During the consultation process, two options were presented regarding the establishment of an international investment court. One possibility would be to design the system as an add-on to the current ISDS regime or under the auspices of an existing institution. Such an approach would allow the use of existing resources for the preparation and initial set-up, saving costs. This would essentially require the approval by the existing regime or institution constituents for an additional mandate and that, in any case, would require additional financial resources.

54. Another possibility is that an international investment court would be established independently from any existing mechanism or institution. In such a case, it could be conceived that States that have consented to the statute of an international investment court would generally be responsible for the financing of the court (the same applies to a permanent appeals body). Questions to be considered include how best to allocate the budget among those constituent States, noting that not all States might be joining at the initial stages of establishment and that the number of investment treaties concluded by States as well as claims brought against those States differ to a substantial degree.

55. An alternative would be that the users of the system, including claimant-investors should be charged a fee, which would contribute to the financing of the system. The fee to be charged to users could vary, from covering the minimal cost of administration to an amount which would allow the system to cover a significant portion of its budget. The latter approach was seen as potentially useful to discourage frivolous claims by investors. In that context, it was also mentioned that one of the criticisms about the current system was that the tribunal members were being selected and paid by the parties, and therefore the funding of any new system should be set up so as to guarantee the independence and impartiality of the adjudicators. During the consultation process, it was also discussed whether an international investment court would address the legal costs of the disputing parties, as such costs constitute a significant portion of the overall costs of the current ISDS regime. Some recent investment treaties include provisions on the matter.[39]

56. As to the budget structure of the system, three broad items were identified during the consultation process. The first item is the remuneration of the adjudicators, which would depend on a number of variables like the number of adjudicators, their employment status (fully-employed, part-time, on-call) and their salaries, privileges and immunities including tax benefits and pension. The second item was the financing of the registrar or secretariat. Again, the budget would vary depending on the number of staff, their employment status and their salary structure as well as the services to be provided. The third item was operating facilities, which would cover the premises, costs of maintenance, security, information and communication and others.

57. In that context, the possibility of any new body having regional offices to give better access was mentioned. In addition, the establishment of an advisory centre to support developing countries in investment disputes was mentioned. The budget for such an advisory centre, which would greatly assist developing countries, could be part of, or be separate from, the overall budget of the system.

C. Applicability of reforms

58. A third element that was considered during the consultation process is the question of the applicability of the reforms to disputes that would arise under existing investment treaties. The options for reforms envisaged in this section are the creation of a stand-alone appellate body (see paras. 20-24 above) or the creation of an international investment court (see paras. 29-57 above).

59. The questions considered are whether a multilateral mechanism, possibly modelled on that of the Mauritius Convention on Transparency, could be envisaged

[39] For instance, the CETA and EU-Viet Nam Free Trade Agreements provide that it is for the losing party to pay the costs; in comparison, in the case of permanent international tribunals for inter-State disputes, the general principle is that each party bears its own costs.

in order to extend the new dispute resolution options to disputes arising under existing investment treaties and, if so, the legal issues to be considered.

60. Precedents for modifying bilateral treaties with a multilateral instrument exist in a number of areas of public international law. For instance, the OECD study, entitled "Developing a Multilateral Instrument to Modify Bilateral Tax Treaties" (the "OECD study")[40] notes that "there have been a number of situations in which States have adopted multilateral conventions in order to introduce common international rules and standards and thereby harmonise a network of bilateral treaties, for example, in the area of extradition".[41]

61. Document A/CN.9/890 and the CIDS report provide an insight on questions to be considered if an approach similar to that of the Mauritius Convention were to be adopted for the implementation of reforms. In short, this approach would relieve States from the burden of pursuing potentially complex and long amendment procedures set forth in their numerous existing investment treaties. Indeed, a mechanism implementing reforms, modelled on the Mauritius Convention, would render the innovations directly applicable to existing investment treaties for those States that wish to embrace such innovations.

62. Furthermore, a multilateral mechanism modelled on the Mauritius Convention approach could allow a reform to begin as a plurilateral project, with the possibility for other States joining at a later stage, whenever they consider it appropriate. This, too, would strengthen the chances for success of such reform.

63. A procedural reform of ISDS could lead to an amendment/modification of the ISDS provisions in the existing investment treaties, in particular where a reform would aim at replacing existing ISDS mechanisms by a new one. In that case, attention should be given to provisions on amendment/modification of investment treaties.[42]

64. Following the Mauritius Convention approach, if such a reform project were to be implemented, the first task could consist in determining the features of the reforms to be implemented. This step would reflect what was done in respect of transparency, where the content of the new transparency provisions was first agreed in the Transparency Rules. The second, logically subsequent step would consist in determining the relevant mechanism which would accomplish the extension of the reforms to existing investment treaties.

65. Moreover, if reforms were implemented, mechanisms could be envisaged to allow for a level of flexibility regarding States' commitments. In this respect, it should be noted that the Mauritius Convention allows for a limited number of reservations and that a similar approach could be adopted with regard to the reform project.

66. Within agreed boundaries, States could modulate the degree of their involvement in the reforms by making appropriate reservations or opt-in/opt-out declarations. These possibilities would accommodate specific concerns or objectives of States.

III. Concluding remarks

67. The Commission may wish to consider whether work should be undertaken on the question of ISDS reforms. In its consideration of the matter, the Commission may wish to note that various initiatives are currently on-going in that field. ICSID has launched a consultation process on a possible reform of its rules.[43] Canada and the European Union, which have set up a new court system in a recently concluded comprehensive economic and trade agreement, have held consultations on a possible

[40] OECD (2015), *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 — 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing.
[41] Ibid., p. 31, para. 14.
[42] See A/CN.9/918 and Addendum, question 5.
[43] See available information on the website of ICSID, at https://icsid.worldbank.org/en/.

reform of ISDS.[44] Organizations that have taken part in the consultation process carried out by UNCITRAL, and are active in the field include, in addition to ICSID,PCA, UNCTAD and OECD. The need for reforms has been acknowledged in various fora specialised in investment policy (such as UNCTAD, OECD and the World Bank). As underlined in certain studies, international investment dispute settlement plays an important role in attracting investments and in strengthening confidence in the investment environment. It is therefore essential to ensure that the resolution of investment disputes is carried out effectively, and that those involved in, or affected by, such disputes have confidence in the system.

68. During the consultation process, it was underlined that efforts to proceed with a reform of the current ISDS regime should be transparent, undertaken on a multilateral basis in order to avoid fragmentation, and should provide the opportunity for non-State actors to give their views. It was generally expressed that the reform process should be the result of an inclusive and collective effort that would permit input from States with different levels of economic development and legal traditions. The importance of handling communication appropriately in relation to any reform process was also underlined.

69. During the consultation process, examples of international courts set up under the auspices of the United Nations were mentioned, for example, the International Criminal Court (ICC),[45] and the International Tribunal for the Law of the Sea (ITLOS).[46]

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[44] See the questionnaire of the EU on options for a multilateral reform of investment dispute resolution, available on the Internet at http://trade.ec.europa.eu/consultations/index.cfm?consul_id=233.

[45] In that context, it may be interesting to note the processes that lead to the creation of the International Criminal Court. In 1994, the International Law Commission (ILC) adopted a draft statute of the international criminal court and recommended that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court. In the same year, the General Assembly established an Ad Hoc Committee open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by ILC and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries (resolution 49/53). In 1995, the Ad Hoc Committee recommended further work, including on redrafting the text of the draft statute prepared by ILC. The General Assembly established the Preparatory Committee, open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to discuss further the major substantive and administrative issues arising out of the draft statute prepared by ILC (resolution 50/46). The Preparatory Committee worked until 1998. In 1998 the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held. The Secretariat prepared the text of the draft rules of procedure of the Conference and established trust funds for the participation of the least developed countries and developing countries in the work of the Preparatory Committee and in the Conference.

[46] The United Nations Convention on the Law of the Sea, which includes the Statutes of ITLOS in Annex VI, was negotiated from 1973 to 1982, opened for signature in 1982 and entered into force in 1994 (after 60 ratifications). Judges were elected in August 1996, with the first case submitted to ITLOS in November 1997.

G. Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

(A/CN.9/918 and Add.1-10)

[Original: English]

Contents

I. Introduction

1. At its forty-ninth session, in 2016, the Commission considered a research study carried out by the Secretariat in conjunction with the Center for International Dispute Settlement (CIDS) of the University of Geneva and the Graduate Institute of International and Development Studies.[1] The CIDS research study, briefly outlined in document A/CN.9/890, seeks to provide a preliminary analysis of the issues that would need to be considered if a reform of the investor-State dispute settlement system were to be pursued at a multilateral level and to map the main options available in reforming investor-State dispute settlement. At that session, the Commission requested the Secretariat to review how the CIDS research study might be best built upon, if approved as a topic of future work at the forthcoming session of the Commission, in 2017, taking into consideration the views of all States and other stakeholders, including how this project might interact with other initiatives in this area and which format and processes should be used.[2]

2. Pursuant to the request of the Commission, and to facilitate the collection of information by delegations, the Secretariat circulated a questionnaire regarding practices or experience with respect to investor-State dispute settlement, together with a short background note on the CIDS research study, reproduced below in section II. The replies are reproduced below in section III in the form in which they were received.

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[1] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 187-195; the CIDS report is available (in English only) on the website of UNCITRAL at: http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf.

[2] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), para. 194.

II. Questionnaire

A. Questions regarding the investor-State dispute settlement framework

3. In September 2016, the Secretariat circulated a questionnaire aimed at collecting information on the investor-State dispute settlement framework and the dispute settlement provisions usually included in international investment agreements (IIAs), as well as on the legislative and judicial framework on recognition and enforcement of decisions of international courts as well as appeal against arbitral awards.

4. The questionnaire included a background note introducing the CIDS research paper presented to UNCITRAL at its forty-ninth session, in 2016. The Commission may wish to recall that the CIDS research paper seeks to analyse whether the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention), adopted in December 2014, could provide a useful model for broader reform of the investor-State dispute settlement framework. To this end, the CIDS research paper proposes a possible roadmap that could be followed if States (including regional economic integration organizations that are party to investment treaties) were to decide to pursue a reform initiative aimed at replacing or supplementing the existing investor-State arbitration regime in international investment agreements (IIAs) with a permanent investment tribunal and/or an appeal mechanism for investor-State arbitral awards.

5. The proposed reform plan is developed on three main blocks: the design of an International Tribunal for Investments (ITI); the design of an Appeal Mechanism (AM) for investor-State arbitral awards; and the establishment of a multilateral instrument (the Opt-in Convention) to extend those new dispute resolution options to States' existing IIAs.

6. The main pillars of the possible reform initiative reviewed in the CIDS research paper are the following. First, what is envisaged would be a truly multilateral dispute settlement system, possibly resulting in the creation of one single International Tribunal for Investments potentially competent to resolve investment disputes concerning as many States as would opt into it, and/or in the creation of one single Appeal Mechanism potentially competent to serve as appellate tribunal for investor-State arbitral awards across all States' IIAs. Second, the suggested reform initiative would be directed at one discrete issue of IIA reform, i.e. the treaties' investor-State arbitration provisions. Third, the mechanism of the Opt-in Convention effectively would release States from the burden of pursuing the potentially complex and long amendment procedures set out in the existing 3,000 IIAs.

7. Against this backdrop, the CIDS research paper first analyses the main challenges that would be faced when designing the International Tribunal for Investments and the Appeal Mechanism respectively and sets out the principal architectural and institutional options available to States when setting up those dispute settlement bodies. These include the options available in relation to the determination of the law governing the proceedings before the new dispute settlement bodies, their composition and structure, the systems of control over their awards and decisions, and questions of enforcement. The research paper then addresses the legal issues to be considered in drafting the Opt-in Convention. It concludes that the challenges involved in broader reforms of the investor-State arbitration regime are substantially more complex than the introduction of a transparency standard in investment treaties. At the same time, the paper also shows that the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention) could provide a useful model if States wish to pursue such broader reform initiatives at a multilateral level.

8. The questionnaire contained the following questions:

A/International Investment Agreements (IIAs)

(1) Is your country a Party to bilateral or multilateral treaties on the protection of foreign investments, including free trade agreements containing a chapter on investment protection (hereinafter "international investment agreements" or "IIAs")? If so, do your IIAs include provisions on the settlement of investor-State disputes?

(2) Do any of the IIAs concluded by your country or your country's model IIA (if available) provide for permanent courts or tribunals (as opposed to investor-State arbitration) for the resolution of investor-State disputes? If so, could you please provide us with the texts of such IIAs, or any information relating thereto, including any information on decisions rendered by such permanent courts or tribunals?

(3) Do any of the IIAs concluded by your country or your country's model IIA (if available) contain provisions whereby investor-state arbitral awards may be subject to appeal (as distinguished from annulment)? If so, could you please provide us with the texts of such IIAs, or any information relating thereto?

(4) Do any of the IIAs concluded by your country or your country's model IIA (if available) address the possible creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court? If so, could you please provide us with the texts of such IIAs, or any information relating thereto, including any information as to whether the Contracting Parties to those IIAs have undertaken any steps to implement those provisions?

(5) Do the IIAs concluded by your country contain provisions on the amendment of the IIAs? If so, could you please provide us with the text of such provisions, or any information relating thereto, including any information as to any instances in which such amendment procedures have been resorted to? Do any of the IIAs concluded by your country contain provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs?

B/Legislative and judicial framework

(6) Is there any statutory basis or judicial mechanism in your country to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)? If so, could you please provide us with any information relating thereto (to the extent it does not relate to judgments of international criminal courts and tribunals)? Have domestic courts in your country ever been requested to recognize or enforce judgments of international courts? If so, could you please provide us with any of those court decisions or information relating thereto (to the extent such decisions or information do not relate to international criminal courts and tribunals)?

(7) Does the legislation on international arbitration in your country contain any provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards?

(8) Do you have any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper?

B. Reference to the questionnaire

9. In the remainder of this note and its addenda, the above questions are referred as follows:

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

III. Compilation of comments

1. Austria

[Original: English]
[Date: 21 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Austria has so far concluded more than 60 bilateral investment treaties (BITs). Most of Austria's BITs provide for investor-state arbitration as a means of dispute settlement. Moreover, Austria is party or signatory to more than 70 treaties with investment provisions.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

So far, the dispute settlement clauses contained in Austria's IIAs follow the classic model of ad-hoc investor-State arbitration. However, as Austria is a member of the European Union (EU) and since the EU has gained explicit power to conclude IIAs to the extent that they concern foreign direct investment within the Common Commercial Policy, Austria will be bound by EU agreements, such as the EU-Canada Comprehensive Economic and Trade Agreement (CETA) or the EU-Vietnam Free Trade Agreement (FTA), in the foreseeable future. The texts of these agreements provide for a permanent "investment court system" but have not yet entered into force and are thus yet not legally binding.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No appeal mechanisms have been included in Austria's IIAs so far. The investment court system in CETA and the EU-Vietnam FTA, however, will provide for such a possibility.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

This possibility has not been taken into consideration in Austria' s IIAs. In the EU context, the (future) parties to CETA and to the EU-Vietnam FTA agree to work towards the establishment of a multilateral investment tribunal and appellate mechanism.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Austria' s IIAs follow the rules of general public international law, i.e., of the Vienna Convention on the Law of Treaties, in this regard and do not provide for a special regime.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

There is no general applicable statutory basis of judicial mechanism in this respect. Whereas foreign arbitral awards can be declared enforceable in a declaratory procedure by a national court, no such procedural instrument exists for a decision or a judgment of an international court. Judgments of the European Court of Human Rights (ECtHR), e.g., are not directly applicable and enforceable under domestic law, and national statutes or decisions not in conformity with the European Convention on Human Rights (ECHR) are not directly set aside by them. Control is exercised politically and collectively, as the execution of the Court' s judgments is supervised by the Committee of Ministers of the Council of Europe. However, compensation based on judgments in accordance with Article 41 ECHR is always paid punctually and fully.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

If the question deals with possible appeals "to" state courts or arbitral tribunals, the answer would be no. However, Austria would like to add the following: Section 610 of the Austrian Code of Civil Procedure (ZPO) provides for a request by any party to the arbitral tribunal to correct or supplement the award in certain aspects. The provision refers to clerical errors, calculation errors, etc. in the award, to lack of reasons of the decision and to incompleteness of the award. It does not provide for an appeal on the merits. It is up to the parties to determine the number of instances of the proceedings in their arbitration agreement. Austrian law does not provide for any standard in this regard and simply respects the decision of the parties. Section 610 ZPO which provides for the possibility of certain challenges to an arbitral award exclusively refers to annulment and is therefore no provision within the meaning of this question.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The EU and its Member States have been engaged over the past years in a reform process of their investment policy and in particular of investor-State dispute settlement procedure. As indicated above, one important element of that reform is the creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen regarding the existing system. Since discussions on the creation and on possible features of such a mechanism are at a very early stage, many questions are still open. Against this background, the options and aspects mentioned in the CIDS research paper constitute useful contributions to the current discussion.

To a certain extent, the different aspects discussed in the CIDS research paper are inter-linked, and adopting a particular position on the options presented for one aspect will have implications on the policy choices available for other aspects. It is therefore difficult and too early to express a preference for any of the detailed options presented in the paper before further discussions about the main goals and priorities of the overall reform project have taken place.

2. Finland

[Original: English]
[Date: 22 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Finland is a Party to multilateral, such as the Energy Charter Treaty, and bilateral treaties on the protection of foreign investments, including European Union free trade agreements containing a chapter or provisions on investment protection (referred together as International Investment Agreements — IIAs). The IIAs include provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The Comprehensive Trade and Economic Agreement between the European Union (EU) and its Member States and Canada (CETA) signed on 30 October 2016 and the Free Trade Agreement between the EU and its Member States and Vietnam, not yet signed, include an investment court system, providing for a renewed system for the resolution of investor-State disputes. These two IIAs are not yet in force.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs - Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Yes, please refer to question 2 above.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The IIAs concluded by Finland contain rather standard provisions regarding amendment of the IIAs. Article 30.2 of the above mentioned CETA also contains provisions on the amendment of the agreement. Amendments are subject to domestic ratification procedures in accordance with national constitutions of each Contracting Party.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

According to legislation on rules concerning the administration of justice relating to the Finnish membership of the EU (1554/1994), a judgment or a decision of a court or another authority of the EU, which is enforceable according to Article 18(3) or Article 280 of the Treaty on the Functioning of the European Union, or Article 299 of the European Atomic Energy Community Treaty, or according to certain separately mentioned EU-regulations, is to be enforced in Finland in the same way as a Finnish court judgment that is no longer subject to ordinary forms of appeal. The Ministry of Justice issues an order for enforcement on application. There is no information available on national court

cases on recognition or enforcement of judgments given by international courts. The existence of such cases is improbable.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The CIDS research paper sets out a number of interesting options for reforming the existing investor-State dispute settlement system. To a certain extent, the different aspects discussed in the CIDS research paper are inter-linked and adopting a particular position on the options presented for one aspect will have implications on the policy choices available for other aspects. It is therefore rather difficult to express a preference for any of the detailed options presented in the paper before further discussions about the main goals and priorities of the overall reform project have taken place.

The EU and its Member States have already been engaged in a process of reform of investment policy and of investor-State dispute settlement over the past years. One element of the reform is also the work towards creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen as regards the existing system. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both internally within the EU and with non-EU countries and we welcome the opportunity to pursue further discussions.

3. Netherlands

[Original: English]
[Date: 21 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Yes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Netherlands is member of the EU and creating a multilateral investment court has been included in the EU's new investment approach, presented in September 2016. The EU recently concluded the EU-Vietnam FTA and the Comprehensive Economic and Trade Agreement (CETA) with Canada in which a reference to a permanent court is found.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No, not in particular, but the Dutch IIA's are subject to the ICSID Convention and UNCITRAL Arbitration Rules (i.e. New York Convention). If one of these treaties would be amended, such an appeal mechanism could be incorporated.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The current treaties do not contain such provisions. However, this might change when the new Model Bilateral Investment Treaty (BIT) will be ready.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Provisions for amending are provided in our Model BIT in the last paragraph. As of 2014, EU Regulation 1219/2012 is in force, which means that amending or changing a BIT should be notified and authorized by the European Commission.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The international court of which a judgement has been challenged before a Dutch Court is the Permanent Court of Arbitration (following the New York Convention). Its judgement is an arbitral award and is thus treated as such. There is a provision on the recognition and enforcement of foreign judgements. A distinction is made between foreign judgements for which an agreement on recognition and enforcement exists between the Netherlands and the State of origin of the judgement and other foreign judgements for which no such agreement exists. There is no provision for the recognition and enforcement of judgements of international courts.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The Dutch arbitration bill contains provisions on appeal, only applicable if the parties gave their written consent (prior, and mutually agreed via a contract).

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

For reference, please see the submission of the European Commission.

4. United Kingdom of Great Britain and Northern Ireland

[Original: English]
[Date: 22 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The United Kingdom has Bilateral Investment Treaties (BITs) in force with over 90 countries. Since the Treaty of Lisbon entered into force, the EU has held competence to negotiate investment treaties on behalf of Member States and since then the United Kingdom has not negotiated any new BITs. The UK's BITs include provisions for the settlement of investor-State disputes under the international arbitration investor-state dispute settlement (ISDS) model.

The UK is currently a Party to the Energy Charter Treaty. This treaty contains provisions on the protection of foreign investments and on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The existing 90+ UK BITs contain provisions for investor-State arbitration and therefore do not provide for a system of permanent courts or tribunals. Since the EU has held competence for the negotiation of investment treaties on behalf of Member States the United Kingdom has not negotiated any new BITs.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

BITs agreed under the existing UK model treaty do not contain provisions whereby investor-state arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

BITs agreed under the existing UK model treaty do not contain provisions that address the possible creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards or (b) a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

BITs agreed under the existing UK model treaty do not contain provisions on the amendment of the IIAs.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The UK has a statutory provision for recognizing and enforcing judgments of the CJEU, e.g. the European Communities (Enforcement of Community Judgments) Order 1972 (SI 1972/1590). Domestic courts in the UK may be requested to recognize or enforce judgments of other international courts, however, there is no statutory basis or judicial mechanism under which this takes place.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The Arbitration Act 1996, the Arbitration (Scotland) Act 2010 and Arbitration (International Investment Disputes) Act 1966 provide for the enforcement of arbitral awards in the United Kingdom under the New York Convention or the ICSID Convention. The powers of review are generally limited as provided for in those treaties.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The UK supports the inclusion of investor-state dispute settlement mechanisms in IIAs to provide investors with an independent means of redress in the event of a dispute with a host State. We support measures to achieve fair outcomes of claims, high ethical standards for arbitrators and transparency of tribunal hearings.

The UK believes that further analysis is needed in terms of the evidence base as well as procedural hurdles before considering the details of how any multilateral mechanism could be established and resourced. We would not seek to prejudice any policy position we would wish to adopt in due course regarding such a court, appeal mechanisms or implications towards existing IIAs.

5. European Union

[Original: English]
[Date: 22 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The EU is currently a Party to the Energy Charter Treaty. This treaty contains provisions on the protection of foreign investments and on the settlement of investor-State disputes.

The EU has also concluded the negotiations of two other agreements containing provisions on investment protection and on the settlement of investor-State disputes which are not yet in force. These agreements are the EU-Canada Comprehensive Trade and Economic Agreement (CETA) and the EU-Vietnam Free Trade Agreement.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The EU-Canada Comprehensive Trade and Economic Agreement (CETA) signed on 30 October 2016 establishes a Tribunal composed of fifteen Members that will decide claims submitted with regard to alleged breaches of the investment protection provisions of the agreement (Article 8.27 CETA). The text of the agreement can be found here: http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

The text of the EU-Vietnam Free Trade Agreement (currently subject to legal revision) establishes a Tribunal composed of nine Members that will decide claims submitted with regard to alleged breaches of the investment protection provisions of the agreement (Chapter 8 on Trade in Services, Investment and E-Commerce, Chapter II (Investment), Section 3 (Resolution of Investment Disputes), Sub-Section 4 Investment Tribunal System), Article 12 — the numbering of the Chapters, Sections and Articles is currently subject to legal revision). The text of the agreement can be found here: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The EU-Canada Comprehensive Trade and Economic Agreement as well as the EU-Vietnam Free Trade Agreement establish Appeal Tribunals to review awards rendered by the Tribunals established under those agreements (Article 8.28 CETA, Article 13 EU-Vietnam FTA).

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

In both the EU-Canada Comprehensive Trade and Economic Agreement and the EU-Vietnam Free Trade Agreement, the Contracting Parties have committed to work towards the creation of a multilateral investment tribunal and/or appellate mechanism (Article 8.29 CETA, Article 15 EU-Vietnam FTA).

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Article 42 of the Energy Charter Treaty contains provisions on the amendment of the agreement. The text of these provisions can be found here: http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

Article 30.2 of the EU-Canada Comprehensive Trade and Economic Agreement contains provisions on the amendment of the agreement and of its annexes. The

text of these provisions can be found here: http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf.

Article X.6 of Chapter 17 of the EU-Vietnam Free Trade Agreement contains provisions on the amendment of the agreement and of its annexes. The text of these provisions can be found here: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The CIDS research paper sets out a number of interesting options for reforming the existing investor-State dispute settlement system. The main options range from creating an International Tribunal for Investments to the creation of an Appeal Mechanisms for reviewing investor-state arbitral awards. Different alternatives for reviewing decisions or awards are discussed, as are different options with regard to the composition of the Tribunal, the nomination of Tribunal Members, the enforcement of decisions, or the applicable law. The paper also examines different ways of applying any such new mechanism to existing investment treaties in the form of an opt-in convention modelled on the Mauritius Convention.

To a certain extent, the different aspects discussed in the CIDS research paper are inter-linked and adopting a particular position on the options presented for one aspect will have implications on the policy choices available for other aspects. It is therefore difficult to express a preference for any of the detailed options presented in the paper before further discussions about the main goals and priorities of the overall reform project have taken place.

The EU and its Member States have already been engaged in a process of reform of investment policy and in particular of investor-State dispute settlement over the past years. One important element of that reform is the creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen as regards the existing system. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both EU-internally and with non-EU countries and we welcome the opportunity to pursue further discussions.

(A/CN.9/918/Add.1) (Original: English/French)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

6. China

[Original: English]
[Date: 29 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Yes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs — Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Yes. Article 9.23 of Chapter 9 (Investment) of the Free Trade Agreement between the Government of the People's Republic of China and the Government of Australia (signed in June 2015) provides that: "Within three years after the date of entry into force of this Agreement, the Parties shall commence negotiations with a view to establishing an appellate mechanism to review awards rendered under Article 9.22 in arbitrations commenced after any such appellate mechanism is established. Any such appellate mechanism would hear appeals on questions of law."

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

A few of IIAs concluded by China contain such provisions. For example, Article 27.4 of the Agreement Among the Government of the People's Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment (signed in May 2012) provides that: "The Contracting Parties shall, at the request of any Contracting Party, enter into

negotiations through appropriate channels for the purpose of amending this Agreement. This Agreement may be amended by agreement among the Contracting Parties. Such amendment shall be accepted by the Contracting Parties in accordance with their respective legal procedures, and shall enter into force on the date to be agreed upon by the Contracting Parties. Amendments shall not affect the rights and obligations of the Contracting Parties provided for under this Agreement until the amendments enter into force."

Do any of the IIAs concluded by your country contain provisions safeguarding investor's rights or providing for transitional arrangements in case of modifications or amendments of the IIAs?

Yes. For example, Article 27.4 of the Agreement Among the Government of the People's Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment provides that: "Amendments shall not affect the rights and obligations of the Contracting Parties provided for under this Agreement until the amendments enter into force."

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

No. There is no known case of such request.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

China notices the growing calls to reform the investor-State arbitration regime, and appreciates the efforts made by CIDS in providing some policy options. We are still making in-depth study on those options and our point of departure is that the investor-State arbitration regime shall be an effective and efficient one striking the proper balance between investor protection and government's right to regulate. This is one of the guiding principles G20 adopted for global investment policymaking this July, and China welcomes and also keeps an open mind on any option that is conducive to the above-mentioned goal.

Without prejudice to China's position on the possible options discussed in the paper, we suggest starting from conducting fact-based analysis with a view to seeking consensus on certain overarching issues before launching any discussion on reform to the current regime. First, what are the main shortcomings of the current ISDS system? Second, what are the underlying causes of the problems? Third, based on the first two steps, we should carefully examine the pro and cons of any proposal in a pragmatic but cautious manner in order to find the most appropriate solution to address such problems without bringing any new systemic challenges. In this process, we should pay special attentions to a few important issues, such as how to ensure the future mechanism to be flexible enough and adapted to the nature of investor-to-state dispute, how to reconcile the future mechanism with the existing system and how to ensure enforcement of the award in the future mechanism.

In addition, China also believes that the procedural shortcomings should not undertake the entire responsibility of the criticism on the current system, and we should take concrete steps to have clearer and more precise substantive obligations in the treaties so that meaningful guidance could be given to the tribunal.

7. Greece

[Original: English]
[Date: 28 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Greece is a party to 44 Bilateral Investment Treaties (BITs). These BITs include provisions on the settlement of investor-States disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs — Question 3: Provisions on appeal to investor-State arbitral awards in IIAs — Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The Bilateral Investment Treaties to which Greece is a party do not contain specific provisions on amendment. They contain provisions on entry into force, duration and termination (with a sunset clause).

The EU Regulation 1219/2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries (Chapter IIII: Authorization to Amend or Conclude Bilateral Investment Agreements) include provisions concerning the authorization of a Member State to enter into negotiations with a third country to amend an existing bilateral investment agreement.

B/Legislative and judicial framework

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The EU and its Member States have already been engaged in a process of reform of investment policy and in particular of investor-State dispute settlement over the past years. One important element of that reform is the creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen as regards the existing system. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both EU-internally and with non-EU countries and we welcome the opportunity to pursue further discussions. In this context we believe that the CIDS research paper sets out a number of interesting options to explore for reforming the existing investor-State dispute settlement system.

8. Japan

[Original: English]
[Date: 29 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Japan is a contracting party to a number of bilateral and multilateral treaties, and most of them include provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs — Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

(a) The Trans Pacific Partnership (TPP) Agreement (not concluded by Japan as of December 2016) addresses the possible creation in the future of an appellate mechanism for investor-State arbitral awards as follows. "Chapter 9, Investment, Article 9.23: Conduct of the Arbitration — In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 9.29 (Awards) should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 9.24 (Transparency of Arbitral Proceedings)."

(b) No.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Some IIAs concluded by Japan contain provisions on the amendments. An example of such provisions is as follows. "Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment, Article 44 Amendments — "1. The Contracting Parties may agree on any amendment to this Agreement. 2. Any amendment shall be approved by the Contracting Parties in accordance with their respective internal procedures and shall enter into force on such date as the Contracting Parties may agree, and shall thereafter constitute an integral part of this Agreement."

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

We do not have any legislation which explicitly and specifically provides the procedure to recognize or enforce judgments of international courts. We are not aware of any case in which our domestic courts have been requested to recognize or enforce judgments of international courts.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Japan considers it premature to make official comments on this paper, because this issue is not formally on the table for discussion in UNCITRAL yet and we should avoid make any prejudice.

9. Mauritius

[Original: English]
[Date: 30 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Mauritius is a party to several bilateral treaties on the protection of foreign investments and these agreements include provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

IIAs concluded by Mauritius do not provide for permanent courts or tribunals for resolution of investor-State disputes.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Under IIAs concluded by Mauritius, an award made by an arbitral tribunal is final and binding.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

IIAs concluded by Mauritius do not provide for the possible creation in future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; or (b) a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

IIAs concluded by Mauritius contain provisions for amendments. IIAs are typically incorporated into the laws of Mauritius by regulations made under section 28A of the Investment Promotion Act. Based on existing regulations, the amendment procedures have not so far been resorted to. IIAs concluded by Mauritius do not contain provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of IIAs. A typical amendment clause provides as follows: "This Agreement may be amended by agreement among both Contracting Parties. Such amendment shall enter into force on the date to be agreed upon by the Contracting Parties."

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

To the extent that "international courts" refer to courts established by international treaties or conventions, there is no statutory or judicial mechanism whereby judgments of international courts except the International Criminal Court can be recognized or enforced in Mauritius. However, judgments from foreign courts can be recognized and enforced under the Foreign Judgments (Reciprocal Enforcement) Act.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Under the International Arbitration Act, a company holding a Global Business Licence (a non-domestic company) may include an arbitration clause in its constitution to the effect that any dispute arising out of the constitution of the company shall be referred to arbitration under the Act. In such a case, any party to the arbitration proceedings may appeal to the Supreme Court on any question of Mauritius law arising out of an award with the leave of the Court.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

We do not have any comments at this stage but would welcome any follow-up questions.

10. Poland

[Original: English]
[Date: 28 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

In the area of the protection of foreign investments Poland is a Party to ca. 60 bilateral treaties and to one multilateral treaty (the Energy Charter Treaty). These treaties contain provisions on investments protection as well as on the dispute settlement mechanism (negotiations during the cooling-off period and possibility to settle the dispute when the arbitration proceeding has already been initiated). There is only one exception — an agreement which regulates the area of commerce and navigation. Moreover, on 30 October 2016, Poland signed the EU-Canada Comprehensive Trade and Economic Agreement (CETA). This treaty also covers investment protection and ISDS.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

None of the IIAs treaties in force concluded by Poland provide for permanent courts or tribunals (as opposed to ISDS) for the resolution of investor-States disputes. However, such permanent court is envisaged in EU-Canada Comprehensive Trade and Economic Agreement (CETA — not in force yet). CETA establishes a Tribunal composed of fifteen Members that will decide claims submitted with regard to alleged breaches of the investment protection provisions of the agreement (Article 8.27 CETA). It is very hard to assess how this kind of permanent court is going to function. It is even too early to present any details of this court, because it does not exist.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

None of the IIAs treaties in force concluded by Poland contain provisions whereby investor-State arbitral awards may be subject to appeal (as distinguished from annulment). CETA (not in force yet) establishes Appeal Tribunals to review awards rendered by the Tribunal established under those agreements (Article 8.28 CETA).

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

None of the IIAs treaties in force concluded by Poland addresses the possible creation on the future of a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/nor a bilateral or multilateral permanent investment tribunal or court. In CETA (not in force yet) the Contracting Parties have committed to work towards the creation of a multilateral investment tribunal and/or appellate mechanism (Article 8.29 CETA).

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Some of the IIAs treaties in force concluded by Poland contain provisions on their amendment or supplement by the mutual agreement of the Contracting Parties. Article 42 of the Energy Charter Treaty contains provisions on the amendment of the agreement. CETA (Art. 30.2) contains provisions on the amendment of the agreement and of its annexes. Moreover, we would like to indicate that final provisions of IIAs treaties

concluded by Poland contain 'sunset clause', which allows protection of investment for some years after dissolving of an agreement.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Polish code for civil proceedings (art. 1145) provides for the recognition of the judicial decisions of foreign States. Since 2008 the *de plano* recognition principle is applied. The recognition may be refused only on grounds specified under art. 1146. Art. 1149(1) provides legal basis for the recognition of decisions of other court (or tribunal) of foreign State if taken in civil matter. However, the above statutory framework does not provide ground for the recognition of supra- or international tribunals. Statutory basis for the recognition and enforcement of the international arbitration tribunals awards is in art. 1215 of the Code. The other one is in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards whereof Poland is a signatory.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Arbitral awards, be they foreign or national, are subject to same legal requirements. In order to become equivalent to court decision (and to enjoy *res judicata*) they need to be recognized by common court (art. 1212) or the common court has to declare their enforceability (art. 1214). With regard to foreign arbitral award, the hearing is mandatory when the recognition or declaration of enforcement is sought.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Options presented in the CIDS research paper have different aspects which are closely inter-linked. Hence it is difficult to indicate a preference for any of them before further discussion about the main goals and priorities.

Reforming investment arbitration and in particular investor-State dispute settlement is recently a subject of many discussions — it is visible especially for EU and its Member States (i.a. during the work on CETA and TTIP). Within the EU still persists discussion on the main goals and priorities in this matter (both EU-internally and with non-EU). Therefore Poland is not able to present any position in regard of the described ISDS mechanisms yet. Consequently, the mechanism elaborated by UNCITRAL can be accepted only as a non-binding guideline.

11. Romania

[Original: English]
[Date: 30 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Romania's investment agreements, either bilateral or multilateral, include provisions on the settlement of disputes in the form of investor-State arbitration.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Romania's investment agreements do not provide for permanent courts or tribunals for the settlement of disputes.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Romania's investment agreements do not contain any provisions whereby investor-state arbitral awards are subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Romania's new model investment agreement, on the basis of which the new Romania-Senegal BIT is currently being negotiated, does provide for the possibility of creating in the future a multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Currently, 6 investment agreements concluded by Romania have provisions on amendment. Of those, only the BIT between Romania and Malaysia has been amended according to those provisions. 29 Agreements were amended although they did not contain a specific amendment clause.

All amendment Protocols were concluded as part of Romania's obligation as an EU Member State to bring its bilateral investment treaties in line with EU legislation. The most commonly encountered provision is the Regional Organization Integration Clause (REIO for short).

Examples of amendment clauses:

Romania-Bosnia and Herzegovina BIT: "This Agreement may be amended by written Agreement between the Contracting Parties. Any amendment shall enter into force under the same procedure required for the entry into force of the present Agreement."

Romania-Demark BIT: "At the entry into force of this Agreement or at any time thereafter the provisions of this Agreement may be amended in such manner as may be agreed between the Contracting Parties. Such amendments shall enter into force when the Contracting Parties have notified each other that the constitutional requirement for the entry into force have been fulfilled"

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Romania does not have any specific statutory basis or mechanism for the recognition and enforcement of the judgments of international courts per se (as opposed to the recognition of judgments of foreign courts).

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Romania's legislation on international arbitration (part IV of the 2009 Civil Code, art 541-1132) does not contain any provisions on appeal, either by State courts or arbitral tribunals, against arbitral awards.

12. Tunisia

[Original: French]
[Date: 28 December 2016]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Tunisia has concluded an extensive network of bilateral and multilateral treaties on foreign investment protection. Tunisia has concluded almost 63 bilateral investment treaties (BITs), the most recent of which was concluded with Switzerland in 2012 and entered into force in July 2014. The majority of these BITs have entered into force.

Despite efforts by the competent Tunisian authorities to establish a model Tunisian BIT, no such model treaty has yet been established.

Tunisia has also concluded a series of multilateral treaties and is in the process of negotiating an important Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union which will contain a chapter on investment.

Some of the multilateral treaties which have already been concluded relate exclusively to investment protection and include the following: the 1993 Convention on the encouragement and protection of investments among the countries of the Arab Maghreb Union (AMU); the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC), which was signed by Tunisia in 1981 and entered into force in 1986; the League of Arab States (LAS) Unified Agreement for the Investment of Arab Capital in the Arab States, concluded in 1980, as amended in 2013.

The majority of these IIAs contain provisions for the settlement of disputes between a host State and foreign investors which refer to international arbitration institutions, including the International Centre for Settlement of Investment Disputes (ICSID) (see BITs concluded with, for example, Turkey, Sweden, the United States of America, France, Italy and Switzerland).

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Arbitration by permanent courts or tribunals (as opposed to arbitration between investors and States) is provided for under some of the treaties concluded by Tunisia with other Arab States. Article 19 of the Convention on the encouragement and protection of investments among the countries of the Arab Maghreb Union and articles 25 and 28 et seq. of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States refer to the Arab Court of Investment with regard to disputes between an investor and the host State.

Article 29 of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States stipulates: "1 — The Court shall have jurisdiction to settle disputes brought before it by either party to an investment which relate to or arise from application of the provisions of the Agreement. 2 — The disputes must have occurred: (a) Between any State Party and another State Party or between a State Party and the public institutions and organizations of the other parties or between the public institutions and organizations of more than one State Party; (b) Between the persons referred to in paragraph 1 and Arab investors; (c) Between the persons referred to in paragraphs 1 and 2 and the authorities providing investment guarantees in accordance with this Agreement."

Only a small number of Tunisian BITs provide for recourse to a permanent court. Among the few BITs to contain this provision is the BIT concluded with Kuwait in 2004, in which article 10 provides for recourse to domestic courts of the host State, international arbitration by ICSID under UNCITRAL rules and also the means of resolution provided for in the LAS Unified Agreement for the Investment of Arab Capital in the Arab States concluded in 1980, namely the Arab Investment Court. (See also article 8 of the BIT concluded with Sudan in 2003 and article 5 of the BIT concluded with the Syrian Arab Republic in 2001.)

BITs concluded with Arab States are only available in Arabic.

The first judgment of the Arab Investment Court (which has so far passed judgment on no more than a dozen cases) was in the 2001 case of Adel Bin Saleh Almaddah and Tanmiah for Management and Marketing Consultancy v. the Tunisian State and the Organizing Committee of the Mediterranean Games in Tunis, Arab Investment Court, Case No. 1/1 Q, judgment of 12 October 2004. The court based its jurisdiction in the case on article 29 of the Unified Agreement for the Investment of Arab Capital in the Arab States and on the contract between the parties, but in its ruling rejected the claims of the plaintiff.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

There are no provisions for an appeal against arbitral awards or against the judgment of a permanent court charged with settling disputes between an investor and a host

State. For instance, article 34 of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States stipulates:

> "1. Judgements shall have binding force only with regard to the parties concerned and the dispute on which a decision is given. 2. Judgements shall be final and not subject to appeal. Where there is a dispute as to the meaning or import of a judgement, the Court shall provide its interpretation at the request of any of the parties concerned. 3. A judgement delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts."

For the Arab Investment Court, this involves a review procedure. This is in accordance with article 35 of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States: "The Court may admit an application for a review of a judgement where the judgement gravely exceeds an essential principle of the Agreement or litigation procedures or where a decisive fact in the case is revealed which was not known at the time of judgement either by the Court or by the party requesting the review. The ignorance of such fact by the said party must not, however, be attributable to his own negligence. Applications must be submitted within six months of the new facts being uncovered and within five years of the delivery of judgement. Review proceedings shall be instituted by a decision of the Court which explicitly confirms the existence of the new fact, sets out the aspects justifying a review and declares that the application is accordingly admissible.

The Court may suspend execution of a judgement which it delivered before deciding to institute review proceedings."

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

There are currently no IIAs concluded by Tunisia which provide for:

(a) A bilateral or multilateral appeal mechanism for arbitral awards between investors and States;

(b) The answer to this question is given in paragraph (2).

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Some IIAs concluded by Tunisia establish provisions for their amendment.

Article 44 of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States stipulates: "This Agreement may not be amended any earlier than five years from the date of its entry into force. Amendments to this Agreement shall be made with the consent of two thirds of the States Parties and shall enter into force for the ratifying States three months after instruments ratifying the amendments have been deposited by at least five States."

Article 10 of the BIT concluded between Tunisia and Turkey in 1991 also provides that "3 — This agreement may be amended by written agreement between the Parties. Any amendment shall enter into force when each Party has notified the other that it has completed all internal requirements for entry into force of such amendment."

See also the BIT between Tunisia and Denmark concluded in 1997 (article 13), the BIT between Tunisia and Guinea concluded in 1990 (article 12), the BIT between Tunisia and Mali concluded in 1986 (article 12), the BIT between Tunisia and Niger concluded in 1992 (article 19), the BIT between Tunisia and Togo concluded in 1987 (article 12) and the BIT concluded between Tunisia and Senegal concluded in 1984 (article 12).

These agreements also establish provisions for the protection of investors' rights in the event of the termination of an agreement. Most treaties will include survival

clauses ensuring the continuation of the agreement for investments completed before its expiry date (no details are given for the case of modification or amendment).

See, inter alia, article 43 of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States, article 10 of the BIT between Egypt and Tunisia concluded in 1989, article 13 of the BIT between Tunisia and China concluded in 2004, article 12 of the BIT between Tunisia and France concluded in 1997 and article 13 of the BIT between Tunisia and Switzerland concluded in 2012.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Tunisia has a legal framework and a judicial mechanism for recognizing and enforcing the judgments of international courts.

Firstly, it is important to note that, in accordance with article 34 of the LAS Unified Agreement for the Investment of Arab Capital in the Arab States, "3 — A judgement delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts".

There is no specific judicial mechanism in Tunisia for recognizing and enforcing the judgments of international courts. There is a common law provision that may be applied in such cases: article 11 et seq. of the Code of Private International Law (promulgated by Act No. 98-97 of 27 November 1998).

To our knowledge, no judgment of the Arab Investment Court has required enforcement proceedings in Tunisia.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The Arbitration Code promulgated by Act No. 93-42 of 26 April 1993 only provides for an appeal procedure for domestic arbitral awards when the parties have provided for this expressly in the arbitration agreement, and excludes awards of arbitrators acting as mediators ("amiables compositeurs") (see article 39).

Only annulment is provided for an international arbitral award (article 78).

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Regarding the possibilities of reforming the arbitration regime for disputes between investors and States proposed in the report of the Geneva Center for International Dispute Settlement (CIDS), establishing a permanent international tribunal for investor-State dispute settlement may be an effective means of addressing the lack of consistency among arbitral awards and decisions. This lack of consistency is also attributable to the fragmentation of the substantive regime for protecting international investment. It is therefore important to harmonize the international framework by establishing a balanced international agreement.

Issues which may arise when establishing a permanent mechanism for dispute settlement are whether a sufficient number of States will accede to this new mechanism and the nature of decisions which would be made by this court. Should these decisions be subject to exequatur procedure by the domestic courts of the executing State, which will enable domestic courts to have a level of control, or merely a simplified recognition procedure, as is the case in ICSID arbitral awards?

Another issue which could arise is the composition of this international court. How should judges or arbitrators be chosen and what criteria should be used?

(A/CN.9/918/Add.2) (Original: English/Spanish)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

13. Argentina

[Original: Spanish]
[Date: 9 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Yes, Argentina is a Party to treaties on the protection of foreign investments, which include provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs - Question 3: Provisions on appeal to investor-State arbitral awards in IIAs - Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

IIAs concluded by Argentina contain provisions on amendment of the IIA. They do not contain provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIA.

Example of treaty provisions:

Bilateral Investment Treaty (BIT) between Argentina and the Russian Federation (1998): "Article 14.3. Amendments may be made to this Convention by mutual agreement between the Contracting Parties. Any amendment shall enter into force after each Contracting Party notifies the other Contracting Party in writing of the completion of the procedures required by its legislation for the entry into force of the said amendments."

BIT between Argentina and Denmark (1992): "Article 11 Amendments. On the date of entry into force of this Agreement or at any time thereafter, its provisions may be amended in the manner agreed upon by the Contracting Parties. Any such amendments shall enter into force once the Contracting Parties have notified each other of the completion of the respective constitutional requirements."

BIT between Argentina and Senegal (1993): "Article 10. Each Contracting Party may request, in writing, the total or partial amendment of this Agreement. The agreed amendments shall enter into force as of notification of their approval by both Contracting Parties."

BIT between Argentina and Qatar (2016, has not yet entered into force): "Article 19 Entry into force - 1. This Treaty and its amendments shall enter into force on the date of receipt of the last notification given in writing by either Contracting Party providing notice, through diplomatic channels, of the completion of its domestic legal procedures required for the entry into force of this Treaty and its amendments. 2. This Treaty may be amended by written agreement between the Contracting Parties."

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

No specific regime has been established to recognize and enforce international judgments, but there is a specific regime to recognize and enforce foreign arbitral awards.

Nevertheless, it should be clarified that article 75 (22) of the National Constitution provides that treaties concluded by the Argentine Republic have supra-legal status. Furthermore, certain human rights treaties have constitutional status. Consequently, if a treaty concluded by Argentina establishes the jurisdiction of an international court over the settlement of disputes and rules on the recognition and enforcement of international awards or judgments, the provisions of that treaty should be observed for the purposes of recognition and enforcement of judgments. In this respect, for instance, reference may be made to article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID), and the statement made by the Argentine Republic pursuant to article 54 (2), which establishes the national judicial authority for federal administrative litigation (Justicia Nacional en lo Contencioso Administrativo Federal) as the competent authority for the recognition and enforcement of ICSID awards.

Domestic courts have been requested to recognize or enforce judgments of international courts; for example, Compania de concesiones de infraestructura SA (CCI) regarding Peition for bankruptcy (Republic of Peru), Case No. 8030/2015, National Commercial Court of Appeals, judgment of 18 August 2015.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No.

14. Jamaica

[Original: English]
[Date: 5 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Jamaica is a party to a number of bilateral treaties on the protection of foreign investments. Jamaica is also a party to the Revised Treaty of Chaguaramas ("RTC"), which establishes the Caribbean Community ("CARICOM") and the CARICOM Single Market and Economy ("CSME"), that contains provisions that would be applicable to investors within CARICOM. In particular, the RTC contains National Treatment (Article 7) and Most Favoured Nation Treatment (Article 8) standards that are commonly found in IIAs. Though these standards as articulated in the RTC are of general application, the provisions would still be applicable in a case where an investor brings a claim against a CARICOM State for failure to adhere to those

standards. The RTC essentially allows for investor-State arbitration by providing that natural or juridical persons of any CARICOM Member State may bring a claim before the Caribbean Court of Justice in relation to any of the rights under the RTC where all the criteria for espousing the claim have been met. There is also an extensive chapter on competition matters (Chapter 8) in the RTC. However, all the IIAs in force contain provisions for investor-State dispute settlement; (the BITs reviewed in preparation for answering this questionnaire are: Jamaica-Argentine Republic, Jamaica-Korea, Jamaica-Germany, Jamaica-Netherlands, Jamaica-Switzerland, Jamaica-China, Jamaica-United Kingdom and Jamaica-United States of America).

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Jamaica does not have a model IIA. However, some IIAs concluded by Jamaica contain provisions whereby the parties to a dispute may submit the dispute to the courts or administrative tribunals of the host State. For example, Article VI(2)(a) of the Jamaica-USA BIT provides for this form of dispute settlement method. Further, Article 8(2) of the Jamaica-China IIA provides that where an investor-State dispute is not initially settled through negotiations, either party to the dispute shall be entitled to submit the dispute to the competent court of the Contracting Party accepting the investment. Another variation is the Jamaica-Swiss Federation IIA that provides that a Contracting Party may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration which would require resort to permanent national courts or tribunals (Article 9(4)). See also Article 11(1) of the Jamaica-Germany IIA which permits parties to pursue local remedies if disputes cannot be settled amicably. We are not aware of any decisions rendered by any Court or Tribunal in Jamaica under any of those IIAs.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

In the IIAs reviewed, there was no provision in any of them concerning appeals from awards of arbitral tribunals.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

In none of the IIAs in force was there any provision regarding the possible creation in the future of any bilateral or multilateral appeal mechanism for investor-State arbitration or for a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

There is generally no provision regarding the amendment of the respective agreements.

<u>B/ Legislative and judicial framework</u>

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The Judgments and Awards (Reciprocal Enforcement) Act provides for the registration and enforcement in Jamaica of any judgment obtained in a Superior Court in the United Kingdom on a reciprocal basis. Under the Judgments (Foreign)(Reciprocal Enforcement) Act, judgments from a Superior Court in any foreign jurisdiction may be recognised and enforced in Jamaica on the basis of an assurance that any such judgment rendered by a Superior Court in Jamaica would be given reciprocal treatment in the other jurisdiction.

The following are two Court of Appeal cases in which foreign judgments were determined to be enforceable in Jamaica. It should be noted that Jamaica has a separate legal framework for the recognition and enforcement of foreign arbitral awards.

(a) DYC Fishing Limited v Perla Del Caribe Inc [2014] JMCA Civ:

http://www.courtofappeal.gov.jm/sites/default/files/judgments/DYC%20Fishing%20Ltd.%20v%20Perla%20Del%20Caribe%20Inc..pdf

(b) Richard Vasconcellos and Jamaica Steel Works Limited and Others SCCA No. 01 of 2008

http://www.courtofappeal.gov.jm/sites/default/files/judgments/Vasconcellos%20(Richard)%20v.%20Jamaica%20Steel%20%20Works%20Ltd.%20%20et%20al_0.pdf

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The recognition and enforcement of foreign arbitral awards in Jamaica is governed by The Arbitration (Recognition and Enforcement of Foreign Awards) Act. That Act incorporates the provisions of the New York Convention on the Recognition of Foreign Arbitral Awards. There is no reference in that Act, and by extension the New York Convention, to appeals against arbitral awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The State acknowledges the consideration by the United Nations General Assembly of possible reformation of the Investor State Dispute Settlement System. The State further acknowledges that uniformity, transparency and predictability are desirable objectives in any Investor-State Dispute Settlement system. We note, however, that Jamaica is not a party to the Mauritius Convention which formed the basis of the CIDS research paper which indicates that we have not adopted a formal position with regards to the application of the Mauritius Convention to our IIAs.

The State recognizes, as the CIDS research paper does, that the incoherence within the present investor-state dispute settlement mechanisms continue to undermine support for IIAs. There are awards in which different arbitral panels have ruled differently on sometimes very similar facts. This has created an atmosphere of uncertainty for investors and States.

The proposals based on the Mauritius Convention are interesting and we continue to study them.

15. Portugal

[Original: English]
[Date: 4 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Portugal has signed and ratified approximately fifty Bilateral Investment Agreements (hereinafter BIT), most of which are currently in force. At the pluri-lateral level, Portugal is currently a Party to the Energy Charter Treaty. These treaties contain provisions on the protection of foreign investments and on the settlement of investor-State disputes.

As a member of the European Union (EU), Portugal has also concluded the negotiations of two other agreements containing provisions on investment protection and on the settlement of investor-State disputes, which are not yet in force. These said agreements are the EU-Canada Comprehensive Trade and Economic Agreement (CETA) and the EU-Vietnam Free Trade Agreement.

Please note that, in order to conclude other “IIAs”, several negotiations with third countries are currently underway, both bilaterally and within the framework of the European Investment Policy.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Portugal has sustained the possibility for investors to use state courts to claim their rights. Hence, in its BITs and in its BIT model, this possibility has been duly foreseen; (accordingly to Portuguese BIT model "the investor may submit the dispute to: a) The national courts of the Party in whose territory the investment was made;"). As an alternative to domestic courts, investors may submit disputes to international arbitration.

The CETA, signed on 30 October 2016, establishes a Tribunal composed of fifteen Members to adjudicate claims submitted with regard to alleged breaches of the investment protection provisions of the agreement (Article 8.27 CETA). The same mechanism is also provided for in the EU-Vietnam Agreement, despite some adjustments (the numbering of the Chapters, Sections and Articles is currently subject to legal revision).

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

In the Portuguese BIT model "the awards shall be binding, but they may be subject to appeal or any other review procedure solely as provided by law and the applicable rules" (Article 24, paragraph 1).

Differently, the EU-Canada Comprehensive Trade and Economic Agreement as well as the EU-Vietnam Free Trade Agreement establish Appeal Tribunals to review awards rendered by the Tribunals established under those agreements (Article 8.28 CETA, Article 13 EU-Vietnam FTA).

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Portuguese new Model BIT states that "Upon the entry into force of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this Agreement shall cease to apply subject to the agreement of both Parties." (Article 25, paragraph 1). Portugal has not yet concluded a BIT incorporating this language, for the time being.

In both the EU-Canada Comprehensive Trade and Economic Agreement and the EU-Vietnam Free Trade Agreement, the Contracting Parties have committed to work towards the creation of a multilateral investment tribunal and/or appellate mechanism (Article 8.29 CETA, Article 15 EU-Vietnam FTA).

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The amendment of Portuguese BIT requires the consent of both parties and follows the same formalities regarding the entry into force of the agreement. In case of termination of the BIT, a sunset clause is foreseen, which guarantees the extension of the protection provided in the agreement for periods ranging from 10 to 20 years.

The provisions on amendments to the Energy Charter, the CETA and the EU-Vietnam Agreement are enshrined in Article 42, Article 30.2 and Article X.6 of Chapter 17, respectively.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Notwithstanding the international treaties signed and ratified by Portugal, pursuant to the Portuguese Civil Procedure Code, no decision issued by a foreign court or arbitrator shall have any effect in Portugal, regardless of the nationality of the parties involved, unless it has been reviewed and confirmed by the competent Portuguese court.

The court responsible for the recognition of foreign decisions is the Regional Appeal Court. The court must verify that: (i) the foreign decision is authentic; (ii) it does not

contain decisions in conflict with Portuguese public order; and (iii) if the situation was resolved under Portuguese law (in accordance with the rules of conflicts of law), it would not violate its provisions.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

We are not aware of the existence of requests to domestic courts to recognize or enforce judgments of international courts.

The primary source of statutory Law is Law No. 63/2011 of 14 December 2011, which approved the Voluntary Arbitration Law (hereinafter "VAL"). The VAL sets out a specific chapter for the enforcement of domestic arbitration awards (Chapter VIII) and another for the recognition and enforcement of foreign arbitral awards (Chapter X). The VAL governs both domestic and international arbitration proceedings.

However, there is a chapter in the VAL dedicated to international arbitration which sets forth certain specific rules, namely:

i. the inadmissibility of pleas based on domestic law of a party that is a State, a State-controlled organization or a State-controlled company;

ii. a more "pro-validity" rule regarding the substantial validity of the arbitration agreement;

iii. the possibility of choosing the rules of law to be applied by the arbitrators, if they have not authorized them to decide ex-aequo et bono;

iv. a more restrictive approach regarding appeals, pursuant to which the award is not appealable unless the parties have expressly agreed on the possibility of an appeal to another arbitral tribunal and regulated its terms; and

v. the possibility of setting aside an award made in Portugal, in an international arbitration in which non-Portuguese law has been applied to the merits of the dispute, if such award is to be enforced or produce other effects in national territory, whenever such enforcement leads to a result that is manifestly incompatible with the principles of international public policy.

Despite what is provided in that chapter, the provisions on domestic arbitration also apply to international arbitration, with the necessary adjustments. The VAL is essentially based on the UNCITRAL Model Law on International Commercial Arbitration (with the amendments adopted in 2006).

Awards issued in arbitrations seated in Portugal do not require submission to previous recognition and are enforceable in terms that are, in general, equivalent to decisions of the Portuguese state courts.

Without prejudice to the mandatory provisions of the New York Convention as well as to other treaties or conventions that bind the Portuguese State, arbitral awards issued in arbitrations seated abroad shall only be effective in Portugal if they are recognized by the competent Portuguese state courts.

The party wishing to recognize a foreign arbitral award, namely in order to have it enforced in Portugal, shall provide the original of the award dully authenticated or a copy dully certified of the same, as well as the original of the arbitration agreement or a duly authenticated copy of the same. If the award or the arbitration agreement is not in Portuguese, the requesting party shall provide a duly certified translation in this language. Once the application for recognition is filled, together with the documents identified above, the opposing party is summoned to, within 15 days, submit its opposition. The trial is conducted pursuant to the rules applicable to appeals.

Portuguese courts are generally favourable to the recognition and enforcement of arbitration awards. An arbitral award granted by an arbitral tribunal is binding upon the parties in the same terms prescribed for a domestic final judgment rendered by a state court and may be enforced similarly. Thus, issues raised that have been finally determined by a competent arbitral tribunal constitute res judicata. Only in exceptional circumstances is it possible to re-hear those issues in a national court.

Those circumstances, which are also applicable to state courts' decisions, include, for instance, the existence of another final decision attesting that the award was the result of a crime committed by the arbitrators in the performance of their functions.

Please note that Portugal signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID") in 1984 and the same is in force since 1 August of that year, and also ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on 18 October 1994 and entered a reservation further to Article I(3) of the same: Portugal shall only apply the Convention in cases where the arbitral awards were rendered in the territory of States bound by the Convention.

Furthermore, Portugal is bound by the Geneva Convention on Execution of Foreign Arbitral Awards, dated 26 September 1927 (ratified by Portugal in 1931), the ICSID Convention and the Inter-American Convention on International Commercial Arbitration, signed in Panama in 1975 (ratified by Portugal in 2002). In addition to these Conventions, there are multiple Bilateral Investments Treaties in force between Portugal and other countries, some of which deal with enforcement issues.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The CIDS research paper sets out a number of interesting options for reforming the existing investor-State dispute settlement system. The main options range from creating an International Tribunal for Investments to the creation of an Appeal Mechanism for reviewing investor-state arbitral awards. Different alternatives for reviewing decisions or awards are discussed, as are different options with regard to the composition of the Tribunal, the nomination of Tribunal Members, the enforcement of decisions, or the applicable law. The paper also examines different ways of applying any such new mechanism to existing investment treaties in the form of an opt-in convention modeled on the Mauritius Convention.

To a certain extent, the different aspects discussed in the CIDS research paper are inter-linked and adopting a particular position on the options presented for one aspect will have implications on the policy choices available for other aspects. It is therefore difficult to express a preference for any of the detailed options presented in the paper before further discussions about the main goals and priorities of the overall reform project have taken place.

The EU and its Member States, including Portugal, have already been engaged in a process of reform of investment policy and in particular of investor-State dispute settlement over the past years. One important element of that reform is the creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen as regards the existing system. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both EU-internally and with non-EU countries and we welcome the opportunity to pursue further discussions.

16. Slovak Republic

[Original: English]
[Date: 5 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Slovak Republic is a party to Energy Charter Treaty, the ICSID Convention and various bilateral investment treaties with investor-state dispute settlement provisions (in total, 32 extra EU IIAs and 20 intra EU IIAs).

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs - Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The Slovak Republic Model BIT does provide for possible future creation of a bilateral or multilateral investment court or tribunal. Such provision was included upon the requirement of the European Commission.

Here we provide the respective provisions included in the current IIAs between the Slovak Republic and Islamic Republic of Iran and the Slovak Republic and United Arab Emirates that have been negotiated, signed but not yet entered into force.

IIA between the Slovak Republic and the Islamic Republic of Iran: "Upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment tribunal and/or a multilateral appellate mechanism applicable to disputes under this Agreement, the relevant parts of this Agreement shall cease to apply."

IIA between the Slovak Republic and the United Arab Emirates: "Contracting Parties may consider implementation of future developments in policy of investment protection of either Contracting Party, including a multilateral investment court provided that both Contracting Parties are signatories of the Convention establishing such a court."

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

In case of IIAs concluded by the Slovak Republic, these do not usually contain any specific provisions on amendment process. The amendment is left to the regime provided by the Vienna Convention on the Law of the Treaties.

However, please see below couple of sample provisions provided in the IIAs between the Slovak Republic and Kenya (which has not been ratified yet) and the Slovak Republic and Turkey entered into force in 2013.

IIA between the Slovak Republic and Kenya: "This Agreement may be amended in writing by mutual consent of both Contracting Parties at any time after it is in force. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement."

IIA between the Slovak Republic and Turkey: "This Agreement may be amended by written agreement between the Contracting Parties. Any amendment shall enter into force when each Contracting Party has notified the other that it has completed all internal requirements for entry into force of such amendment."

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

No. The Slovak law governs the recognition and enforcement of court judgments of foreign countries.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

First of all, please be informed that the Slovak Republic consistently supports the ongoing efforts on reforming the current ISDS regime. Based on the discussions within the EU, outcomes reached in the EU investment agreements as well as after studying various investment protection models worldwide, the Slovak Republic successfully implemented many balanced provisions into its Model BIT with the primary aim to provide investment protection for responsible and non-speculative investors while providing sufficient space for state regulatory powers in dealing with the public legitimate objectives.

As a part of these efforts, the Slovak Republic welcomes the discussions on the multilateral solution options with extensive potential on the reform needed. All of the presented options, if chosen, would be preceded by a period of negotiations and meetings of the negotiating contracting parties. In case of a reform of ISDS, it is desired that the initiative for future proposal for multilateral reform of ISDS does have wide support from Contracting Parties. Therefore, it may be advisable to explore negotiation history of successful projects such as ICSID Convention, WTO Appellate body or process preceding Marrakesh Agreement.

You may be aware that the EU and its Member States have already been engaged in a process of reform of investment policy and in particular of investor-State dispute settlement over the past years, including the creation of a multilateral mechanism for the settlement of investment disputes. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both EU internally and with non-EU countries and we welcome the opportunity to pursue further discussions.

We appreciate the preparation of the said CIDS research paper in this regard, which we consider as a great basis for further expert discussions.

17. Spain

[Original: English]
[Date: 30 December 2016]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Spain is currently a party in 76 bilateral investment agreements (BIAs) and Spain is also a party to the Energy Charter Treaty. All of these agreements contain provisions on the protection of foreign investments and on the settlement of investor-State disputes.

The EU has concluded the negotiations of two other agreements, in which Spain is also a Party, containing provisions on investment protection and on the settlement of investor-State disputes, which are not yet in force. These agreements are the EU-Canada Comprehensive Trade and Economic Agreement (CETA) and the EU-Vietnam Free Trade Agreement.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs - -

Spain does not have any BIA containing provisions on permanent courts instead of investor-State arbitration for the resolution of disputes. However, the CETA agreement as well as the EU-Vietnam FTA establish Tribunals that will decide claims submitted with regard to alleged breaches of the investment protection provisions of these agreements.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Spain does not have any BIA containing provisions whereby investor-State arbitral awards may be subject to appeal. However, the CETA agreement as well as the

EU-Vietnam FTA establish Appeal Tribunals to review awards rendered by the Tribunals established under those agreements.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Spain does not have any BIA addressing the possible creation of a bilateral or multilateral appellate mechanism or a permanent institution. However, Spain is working in coordination with the European Commission and the other Member States towards the creation of a multilateral investment mechanism. The CETA agreement as well as the EU-Vietnam FTA contain provisions in this regard.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Only seven BIAs concluded by Spain contain provisions on the amendment of the agreement: Bosnia and Herzegovina; Republic of Korea; People's Republic of China; Indonesia; Lebanese Republic; Republic of Lithuania and Republic of Trinidad and Tobago.

None of the BIAs concluded by Spain contain provisions safeguarding investor's rights or providing for transitional arrangements in case of modifications.

On the other hand, the Energy Charter Treaty, the CETA and the EU-Vietnam FTA contain provisions on the amendment of the agreement.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Articles 21 and 22 of the Spanish organic law of Judicial Power stipulate that the judgments of international courts are enforceable in Spain provided that the jurisdiction of the International Tribunal is determined by an International Treaty of which Spain is a party or accepted by Spain unilaterally.

It is the case of the acceptance by Spain of the jurisdiction of the International Court of Justice (ICJ), which was made unilaterally by a Declaration of 15 October 1990.

The organic law of Judicial Power can be found at: http://www.boe.es/buscar/act.php?id=BOE-A-1985-12666

The unilateral declaration accepting the jurisdiction of the International Court of Justice can be found at: http://www.boe.es/buscar/doc.php?id=BOE-A-1990-27553

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

There is no appeal mechanism of arbitral awards in our legislation.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Spain supports the idea of working towards the creation of a multilateral investment dispute settlement mechanism that counteracts on the perceived limitations of the current ad hoc Investor-State Dispute Settlement. The new mechanism should be built without any doubt in terms of its legitimacy, neutrality, independence, transparency, affordability and consistency.

This multilateral mechanism should apply to multiple existing or future agreements and we think that a good option to do this would be on the basis of an opt-in system, similar to the "Mauritius Convention on Transparency". This would avoid the need to modify the investment agreements one by one.

Spain, the EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such mechanism and we welcome the opportunity to pursue further discussion

(A/CN.9/918/Add.3) (Original: English/French/Spanish)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

18. Algeria

[Original: French]
[Date: 10 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

At the bilateral level, Algeria has signed 29 treaties with European countries, 29 treaties with Arab countries, 9 treaties with Asian countries, 3 treaties with American countries and 13 treaties with African countries.

The treaties signed and ratified by Algeria include provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The use of permanent tribunals for the resolution of disputes between investors and Algeria is provided for by both the bilateral and multilateral international agreements signed and ratified by Algeria.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The IIAs concluded by Algeria do not contain provisions whereby investor-State arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The IIAs signed and ratified by Algeria do not address the possible creation in the future of a bilateral or multilateral appellate mechanism for investor-State arbitral awards, or a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The IIAs signed and ratified by Algeria contain provisions on the amendment of the IIA.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Algerian domestic law recognizes and enforces judgments of international courts, subject to certain conditions. See article 605 of the Code of Civil and Administrative Procedure of Algeria.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Algerian legislation on international arbitration contains provisions on appeal in articles 1055 to 1061 of the Code of Civil and Administrative Procedure.

19. Czech Republic

[Original: English]
[Date: 10 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The Czech Republic is currently a Party to about 80 bilateral investment treaties and to the Energy Charter Treaty. All of them include provisions on the protection of foreign investment and on the settlement of investor-State disputes.

The Czech Republic is also a Party to the EU-Canada Comprehensive Trade and Economic Agreement (CETA) and the EU-Vietnam Free Trade Agreement. Both agreements contain provisions on the protection of foreign investment and on the settlement of investor-State disputes, but they are not yet in force. However, in respect of this questionnaire, the Czech Republic will only provide information regarding bilateral investment treaties concluded by the Czech Republic with a third State.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

None of the IIAs concluded by the Czech Republic provide for permanent courts or tribunals.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

None of the IIAs concluded by the Czech Republic allow appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

None of the IIAs concluded by the Czech Republic contain the possible creation of a bilateral or multilateral appellate mechanism for investor-State arbitral awards or a bilateral or multilateral permanent investment tribunal or court. The only option how to incorporate the bilateral or multilateral appellate mechanism for investor-State arbitral awards or a bilateral or multilateral permanent investment tribunal or court is to amend the IIAs (see question 5).

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Article 13(5) of the Czech — Chinese BIT, Czech — Bosnia and Herzegovina BIT and Czech — Bahrain BIT contains provisions on the amendment of the agreement, which states: "This agreement may be amended by a written agreement between the Contracting Parties. Any amendment shall enter into force under the same procedure required for entering in force of the present Agreement."

Article 15 of the Czech — Azerbaijan BIT contains provisions on the amendment of the agreement, which states: "Any additions and amendments may be made to this Agreement by mutual consent of the Contracting Parties. Such additions and amendments shall be made in a form of separate protocols being an integral part of this Agreement and shall enter into force in accordance with the provision of Article 16 of this Agreement."

Article 12 of the Czech — Indonesian BIT contains provisions on the amendment of the agreement, which states: "This Agreement may be amended at any time, if deemed necessary, by mutual consent."

Article 12(4) of the Czech — North Korean BIT contains provisions on the amendment of the agreement, which states: "This Agreement may be amended by mutual consent in writing between the Contracting Parties. Any amendment shall enter into force when each Contracting Party has notified the other that it has completed all legal requirements for entry into force of such an amendment."

Article 13(4) of the Czech — Lithuanian BIT contains provisions on the amendment of the agreement, which states: "This Agreement can be amended at any time as may be agreed by written notice between two Contracting Parties. Such amendments shall enter into force when the Contracting Parties have notified each other that all necessary juridical formalities for entry into force have been completed."

Article 11 of the Czech — Malaysian BIT contains provisions on the amendment of the agreement, which states: "This Agreement may be amended by mutual consent of both Contracting Parties at any time after it is in force. Any alteration or modification of this Agreement shall be done without prejudice to the rights and obligations arising from this Agreement prior to the date of such alteration or modification until such rights and obligations are fully implemented."

Article 25(5) of the Czech — Mexican BIT contains provisions on the amendment of the agreement, which states: "This Agreement may be modified by mutual consent of the Contracting Parties and the agreed modification shall come into effect in conformity with the procedures established in paragraphs (1) and (2)."

Article 12(3) of the Czech — Turkish BIT contains provisions on the amendment of the agreement, which states: "This agreement may be amended by a written agreement between the Contracting Parties. Any amendment shall enter into force after each Contracting Party has notified the other that it has completed all internal requirements for entry into force of such amendment."

Despite other BITs which the Czech Republic concluded do not contain explicit provisions on the amendment of the agreement, these BITs may be amended as well.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Generally speaking, recognition and enforcement of judgments of international courts is based on the Article 1 paragraph 2 of the Constitution of the Czech Republic.

Article 1:" (1) The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens. (2) The Czech Republic shall observe its obligations resulting from international law."

The relevant national legal framework for effective execution of ECHR judgments is based on the Act no. 186/2011 Coll., on Providing Cooperation for the Purposes of Proceedings before Certain International Courts and Other International Supervisory Bodies, and on the Government Agent`s Statute annexed to Government Resolution No. 1024/2009 of 17 August 2009. The Act stipulates that all branches of the Government as well as the judiciary are required to take without undue delay both individual and general measures to put an end to violations of the relevant international instrument found in individual cases. The Government Agent`s Statute specifies that after the translation of the respective judgment, the Government Agent

submits a report to the Minister of Justice and recommends to, and consults with, public authorities concerned what steps should be taken following the finding of a violation by the Court. Furthermore, in 2015, the Office of the Government Agent established the Committee of Experts on the Execution of Judgments of the European Court of Human Rights. Its legal basis stems from Article 5 § 5 of the Statute of the Government Agent. The Committee of Experts is composed of all key actors, including representative of all ministries, Parliament, the Constitutional Court, the Supreme Court, the Supreme Administrative Court, the Supreme Public Prosecutor`s Office, the Public Defender of Rights, the Czech Bar Association, academia and NGOs. The legal representative of the petitioner might be summoned as well. Once the consensus regarding measures that need to be taken to execute the Court`s judgment is reached, the Office of the Government Agent is then responsible for the drafting of action plans and reports for the Committee of Ministers.

Moreover, following the Court`s judgment, the Constitutional Court Act allows for the reopening of the proceedings before the Constitutional Court. It is possible to reopen the proceedings in any case, be it criminal, civil, commercial, administrative, etc. More information is available on the designated Council of Europe website.

As regards the judgments of European Court of Justice, these are legally binding and national courts follow them in their decision-making practice.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

According to the Czech law the arbitral award is final and binding and is not subject to appeal. However, according to Art. 27 of the Act No. 216/1994 Coll., on Arbitration, as amended, the parties to the arbitration agreement may agree in the arbitration agreement that a revision of the arbitral award by another arbitral tribunal may take place on the basis of a request by one of the parties after the arbitral award is rendered. Such request for revision shall be made in a time limit as specified in the arbitration agreement or by default in 30 days after the receipt of the arbitral award by requesting party. The revision proceedings are part of arbitral proceedings and shall be conducted in accordance with the above mentioned Act on Arbitration.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The CIDS research paper is very useful for an initial debate how to approach the issue of multilateralization of investor-State dispute settlement system. The Czech Republic as a Member State of the EU is fully engaged in a process of reform of international investment regime, where a multilateral mechanism for settlement of investment disputes is an assumed future element. In this effort, the EU and its Member States currently discuss internally a possibility of such mechanism and related next steps.

20. Ecuador

[Original: Spanish]
[Date: 27 December 2016]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Response of the Office of the Counsel General of the State: The Republic of Ecuador is a State Party to bilateral investment protection treaties that include provisions on the settlement of investor-State disputes. A total of 16 bilateral investment treaties are currently in force and 10 have been terminated.

Response of the Office of the President of the Republic: Those IIAs include provisions on the settlement of investor-State disputes. Generally, such disputes are resolved through a tribunal composed of a representative of the State that has received the

investment, a representative of the investor and a third party chosen by the two representatives by mutual consent. If the two representatives are unable to reach an agreement, the arbitration administration centre will appoint the third arbitrator, who will preside over the arbitral proceedings. Those arbitrators generally belong to an exclusive club of professionals who are chosen repeatedly by investors and the respective arbitration centres. Their privately practicing lawyers, who come from large firms based in Paris, New York and London, usually defend big transnational corporations and therefore generally tend to rule in their favour and interpret the protection of investors broadly, to their benefit. Arbitrators' decisions are not open to appeal, even if they grossly violate Ecuadorian and comparative law, and arbitrators are also accorded immunity, which makes them — like European monarchs — exempt from liability with regard to all the decisions they take, even if such decisions lead to the State losing billions of dollars, in flagrant violation of law and equity.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Response of the Office of the President of the Republic: The courts and tribunals draw their personnel from that exclusive club of lawyers who come from legal firms that tend to defend the rights of the investor.

Response of the Directorate of International Instruments, Ministry of Foreign Affairs and Human Mobility : The text of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment states that: "Art. VI. 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: (a) To the courts or administrative tribunals of the Party that is a party to the dispute; or (b) In accordance with any applicable, previously agreed dispute-settlement procedures; or (c) In accordance with the terms of paragraph 3. 3. Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) To the International Centre for the Settlement of Investment Disputes ('Centre') established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ('ICSID Convention'), provided that the Party is a party to such Convention; or (ii) To the Additional Facility of the Centre, if the Centre is not available; or (iii) In accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or (iv) To any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute. (b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent."

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Response of the Office of the President of the Republic: No. The only option that exists in some arbitration centres to which Ecuador has referred disputes is the possibility of requesting the annulment of arbitral awards. However, annulment action does not necessarily have suspensive effect and it is the annulment tribunal that must decide on the matter, either by suspending the effects of the appealed judgment, or by establishing a guarantee to ensure its enforcement.

Yet more concerning is the fact that, in arbitration that takes place in accordance with the UNCITRAL Arbitration Rules, annulment proceedings are not conducted before the arbitral tribunal, but before the courts of the Netherlands, which represents an

excessive and disproportionate relinquishment of sovereignty in favour of another country that is also a recipient of investments.[1]

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Response of the Office of the Counsel General of the State to questions 2, 3 and 4: The IIAs concluded by the Republic of Ecuador do not contain provisions: (i) on the settlement of investor-State disputes through permanent courts or tribunals; (ii) whereby investor-State arbitral awards may be subject to appeal; (iii) on the possible creation in the future of a bilateral or multilateral appellate mechanism for investor-State arbitral awards, or on the creation of a bilateral or multilateral permanent investment tribunal or court.

Response of the Office of the President of the Republic: The IIAs do not address the creation in the future of a bilateral or multilateral appellate mechanism for investor-State arbitral awards, or a bilateral or multilateral permanent investment tribunal or court. However, the Republic of Ecuador agrees with that proposal as an alternative to the current system, with the proviso that it must be aligned with the Inter-American System for the protection of human rights; that is, recourse should be made to international tribunals only once all domestic judicial bodies have been exhausted.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Response of the Office of the Counsel General of the State: Examination of the IIAs signed and ratified by the Republic of Ecuador reveals that they do not contain provisions on the amendment or reform of the IIA, thus entailing implementation of article 39 of the Vienna Convention on the Law of Treaties, which states: "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."

Response of the Office of the President of the Republic: None of the IIAs concluded conflict with any provisions on their amendment.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Response of the Office of the Counsel General of the State: In respect of foreign judgments, article 102 of the General Code of Procedure states that "The recognition and homologation of foreign judgments, arbitral awards and mediation instruments which have the effect of a judgment in their legislation of origin shall be the responsibility of the specialized chamber of the provincial court of the place of domicile of the respondent.

"The enforcement of foreign judgments, arbitral awards and mediation instruments (actas de mediación) shall be the responsibility of the judge of the court of first instance of the place of domicile of the defendant which has jurisdiction over the case due to its subject matter.

"If the defendant is not domiciled in Ecuador, the judge of the court of first instance of the place in which the assets are located or in which the judgment, arbitral award or mediation instrument should have effect shall have jurisdiction."

However, judgments rendered by international courts (the Court of Justice of the Andean Community or the Inter-American Court of Human Rights) are directly applicable and Ecuadorian law does not provide for a judicial mechanism for their enforcement or recognition.

[1] Note by the Secretariat of UNCITRAL: The UNCITRAL Arbitration Rules provide that the place of arbitration is determined by agreement of the parties (article 18); annulment procedures would take place before the courts at the place of arbitration as determined by the parties.

In particular, article 91 of the Statute of the Court of Justice of the Andean Community, published in Official Register No. 384 on 6 August 2001, provides confirmation of that as follows: "The judgment shall have binding force and be considered res judicata from the day following its notification, and it shall be applicable in the territory of member countries, without homologation or an exequatur being necessary."

In relation to decisions emanating from the Inter-American System for the protection of human rights and the Universal Human Rights System, article 68 of the American Convention on Human Rights establishes that the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties, which, in Ecuador, is reflected in Executive Decree No. W 1317, published in Official Register No. 428 on 18 September 2008. Namely, article 1 of that Decree provides as follows: "The Ministry of Justice and Human Rights shall be responsible for coordinating the enforcement of judgments, interim measures, provisional measures, amicable agreements, recommendations and resolutions originating in the Inter-American System for the protection of human rights and in the Universal Human Rights System, and other obligations arising out of international commitments in that area."

Response of the Office of the President of the Republic: This is governed by articles 102 to 106 of the General Code of Procedure, the text of which is transcribed below:

"Art. 102 — Jurisdiction. The recognition and homologation of foreign judgments, arbitral awards and mediation instruments which have the effect of a judgment in their legislation of origin shall be the responsibility of the specialized chamber of the provincial court of the place of domicile of the respondent.

"The enforcement of foreign judgments, arbitral awards and mediation instruments shall be the responsibility of the judge of the court of first instance of the place of domicile of the defendant which has jurisdiction over the case due to its subject matter.

"If the defendant is not domiciled in Ecuador, the court of first instance of the place in which the assets are located or in which the judgment, arbitral award or mediation instrument should have effect shall have jurisdiction.

"Art. 103 — Effect. In Ecuador, foreign judgments, arbitral awards and mediation instruments which have been homologated and rendered in contentious or non-contentious proceedings shall have the force granted to them by the international treaties and agreements currently in force, without the need for review of the substance of the case they concern. "With regard to children and adolescents, the provisions of the law on the subject and the international instruments ratified by Ecuador shall apply.

"Art. 104 — Homologation of foreign judgments, arbitral awards and mediation instruments. For the homologation of foreign judgments, arbitral awards and mediation instruments, the competent chamber of the provincial court shall ascertain whether: 1. They have undergone the necessary external formalities to be considered authentic in the State of origin; 2. The judgment became res judicata in accordance with the laws of the country where it was rendered and the necessary supporting documents have been duly authenticated; 3. They have been translated, where appropriate; 4. The relevant procedural documents and certifications prove that the respondent was legally notified and the proper defence of the parties was ensured; 5. The request indicates the place of summons of the natural or legal person against whom the foreign decision is to be enforced.

"For the purposes of recognizing judgments and arbitral awards against the State, since they do not relate to trade issues it must also be demonstrated that they are not contrary to the provisions of the Constitution and the law, and that they comply with the international treaties and agreements currently in force. In the absence of international treaties and agreements, they shall be regarded as compliant if they are

referred to in the letters rogatory concerned or if the national law of the country of origin recognizes their effectiveness and validity.

"Art. 105 — Homologation procedure. In order for foreign judgments, arbitral awards and mediation instruments to be homologated, the applicant shall submit an application to the competent chamber of the provincial court, which, after ensuring that the conditions of this article have been met, shall summon the applicant to the location indicated for that purpose. Once the person against whom the judgement is to be enforced has been summoned, that person shall have five days to submit and provide supporting evidence for any objection to the homologation.

"The judge shall reach a decision within thirty days of the date on which the summons was issued. If a well-founded and acceptable objection is submitted and if the complexity of the case so warrants, the court shall convene a hearing, which shall be conducted and a decision reached in accordance with the general rules of this Code. The hearing shall be convened within a maximum of 20 days of submission of the objection.

"The chamber shall reach a decision at the same hearing. Appeals against the judgment of the chamber of the provincial court may be made only before the same judge.

"Once the issue of homologation has been resolved, foreign judgments, arbitral awards and mediation instruments shall be enforced as provided for in this Code.

"Art. 106 — Evidentiary effects of foreign judgments, arbitral awards and mediation instruments. A party that, as part of a proceeding, seeks to avail itself of the evidentiary effects of a foreign judgment, arbitral award and mediation instrument must first have them homologated in the manner provided for in this Code."

With regard to the request to provide information on court decisions relating to recognition of the judgments of foreign courts, owing to the nature of my role I have no information in that regard, nor am I aware of whether any such judgment has been recognized or enforced.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The legislation on international arbitration of the Republic of Ecuador does not contain any provisions on appeal by State courts or arbitral tribunals against arbitral awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The Office of the Counsel General of the State has two comments regarding the CIDS research paper on reform of the investor-State arbitration regime.

The establishment of a supranational judicial body by means of a multilateral treaty would reduce inconsistencies in arbitral awards that settle similar cases, thus providing parties with uniform interpretations and legal certainty.

It is important to determine the legal status of the international investment tribunal, that is, whether it is a supranational judicial body or a private arbitral body. This clarification would lead to different outcomes with regard to the recognition and enforcement of a judgment (in the case of an international permanent investment tribunal or court) or an award (in the case of a tribunal or court that retained some of the advantages of international arbitration), depending on the case. With regard to the first scenario, prima facie, recognition and enforcement would be governed by the provisions of the multilateral treaty that created the aforementioned judicial body. In the second scenario, recognition and enforcement of an award could take place through the existing Convention on the Recognition and Enforcement of Foreign Arbitral Awards [done in New York on 10 June 1958].

21. Germany

[Original: English]
[Date: 6 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Germany is party to 129 bilateral investment promotion and protection treaties (BITs) currently in force. The majority of these treaties contains provisions on investor-state dispute settlement (ISDS). In addition, Germany is party to the Energy Charter Treaty which also contains provisions on investment protection and ISDS.

The Comprehensive Economic and Trade Agreement between the EU, its Member States and Canada (CETA), as well as the Free Trade Agreement between the EU, its Member States and Vietnam (EU-VNM FTA), neither of which has been ratified, yet, each also contain provisions on investment protection and provide for an investment court to settle investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

No. However, CETA as well as the EU-VNM FTA each provide for a permanent investment court.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No. However, CETA as well as the EU-VNM FTA each provide for a permanent appellate tribunal to review awards rendered by the court of first instance provided for by these agreements.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No. However, in both CETA and the EU-VNM FTA the Contracting Parties have committed to work towards the creation of a multilateral investment court and/or appellate mechanism.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Article 42 of the Energy Charter Treaty contains provisions on the amendment of the agreement. In addition, Article 30.2 of CETA and Article X.6 of Chapter 17 of the EU-VNM FTA each contain provisions on the amendment of the respective agreement and of its annexes. Furthermore, IIAs can be modified or amended pursuant to general principles of public international law.

The German BITs contain so-called "sunset-clauses" providing protection when the respective BIT is terminated. According to such clauses investments made before the expiry of a terminated BIT remain protected by the provisions of the BIT for a certain time after the expiry of the BIT. In case an IIA was negotiated to replace an existing IIA, the IIAs usually provided for the more recent IIA to apply to existing investments from the date of its entry into force.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Judgments of the European Court of Justice against Member States like Germany are automatically enforceable (Art. 280 Treaty on the Functioning of the European Union, TFEU). The order for enforcement shall be appended to the decision of the European Court, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for

this purpose (in Germany the Ministry of Justice) and shall be made known to the Commission and to the Court of Justice of the European Union. When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Some decisions of the International Court of the Sea shall be enforceable in the Contracting States of the Convention of the Law of the Sea. In Germany the Law on the Enforcement of Decisions by International Courts in Matters of the Law of the Sea (*Gesetz über die Vollstreckung von Entscheidungen internationaler Gerichte auf dem Gebiet des Seerechts (Seegerichtsvollstreckungsgesetz — SeeGVG), BGBl. I 1995, p. 778, 786*) applies to the enforcement of such decisions. An enforcement clause (writ of enforcement) will be issued by the competent German court in case the authenticity of the decision has been verified, the content of the decision is enforceable and according to German law suitable to be enforced. After issuance of the enforcement clause the creditor will be able to proceed to enforcement in accordance with the national law.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The German law on arbitration (§§ 1025-1066 Civil Procedure Law) follows the UNCITRAL Model Law on Arbitration of 1985. No appeal to the regular courts against an arbitral award is laid down in the German arbitration law. An appeal against an arbitral award to another arbitral tribunal remains possible if the parties have included such a measure into their arbitral agreement or have agreed upon it during the arbitral proceedings.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Some features of ISDS have become subject to increased scrutiny in recent years. Investment policy makers, stakeholders and international organizations in many countries are engaged in a reflection process about possible reforms of the system.

The idea of a multilateral system for the resolution of investment disputes has emerged in order to improve the current system and address its perceived limitations in terms of legitimacy, transparency, consistency and predictability.

The establishment of an International Court for Investments and/or an Appeal Mechanism to the arbitration system, as proposed in the research paper, could be a further step to improve the current ISDS system. An important step has already been undertaken with the introduction of an Investment Court System with permanent judges (as opposed to an ad-hoc tribunal) and an appellate mechanism as undertaken by CETA, the EU-VNM FTA and the European Commission's draft proposal for TTIP (http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf).
Following this development we could also support the just opened discussions on the establishment of a Multilateral Investment Court, as proposed by the European Commission and Canada. As many of the design options for an International Court for Investments and/or an Appeal Mechanism are interdependent, at this early stage of exploration we do not have a position on a concrete concept for such institutions.

However, and without prejudice to a future German position, the following aspects should be taken into consideration:

(a) The design of such institutions should ensure that their awards can be reliably executed also in States that do not adhere to these institutions but are party to the ICSID Convention and / or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards;

(b) An institutional system containing both a court of first instance and an appeal mechanism could provide for a greater consistency and predictability than only an appeal mechanism;

(c) An opt-in-convention may be a possible mechanism for establishing an International Court for Investments and/or an Appeal Mechanism. This approach would be more adaptable to the specific needs and interests of states and could enable a greater number of states to accede to such institutions.

22. Latvia

[Original: English]
[Date: 6 January 2017]

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Latvian legislation does not prescribe requirements for recognition of judgements of international courts (as opposed to decisions of a foreign court). Thereby, there are no judicial mechanism and court rulings with regards to recognition or enforcement of judgements of international courts.

Cabinet Regulation No. 355 of 1 July 2014 "Regulations Regarding Representation in International Human Rights Institutions" prescribes the procedures by which representation of the interests of Latvia shall be ensured before the European Court of Human Rights (hereinafter "the Court") and in the framework of the United Nations Organization (hereinafter "the UN") human rights treaty monitoring mechanisms. Representation of the interests of Latvia before the Court and in the framework of the UN human rights treaty monitoring mechanisms shall be ensured by an authorized representative of the Cabinet. According to the Regulation functions of the representative, among other, is to submit an appeal of the government to the Grand Chamber of the Court on the basis of a Cabinet decision; if the court makes a ruling finding a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols in Latvia, to submit an informative report to the Cabinet on evaluation of the ruling of the Court, indicating measures necessary for execution of the ruling; on the basis of the information provided by responsible authorities, to prepare and submit a position of the government to the Committee of Ministers of the Council of Europe on execution of the ruling of the Court finding a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms or its protocols in Latvia.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

According to Latvian legislation, recognition of decisions of foreign arbitration courts takes place in accordance with international agreements that are binding for the Republic of Latvia, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and, respectively, in accordance with the Civil Procedure Law. There are no provisions on appeal by national courts against arbitral awards.

The order of recognition of foreign arbitrary judgements is similar to recognition of foreign court judgements. Procedure for Recognition and Enforcement of a Decision of a Foreign Court is regulated in Chapter 77 of the Civil Procedure Law. If some specific questions are not regulated by *lex specialis* in Chapter 77, general provisions of Civil Procedure Law shall apply. An application for the recognition and enforcement of a decision of a foreign arbitration court must be submitted for examination to a district (city) court on the basis of the place of enforcement of the decision or also based on the declared place of residence of the defendant, but, if none, the place of residence of the defendant or legal address. Having examined an application for the recognition and enforcement of decision of a foreign arbitration court, a court shall take a decision to recognize and enforce the decision, or to reject the application. An application can only be dismissed in the cases provided for by international treaties, binding upon the Republic of Latvia — Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Decision of a foreign arbitration court after its recognition must be enforced in accordance with the general procedures laid down in Civil Procedure Law.

There are no specific provisions on recognition or appeal concerning decisions of international arbitration. The procedure described above also applies to decisions of international arbitration in so far as it is not otherwise provided for in international agreements that are binding for the Republic of Latvia.

(A/CN.9/918/Add.4) (Original: English/French/Spanish)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

23. Belarus

[Original: English]
[Date: 9 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The Republic of Belarus is a party to the following multilateral treaties regulating investments: 1. Convention on the Settlement of Investment Disputes between the States and Nationals of Other States dated March 18, 1965; 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10, 1958 (the enforcement of arbitral awards in the Republic of Belarus is governed by Chapter 28 of the Code of Economic Procedure); 3. Convention Establishing the Multilateral Investment Guarantee Agency dated October 11, 1985; 4. Energy Charter Treaty dated December 17, 1994; 5. Treaty on cooperation in the field of investment activities within the CIS dated December 24, 1993; 6. Convention on the investor rights' protection dated March 28, 1997.

The Republic of Belarus signed 61 bilateral investment agreements.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Bilateral investment agreements of the Republic of Belarus usually include the clause providing for the possibility to submit the dispute to ICSID. No decision has ever been delivered by a permanent court or a tribunal with regard to the bilateral investment agreements of the Republic of Belarus.

As an example of Belarusian treaty practice, Article 9 of the Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments, dated March 31, 2004, stipulates as follows: "1. Any dispute concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled by negotiations. 2. If any dispute mentioned in paragraph (l) of this Article cannot be settled within six months following the date on which the dispute has been raised by the investor through written notification to the Contracting Party, each Contracting Party hereby consents to the submission of the dispute, at the investor's choice, for resolution to: a competent court of the Contracting Party, or the International Centre for Settlement of Investment Disputes (ICSID) for settlement by

arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or judicial remedies should be exhausted; or an ad hoc tribunal set up under Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The appointing authority under the said rules shall be the Secretary General of ICSID. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to the tribunal mentioned; or by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC). 3. For the purpose of this Article and the said Washington Convention, any legal person which is constituted in accordance with the legislation of one Contracting Party and which, before a dispute arises, was controlled by an investor of the other Contracting Party, shall be treated as a national of the other Contracting Party. 4. Any arbitration under paragraph 2 (b)-(d) of this Article shall, at the request of either Contracting Party, be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958. 5. The consent given by each Contracting Party in paragraph (2) and the submission of the dispute by an investor under the said paragraph shall constitute the written consent and written agreement of the parties to the dispute. 6. In any proceeding involving an investment dispute, a Contracting Party shall not assert, as a defence, counterclaim or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received pursuant to an insurance or guarantee contract. 7. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations".

Article 10 of the Agreement between the Government of the Republic of Belarus and the Government of the Republic of Croatia on the Reciprocal Promotion and Protection of Investments, dated June 26, 2001, stipulates as follows: "1. Any investment dispute between a Contracting Party and an investor of the other Contracting Party shall be settled by negotiation. 2. If a dispute under paragraph 1 of this Article cannot be settled within six (6) months of a written notification, the dispute shall be, upon the request of the investor, settled as follows: a) by a competent court of the Contracting Party, or b) by conciliation or arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington D.C. on March 18th, 1965. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted; or c) by arbitration by three arbitrators in accordance with the UNCITRAL arbitration rules, as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such dispute to the tribunal mentioned; or d) by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC). 3. The award shall be final and binding; it shall be executed according to the national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations. 4. A Contracting Party which is a party to the dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise the objection that the investor who is the other party

to the dispute has received an indemnity by virtue of a guarantee in respect of all or a part of its losses".

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs — Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Belarusian bilateral investment agreements do not contain such provisions.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Belarusian bilateral investment agreements contain provisions on their amendments. As a general rule, any amendments enter into force under the same procedure that is required for the entry into force of the agreement itself. If an agreement does not contain specific rules for the amendments, then the general regulations set out by the Vienna Convention on the International Treaties are applied. For example, Article 13 of the Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments, dated March 31, 2004, stipulates as follows: "At the time of entry into force of this Agreement or at any time thereafter the provisions of this Agreement may be amended in such manner as may be agreed between the Contracting Parties. Such amendments shall enter into force when the Contracting Parties have notified each other that the internal legal requirements for the entry into force have been fulfilled."

Several Belarusian multilateral investment agreements contain provisions [safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs]. For example, paragraph 2 of Article 10 of the Treaty on cooperation in the field of investment activities within the CIS dated December 24, 1993, stipulates as follows: "In case the change of investment legislation of the Party, receiving investment, or the denunciation of the present Agreement result in the impairment of the terms of the activities of enterprises previously created by the Parties in the territory of said Party, the rules, which applied at the time of registration of such enterprises, remain in force for the following 5 years". Nevertheless currently these provisions are viewed as outdated and discriminating against national investors, therefore the general approach is not to include them into the new agreements. These provisions are also not used in the Belarusian bilateral investment agreements.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The Supreme Court of the Republic of Belarus is the competent court for recognition and enforcement of arbitral awards under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965 (ICSID Convention). Pursuant to Article 45 of the Economic Procedure Code of the Republic of Belarus cases on recognition and enforcement of foreign courts' awards and foreign arbitral awards concerning business and other economic activities disputes are subject to the jurisdiction of a court that considers economic disputes. A procedure for recognition and enforcement of foreign arbitral awards is governed by Chapters 28 and 29 of the Economic Procedure Code of the Republic of Belarus. Whereas, having regard to the provisions of Article 48 of the Economic Procedure Code of the Republic of Belarus setting the right of the Supreme Court of the Republic of Belarus to initiate proceedings regarding any dispute within the jurisdiction of courts that consider economic disputes, the Supreme Court of the Republic of Belarus is a competent court for recognition and enforcement of arbitral awards in the Republic of Belarus under the ICSID Convention. As far as decisions of international courts such as ICJ are concerned, Belarus has never been handed down a ruling to recognize and enforce. It is presumed, however, that being grounded in international

treaty obligations, such rulings should fall under the legislation on international treaties (Law of the Republic of Belarus on International Treaties of the Republic of Belarus of July 23, 2008). Under the Law all governmental agencies are responsible for implementation and performance of international obligations of Belarus within their area of competence.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

There is no specific appeal system for the investment arbitration, as the general system of appeal under the Economic Procedure Code of the Republic of Belarus is applied.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The Belarusian party recognizes the emerging global demand for the reform of the investor-State arbitration regime, and believes that UNCITRAL is the appropriate multilateral forum to discuss the correspondent issues.

The Belarusian party is convinced that, due to the importance of the topic and the long-lasting consequences of the proposed reform, it is of an utmost necessity that the consultation process is based on the principles of inclusiveness and transparency, while its outcome has to embody a well-defined and consensually shared vision of aims, methods and substance, address all possible concerns, and deliver a clear picture of the modalities and consequences of the mechanism to be adopted.

The Belarusian party is a firm advocate of the idea to enhance a regional dimension, complementing the global investor-State arbitration regime. Establishment of regional institutions as elements of the global system allows for better geographic coverage, decrease in logistical expenses, promotion and development of local expert capacities, encouragement of interaction among different legal systems.

The Republic of Belarus stands ready in principle to consider the possibility of establishing a regional presence of new investor-State arbitration regime for Eastern Europe in due course.

24. Colombia

[Original: Spanish]
[Date: 16 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Colombia is currently a Party to 23 IIAs, 17 of which are in force and 6 of which have been signed, all of which, apart from the free trade agreements (FTAs) with the European Free Trade Association (EFTA) and the European Union, have a mechanism for resolving disputes between investors and the State. In the specific case of the Cooperation Agreement concluded with Brazil, which provides for institutional governance and dispute prevention, a national focal point, or ombudsman, is appointed by each Party to support the investors of the other Party in its territory.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Colombia is currently in the process of revising its model IIA to update it and tailor it to the international context. The revision brings together the international investment arbitration experiences of the past decade and reflects a number of important developments. To sum up very briefly, the model seeks to preserve the regulatory powers of the State and regulate the investor-State dispute settlement (ISDS) system, improving aspects such as transparency and consistency. For further information, we enclose herewith the first draft of this model.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs — Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The 2011 model bilateral investment treaty (BIT) does not contain any such provisions or any such mechanism. However, the 2016 model IIA is expected to make provisions for the legal concept of appeal. In the case of the FTAs with Chile, the Pacific Alliance and the United States, the possibility of designing an appeal mechanism is established.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The IIAs concluded by Colombia contain provisions on amendment that take various forms. Depending on the case, use might be made of administrative commissions with binding powers of interpretation with regard to investment arbitration. The general rule is that amendments may be made by written agreement between the Contracting Parties and submitted for ratification. No kinds of safeguards are provided for in case of amendments to the text of an IIA.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Colombia is a Party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and to the Inter-American Convention on International Commercial Arbitration (1975), which address the recognition of international awards, as well as to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

Decisions of the Supreme Court granting recognition of international awards are available at: http://190.24.134.101/corte/wp-content/uploads/2016/10/SC12467-2016.pdf

http://www.oas.org/es/sla/ddi/docs/colombia%20-%20drummond%20ltd%20v%20ferrovias%20en%20liquidacion,%20ferrocariles%20nacionales%20de%20colombia%20s.a..pdf

http://190.24.134.101/corte/wp-content/uploads/2016/10/SC12467-2016.pdf

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Colombian domestic legislation does not provide for any such concept. The Arbitration Statute of Colombia follows the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The paper outlines a number of options that are only now being explored in Colombia.

25. Mauritania

[Original: French]
[Date: 5 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The Islamic Republic of Mauritania has concluded a large number of investment promotion and protection agreements with friendly countries. All of those agreements

include provisions on the settlement of any disputes which may arise between the State and investors.

Act No. 52-2012 of 31 July 2012 on the Investment Code contains provisions on the settlement of disputes, in particular in article 30, which states: "All disputes arising out of the interpretation or application of this Code shall be settled through conciliation or, if the parties concerned are unable to reach an agreement, through arbitration or, at the choice of the investor, by the competent Mauritanian courts in accordance with the laws and regulations of Mauritania. Disputes between foreign investors or foreign-controlled enterprises established in Mauritania and the public authorities of Mauritania in relation to this Code may also be resolved through conciliation or arbitration by virtue of either mutual agreement between both parties; agreements and treaties on investment protection concluded between Mauritania and the State from which the investor originates; or arbitration before the International Mediation and Arbitration Chamber of Mauritania (CIMAM) or the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, ratified by Mauritania."

International agreements generally provide that "any investment dispute arising between one contracting party and an investor of the other contracting party shall be resolved amicably wherever possible". If the dispute cannot be settled amicably, within six months of the date of its notification by one of the contracting parties, the investor shall be entitled to submit the dispute either to the judicial authority of the contracting party to the dispute, or to an ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or to the International Centre for Settlement of Investment Disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

A permanent arbitration and mediation institution, the purpose of which is to contribute to building the trust required for business development while promoting mediation and arbitration as suitable methods of conflict resolution, has been established through the promulgation of Act No. 2000-06 of 18 January 2000 on the Arbitration Code and of Decree No. 2009-182 of 7 June 2009 on the creation of permanent arbitration and mediation institutions.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The IIAs provide that arbitration awards shall be final and binding for the parties concerned.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The agreements concluded by Mauritania do not provide for the creation in the future of a bilateral or multilateral appellate mechanism for investor-State arbitral awards, but there is nothing to prevent a clause to that effect from being established.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The agreements that have been concluded provide for amendments according to the interest of the parties, except for the international treaties that govern intellectual or industrial property rights in force at the time of their signature.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

This issue of recognition can be resolved through bilateral cooperation by means of an agreement between Mauritania and the contracting party, or in accordance with the section of the Code of Civil, Commercial and Administrative Procedure relating to the procedure for the enforcement of judgments.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Act No. 2000-06 of 18 January 2000 on the Arbitration Code provides as follows:

"Article 37 — The award may be appealed against, unless the parties have waived their right to appeal [in the arbitration agreement. However, the award cannot be appealed] when the arbitrator has been appointed to decide as amiable compositeur, unless the parties have expressly reserved the right to do so in the arbitration agreement. The appeal against the arbitral award shall be considered and decided in accordance with the rules on the procedure established by the provisions of the Code of Civil, Commercial and Administrative Procedure regarding judicial judgments. If the court upholds the contested arbitral award, it renders it enforceable. If it invalidates the award, it shall rule on the merits and render a new decision.

"Article 38 — When, on the basis of the distinctions made in article 37, the parties have waived their right to appeal or have not expressly reserved the right to do so in the arbitration agreement, an action for annulment of the decision that is considered to be an arbitration award may nevertheless be brought despite any stipulation to the contrary. Annulment action shall be initiated only in the following cases: 1. If the arbitral award was rendered in the absence of an arbitration agreement or on the basis of an invalid or expired agreement; 2. If the arbitral tribunal was improperly constituted or the sole arbitrator was improperly appointed; 3. If the arbitrator ruled without complying with the mandate with which it was entrusted; 4. If the arbitrator failed to comply with a rule of public policy; 5. If the fundamental rules of procedure relating to due process and the adversarial principle were not complied with."

26. Thailand

[Original: English]
[Date: 25 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Thailand is a party to a number of IIAs, both bilateral investment treaties (BITs) and bilateral/regional free trade agreements (FTAs), most of which contain provisions on the settlement of investor-State disputes. Examples include Japan-Thailand Economic Partnership Agreement (JTEPA), Thailand-Australia Free Trade Agreement (TAFTA), Thailand-New Zealand Closer Economic Partnership (TNZCEP), ASEAN Comprehensive Investment Agreement (ACIA), ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) and the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the People's Republic of China and ASEAN (ACFTA). It is also noteworthy that Thailand is in the process of negotiating FTAs containing provisions on the settlement of investor-State disputes, including the Regional Comprehensive Economic Partnership (RCEP) Agreement and the Agreement on Investment under ASEAN-Hong Kong Free Trade Agreement (AHKFTA).

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Many of Thailand's IIAs, as well as its 2013 Model Bilateral Investment Treaty (Model BIT), have provisions allowing for investor-State disputes to be submitted to the competent domestic court in certain circumstances. Article 9(2) of the Thailand-Bahrain Bilateral Investment Treaty, for example, specifies that "If such disputes or differences cannot be settled according to the provisions of paragraph (1) of this

Article within three months from the date of request for settlement, the investor concerned may submit the dispute to: (a) the competent court of the Contracting Party for decision; ..."

Another example is Article 8(2) of the Thailand-Israel BIT, which provides that "If any dispute between an investor of one Contracting Party and other Contracting Party cannot be thus settled within a period of six months, the investor shall be entitled to submit the dispute to any of the following bodies at the option of the investor concerned: (a) The courts of competent jurisdiction of the Contracting Party in whose territory the investment was made; ..."

Similarly, Article 10(5) of Thailand's Model BIT provides that "If the dispute in question cannot be resolved through consultation and negotiations within a period of six months, the investor may submit the dispute, at the investor's choice, for settlement to: a) the competent courts or administrative tribunals of the Contracting Party in whose territory the investment was made, provided that such courts or administrative tribunals have jurisdiction ..."

Thailand's FTAs also contain similar provisions, one example being Article 21(1) of Chapter 11 of AANZFTA, which provides that "A disputing investor may submit a claim referred to in Article 20 (Claim by an Investor of a Party) at the choice of the disputing investor: (a) where the Philippines or Viet Nam is the disputing Party, to the courts or tribunals of that Party, provided that such courts or tribunals have jurisdiction over such claim; ..."

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Thailand's IIAs and its Model BIT do not contain such provisions.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

None of Thailand's IIAs addresses the possible creation of such mechanisms. The same applies for the Model BIT.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Most of Thailand's IIAs contain provisions on amendment. The form and substance of these provisions differ across different lIAs. Some IIAs simply provide that "[this Agreement may be amended at any time, if deemed necessary, by mutual consent of both Contracting Parties" (see, for example, Article IX of Thailand-Indonesia BIT and Article 13 of Thailand-DPRK BIT).

Others adopt a more detailed formulation, such as "This Agreement may be amended in writing by mutual consent of the Contracting Parties. Any amendment shall enter into force after each Contracting Party has notified the other Contracting Party in writing that it has completed all internal requirements for the entry into force of such amendment' (see, for example, Article 14 of Thailand-Jordan BIT and Article 14 of Thailand-Myanmar BIT). A more flexible formulation can be found in Article 6 of Chapter 18 of AANZFTA, which provides that "[t]his Agreement may be amended by agreement in writing by the Parties and such amendments shall come into force on such date or dates as may be agreed among them".

None of Thailand's lIAs contains provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the lIAs. However, in the case of termination, some lIAs, such as Thailand-Hungary BIT, provide for a ten-year "survival" ("sunset") period for investments made prior to the date of termination of the Treaty.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

There is no existing statutory basis or judicial mechanism in Thailand to recognize and enforce judgments of international courts.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Thailand's Arbitration Act B.B. 2545 (2002) does not provide a mechanism for appeal against arbitration awards. This means that arbitral awards are final and binding in Thailand. However, Section 45 of the Arbitration Act allows for appeals against an order or judgment of the competent court, which has been requested to enforce arbitration awards, in the following circumstances: (1) The recognition or enforcement is contrary to public policy; (2) The order or judgment is contrary to the provisions of law concerning public policy; (3) The order or judgment is not in accordance with the arbitral award; (4) The judge who sat in the case gave a dissenting opinion; or (5) The order is an order concerning provisional order measures for protection under Section 161 of the Arbitration Act.

The right to appeal pursuant to the Act is a statutory right and the parties are unable to exclude it by way of agreements.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Thailand welcomes the preliminary analyses made in the CIDS research paper, and would like to suggest that further reflections be made on the following issues:

(l) Utility of an ITI

While having one single investment tribunal to resolve investment disputes across all investment treaties can potentially help ensure consistency in international investment law and the interpretation of investment treaties, it still needs to be considered whether having one single forum would be an efficient and sufficient way for resolving investor-State disputes. Particular attention might be paid to the issue of whether such a forum can adequately cater for country-specific situations and concerns. Additionally, since it is suggested that an ITI should be established as a permanent organization rather than an ad hoc arbitration body, there are important matters, both substantive and administrative, that need to be further considered, including the structure of the secretariat, the source of funding, the ITI's rules of procedure, the qualifications of arbitrators, and the possible mechanisms for enforcing the final arbitral awards.

More fundamentally, it should be recognized that one of the main purposes of using arbitration as a means to resolve disputes is to avoid having to resort to the formal and often lengthy process in domestic courts. In principle, arbitration is driven by "party autonomy" and can be customized in accordance with the parties' mutual agreement, thus offering flexibility and allowing for relatively fast settlement. The creation of one single arbitration forum may take away this flexibility. Importantly, under existing arbitration mechanisms the parties can select arbitrators with specific expertise, reputation, and competence to resolve their disputes. In contrast, the decision-makers of the envisaged ITI the permanent body-would not be selected by all parties. Doubts might therefore arise as to the suitability of the persons acting as arbitrators, and the relevant procedures may no longer depend on the parties' satisfaction but on the rules set by the permanent body. Moreover, the costs associated with using the ITI's mechanism — travelling costs, legal fees, tribunal fees and other expenses — as well as the estimated time needed for resolving each case are not yet determined. The amount of expenditure and time involved might be so substantial that the new mechanism becomes impractical, which is to be contrasted with normal arbitral proceedings, whereby the time and costs involved can be roughly estimated by considering the rules chosen by the parties.

(2) Appeal Mechanism (AM) and the establishment of an Opt-in Convention

With regard to the proposed creation of a single Appeal Mechanism (AM) to serve as appellate tribunal for investor-State arbitral awards across all States' IIAs, further study may be needed to consider whether the introduction of an appeal procedure

would unreasonably increase the costs and the length of proceedings. Such a study should also seek to further justify why an AM is desirable, given that it would jeopardize the finality of arbitral awards, which is one of the core advantages of arbitration.

It is also important to note that, while most arbitration regimes exclude the possibility of appeals against arbitral awards, there is an increasing number of investment treaties that include provisions for appellate review. Thus, it is necessary to consider how the appellate mechanism envisaged by the CIDS research paper would differ from the existing mechanisms as well as the relationship between the new appellate mechanism and the existing ones. A related issue warranting further study is the relationship between the new appellate mechanism (and the envisaged Opt-in Convention) and the operation of the New York Convention 1958, in particular the issue of whether the Convention and existing arbitration rules need to be amended.

Other matters that might benefit from a further study are (1) whether transitory measures, especially measures relating to an appeal against awards made prior to the establishment of the appellate mechanism and of mechanisms for recognition and enforcement of such awards by a domestic court are needed and (2) whether a mechanism for an exercise of the host State's right to appeal is needed in case where the host State unilaterally offers to investors the right to appeal under the Opt-in Convention but the home State is not a party to the Opt-in Convention.

(3) Other Comments

While the establishment of an ITI may have several benefits, it might still be worth exploring options other than creating a new mechanism in order to address the challenges associated with existing mechanisms, especially when it is considered that several questions and concerns surrounding the establishment of an ITI and an AM are yet to be addressed. One such option is to seek to resolve the problems with the existing mechanisms internally within the respective arbitration regimes.

(A/CN.9/918/Add.5) (Original: English/French/Russian/Spanish)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

27. Belgium

[Original: English/French]
[Date: 15 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Belgium has signed 95 bilateral investment treaties and 67 treaties with investment provisions. Investor state dispute settlement measures are present in each of these treaties. Most of these measures provide for an ICSID arbitral procedure or the establishment of an ad hoc arbitral tribunal according to UNCITRAL rules.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Belgium is currently undergoing a revision of its model BIT and arbitration is one of the discussed topics. Belgium will provide UNCITRAL with the text of its new model BIT as soon as a final version is available.

Furthermore, Belgium is following closely the discussions relating to arbitration which are arising at the European level. Key priorities for Belgium relating to these evolutions are the selection process of the arbitration judges, their remunerations, the ethics standards that will be applied to them and the access of SMEs to the new system.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

None of the agreements that Belgium has signed have yet established an appeal mechanism.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Belgium is currently undergoing a revision of its model BIT and arbitration is one of the discussed topics. Belgium will provide UNCITRAL with the text of its new model BIT as soon as a final version is available.

Furthermore, Belgium is following closely the discussions relating to arbitration which are arising at the European level. Key priorities for Belgium relating to these evolutions are the selection process of the arbitration judges, their remunerations, the ethics standards that will be applied to them and the access of SMEs to the new system.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Article 42 of the Energy Charter Treaty contains provisions on the amendment of the agreement.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

See Brussels Regulation No. 1215/2012 of 12 December 2012.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

See article 1716 of judicial Code — our legislation does not provide for appeal against arbitral awards and only allows parties to provide for such a possibility in their arbitration agreement.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The CIDS research paper sets out a number of interesting options for reforming the existing investor-State dispute settlement system. The main options range from creating an International Tribunal for Investments to the creation of an Appeal Mechanism for reviewing investor-State arbitral awards. Different alternatives for reviewing decisions or awards are discussed, as are different options with regard to the composition of the Tribunal, the nomination of Tribunal Members, the enforcement of decisions, or the applicable law. The paper also examines different ways of applying any such new mechanism to existing investment treaties in the form of an opt-in convention modelled on the Mauritius Convention.

To a certain extent, the different aspects discussed in the CIDS research paper are interlinked and adopting a particular position on the options presented for one aspect will have implications on the policy choices available for other aspects. It is therefore difficult to express a preference for any of the detailed options presented in the paper before further discussions about the main goals and priorities of the overall reform project have taken place. The EU and its Member States have already been engaged in a process of reform of investment policy and in particular of investor-State dispute settlement over the past years. One important element of that reform is the creation of a multilateral mechanism for the settlement of investment disputes which would seek to address some of the concerns which have arisen as regards the existing system. The EU and its Member States are currently engaged in exploratory discussions and reflections on the main goals and priorities of the creation of such a mechanism, both EU-internally and with non-EU countries and we welcome the opportunity to pursue further discussions.

28. Chile

[Original: Spanish]
[Date: 6 March 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Chile has signed 26 trade agreements, including free trade agreements and economic complementarity agreements, nine of which contain chapters on investment protection with provisions on investor-State dispute settlement. In addition, Chile has concluded 36 agreements on the promotion and reciprocal protection of investments, all of which include provisions on investor-State dispute settlement.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

As noted above, with regard to investor-State dispute settlement, the international investment agreements concluded by Chile provide for an arbitration model (a) in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID) and the Rules of Procedure for Arbitration Proceedings of ICSID, provided that both the respondent and the Party of the claimant are parties to the ICSID Convention, (b) in accordance with the ICSID Additional Facility Rules, provided that either the respondent or the Party of the claimant is a party to the ICSID Convention, (c) that is established on an ad hoc basis in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, or (d) in accordance with any other arbitration rules or institution agreed upon by the disputing parties.

Without prejudice to the foregoing, it should be noted that in cases in which it is not possible to reach an amicable settlement or a settlement through consultations within the prescribed time limit, the agreements concluded by Chile on the promotion and reciprocal protection of investments (including with France, Ecuador, the Plurinational State of Bolivia and El Salvador) grant the investor the option of recourse to the competent courts of the contracting party in whose territory the investment was made or to international arbitration.

A third possibility is that recourse must be made to the competent courts of the contracting party in whose territory the investment was made, unless arbitration is commenced by mutual agreement. Specific examples include, but are not limited to:

Article 8, paragraph 2, of the Agreement between the Government of the French Republic and the Government of the Republic of Chile concerning the Mutual Promotion and Reciprocal Protection of Investments, regarding the settlement of disputes between one contracting party and an investor of the other contracting party: "2. If any such dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, at the request of the national or the company, be submitted: — Either to the competent tribunal of the Contracting Party in whose territory the investment was made; — Or for arbitration to the International Centre for Settlement of Investment Disputes […]. Once the investor has submitted the dispute to the competent tribunal of the Contracting Party in whose territory the investment was made or for international arbitration, the choice of procedure shall be definitive."

Article 10, paragraph 2, of the Agreement between the Republic of Chile and the Federal Republic of Germany on the Promotion and Reciprocal Protection of Investments: "If a dispute within the meaning of the first paragraph cannot be resolved within six months of the date of the claim by one of the two litigants, it shall be referred at the request of either disputing party to the competent courts of the Contracting Party in whose territory the investment was made. […] 4. The provisions

[of paragraph 2] do not affect the right of the Parties in dispute to mutually agree to submit the dispute to an international arbitral tribunal. (5) In the cases set out in paragraphs 3 and 4 of this Article, unless the disputing parties have agreed otherwise, disputes shall be submitted to arbitration proceedings within the framework of the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" of 18 March 1965."

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

In the light of the reference made by the international investment agreements concluded by Chile to the provisions of the Convention and the Additional Facility Rules of the International Centre for Settlement of Investment Disputes and the Arbitration Rules of the United Nations Commission on International Trade Law, final awards may be subject to clarification, review and annulment, but not to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Four of the international investment agreements concluded by Chile (in the chapters on investment protection in the free trade agreements concluded with the United States of America, Colombia and Peru, and in the Additional Protocol to the Pacific Alliance Framework Agreement) address the creation in the future of a multilateral appellate mechanism, specifically in the provisions on the conduct of arbitration, along the following lines:

Article 10.19, paragraph 10, of the United States-Chile Free Trade Agreement: "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 10.25 in arbitrations commenced after the appellate body's establishment."

Article 10.20, paragraph 12, of the Additional Protocol to the Pacific Alliance Framework Agreement: "If a separate multilateral agreement enters into force as between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment agreements to hear investment disputes, the Parties shall explore the possibility of reaching an agreement that would have such appellate body review awards rendered under Article 10.26 in arbitrations commenced after the multilateral agreement enters into force as between the Parties."

To date, the international investment agreements concluded by Chile do not address the creation in the future of a permanent bilateral or multilateral investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

In accordance with the final provisions of the international investment agreements concluded by Chile, the parties may agree on any modification of the agreements. Specific examples include, but are not limited to:

Article 24.2, paragraphs 1 and 2, of the United States-Chile Free Trade Agreement: "The Parties may agree on any modification of or addition to this Agreement", "When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement."

Article 22.1 of the Free Trade Agreement between Colombia and Chile, entitled "Amendments, Modifications and Additions": "The Parties may agree on any amendment to, modification of or addition to this Agreement. 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, an

amendment, modification or addition shall constitute an integral part of this Agreement."

With regard to provisions on transitional arrangements in case of modifications of or amendments to international investment agreements, all of the agreements concluded by Chile on the promotion and reciprocal protection of investments guarantee the continued effectiveness of the provisions for a period of 5, 10, 15 or 20 years in respect of investments made prior to the date of termination of the agreement:

Agreement between the Government of the Republic of Chile and the Government of the Republic of Italy on the Promotion and Protection of Investments. Paragraph 2 of article 15, entitled "Duration and Expiry": "With regard to investments made prior to the expiry dates referred to in the previous paragraph, the provisions of articles 1 to 13 shall remain in force for a further five years from the aforementioned dates."

Agreement between the Government of Malaysia and the Government of the Republic of Chile on the Promotion and Protection of Investments. Paragraph 4 of article 10, entitled "Entry into Force, Duration and Termination": "With respect to investments made or acquired prior to the date of termination of this Agreement, the provisions of this Agreement shall remain in force for a period of ten (10) years from the date of termination."

Agreement between the Government of the Republic of Chile and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments. Paragraph 3 of article 11, entitled "Final Provisions": "With respect to investments made prior to the date on which the notice of termination of this Agreement became effective, its provisions shall remain in force for an additional period of fifteen years from that date."

Agreement between the Government of the French Republic and the Government of the Republic of Chile concerning the Mutual Promotion and Reciprocal Protection of Investments. Article 13: "Upon the expiry of the validity of this Agreement, investments made while it was in force shall continue to be protected by its provisions for an additional period of 20 years."

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The legal system of Chile does not provide for a special regime for the recognition and enforcement of judgments of international courts. Given that lack of a special regime, it is understood that the general rules for the recognition in Chile of foreign judgments apply; recognition is governed by the provisions of articles 242 to 251 of the Code of Civil Procedure. Those provisions cover the procedure before the Supreme Court of Justice that leads to the recognition and enforceability of a decision provided that it falls within the framework of one of the following models.

The three models contained in the Code of Civil Procedure are as follows:

Firstly, if there is an express provision in a treaty that establishes a particular procedure, the "treaty regime" applies. That regime is established in article 242 of the Code. The provision states that "decisions rendered in a foreign country shall have the force granted to them by the relevant treaties in Chile, and the procedures established by Chilean law shall be followed for their enforcement, insofar as such procedures are not modified by those treaties."

In the absence of special rules in the applicable treaties, the "reciprocity model" applies, as enshrined in articles 243 and 244 of the Code. The articles establish that, in the absence of international conventions and treaties that bind Chile in that area, the country must abide by the principle of both positive and negative reciprocity. Therefore, in cases in which no agreement has been concluded with the State in whose territory decisions for which recognition is sought have been rendered, such decisions "shall have the same legal force as that given to judgments rendered in Chile." Similarly, article 244 of the Code states that if the decision "is rendered in a country

that does not give effect to the judgments of Chilean courts, the decision shall have no legal force in Chile."

Lastly, and with the greatest practical application, is the "model of international regularity", enshrined in article 245 of the Code. When none of the previous models can be applied, article 245 of the Code establishes that in Chile, the decisions of foreign courts will have "the same legal force as if they had been rendered by Chilean courts", provided that they meet the conditions set out in the provision.

Furthermore, according to article 245 of the Code, in Chile, decisions rendered by foreign courts shall have the same legal force as if they had been rendered by Chilean courts provided that they meet the following conditions:

"1a. They contain nothing contrary to the laws of the Republic. However, the procedural laws to which the determination of the judgment has been subject in Chile shall not be taken into consideration;

2a. They are not inconsistent with national jurisdiction;

3a. The party against whom the judgment is invoked has been duly notified of the action. However, that party may prove that, for other reasons, it was unable to present its case;

4a. They are enforceable under the laws of the country in which they have been rendered."

In respect of the procedure, as governed by article 248 of the Code, in short, once the enforcement request has been submitted, the party against whom enforcement of the foreign judgment is sought is notified, and is given a time frame in which to make any relevant comments. A report is also received from the prosecutor of the Supreme Court. Lastly, once the foreign judgment has been recognized by the Supreme Court, it may be enforced with the same value as a judgment rendered in a domestic court.

With regard to the recognition and enforcement of judgments of foreign courts, the procedure depends on the instrument through which the State became a party to the relevant legal body. For example, article 68 (2) of the American Convention on Human Rights states: "That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." That article grants victims or their families recourse to domestic law for the enforcement of the judgment through the procedure for enforcing judgments against the State, in accordance with the domestic law of the respondent State.

Yes, domestic courts have been requested to recognize and enforce judgments of international courts. The judgment of the Inter-American Court of Human Rights in the case of Atala Riffo y Niñas vs. Chile is available at http://corteidh.or.cr/docs/casos/articulos/seriec_239_esp.pdf.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

No. Article 34 of the International Commercial Arbitration Act of 2004 provides for an application for setting aside an award as the exclusive recourse against an arbitral award.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

At the moment, Chile does not wish to make any comments regarding the CIDS research paper.

29. France

[Original: French]
[Date: 23 January 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

France is a party to 97 bilateral treaties on the promotion and protection of investments that are currently in force. Four treaties are undergoing an approval process that is nearing completion. Three other treaties have been unilaterally terminated, but remain applicable by virtue of their sunset clauses. With the exception of several treaties that, for the treatment of investor-State dispute settlement, refer to the contracts specifically concluded for the purposes of the investments covered by their provisions, those agreements typically contain a provision on the settlement of disputes that may arise between an investor and the State receiving the investment. The Energy Charter Treaty, to which France is a party, also includes provisions on investment protection (part III) and an investor-State dispute settlement mechanism (part V, article 26).

Since the entry into force, on 1 December 2009, of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, foreign direct investment has formed part of the commercial policy of the European Union, in accordance with article 207 of the Treaty on the Functioning of the European Union, which permits the European Union to negotiate, within the framework of its trade agreements, provisions on investment protection and investor-State dispute settlement. On 30 October 2016, the European Union and its member States signed the Comprehensive Economic and Trade Agreement (CETA) with Canada, which contains provisions on investment (chapter 8) and investor-State dispute settlement. The European Union has also negotiated a free trade agreement with Viet Nam, chapter 8 of which, entitled "Trade in Services, Investment and E-Commerce", contains a sub-chapter II on investment and investor-State dispute settlement.

It should be noted that under Regulation No. 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between member States and third countries, existing bilateral investment agreements remain in force provided that member States notify the European Commission of those agreements, as has been the case with regard to the aforementioned agreements concluded by France. Furthermore, member States of the European Union still have the option of concluding bilateral investment agreements under certain conditions, provided that those agreements are duly authorized by the European Commission.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The international investment agreements to which France is currently a party do not provide for permanent courts or tribunals for investor-State dispute settlement. However, the recent agreements negotiated by the European Union and its member States with Canada and Viet Nam establish a permanent jurisdictional mechanism for the settlement of investor-State disputes which differs significantly from the ad hoc arbitration procedures currently used to resolve such disputes.

As previously indicated, the member States of the European Union are signatories, alongside the European Union, to the CETA with Canada. Chapter 8, section F, of the CETA establishes a tribunal with 15 members to resolve disputes arising out of alleged breaches of section C (non-discriminatory treatment with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of a covered investment) and section D (investment protection) of the Agreement (article 8.18). Article 8.27 of the CETA relates to the constitution of the tribunal responsible for settling the aforementioned claims. To that end, the CETA Joint

Committee is responsible for appointing 15 tribunal members, five of whom are nationals of a member State of the European Union, five of whom are nationals of Canada and five of whom are nationals of third countries. The Agreement provides that those members shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. They are appointed for a five-year term, renewable once. The full text of the CETA is available at http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf (pages 107-146 are relevant to this questionnaire).

Sub-chapter II, section 3, of chapter 8 of the agreement negotiated with Viet Nam, which is currently undergoing legal fine-tuning, contains a similar mechanism to that of the CETA. In this case, article 12 of that sub-chapter of the Agreement provides for the establishment of a tribunal with nine members, appointed jointly by the European Union and Viet Nam, to rule on alleged breaches of the provisions on investment protection. Competence criteria similar to those established in the CETA are also set out therein. The non-final text of the Agreement is available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154210.pdf (pages 28 to 66).

In view of the fact that neither agreement is yet in force, the permanent tribunals whose establishment they provide for have not yet been constituted and, therefore, have not yet rendered any decisions.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The international investment agreements to which France is currently a party do not provide for the possibility of appeal against arbitral awards delivered pursuant to their clauses on investor-State dispute settlement. However, the agreements negotiated by the European Union and its member States with Canada (article 8.28) and Viet Nam (sub-chapter II, article 13) establish a mechanism for appeal against first-instance awards rendered by the permanent tribunals whose establishment the agreements provide for.

Article 8.28 of the CETA provides for the establishment of an appellate tribunal to review awards rendered by the aforementioned CETA tribunal. The appellate tribunal may uphold, reverse or modify awards on three bases: (a) errors in the application or interpretation of the law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and (c) the grounds for annulment set out in article 52 (1) (a)-(e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b) above.

Article 13, under sub-chapter II, of chapter 8 of the Agreement between the European Union and Viet Nam also provides for a permanent appeal tribunal and establishes grounds for appeal similar to those under the CETA.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The international investment agreements to which France is currently a party do not specifically provide for the possibility of establishing, on a bilateral or multilateral basis, an appellate mechanism for awards or a permanent investment court.

However, the agreements negotiated by the European Union and its member States with Canada and Viet Nam refer to those possibilities as follows:

(a) Appellate mechanism

Article 8.28 of the CETA provides for the establishment of an appellate tribunal responsible for reviewing awards rendered by the aforementioned CETA tribunal. The appellate tribunal may uphold, reverse or modify awards on three bases: (a) errors in the application or interpretation of the law; (b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; (c) the grounds for annulment set out in article 52 (1) (a)-(e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b) above.

Article 13, under sub-chapter II, of chapter 8 of the Agreement between the European Union and Viet Nam also provides for a permanent appeal tribunal and establishes grounds for appeal similar to those under the CETA.

(b) Permanent mechanism

Article 8.29 of CETA, entitled "Establishment of a multilateral investment tribunal and appellate mechanism", provides that the Parties shall pursue the establishment of a multilateral investment tribunal and/or a permanent appellate mechanism. It also provides that upon the establishment of such a tribunal, the Joint Committee shall adopt a decision providing that disputes under the CETA be resolved by that tribunal, and make appropriate transitional arrangements.

Article 15 of the Agreement between the European Union and Viet Nam, entitled "Multilateral dispute settlement mechanisms", provides that the Parties to the Agreement shall enter into negotiations for an international agreement providing for a multilateral investment tribunal and a multilateral appellate mechanism. The Trade Committee is to be responsible for adopting transitional arrangements for the purposes of converting the bilateral system into a multilateral system.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The international investment agreements that are currently in force do not necessarily contain provisions on their amendment. However, that does not prevent some of them from being amended, as demonstrated, for example, by the exchange of letters of 20 March 1986 between the Government of France and the Government of Egypt amending the Convention on the Reciprocal Encouragement and Protection of Investments of 22 December 1974 (see Decree No. 87-58 of 29 January 1987: https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000882548). The agreements that contain provisions on their amendment include:

The Agreement between the Government of France and the Government of Colombia on the Reciprocal Encouragement and Protection of Investments, signed on 10 July 2014 and currently in the process of being approved, article 18 (2) of which establishes that the Parties may amend the Agreement and that amendments must be approved in accordance with the constitutional requirements of the Parties. Those amendments are regarded an integral part of the Agreement and enter into force on the date agreed upon by the Parties (the Agreement is not yet in force, but the text is already available online at https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000000882548).

The text of that agreement does not provide for any transitional arrangements. However, establishing the date of entry into force of amendments should ensure the protection of the rights of investors whose investments have been made under the original agreement. Article 42 of the Energy Charter Treaty also allows the Parties to the Treaty to propose amendments, which may be submitted to the Energy Charter Conference for adoption and enter into force on the ninetieth day following deposit of the instruments of approval or ratification by at least three fourths of the Contracting Parties (see http://www.assemblee-nationale.fr/14/pdf/projets/pl3745-ai.pdf).

The CETA and the Agreement between the European Union and Viet Nam both contain, in articles 30.2 and X.6 respectively (chapter 17: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154231.pdf), a clause providing for amendment to the terms of the Agreement, including provisions on investment protection and investor-State dispute settlement. They provide that an amendment will enter into force following the exchange of written notifications certifying the Parties' fulfilment of their obligations and the completion of their internal procedures required for the entry into force of the amendment, or on the date agreed upon by the Parties.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

With regard to court decisions, a distinction should be made between decisions of the Court of Justice of the European Union (CJEU) and other international decisions (excluding those of the International Criminal Court). In the context of the law of the European Union, whose focus on integration distinguishes it from other international organizations, the General Court and CJEU render decisions that have a direct effect on the domestic law of member States. There are several types of remedy (actions for annulment, actions for failure to act, infringement proceedings and the mechanism of referral by the courts of member States to CJEU for a preliminary ruling). No domestic legal action is required to ensure that the decisions of CJEU and the General Court are enforced. However, member States may need to take legislative or regulatory measures in order to comply with those decisions. Lastly, if a member State does not comply with the decisions of CJEU, the European Commission is entitled to refer the matter back to CJEU so that the Court can, on the basis of the State's failure to give effect to a judgment of the Court of Justice and thus to fulfil its obligations, order the member State in question to pay a fine and a daily penalty.

In addition to the law of the European Union, France is also a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which established the European Court of Human Rights. That court renders final judgments. Article 46 (1) of the European Convention on Human Rights provides that States must abide by the decisions of the Court in cases to which they are parties. In particular, States must pay any compensation ordered by the Court and take any measures set out in the decision with regard to the persons who have brought the case before the Court. It is not necessary to apply again to a national court following the delivery of a judgment by the European Court of Human Rights.

With regard to other international courts, taking into account that criminal courts are not covered by this questionnaire, disputes are of an inter-State nature. It should be recalled in this respect that other international dispute resolution mechanisms, such as the Dispute Settlement Body of the World Trade Organization, are available to States. Of course, it is not necessary to adopt laws or apply to a judge to make such decisions rendered by international courts enforceable.

The national legal framework does not contain specific provisions on the recognition and enforcement of decisions of international courts.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Under current legislation, international arbitral awards cannot be appealed against before the French courts.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

France wishes to thank CIDS for its valuable contribution to the ongoing discussions on the possibility of reforming the procedures for investor-State dispute settlement. The research paper reviews various options that could lead to the establishment of a permanent international tribunal for settling investment-related disputes or an appeal mechanism for controlling the awards and decisions rendered in the context of investor-State disputes. Several options regarding the control of those decisions are addressed in the CIDS research paper, in addition to a number of options regarding the composition of a possible permanent international tribunal, the appointment of its members, the enforcement of its judgments and the applicable law. The research paper also examines the possibility of applying those new mechanisms to existing investment agreements through an agreement based on the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. It appears that those issues are closely interrelated, and that the approach adopted in relation to a particular aspect inevitably affects the other aspects of the proposed reform, the

main priorities and objectives of which require further discussion before a position can be taken regarding the various options discussed in the CIDS research paper.

It is also important to highlight that the European Union and its member States have already engaged in an in-depth reflection on the reform of investor-State dispute settlement. That work was undertaken in the context of the negotiation of trade agreements with third States containing a section on investment, and led to the development of a new approach, the "Investment Court System", which the European Union now promotes in all its trade negotiations and which France has undertaken to include in its next model agreement on the promotion and protection of investments, which is currently being drafted. Under this new approach, the European Union also promotes the establishment of a permanent court dedicated to settling investor-State disputes as an alternative to the current system. France has called for this reform and has directly contributed to the development of the new approach promoted by the European Union by publishing, as early as May 2015, a series of innovative and far-reaching proposals, which include the establishment of a permanent multilateral court (see http://www.diplomatie.gouv.fr/fr/IMG/pdf/20150530_isds_papier_fr_vf_cle432fca.pdf).Therefore, France fully endorses this proposed reform and hopes that the preliminary and exploratory work already undertaken by the member States of the European Union, as well as within and beyond the European institutions, to explore ways of establishing such a court will be actively pursued. However, the initiative remains a long-term project which requires further consideration at this stage.

30. Mexico

[Original: Spanish]
[Date: 10 March 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Mexico has signed 12 free trade agreements and 32 agreements on the promotion and reciprocal protection of investments, 29 of which are in force. Of the 12 free trade agreements to which Mexico is a party, 10 contain a chapter on investment with substantive disciplines and mechanisms for the settlement of investor-State disputes (the texts of the agreements signed by Mexico are available at http://www.gob.mx/se/acciones-y-programas/comercio-exterior-paises-con-tratados-y-acuerdos-firmados-con-mexico?state=published).

Those free trade agreements and agreements on the promotion and reciprocal protection of investments provide that an investor of a member country may use a dispute settlement mechanism to resolve an investment dispute that arises between it and the member country that receives its investment.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

None of the agreements to which Mexico is a party provide for permanent courts or tribunals. The agreements signed by Mexico provide for the possibility of referring to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, or to the United Nations Commission on International Trade Law; the establishment of ad hoc tribunals is also provided for.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The agreements in force in Mexico do not contain provisions whereby arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The agreements in force in Mexico do not provide for any such permanent mechanisms.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The existing agreements on the promotion and reciprocal protection of investments and free trade agreements with chapters on investment contain provisions on amendments and the termination of those agreements. In a number of cases, rights are established for investors, with transitional arrangements in case of termination (for example, article 19.6 of the free trade agreement with the Republic of Peru provides that, in the event of termination of the agreement, investors will be protected during the 10 years following termination). Certain procedures are also included to enable the entry into force of those arrangements.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Under article 1347-A of the Code of Commerce, published in the Official Gazette on 7 April 2016, judgments and decisions may be enforced if they meet certain requirements, as listed in that paragraph.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Mexican legislation does not provide for the appeal of arbitral awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Mexico does not have any comments regarding the CIDS research paper.

31. Pakistan

[Original: English]
[Date: 21 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Pakistan has concluded a number of Bilateral and Multilateral treaties on the Protection of foreign investment. The world's first Bilateral Investment Treaty (BIT) was signed on November 25, 1959 between Pakistan and Germany. To date Pakistan has signed BITs with 48 countries/organizations. Pakistan has also signed FTAs with Sri Lanka (12-06-2005), China (24-112006) and Malaysia (08-11-2007). The latter two FTAs are comprehensive and contain chapter on Investment embodied in the text. Most of the BITs that Pakistan signed with other states allow for a dispute resolution mechanism, whereby an investor whose rights under the BIT have been violated can have recourse to competent judicial, arbitral or administrative bodies of the host country where investment has been made or can approach for international arbitration under the auspices of the ICSID, or Rules of Arbitration of UNCITRAL or Rules of Arbitration of International Chamber of Commerce.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

The existing model BIT template of Pakistan do not provide for permanent courts or tribunals (as opposed to investor-state arbitration). However, it provides for all the available remedial national/international forums like mutual negotiations and consultations, the competent judicial, arbitral or administrative bodies of the Contracting Party in whose territory the investment has been made; or international arbitration under the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States under ICSID or the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or the Rules of Arbitration of the International Chamber of Commerce (ICC).

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

The existing model BIT template of Pakistan does not provide provisions whereby investor-state arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Pakistani model BIT template do not provide for possible creation in the future of a bilateral or multilateral appellate mechanism for investor-state arbitral awards: and/or a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The existing model BIT template of Pakistan contains provisions on the amendments of the BITs. The following is the text of the provision: "Any changes and amendments to this Agreement may be made by the mutual agreement of the Contracting Parties, which shall form protocols to this Agreement and shall have the same effect, as if it were part of this Agreement".

Though Pakistani model BIT template do not specifically contain provisions regarding safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the BITs, however, it provides that the BIT shall remain in force for a further period of five years in case the agreement is terminated in the prescribed manner.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

The Government of Pakistan has ratified the New York Convention of 1958 through legislation known as Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 conferring jurisdiction on the High Court which shall recognize and enforce the foreign arbitral award in the same manner as a judgement or order of the court in Pakistan. Further, the recognition of a foreign arbitral award shall not be refused except in accordance with Article V of the New York Convention. However, this Act shall not apply to foreign arbitral awards made before 14 July 2005.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Under the domestic legislation, there is no right of appeal against the Arbitral Awards made by the Court or Tribunal in cases of International Arbitration.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

We may support in principle a multilateral dispute settlement system, resulting in creation of single International Tribunal for Investments potentially competent to resolve investment disputes concerning as many States as would opt into it and creation of one single Appeal mechanism potentially competent to serve as an appellate tribunal for Investor-State arbitral awards across all States. We believe that foreign investors look favourably upon the existence of bilateral and multilateral investment treaties between their home and host country as a means to have stronger protections of their investments.

However it may also be kept in view while designing such a system for dispute resolution that at the international level there is a serious concern over the dispute resolution provisions in BITs that allows investors to enter arbitration with states over treaty violations. Furthermore, the existing applicable legal frameworks provide for compensation in cases of direct expropriation and indirect expropriation and the meaning of indirect expropriation is constantly expanding to include even delays in decisions of the court, change in legislation and adverse decision of domestic courts. Some of the recently concluded BITs even did not contain investor-State Arbitration clause in them and a number of governments are now terminating or revising their BITs. In this background Government of Pakistan is also revising its BIT template and has initiated negotiations for revoking investor-State Arbitration Clause in BITs with some of the countries. We propose that while designing a system for broader reforms of the investor state dispute settlement framework, the above hitches of the existing framework may be looked into and appropriate redress may be provided in the new model.

32. Russian Federation

[Original: Russian]
[Date: 16 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

The Russian Federation has concluded 82 bilateral treaties on the promotion and mutual protection of capital investments (international investment agreements, or IIAs) of which 65 have entered into force. The Russian Federation is also a party to the multilateral Agreement on Promotion and Mutual Protection of Investments in the Member States of the Eurasian Economic Community and to multilateral treaties relating to the protection of foreign investment (the Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part (hereinafter, the Partnership Agreement between the Russian Federation and the European Union) and the Treaty on the Eurasian Economic Union).

The international investment agreement (IIA) of, and the Treaty on, the Eurasian Economic Union contain provisions on the procedure for the settlement of disputes between States and foreign investors.

The Partnership Agreement between the Russian Federation and the European Union does not contain specific provisions on the procedure for the settlement of disputes between States and foreign investors.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Almost all the international investment agreements (IIAs) contain provisions on the settlement of disputes between States and foreign investors. Most of the international investment agreements (IIAs) provide for the investor having the choice of settling

disputes through courts in the place of investment or an arbitral tribunal (commercial arbitration) or the International Centre for Settlement of Investment Disputes (ICSID).

Examples include the agreement between the Government of the Union of Soviet Socialist Republics (USSR) and the Government of the Republic of Italy on the promotion and mutual protection of capital investments (signed in Rome on 30 November 1989), the agreement between the Government of the Russian Federation and the Government of the Kingdom of Cambodia on the promotion and mutual protection of capital investments (signed in Moscow on 3 March 2015) and the Treaty on the Eurasian Economic Union (subsection 6 of section VII on trade in services, facilities, activities and investments (annex 16 to the Treaty on the Eurasian Economic Union)).

Some IIAs do not provide for the settlement of disputes between a State and foreign investor in the State court of a contracting party, for example in the agreement between the Government of the USSR and the Government of the Kingdom of Belgium and the Grand Duchy of Luxembourg on the mutual promotion and protection of capital investment (signed in Moscow on 9 February 1989).

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No IIAs contain provisions whereby arbitral awards in disputes between States and foreign investors may be subject to appeal.

Approximately 50 IIAs and the Treaty on the Eurasian Economic Union contain a special provision whereby the arbitral award on the investment dispute between the State and the foreign investor is final and binding for both parties.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

The Russian Federation's IIAs do not address the possible creation in the future of: (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; or (b) a bilateral or multilateral permanent investment tribunal or court.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Most of the IIAs contain provisions on the amendment of the IIA, such as the agreement between the Government of the Russian Federation and the Government of the Republic of Singapore concerning the encouragement and reciprocal protection of investment (concluded in Singapore in 27 September 2010). However, the IIAs do not contain provisions safeguarding investors' rights, nor do they provide for transitional arrangements in case of modifications or amendments of the IIA.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Russian legislation does not contain specific provisions on the procedure of recognizing or enforcing judgments of international courts and tribunals, except for a number of provisions relating to the implementation of European Court of Human Rights (ECHR) decisions. The decisions of the ECHR are implemented in the Russian Federation under the obligations set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms, if not contrary to the Constitution of the Russian Federation. There are no procedures for the enforcement of these decisions, but procedural legislation provides for the possibility of reviewing previous decisions of Russian courts in the light of ECHR decisions.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Russian legislation on international arbitration does not contain any provisions on appeal against arbitral awards but does provide for application to set aside the decision.

In accordance with the Russian Federal Arbitration Procedure Code (article 233), an international commercial arbitration decision may be set aside by an arbitral tribunal on the grounds provided for in an international treaty of the Russian Federation and the Federal Act on international commercial arbitration.

Russian Federal Act No. 5338-1 of 7 July 1993 on international commercial arbitration provides that any arbitral award which has been challenged in a State court may be changed only by applying for its setting aside.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The Russian Federation supports the UNCITRAL initiative to explore international practice in establishing institutional arbitral tribunals and bodies for the settlement of investment disputes and is prepared to engage constructively in the discussion of possible options for reforming investment arbitration.

33. Switzerland

[Original: French]
[Date: 29 December 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

There are currently 113 bilateral investment protection agreements concluded by Switzerland in force, 92 of which provide for an ISDS mechanism. Furthermore, free trade agreements with Japan, Singapore and South Korea, as well as the Energy Charter Treaty, contain provisions on investment protection, including an ISDS mechanism.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

No, the international investment agreements concluded by Switzerland do not provide for permanent courts or tribunals. Moreover, Switzerland does not have a model international investment agreement.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

No, the international investment agreements concluded by Switzerland do not contain any provisions allowing appeals to be made against investor-State arbitral awards.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No, the international investment agreements concluded by Switzerland provide neither for the future creation of a bilateral or multilateral appeal mechanism for investor-State arbitral awards nor for the future creation of a bilateral or multilateral permanent investment court or tribunal.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

In general, the international investment agreements concluded by Switzerland do not include provisions relating to their amendment. However, some of the international investment agreements concluded by Switzerland do include such provisions, although recourse has never been made to them.

In contrast, none of the international investment agreements concluded by Switzerland provide for the protection of investors' rights or transitional measures in the event of the modification or amendment of those agreements. The international investment agreements concluded by Switzerland do, however, include provisions for the protection of investors' rights in the event of termination of the agreement. Those provisions thus establish the period, from the date of termination of the agreement, during which the agreement continues to apply to investments made before that date.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

According to article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "The High Contracting Parties undertake to abide by the final judgment of the Court [European Court of Human Rights (ECHR)] in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." On the basis of that obligation, Switzerland, since its accession to the European Convention on Human Rights in 1974, has implemented about 100 ECHR judgments, with adoption of the necessary measures, including individual measures (payment of just satisfaction and other individual measures) and in some cases general measures (adaptation of practice and legislative amendments).

With regard to the other individual measures in particular, reference should be made to the possibility under Swiss law of reviewing the decision of the Federal Tribunal following a judgment by ECHR. If, in a final judgment, the latter finds that there has been a violation of the European Convention on Human Rights, a review of the contested decision of the Federal Tribunal may be requested, provided that the following two cumulative conditions are met: compensation does not remedy the effects of the violation, and a review is necessary to remedy the effects of the violation.

It should also be noted that the Committee of Ministers (Department for the Execution of Judgments of the European Court of Human Rights) has compiled a "Country Profile" for each of the 47 member States of ECHR, including Switzerland. Those country profiles provide a brief overview of the main issues being monitored by the Committee of Ministers and the main reforms adopted in closed cases, as well as general statistics. The profiles will be made available to the public shortly.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Actions for annulment against international awards delivered by Swiss arbitral tribunals may be brought before the Swiss Federal Tribunal (the "Federal Tribunal"). Any such actions must be based on one of the five grievances set out in article 190 (2) of the Federal Act on Private International Law, namely: if the tribunal was not properly constituted; if the tribunal lacked jurisdiction; if the tribunal ruled on a matter beyond the claims submitted to it; if the tribunal failed to respect the right of the parties to be heard or if the award was incompatible with public policy. Only parties to the proceedings have the right to take legal action.

The Federal Act on Private International Law that is currently in force does not contain any provisions relating to the appeal or review of arbitral awards. However, in international arbitration, Swiss legal opinion allows for the possibility of review without exceptions, even in the absence of a legal basis, through the analogous application of article 121 et seq. of the Federal Supreme Court Act. Only parties to the proceedings are entitled to take legal action.

The Federal Act on Private International Law currently in force does not contain express provisions on the interpretation or rectification of an arbitral award. However, legal opinion accepts that Swiss law allows arbitral tribunals, in cases of international arbitration in Switzerland, to interpret awards and rectify oversights. The parties to the proceedings are also entitled to apply to the court for the interpretation or rectification of an arbitral award.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Switzerland welcomes the discussions currently taking place at the multilateral level relating to options for reforming the investor-State arbitration regime, and is actively participating in those discussions. In view of the fact that existing investment arbitration institutions are governed at the multilateral level, any reforms should also be undertaken at the multilateral level, and not as part of bilateral free trade agreements.

Proposals to create a permanent tribunal to resolve investment disputes between investors and States and/or an appeal mechanism for awards rendered following a dispute between investors and States must be thoroughly examined. As a first step, the various elements (legal issues etc.) should be identified and compiled by experts. Switzerland will then decide on its position on the basis of those analyses.

(A/CN.9/918/Add.6) (Original: English/French/Spanish)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

34. Canada

[Original: English]
[Date: 20 April 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Canada is party to a significant number of both bilateral and multilateral international investment agreements (as the term is defined here). All of Canada's international investment agreements contain provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Article 8.27 of the Comprehensive Economic and Trade Agreement signed between Canada and the European Union provides for the establishment of a permanent tribunal to resolve investor-State disputes under the Agreement. The text of the Agreement is available at http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Article 8.28 of the Comprehensive Economic and Trade Agreement signed between Canada and the European Union provides for the establishment of a permanent appellate tribunal to review awards rendered by the investor-State Tribunal established in the Agreement. The text of the Agreement is available at http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Article 8.29 of the Comprehensive Economic and Trade Agreement signed between Canada and the European Union commits Canada to pursue the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. The text of the Agreement is available at http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/08.aspx?lang=eng. Other Canadian IIAs,

contain similar language. For example, Annex 8E of the Canada-Korea FTA provides that the Parties are to consider the establishment of a "bilateral appellate body or similar mechanism to review awards." The text of that Agreement is available at http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/korea-coree/fta-ale/08.aspx?lang=eng.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Some, but not all, of Canada's international investment agreements contain provisions on amendment. In general, those provisions provide for the possibility of amendment based on the mutual agreement of the Parties. For example, Article 2202: Amendments, of NAFTA provides that "1. The Parties may agree on any modification of or addition to this Agreement. 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement." Article 30.2 of CETA provides that "1. The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable internal requirements and procedures necessary for the entry into force of the amendment, or on the date agreed by the Parties."

Canada has used the amendment procedures in its FTAs to make amendments. To give a recent example, in September 2013, Canada and Chile reached an agreement to amend the Canada-Chile FTA in order to add a chapter on financial services and make updates to the customs procedures, government procurement and dispute settlement chapters. The Article on Amendments in the Canada-Chile FTA is P-02, and it provides "1. The Parties may agree on any modification of or addition to this Agreement. 2. When so agreed, and approved in accordance with the applicable legal procedures of each Party, a modification or addition shall constitute an integral part of this Agreement." More information on this amendment is available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/amend1.aspx?lang=eng. While these amendments did not specifically relate to the investment provisions of the FTA, the same procedures would have applied to such amendments.

For the most part, Canada's IIAs provide for amendments to be effective on a date agreed to by the Parties or once the respective legal procedures have been completed and appropriate notifications exchanged (see examples provided above). However, the IIA between Canada and Egypt provides in Article XVII:

> "(2) This Agreement shall remain in force for a period of 15 years and thereafter shall continue in force indefinitely unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVII inclusive of this Agreement shall remain in force for a period of fifteen years.
>
> (3)(a) This Agreement may be amended or modified with the agreement, in writing, of the Contracting Parties. (b) Any amendment or modification of this Agreement shall enter into force in accordance with the procedure set out in paragraph (2) above."

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Under the Canadian federal system, the recognition and enforcement of foreign civil judgments, including judgments on commercial matters, generally falls under the legislative authority of the provinces and territories.

Recognition and enforcement of such judgments may be sought under legislation, where such legislation has been adopted (for example, under the Civil Code of Québec, the Saskatchewan Enforcement of Foreign Judgments Act, the British Columbia Court Order Enforcement Act, or the New Brunswick Foreign Judgments Act). As the legislation is not uniform across Canada, requirements may vary from one jurisdiction to another.

Legislation in all jurisdictions except in Québec also provides for recognition and enforcement under the 1984 Convention between Canada and the United Kingdom of Great Britain and Northern Ireland providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Recognition and enforcement of foreign civil judgments may also be sought at common law (except in Québec), that is, in accordance with norms established by Canadian courts. At common law, the basic requirement for recognizing and enforcing a foreign civil judgment is the existence of a real and substantial connection between the court that rendered the judgment and the subject matter giving rise to the claim or the defendant.

We are not aware of any cases where a Canadian court has been asked to recognize and enforce the judgment of an "international" tribunal (i.e., one created by treaty such as the Caribbean Court of Justice or the CJEU).

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Canada's domestic legislation on international arbitration does not contain provisions allowing for an appeal against arbitral awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Canada is currently exploring the possibility of establishing a multilateral mechanism for the resolution of investment disputes between investors and States as a way of addressing concerns about the legitimacy of the adjudication process and to improve the quality and consistency of awards. Canada is presently engaging in consultations with respect to the multilateral mechanism, its design and implementation, and the way forward.

35. Côte d'Ivoire

[Original: French]
[Date: 21 March 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Côte d'Ivoire has concluded several agreements, including tax agreements. The international tax agreements are designed to eliminate double taxation which would result from each of the States concerned applying its own tax laws with respect to income, registration fees, stamp duty and, in some instances, inheritance, and to protect and encourage investments on a reciprocal basis. These agreements do not include provisions on the settlement of investor-State disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

Côte d'Ivoire is a party to the Treaty on the Harmonization of Business Law in Africa (OHADA), signed in Port Louis on 17 October 1993. Strictly speaking, the Treaty is not an IIA and the Common Court of Justice and Arbitration that it establishes is not a court for the settlement of investor-State disputes. However, they could, arguably, be considered as such.

In its preamble, the treaty seeks, inter alia, to restore the legal and judicial security of economic activities in order to ensure investor confidence and facilitate interaction between the States Parties. These are all elements which form the fundamental principle of IIAs. The treaty provides for uniform acts which are rules that are common, simple, modern, tailored to the economic situation, directly applicable and binding in States Parties, notwithstanding any prior or subsequent contrary provision of domestic law.

The Common Court of Justice and Arbitration (CCJA) acts as the court of cassation, in place of National Courts of Cassation, in all uniform law disputes. Cases may be brought to the court by a party to proceedings before a national court or by referral through a national court itself. This also includes cases between private investors and a State in the third instance, in other words: an appeal in cassation. This permanent court is therefore not intended solely to settle disputes between member States and investors, but it may do so.

Decree No. 84-447 of 22 March 1984 on agreements for the promotion and mutual guarantee of investments provides for a model IIA. Article 1 stipulates that the Minister of Economy and Finance and the Minister for Foreign Affairs are authorized to negotiate and sign with States, upon request, agreements for the promotion and mutual guarantee of investments within the scope of the provisions of the framework agreement for the promotion and mutual guarantee of investments, which is an annex to the decree.

This model provides, for example in the case of expropriation in the public interest, for parties (investors and States) to have recourse to the International Centre for Settlement of Investment Disputes (ICSID) if the panel of experts charged with considering a case has not communicated its decision within three months.

Several investor-State agreements do in fact include provisions for recourse to the ICSID.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

There are currently no provisions within Côte d'Ivoire's legal system, in IIAs or the model IIA, whereby investor-State arbitral awards may be subject to appeal (as distinguished from annulment).

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

On the issue of IIAs concluded by Côte d'Ivoire or the current model IIA which address the possible creation in the future of: (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court, Côte d'Ivoire has not yet taken any concrete steps in these matters.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Regarding whether IIAs to which Côte d'Ivoire is a party contain provisions on their amendment, this is not yet the case.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

There is a statutory basis or judicial mechanism in Côte d'Ivoire for recognizing and enforcing judgments of international courts (as opposed to arbitral awards).

The Code of Civil, Commercial and Administrative Procedure provides for enforcement proceedings.

Article 345 stipulates that judicial decisions, whether contentious or non-contentious, made in a foreign country cannot be enforced or made public in the

Republic until they have been declared enforceable, subject to special provisions resulting from international agreements. This allows for an exception to be made, in order to adhere to treaties providing for the application of international standards and their direct execution, which overrides all other forms of proceedings. This applies, for example, to the judgments of the WAEMU (West African Economic and Monetary Union) Court of Justice, which are mandatory for member countries, including Côte d'Ivoire, under article 20 of Additional Protocol No. 1 and article 57 of the Rules of Procedure. Even if the court has not yet ruled on the execution of its decisions without an enforcement order, this should be possible and in accordance with national procedures.

The Ivorian courts have already implemented decisions of international courts, in accordance with Côte d'Ivoire's observance of its international commitments.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Ivorian legislation on international arbitration does not contain any specific provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

The reform proposed by the CIDS would be welcome to the extent that it seeks to address weaknesses or legal loopholes regarding the settlement of investor-State disputes in the States targeted. It could thus seek to establish links with existing systems in order to avoid contravening the principles of State sovereignty and Community law.

36. El Salvador

[Original: Spanish]
[Dates: 30 January and 13 February 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

El Salvador is a party to both free trade agreements and bilateral investment treaties containing chapters on investment protection.

It is worth mentioning that there are currently around 19 bilateral investment treaties in force in El Salvador, which are available at http://www.sice.oas.org/ctyindex/SLV/SLVBITS_e.asp and which contain provisions on the settlement of investor-State disputes.

There are also nine trade agreements in force in El Salvador. However, only six of those trade agreements, listed below, contain chapters relating to the protection of investors and provisions on the settlement of investor-State disputes:

- Free trade agreement with Chile, chapter 10
- Free trade agreement between Central America and Mexico, chapter 11
- Free trade agreement with Taiwan Province of China, chapter 10
- Free trade agreement with Panama, chapter 10
- Free trade agreement with Colombia, chapter 12
- Free trade agreement with the United States of America, chapter 10.

As mentioned, El Salvador is a State party to bilateral investment treaties and free trade agreements containing chapters on investment protection. In both cases, the agreements include provisions on the settlement of investor-State disputes. The

Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), for example, contains a specific chapter governing investment (see chapter 10, section B, of the Agreement). At the bilateral level, the Agreement on the Promotion and Reciprocal Protection of Investments between El Salvador and Uruguay also illustrates the procedure that has been established for the settlement of disputes between the Government and an investor (see article 9).

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

No, all the trade agreements concluded by El Salvador that provide for the settlement of investor-State disputes contain provisions for the settlement of such disputes by international arbitration: primarily ad hoc arbitral tribunals constituted under the rules of the International Centre for the Settlement of Investment Disputes or the rules of the United Nations Commission on International Trade Law.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Only the Dominican Republic — Central America — United States Free Trade Agreement (CAFTA-DR) provides, in annex 10-F of the Agreement, for the possible development in the future of an appellate mechanism or similar body to review awards rendered by tribunals in accordance with chapter 10 of the Agreement, relating to investment.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Annex 10-F of the Dominican Republic — Central America — United States Free Trade Agreement addresses the possible development by the parties to the Agreement of provisions intended to establish an appellate body within the framework of the Agreement. To date, the parties to the Agreement have not agreed on actions for the development of that mechanism.

The text of the above-mentioned annex expressly provides as follows:

> "1. Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the Negotiating Group to take into account the following issues, among others: (a) the nature and composition of an appellate body or similar mechanism; (b) the applicable scope and standard of review; (c) transparency of proceedings of an appellate body or similar mechanism; (d) the effect of decisions by an appellate body or similar mechanism; (e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 10.16 and 10.25; and (f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.
>
> 2. The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. On approval of the draft amendment by the Parties, in accordance with Article 22.2 (Amendments), the Agreement shall be so amended."

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

The majority of the agreements concluded by El Salvador provide for the "termination or denunciation" of the agreement by one of the contracting parties. Typically, that termination is not immediate, but rather a time frame is established for the termination to take effect.

As a mechanism for protecting investments, it is established that those investments made prior to the termination of agreements shall continue to be covered for a certain period following termination or denunciation.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

In El Salvador, the applicable legislation for the recognition and enforcement of judgments of international courts is the Code of Civil and Commercial Procedure, article 555 of which provides as follows: "Foreign instruments — Art. 555. — Final judgments and other final decisions delivered by foreign courts, and foreign arbitral awards recognized in El Salvador are also enforceable instruments. Such instruments shall be enforceable under the terms indicated by international multilateral treaties, provisions governing international legal cooperation or agreements concluded with the country in which the instruments were issued. Once the foreign instrument has been recognized, it shall be enforced in accordance with the rules of compulsory enforcement set out in this Code, unless international agreements provide otherwise."

There is both a statutory basis and a judicial mechanism for the recognition and enforcement of judgments rendered by international courts or tribunals. The Constitution of El Salvador and the Code of Civil and Commercial Procedure recognize the power of those courts and tribunals to render judgments in cases under their jurisdiction.

The procedure for recognizing foreign instruments is established in article 558 of the aforementioned Code. In accordance with article 562 of the Code, the court of first instance with jurisdiction over the place of domicile of the judgment debtor is competent to enforce any such instruments. If the judgment debtor does not reside in El Salvador, the courts of first instance of the place in which the property that should be surrendered is located, or the place chosen by the judgment creditor owing to the fact that the property that should be surrendered is located there, have jurisdiction.

If there is no international treaty recognizing foreign instruments as enforceable instruments in El Salvador, article 556 of the Code of Civil and Commercial Procedure establishes the procedure to be followed in order to obtain that recognition: "Art. 556: Where there are no international treaties or provisions applicable to the recognition of a foreign instrument as an enforceable instrument in El Salvador, such recognition may be granted if at least one of the following requirements is met: 1. The judgment, which has the effect of res judicata in the State in which it has been delivered, has been rendered by a competent court in accordance with the provisions of El Salvador regarding international jurisdiction. 2. The respondent against whom enforcement is sought has been duly summoned, even if that respondent has been declared in contempt of court, provided that the respondent's right to defend itself has been guaranteed and it has been served with the decision. 3. The judgment fulfils the elements required in order for it to be regarded as enforceable in the place in which it was rendered, and meets the conditions of authenticity required by national law."

The judgment shall not affect the constitutional principles or the public policy principles of the law of El Salvador, and the fulfilment of the obligation it entails should be lawful in El Salvador.

There are no ongoing proceedings in El Salvador, nor has an enforceable judgment with the effect of res judicata been issued by a court of El Salvador.

In El Salvador, the procedure for the enforcement of foreign instruments is known as a writ of *pareatis* or *exequatur*, which is governed by civil and commercial procedural legislation. In that regard, the Supreme Court is the authority that is competent to grant, in accordance with the law and where necessary, the enforcement of judgments of foreign courts in any part of El Salvador. On that basis, the Code of Civil and Commercial Procedure recognizes foreign final legal decisions as enforceable instruments, and makes them enforceable, on the basis of the provisions of international multilateral treaties, provisions on international legal cooperation or agreements concluded with the country in which the instruments were issued.

In El Salvador, domestic courts have been requested to recognize or enforce judgments of international courts, particularly in relation to judgments rendered by the Inter-American Court of Human Rights in cases against El Salvador. Similarly, at the national level, a judgment rendered by the International Court of Justice in relation to a frontier dispute has been enforced, while at the regional level a judgment rendered by the Central American Court of Justice has also been enforced.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

Article 3 (h) of the Mediation, Conciliation and Arbitration Act of El Salvador provides for four different kinds of arbitration: ad hoc, institutional, international and foreign, and considers arbitration to be international in any of the following cases: 1. When the parties to an arbitration agreement are domiciled in different States at the time of conclusion of that agreement. 2. If one of the following places is located outside the State in which the parties are domiciled: (a) The place of arbitration, whether this has been expressly established in the arbitration agreement, or in accordance therewith; (b) The place where a substantial part of the obligations of the legal relationship is to be performed or the place with which the subject matter of the dispute is most closely connected. For the purposes of this subparagraph, if a party has more than one domicile, the domicile will be that which is most closely connected to the arbitration agreement; if a party does not have a domicile, reference is to be made to the party's residence.

A Foreign Arbitration is an arbitration in which the arbitral award has not been delivered in El Salvador.

In that regard, article 66-A of the Act provides for the possibility of submitting an appeal against an arbitral award delivered in arbitration proceedings, with suspensive effect, within seven working days of notice of the award or of the order through which clarification, corrections or additional information are provided, before the second-instance chamber with jurisdiction over civil cases in the place of domicile of the respondent or, in the case of more than one respondent, the place of domicile of any one of those respondents.

Legislative Decree No. 914 of 2002 establishes the Mediation, Conciliation and Arbitration Act, which lays down the applicable legal regime with regard to arbitration, without prejudice to the provisions of international treaties or conventions currently in force. Article 66-A recognizes the possibility of submitting appeals against arbitral awards delivered by national courts or tribunals: "An arbitral award delivered in arbitration proceedings may be appealed against with suspensive effect, within seven working days of notice of the award or of the order through which clarification, corrections or additional information are provided, before the second-instance chamber with jurisdiction over civil cases in the place of domicile of the respondent or, in the case of more than one respondent, the place of domicile of any one of those respondents. With regard to all other aspects, the processing of appeals shall be subject to the provisions of ordinary law. No appeals may be made against the decision of the second-instance chamber."

37. India

[Original: English]
[Date: 28 April 2017]

A/ International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

India inked Bilateral Investment Promotion and Protection Agreements (BIPPAs)/ BITs with 83 countries since 1994. However, India unilaterally abrogated the said BIPPAs/BITs with 43 of the said 73 countries with whom the initial duration of 10/15 years of the said agreements was already over and which allowed for such a

termination as per the decision of the Government of India to this effect. With respect to the remaining countries, a request of a Joint Interpretative Statement was issued. The erstwhile BIPPAs/BITs with these countries which are still alive would be terminated at the expiry of the initial duration. Currently, India is in the process of renegotiating with partner countries on new BITs based on India's new model text. India is also a signatory to FTAs with many partner countries. India's BITs and model BIT do contain provisions on settlement of Investor State Disputes.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs

None of the IIAs nor the Model BIT provide for permanent courts or tribunals as such.

However, under Article 29 of India's new model BIT, it does mention about developing an institutional mechanism with an appellate body in future for investment treaty disputes.

Article 29 of India's new Model BIT reads as follows:

Article 29

Appeals Facility

The Parties may by agreement or after the completion of their respective procedures regarding the enforcement of this Treaty may establish an institutional mechanism* to develop an appellate body or similar mechanism to review awards rendered by tribunals under this chapter. Such appellate body or similar mechanism may be designed to provide coherence to the interpretation of provisions in this Treaty. In developing such a mechanism, the Parties may take into account the following issues, among others:

(a) the nature and composition of an appellate body or similar mechanism;

(b) the scope and standard of review of such an appellate body;

(c) transparency of proceedings of the appellate body;

(d) the effect of decisions by an appellate body or similar mechanism;

(e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 20.1 of this Treaty; and

(f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

*This may include an appellate mechanism for reviewing investor-state disputes established under a separate multilateral agreement in future.

Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

Article 29 as quoted in the answer to question 2 describes about appeals facility. Ongoing negotiations are on the basis of this new model BIT.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

India's model BIT text does envisage the creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court. Article 29 as quoted in the above answers includes reference to a mechanism in future under a multilateral agreement.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

(a) There are explicit provisions for amendment of an IIA in existing BITs and India's model text. The exact text of the provisions regarding amendments in the model BIT is as follows:

Article 37

Amendments

1. This Treaty may be amended at any time at the request of either Party. The requesting Party must submit its request in written form explaining the grounds on which the amendment shall be made. The other Party shall consult with the requesting Party regarding the proposed amendment and must also respond to the request in writing.

1. This Treaty will stand automatically amended at all times to the extent that the Parties agree. Any agreement to amend the treaty pursuant to this Article must be expressed in writing, whether in a single written instrument or through an exchange of diplomatic notes. These amendments shall be binding on the tribunals constituted under Chapter IV or Chapter V of this Treaty and a tribunal award must be consistent with all amendments to this Treaty."

(b) There are no instances of such an amendment in any case of a BIT between India and a partner country.

(c) India's model BIT text or any of the BITs concluded by India so far do not contain provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs.

B/ Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

No.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The legislation does provide for challenge of awards on certain grounds, however, the legislation does not specify an appeal before another arbitration tribunal.

However, the Supreme Court of India recently in Centrotrade Minerals & Metal vs. Hindustan Copper Ltd, held that parties may provide for appeal in the arbitration agreement.

In this case the first award was under an arbitration administered by ICA (Indian Council of Arbitration) the aggrieved party then by means of an appeal as provided in the agreement brought about the subsequent appellate arbitration seated in London under ICC Rules.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

It is important to start with a blank canvas to devise a more fair, a more legitimate, and a more self-contained system of ISDS with internal checks and balances to ensure a good quality of decision-making. This new system of dispute resolution should also be one which can seamlessly be merged into the current landscape of enforcement of decisions — with possibly one or two tweaks to facilitate better and quicker enforcement.

One of the most critical areas in designing a permanent investment court relates to its composition, structure and certainty.

One of the drawbacks of the current landscape of BIT arbitrations is the number of inconsistent or even contradictory awards — for instance, on the proper interpretation

of umbrella clauses, the effect of an MFN clause, whether the FET standard only requires the minimum standard under CIL or if it is more expansive. Critics have also pointed to the CME and Lauder cases against the Czech Republic where the same facts led to two different decisions by two arbitral tribunals.

The legal and practical challenges to establishing a world investment court should not be underestimated. These have been quite exhaustively dealt with in the CIDS analysis. It is also a welcome to have an opt in clause unlike in the Mauritius Convention where India had raised the issue with the opt out clause.

India welcomes the move to have discussions and deliberations on the proposal, and further comments could be provided in due course.

(A/CN.9/918/Add.7) (Original: English)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: comments from International Intergovernmental Organizations

ADDENDUM

Contents

IV. Comments from International Intergovernmental Organizations

This section reproduces comments received by the Secretariat from the Organisation for Economic Cooperation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD) regarding activities in relation to the investor-State dispute settlement framework.

1. Organisation for Economic Cooperation and Development (OECD)

[Original: English]
[Date: 8 June 2017]

Table of contents

A. Introduction

1. An OECD-hosted inter-governmental Roundtable that gathers over 55 economies from around the world has engaged in regular analysis and discussion of investment treaties and investor-state dispute settlement (ISDS) since 2011. The vigorous discussions have been enriched by input from business, civil society and NGOs, and

experts. The Roundtable has also benefited from presentations of investment treaty policy and/or new model treaties from numerous governments including Brazil, the European Union, India, Indonesia, and South Africa. Summaries of Roundtable discussions and background papers are made public. This document briefly outlines these Roundtable discussions and background analysis.

2. The following economies are invited to participate in the Roundtable: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and the European Union. Participation typically varies somewhat depending on the issues being discussed. International organizations including UNCTAD, ICSID, UNCITRAL and the PCA have also participated in Roundtable work on investment treaties. In addition to Roundtable work on investment treaties, governments also identify salient investment treaty issues and chair inter-governmental discussions in a separate regular OECD-hosted Investment Treaty Dialogue. For example, the EU and Canada prepared and chaired a Dialogue on a possible multilateral investment court in 2016.

3. This short outline focuses on work at the OECD directly addressing investment treaties and ISDS, which is centred in the Roundtable. In the field of investment, OECD work also addresses Responsible Business Conduct, the Policy Framework for Investment (helping governments improve the investment climate through a broad range of policies), Investment Policy Reviews, investment statistics and many other areas. More broadly, work on investment treaties and policy at the OECD takes place in the broader context of work with governments across the full range of policy fields at issue in ISDS (e.g. policies on the environment, health, energy, finance, budget, anti-bribery, competition, good regulation, etc.).

B. Initial Roundtable work on ISDS (2011-2012) (Roundtables 15, 16, 17; public consultation)[1]

4. The initial Roundtable work focused on dispute settlement centred on discussion of a wide-ranging scoping paper on ISDS.[2] The goals were to (i) develop a broad picture of the ISDS system including recent developments and emerging issues of interest to governments; (ii) build up the stock of comparative information about dispute resolution under the system; and (iii) invite a broad range of governments to engage over time in a wide ranging, strategic and intergovernmental discussion of investment treaties. This section first summarises some findings about the diversity of government policies, treaty writing practices and experiences with ISDS and then outlines work on key issues in ISDS.

1. Findings on the diversity of government policies, treaty writing practices and experiences with investment arbitration

- *Diverse legal sources.* Investment law differs from other major bodies of international economic law in that it is spread across an extraordinary range of international and domestic sources of law. Rather than being primarily anchored in a compact and broadly-applicable body of instruments (as at the WTO, for example, where key agreements apply to all 164 WTO members), investment law is contained in (i) some 3,000 bilateral or multilateral investment treaties

[1] See Summaries of discussions 15th Roundtable (http://oe.cd/1Zm), 16th Roundtable (http://oe.cd/1Zn), and 17th Roundtable (http://oe.cd/1Zo) and Public consultation on ISDS (http://oe.cd/1Zp).

[2] See Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

with generally similar but by no means identical provisions; (ii) other international treaties (notably the ICSID Convention and the New York Convention); (iii) various arbitration rules including those primarily developed by governments (ICSID, UNCITRAL) as well as rules developed by business organizations (e.g., ICC, SCC); (iv) customary international law; and (v) the domestic law of many States. The diversity of the applicable procedural rules and substantive law makes it difficult to grasp the issues presented by the system.

- *Wide recognition that comparative analysis between ISDS and other international dispute resolution systems is informative.* Governments in the Roundtable considered how ISDS compares with dispute resolution at the WTO and under the European Court of Human Rights (ECHR) system. Although the systems address similar and at times overlapping issues, they vary in many respects (such as the types of parties with access to the system, remedies, selection and status of adjudicators, availability of appeal and timing).

- *A broadly-recognised need for empirical analysis of a fast-evolving system.* Roundtable governments supported sustained government attention to evaluating the system in light of increasing use and greater political debate in parliaments and societies.

- *Diverse bilateral investment treaty practice on regulating dispute settlement.* A large-scale statistical survey of ISDS provisions in bilateral investment treaties[3] showed that, although the vast majority contained ISDS provisions, their content varied markedly. ISDS through investment arbitration had become a common feature, but the 1,660 treaties in the sample contain an estimated 1,200 different rule sets on ISDS. There were differences in approach to many procedural issues (e.g., selection and regulation of arbitrators) as well as small differences in language.

- *Light but growing regulation of ISDS in bilateral investment treaties.* Most investment treaties were either silent or contained little or only sporadic guidance on important aspects of the conduct of ISDS. As a result, key decisions regarding the conduct of the proceedings were largely left to the disputing parties if they could agree, or to arbitral panels. Treaties that permitted covered investors to choose between bringing claims in local courts or ISDS, or to choose between arbitration options could give claimant investors considerable influence over significant issues.

- *Diverse experiences with regard to exposure to investor claims.* The countries represented at the Roundtable had had diverse experiences with ISDS. Some countries had defended multiple cases while others had not yet faced a claim. Some had adjusted the ISDS provisions in their model treaty texts and their agreed treaties to reflect their experiences as respondents.

- *Diverse policies and attitudes.* As outlined in a 2012 Roundtable progress report on its work on ISDS,[4] most countries in the Roundtable considered that the ISDS system was valuable but could be improved. Several countries stated that they consider that it is important to recognise that the ISDS system has worked well overall. It was also noted that the domestic courts in some countries perform poorly or are inefficient. Some countries participating in the Roundtable voiced fundamental concerns about the design and impact of ISDS and/or had never agreed to ISDS.

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[3] Pohl, J., K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", OECD Working Papers on International Investment, 2012/02. http://dx.doi.org/10.1787/5k8xb71nf628-en.

[4] "Government perspectives on investor-state dispute settlement: a progress report"; Freedom of Investment Roundtable, 14 December 2012 (http://oe.cd/1Zq).

2. Key issues in ISDS

5. The ISDS scoping paper[5] and early Roundtable discussions on ISDS also addressed a range of key issues, some longstanding and others only emerging at that time:

- *Access to justice for different types of investors and for other victims of government misconduct.* A survey of the available information about ISDS claimants showed that (i) there was little or no public information about many investor claimants in ISDS; (ii) small investors were present as ISDS claimants; and (iii) medium and large multinational enterprises accounted for about half of the cases surveyed. Completion rates for claims and outcomes were not evaluated. Nationality of the controlling entity/individual was often hard to determine. It was noted that while ISDS is a powerful international dispute resolution system available to covered foreign investors, other investors and other non-state actors without access to ISDS must generally rely on their home States for espousal of international claims (unless they have access to certain regional human rights systems).
- *Costs and third party financing of investment arbitration claims.* The ISDS scoping paper noted generally that: (i) costs of ISDS were high and some reform efforts were underway to try to reduce them; and (ii) rules for allocating these costs among the parties were very flexible and were a source of uncertainty. Limited available information suggested average costs of USD 8 million/case. The high costs and potentially high damages awards characteristic of ISDS appeared to make it an attractive market for third party funders.
- *The question of a level playing field between foreign and domestic investors: remedies and treaty shopping.* The question of whether investment treaties give covered foreign investors greater substantive and procedural rights than those of domestic investors under domestic law has been debated in a number of jurisdictions in recent years, as have the relevant policy conclusions. Initial analysis and discussions focused on available remedies (generally only non-pecuniary remedies under domestic law in contrast to money damages in ISDS) and the broad availability of "treaty shopping" in ISDS.
- *Enforcement of ISDS awards.* At the time of the initial discussions, state compliance with ISDS arbitration awards was generally considered to have been good, but some problems had arisen with compliance with both ICSID and non-ISCID awards. A number of Roundtable participants and stakeholders expressed concerns about enforcement.
- *Characteristics, selection, incentives and regulation of arbitrators.* The Roundtable considered an overview in the ISDS scoping paper of available information and policy issues relating to the (i) characteristics of the pool of investment arbitrators (e.g., elite status in the legal profession, preponderance of lawyers in private practice, low levels of government and public law backgrounds, contrast between regional origins of arbitrators and respondent states, 95 per cent/5 per cent gender balance, etc.); (ii) selection of arbitrators including the debate over appointment of arbitrators by parties and their counsel in ISDS, and the issue of information asymmetries between disputing parties; (iii) the issue of economic incentives of arbitrators and conflicts of interest; and (iv) the limited regulation of arbitrators including as applied to emerging issues such as the multiple roles of individuals as arbitrator, legal counsel and expert.

[5] Gaukrodger, D. and K. Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03. http://dx.doi.org/10.1787/5k46b1r85j6f-en.

C. Follow-up work on consistency in ISDS and government input into interpretation, and on shareholder claims for reflective loss (2012-2014) (Roundtables 18, 19, 20, 21)[6]

6. The initial work on ISDS had addressed the issue of consistency and a substantial number of Roundtable participants expressed serious concerns about inconsistencies in ISDS decisions. Some others took a more positive view, highlighting differences between treaties and contexts. Many tools exist for governments to communicate about how treaties should be interpreted. The Roundtable requested follow-up work on consistency including on the role of government input into interpretation. It subsequently addressed (i) different forms of government "voice" as an alternative to "exit" from treaties perceived as subject to unwanted interpretations; [7] (ii) the legal regime governing joint government interpretations of investment treaties;[8] and (iii) and state-to-state dispute settlement (SSDS) as a possible method to improve treaty interpretation.[9]

7. Roundtable work on the acceptance in ISDS of claims by covered shareholders for losses incurred by companies in which they own shares (claims for reflective loss) began as part of the work on consistency. A paper on the impact of reflective loss claims on consistency[10] outlined the sharply contrasting approaches to such claims between advanced systems of corporate law on the one hand (where reflective loss claims are generally barred for policy reasons) and in ISDS on the other hand (where reflective loss claims have been widely permitted). It noted that while the ISDS approach provides benefits to claimant shareholders, the consistency-related risks associated with reflective loss claims included concurrent or multiple claims arising out of the same facts and parties, inconsistent decisions, exposure of governments to double recovery, reduced predictability, hindrance of amicable settlement of claims and facilitation of treaty shopping.

8. The initial work on shareholders had also noted that the unusual approach to claims for reflective loss in ISDS can disrupt the hierarchy of claims on company assets. It may create new risks for some investors in companies (creditors and non-covered shareholders), possibly increasing uncertainty and raising the overall costs of capital for investment. (Creditors were broadly defined to include contractual claimants on the company, including bondholders and other lenders, employees, suppliers and others.) The Roundtable subsequently further investigated the corporate law issues raised by reflective loss claims[11] including the impact on corporate finance and investment, corporate governance and the transferability of shares; it also addressed relevant investment treaty practice.[12] A further paper presented the issues primarily to a business audience.[13]

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[6] See Summaries of discussions 18th Roundtable (http://oe.cd/1Zr), 19th Roundtable (http://oe.cd/1Zs), 20th Roundtable (http://oe.cd/1Zs), 21st Roundtable (http://oe.cd/1Zu).

[7] Gordon, K. and J. Pohl (2015), "Investment Treaties over Time — Treaty Practice and Interpretation in a Changing World", OECD Working Papers on International Investment, 2015/02. http://dx.doi.org/10.1787/5js7rhd8sq7h-en.

[8] Gaukrodger, D. (2016), "The legal framework applicable to joint interpretive agreements of investment treaties", OECD Working Papers on International Investment, 2016/01. http://dx.doi.org/10.1787/5jm3xgt6f29w-en.

[9] Gaukrodger, D. (2016), "State to State dispute settlement and the interpretation of investment treaties", OECD Working Papers on International Investment, 2016/03. http://dx.doi.org/10.1787/5jlr71rq1j30-en.

[10] Gaukrodger, D. (2013), "Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency", OECD Working Papers on International Investment, 2013/03. http://dx.doi.org/10.1787/5k3w9t44mt0v-en.

[11] Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02. http://dx.doi.org/10.1787/5jz0xvgngmr3-en.

[12] Gaukrodger, D. (2014), "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice", OECD Working Papers on International Investment, 2014/03. http://dx.doi.org/10.1787/5jxvk6shpvs4-en.

[13] "The impact of investment treaties on companies, shareholders and creditors" OECD Business and Finance Outlook 2016, Chapter 8 (http://oe.cd/1Zv).

D. Current Roundtable work on investment treaties (2014-present) (Roundtables 22, 23, 24, 25, 26)[14]

1. The balance between investor protection and governments' right to regulate

9. Governments are now frequently called on to explain their policy choices in particular with respect to the balance between governments' right to regulate and the protection of foreign and domestic investors. Suggested methods to address the balance in investment treaties can include adjustments to substantive law that (i) define or limit individual treaty protections for foreign investors; (ii) establish carve-outs or special regimes for particular sectors; (iii) incorporate general exceptions, right-to-regulate clauses or clarifications; (iv) clarify or establish conditions on access to treaty benefits, such as compliance with domestic law; or (v) align the treatment of foreign and domestic investors. They can also include the design of dispute resolution (see below).

10. The ongoing work in this area has included (i) discussion of a scoping paper on balancing investor protection and governments' right to regulate; [15] (ii) an examination of fair and equitable treatment (FET) provisions with particular regard to NAFTA government policy [16] and views about FET as one possible method to address the balance by limiting FET to customary international law and actively intervening on its interpretation; and (iii) an Investment Treaty Conference addressing The Quest for Balance.[17]

2. Societal benefits and costs of investment treaties

11. Early Roundtable discussions considered the development impacts of ISDS, including its impact on domestic institutions of public governance. Since 2014, broader work on the societal benefits and costs of investment treaties has generated an inventory of evidence on the economic effects for home, host and transit economies; the effects on global and domestic governance; and the impact on the pursuit of strategic foreign policy objectives. The work also identifies information needed to make a more comprehensive assessment of benefits and costs. The issues were discussed at the 2017 Investment Treaty Conference on Evaluating and Enhancing the Outcomes of Investment Treaties.[18]

3. Arbitrators, adjudicators and appointing authorities

12. Ongoing work has reviewed recent developments in this area including the investment court system approach to a standing tribunal as set out in the recent Comprehensive Economic and Trade Agreement between Canada and the EU (CETA). It is also considering the role and importance of appointing authorities in investor-state arbitration. Appointing authorities are typically charged with appointing the chair of an arbitral tribunal if the parties or co-arbitrators are unable to agree on one. Negotiation theory suggests that appointing authority nominating practices likely have significant influence on the composition of investor-state arbitration tribunals and the overall pool of arbitrators. The impact of dispute settlement institutions on the balancing of interests was also addressed at the

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[14] Summary of the 22nd Roundtable (http://oe.cd/1Zw), 23rd Roundtable (http://oe.cd/1Zx), 24th Roundtable (http://oe.cd/1Zy), 25th Roundtable (http://oe.cd/1Zz).

[15] Gaukrodger, D. (2017), "The balance between investor protection and the right to regulate in investment treaties: A scoping paper", OECD Working Papers on International Investment, 2017/02. http://dx.doi.org/10.1787/82786801-en.

[16] Gaukrodger, D. (2017), "Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law", OECD Working Papers on International Investment, 2017/03. http://dx.doi.org/10.1787/0a62034b-en.

[17] Conference on investment treaties: The quest for balance between investor protection and governments' right to regulate (http://oe.cd/1ZA).

[18] Conference on evaluating and enhancing outcomes of investment treaties (http://oe.cd/1ZB).

Investment Treaty Conference on The Quest for Balance,[19] and a possible multilateral investment court was addressed in an Investment Treaty Dialogue.

E. Other work partly relating to investment treaties (Responsible Business Conduct, State-owned enterprises, investment facilitation)

13. Many governments are seeking to attract investment that meets the standards of responsible business conduct (RBC) and sustainable development. A broad survey of treaty provisions in 2014[20] revealed that only 12 per cent contained references to these issues. However, practices varied by country and the frequency of inclusion was increasing rapidly. The potential role of investment treaties in fostering RBC was discussed at the first government-led Investment Treaty Dialogue in 2015. Together with the Roundtable, several OECD Committees have engaged in an intensive discussion of the role of state-owned enterprises in domestic and international markets,[21] with attention given to relevant investment treaty policy. The Roundtable is also considering the issue of investment facilitation, building on the long-standing attention to many similar issues in the development and application of the Policy Framework for Investment.

F. Conclusion

14. The views shared by countries participating in the Roundtable and supporting background studies by the OECD Secretariat have generated information that can advance mutual understanding and help governments with their treaty and investment policy.

2. United Nations Conference on Trade and Development

[Original: English]
[Date: 12 June 2017]

Growing unease with the current functioning of the global international investment agreements (IIA) regime, together with today's sustainable development imperative, has triggered a move towards reforming international investment rule making. Over the past years, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs. Significant progress has been made during this first phase of IIA reform, but much remains to be done. To move to phase 2 of IIA reform, policy attention needs to focus on comprehensively modernizing the stock of outdated, first-generation treaties. In the World Investment Report 2017, UNCTAD presents and analyses the pros and cons of 10 policy options for reforming existing old-generation IIAs (UNCTAD, 2017). Reforming investment dispute settlement is high on the agenda, with concrete steps undertaken, including at the multilateral level. Some of the reform steps could potentially extend to the existing stock of older treaties. Overall, reform efforts should aim at a holistic approach, ensuring a transparent and inclusive process, and not losing sight of the overarching objective of sustainable development.

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[19] Conference on investment treaties: The quest for balance between investor protection and governments' right to regulate (http://oe.cd/1ZA).

[20] Gordon, K., J. Pohl and M. Bouchard (2014), "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey", OECD Working Papers on International Investment, 2014/01. http://dx.doi.org/10.1787/5jz0xvgx1zlt-en.

[21] "*State-Owned Enterprises as Global Competitors – A Challenge or an Opportunity?*", 2016 (http://oe.cd/1ZC).

I. Reforming investment dispute settlement as part of UNCTAD's Road Map for IIA Reform

UNCTAD's advocacy for systemic and sustainable development-oriented investment policymaking started in 2010. Following UNCTAD's Investment Policy Framework for Sustainable Development (published in 2012 and updated in 2015) (figure 1), which offers policy options for designing new-generation IIAs, it culminated in UNCTAD's Road Map for IIA Reform (2015) (figure 2), which sets out five action areas for reform: (i) safeguarding the right to regulate, while providing protection; (ii) reforming investment dispute settlement; (iii) promoting and facilitating investment; (iv) ensuring responsible investment; and (v) enhancing systemic consistency.

Figure 1
UNCTAD's Investment Policy Framework for Sustainable Development [*Source*: ©UNCTAD]

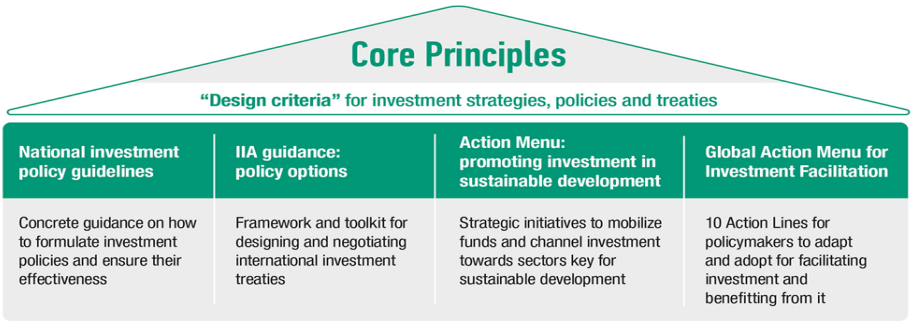
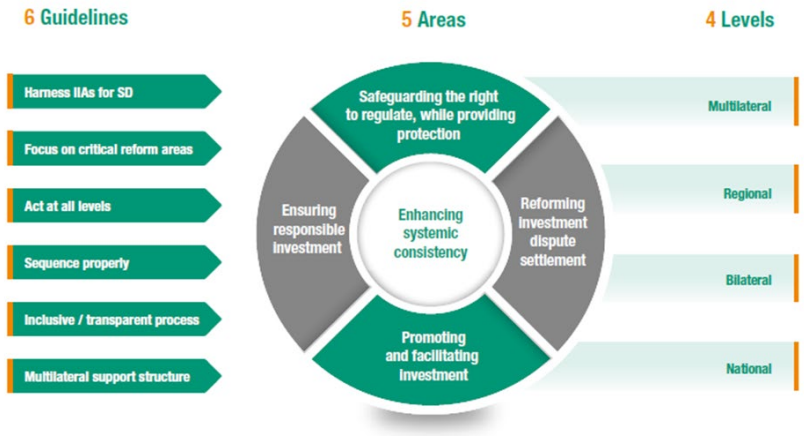


Figure 2
UNCTAD's Road Map for IIA Reform [*Source*: ©UNCTAD]



Building on UNCTAD's past work on investor-State dispute settlement (ISDS),[22] the Road Map identified three sets of options for improving investment dispute settlement

[22] This includes, for example, the 2012 version of UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2012 at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf), the World Investment Report 2013 (UNCTAD, 2013, at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf) and the Sequel on ISDS (UNCTAD, 2014, at http://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf). See also "Policy Options for IIAs: Part A. Post-Establishment" in the 2015 version of UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015a, at http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf).

along two prongs of actions: reforming the existing mechanism of ad hoc arbitration for ISDS, while keeping its basic structure; or replacing it (table 1).[23]

Table 1
Sets of options for reforming investment dispute settlement

Reforming existing investor-State arbitration		Replacing existing investor-State arbitration
Fixing existing ISDS mechanisms	Adding new elements to existing ISDS mechanisms	
1. **Improving the arbitral process**, e.g. by making it more transparent and streamlined, discouraging submission of unfounded claims, addressing ongoing concerns about arbitrator appointments and potential conflicts. 2. **Limiting investors' access**, e.g. by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by "mailbox" companies 3. **Using filters for channelling sensitive cases** to State-State dispute settlement 4. **Introducing local litigation requirements** as a precondition for ISDS	1. **Building in effective alternative dispute resolution** 2. **Introducing an appeals facility** (whether bilateral, regional or multilateral)	1. **Creating a standing international investment court** 2. **Replacing ISDS by State-State dispute settlement** 3. **Replacing ISDS by domestic dispute resolution**

Source: ©UNCTAD, World Investment Report 2015.

All identified reform options have their pros and cons, and pose their own specific challenges. Whatever option countries prefer, they need to bear in mind three challenges: (i) what is needed is comprehensive reform, applying not only to ISDS but also to the substantive IIA provisions; (ii) reform steps ideally should not only apply to future treaties, but also address the stock of existing IIAs; and (iii) domestic capacity-building is needed for improving developing countries' administrative and judicial capacities, a prerequisite for some of the reform options.

A. Reforming existing investor-State arbitration

The option of keeping and reforming the existing system of investor-State arbitration has two entry points: fixing the existing system and adding to it.

Fixing the existing ISDS mechanisms

Reform elements could be the inclusion in IIAs of new provisions designed to (1) improve the arbitral process; (2) refine investors' access to investment arbitration; (3) establish filters for channelling sensitive cases to State-State dispute settlement; and (4) introduce local litigation requirements. These reform options could be implemented by contracting States in existing and future individual IIAs and would not require coordinated actions by a large number of countries.

(1) Improving the arbitral process: This option focuses on reforming the way arbitration proceedings are conducted while preserving the main features of the ISDS system. The goals of such modifications are to (i) enhance the legitimacy of the ISDS system, (ii) enhance the contracting parties' control over the interpretation of their treaties and/or to (iii) streamline the process and make it more efficient.

[23] For a more detailed analysis of the set of options for reforming investment dispute settlement, including their pros and cons, see UNCTAD (2015b at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf), Chapter IV, pp. 145-155.

(2) Limiting investors' access to ISDS: This approach aims to narrow the range of situations in which foreign investors may resort to international arbitration, thereby reducing States' exposure to legal and financial risks posed by ISDS.

(3) Using filters for channelling sensitive cases to State-State dispute settlement: This reform option provides for State-State dispute settlement if a joint committee fails to resolve a case. While maintaining the overall structure of today's ISDS mechanism, this constitutes a "renvoi" of disputes on sensitive issues to State-State dispute settlement.

(4) introducing local litigation requirements as a precondition for ISDS (including exhaustion of local remedies): This reform option aims to promote recourse by foreign investors to domestic courts while retaining the option for investor-State arbitration, as a remedy of last resort (i.e. after a certain period of time of litigating the dispute in domestic courts or after exhaustion of local remedies). In so doing, it would respond to some of the concerns arising from the steep rise in ISDS cases over the last decade.

Adding new elements to the existing ISDS mechanisms

These policy options add new elements to complement the existing investor-State arbitration mechanism. They can be combined with the above-mentioned improvements of the mechanism.

(1) Building in effective alternative dispute resolution: This approach to ISDS reform promotes the use of alternative dispute resolution (ADR) mechanisms as a step before the commencement of international investment arbitration. Although ADR cannot in itself solve key ISDS-related challenges, it can reduce the number of disputes which result in full-scale arbitration. This renders it a complementary, rather than a stand-alone, avenue for ISDS reform. Policy options are available at the national and the international level (through the IIA), that can be complementary, such as the designation of lead agencies for amicable settlements or ombuds offices at the national level and the inclusion of ADR provisions in IIAs (UNCTAD, 2015b).

(2) Appeals facility: This option would preserve the structure of the existing investment arbitration mechanism and add a new layer to it. An appeals facility could take two main forms: either a standing or an ad hoc body. It could have the competence to undertake a substantive review and correct the arbitral tribunals' first instance decisions. An appellate mechanism could be given review jurisdiction that goes beyond the scope of review available under the existing annulment procedures under the ICSID Convention. It could serve to enhance the predictability of treaty interpretation and improve consistency among arbitral awards. All this could significantly contribute to enhancing the political acceptability of ISDS and the IIA regime as a whole.

Should countries decide to opt for establishing such an appeals mechanism, questions would need to be resolved regarding several sets of issues: (i) the establishment of such a body, notably whether it would have a bilateral, regional or multilateral nature; whether it would be permanent or ad hoc; (ii) its organization and institutional set-up; (iii) the added time and cost of the proceedings; and (iv) the competence of such a body.

B. Replacing the existing ISDS system with other dispute resolution mechanisms

The options below would abolish the existing system of ad hoc investor-State arbitration and replace it with other mechanisms for settling investment disputes. Potential replacements include (1) the creation of a standing international investment court, (2) State-State dispute settlement, and/or (3) reliance on domestic judicial systems of the host State. The replacement options differ in the extent of change they bring. States can focus on one of the options or can pursue them in parallel or in combination.

(1) Standing international investment court: This option retains investors' right to bring claims against host States but replaces the system of multiple ad hoc arbitral tribunals with a single institutional structure, a standing international investment court. Such a court would consist of judges appointed or elected by States on a permanent basis; it would be competent for all investment disputes arising from IIAs made subject to its jurisdiction and could also have an appeals chamber. A standing investment court would be a public institution serving the interests of investors, States and other stakeholders and, more broadly, strengthening the legitimacy of the investor-State regime. It has also been suggested, that the competence of the court be broadened, depending upon the content of the agreements made subject to its jurisdiction, for example, by giving legal standing or procedural rights to other stakeholders.

Clearly, establishing such a court raises a number of important legal and political challenges, and, in its very nature, would constitute a long-term project. As countries move in this direction, they need to consider a number of key issues: (i) the establishment of such a court, such as the need to build consensus among a critical mass of countries around a convention establishing such a court; (ii) the organization and institutional set-up, such as the location, financing and staffing of the court; (iii) the participation of countries in the court and how to transition from a possible bilateral or plurilateral court to a more universal structure serving the needs of developing and least developed countries; (iv) the competence of the court, such as the type of treaties and cases it is competent to address.

(2) State-State dispute settlement: State-State arbitration is included in virtually all existing IIAs, and it is also the approach taken by the WTO for resolving international trade disputes. Unlike the fostering of State-State dispute resolution as a complement to ISDS, this option presupposes that State-State proceedings would be the only way of settling investment disputes at the international level. The home State would have discretion on whether to bring a claim. States would need to decide on the court that should hear a case; options include the International Court of Justice, ad hoc tribunals or an international court as envisaged above. The option of replacing ISDS with State-State dispute settlement can help to address some of the concerns with regard to ISDS. However, it also raises a number of difficult challenges that would need to be addressed before taking this route.

(3) Exclusive reliance on domestic dispute resolution: This option abolishes investors' right to bring claims against host States in international tribunals and limits their options for dispute resolution to domestic courts. Unlike the promotion of domestic resolution as a step preceding investor claims at the international level (e.g. exhaustion of local remedies, local litigation requirement), under this option, domestic judicial institutions would be the only and final mechanism for settling investor-State disputes. This option entails a number of pros and cons, and some have noted that it has merits mainly in countries where reliance on ISDS is less important because of their sound legal systems, good governance and local courts' expertise.

II. Recent developments

So far, 109 countries have been respondents to one or more known ISDS claims (UNCTAD, 2017). In 2016, 62 new cases were initiated, bringing the total number of known cases to 767. This number is lower than the 74 initiated in the preceding year, but higher than the 10-year average of 49 cases per year (2006-2015). About two thirds of ISDS cases in 2016 were brought under bilateral investment treaties (BITs), most of them dating back to the 1980s and 1990s. The IIAs most frequently invoked in 2016 were the Energy Charter Treaty (ECT) (with 10 cases), the North American Free Trade Agreement (NAFTA) and the Russian Federation — Ukraine BIT (3 each).

In terms of treaty-making, most of today's new IIAs include sustainable development-oriented reform elements that preserve the right to regulate, while maintaining protection, foster responsible investment and improve investment dispute settlement

(UNCTAD, 2017). A comparison of treaties over time shows that selected ISDS reform options are more frequently found in recent BITs than in earlier ones (table 2).

Table **2**
Selected ISDS options in IIAs — comparison of "old" and "new" BITs

Treaty provisions Selected ISDS options	**UNCTAD Policy Framework Option**	**Earlier BITs** (1959-2010) (2,432)	**Recent BITs** (2011-2016) (110)
Limit treaty provisions subject to ISDS or exclude policy areas from ISDS	6.2.1	8%	29%
Limit time period to submit claims	6.2.1	5%	40%

Source: ©UNCTAD, IIA Mapping Project.[24]

Among the IIAs signed in 2015 and 2016, most of the treaties reviewed included at least one element limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS or limiting time period to submit claims), with several omitting ISDS altogether (e.g. those signed by Brazil with its treaty partners).

To these reform efforts add steps for improving investment dispute settlement undertaken at the multilateral level. Current discussions on the establishment of a multilateral investment court and/or appellate mechanism could result in an instrument that ultimately changes ISDS provisions included in earlier treaties. Such efforts to reform investment dispute settlement can help address key concerns and pursue procedural and institutional improvements.

III. Conclusions: a holistic, inclusive and sustainable development-oriented process for reforming investment dispute settlement

The IIA regime is currently facing several challenges of which ISDS is but one part. To effectively reform the current IIA regime, more thinking would be needed on how to synchronize reform of investment dispute settlement and the reform of substantive IIA content. UNCTAD's Road Map for IIA Reform can provide guidance for addressing these key areas of IIA reform (UNCTAD, 2015a) and so can UNCTAD's 10 policy options for modernizing the existing stock of old-generation IIAs, as set out in the World Investment Report 2017.[25]

Throughout, countries' engagements in reform initiatives should be guided by three key considerations:[26]

(i) Taking a holistic approach to IIAs and IIA reform; exploring new ways for dispute settlement, while not losing sight of substantive content of the current stock of treaties.

(ii) Ensuring an inclusive and transparent process, addressing the "development challenge" (i.e. avoiding a situation in which countries with small

[24] The numbering refers to "Policy Options for IIAs: Part A. Post-Establishment" in the 2015 version of UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015a). Data derived from UNCTAD's IIA Mapping Project. The Mapping Project is an UNCTAD-led collaboration of more than 45 universities around the globe. Over 2,500 IIAs have been mapped to date, for 100 features each (including some 20 options for the settlement of investment disputes).

[25] For a detailed analysis of the 10 policy options for phase 2 of IIA reform, and their pros and cons, see Chapter III of the World Investment Report 2017 (UNCTAD, 2017), at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

[26] See also "UNCTAD Director contributes to exploratory discussions on a multilateral investment court", 15 December 2016, available at http://investmentpolicyhub.unctad.org/News/Calendar/Archive/533.

bargaining power or latecomers find themselves in the role of "rule-takers") and involving other affected stakeholders.

(iii) Not losing sight of the overarching objective of sustainable development-oriented IIA reform, pursuing an IIA regime that is conducive to sustainable development and mobilizes investment required for achieving the Sustainable Development Goals (SDGs).

Comprehensive regime reform — addressing new and existing treaties across the five action areas identified in UNCTAD's Road Map — would benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work (research and policy analysis, technical assistance and intergovernmental consensus building) can play a key role in this regard. As the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's existing multi-layered and multifaceted IIA regime, UNCTAD can help bring coordination and coherence to reform efforts.

UNCTAD additional resources

UNCTAD International Investment Agreements Navigator, available at http://investmentpolicyhub.unctad.org/IIA

UNCTAD IIA Mapping Project, available at

http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu

Figure 1:

UNCTAD Investment Dispute Settlement Navigator, available at http://investmentpolicyhub.unctad.org/ISDS

(A/CN.9/918/Add.8) (Original: English)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

38. Israel

[Original: English]
[Date: 26 June 2017]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

Yes, both BITs and FTAs. ISDS provisions are included.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs — Question 3: Provisions on appeal to investor-State arbitral awards in IIAs — Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

Yes, some IIAs concluded by Israel contain provisions on the amendment of the IIAs. These provisions were never used. Most of Israel's IIAs include a provision protecting investors' rights in the case of termination of the IIA ("sun-set" provision).

Examples of Israel's amendment provisions:

Israel — Ukraine (signed: 2010; in force: 2012)

Article 14 Amendment of the Agreement

Changes and amendments to this Agreement shall be made by mutual written consent of the Contracting Parties and be formed in Protocols, which constitute its integral part and shall into force in accordance with Article 16 of this Agreement.

Israel — Turkey (signed: 1996; in force 1998)

Article 14 Duration and Termination

[...] This Agreement may by amended by written agreement between the Contracting Parties. Any amendment shall enter into force after each Contracting Party has notified the other that it has completed all its internal requirements for the entry into force of such amendment. In respect of investments made while this Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of 10 years after the date of termination.

Israel — Lithuania (signed: 1994; in force: 1996)

Article 13 Amendments

At the time of entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be amended in such manner as may be agreed between the Contracting Parties. Such amendments shall enter into force pursuant to the terms of Article 14.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

No.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

The applicable legislation provides that enforcement of foreign arbitral awards is done in accordance with an applicable treaty to which Israel is a party (if the award is subject to such a treaty) (Article 29A, Arbitration Law — 1958). There are no statutory provisions allowing for direct appeal against foreign awards.

Question 8: Any comments regarding the possible options for reform of the investor-State arbitration regime discussed in the CIDS research paper

Israel believes UNCITRAL could be one of several appropriate global forums for discussing tools in relation to a permanent investment court and an appeal mechanism, due to the opportunities this can provide for smaller Member States from various geographic locations to participate in the discussions. As an initial stage, discussions in a Working Group on the topic could focus on clarifications of the proposals suggested in the CIDS paper. This could facilitate a common understating of the specifics of the options before the UNCITRAL member states in order to decide which of the approaches suggested has more potential of ultimately gaining consensus and resulting in a concrete outcome. Such a direction could also facilitate subsequent focused deliberations on the challenges and obstacles and identification of means to resolve them.

Israel stresses, however, that its support for continuation of work in this area does not imply support for the idea of a permanent court or an appellate mechanism, nor does it mean that Israel will join a Convention on this issue if such a Convention is finalized.

(A/CN.9/918/Add.9) (Original: English)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

39. Republic of Korea

[Original: English]
[Date: 13 July 2017]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

As of December 31, 2016, the Republic of Korea has signed 95 bilateral investment treaties (BITs) among which 87 agreements are in effect. The Republic of Korea is a signatory to 15 Free Trade Agreements (FTAs).

As for BITs, 83 agreements out of 87 which are in effect contain provisions on the settlement of investor-State disputes. Four agreements that do not contain such provisions are Korea-German BIT, Korea-France BIT, Korea-Pakistan BIT and Korea-Bangladesh BIT.

As for FTAs, 14 agreements contain provisions on the settlement of investor-State disputes except for Korea-EU FTA.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs — Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

As of December 31, 2016, no IIA to which the Republic of Korea is a party includes (i) any provision on permanent courts or tribunals; and (ii) any provision whereby investor-State arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

Four FTAs, the Korea-United States FTA, the Korea-Australia FTA, the Korea-Canada FTA and the Korea-New Zealand FTA, contain provisions addressing the possible future creation of a bilateral or similar appellate mechanism to review investment treaty arbitral awards.

The texts are provided in the following:

The Korea-United States FTA, Chapter 11 (Investment), Annex 11-D Possibility of a bilateral appellate mechanism

> "Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 11.26 in arbitrations commenced after they establish the appellate body or similar mechanism."

(signed on June 30, 2007; date of entry into force: March 15, 2012)

The Korea-Australia FTA, Chapter 11 (Investment), Article 11.20 Conduct of the arbitration

> "13. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 11.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties."

-Annex 11-E, Possibility of a bilateral appellate mechanism

> "Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 11.26 in arbitrations commenced after they establish the appellate body or similar mechanism."

(signed on April 8, 2014; date of entry into force: December 12, 2014)

The Korea-Canada FTA, Chapter 8, Annex 8-E, Possibility of a bilateral appellate mechanism

> "Within three years after the date this Agreement enters into force, the Parties shall consider whether to establish an appellate body or similar mechanism to review awards rendered under Article 8.24 in arbitrations commenced after they establish the appellate body or similar mechanism."

(signed on September 22, 2014; date of entry into force: January 1, 2015)

The Korea-New Zealand FTA, Article 10.26 Conduct of the arbitration

> "9. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review decisions and awards rendered under this Article and Article 10.30 in arbitrations commenced after the multilateral agreement enters into force between the Parties."

(signed on March 23, 2015; date of entry into force: December 20, 2015)

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

As for BITs, 25 agreements out of 87 which are in effect contain provisions on the amendment of the BITs. As for FTAs, all agreements signed contain provisions on the amendment of the FTAs. As of December 31, 2016, no IIA to which the Republic of Korea is a party includes any provision safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

Article 6, Paragraph 1 of the Constitution of the Republic of Korea provides that, "Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea." Therefore, if there are treaties or conventions regarding recognition and/or enforcement of international court judgments, they can so be recognized and enforced accordingly.

Apart from that, there are no specific legal provisions or judicial organizations in the Korean legal system that deal with such recognition and/or enforcement of judgments delivered by "international courts".

However, we do have provisions on the recognition and enforcement of judgments rendered by foreign courts, where the recognition and enforcement procedures are carried out not by international courts but by domestic courts, as provided in Article 217 of the Civil Procedure Act and Article 26 and 27 of the Civil Execution Act.

For your information, there have not been any known cases whereupon Korean domestic courts were requested to recognize or to enforce a judgment from an "international court".

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

In the Korean law system, the Arbitration Act stipulates on international arbitration. However, it does not contain any provisions on appeal by State courts or arbitral tribunals against arbitral awards.

(A/CN.9/918/Add.10) (Original: English)

Note by the Secretariat on settlement of commercial disputes: investor-State dispute settlement framework: compilation of comments

ADDENDUM

Contents

III. Compilation of comments

40. Republic of Indonesia

[Original: English]
[Date: 16 March 2018]

A/International Investment Agreements (IIAs)

Question 1: Information on IIAs and their provisions on the settlement of investor-State disputes

As of December 31, 2017, the Republic of Indonesia has signed 64 bilateral investment treaties (BITs) among which 42 agreements are in effect and 22 agreements have been discontinued.

The Republic of Indonesia is a signatory to 9 Free Trade Agreements (FTAs),[1] 7 of them have Investment Chapter.

All 64 BITs contain provisions on the settlement of investor-State disputes. As for the FTAs, only the ASEAN-Hong Kong FTA does not have such provisions.

Question 2: Provisions for permanent courts or tribunals (as opposed to investor-State arbitration) in IIAs — Question 3: Provisions on appeal to investor-State arbitral awards in IIAs

As of December 31, 2017, no BITs or Investment Chapter in the FTAs to which the Republic of Indonesia is a party includes (i) any provision on permanent courts or tribunals; and (ii) any provision whereby investor-State arbitral awards may be subject to appeal.

Question 4: Provisions in IIAs on creation in the future of (a) a bilateral or multilateral appellate mechanism for investor-State arbitral awards; and/or (b) a bilateral or multilateral permanent investment tribunal or court

No BITs or Investment Chapter in the FTAs signed by Indonesia, contain provisions addressing the possible future creation of a bilateral or similar appellate mechanism to review investment treaty arbitral awards.

Question 5: Provisions on the amendment of the IIAs; provisions safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments of the IIAs

All BITs and FTAs signed by Indonesia contain provisions on amendment. As of December 31, 2017, no BITs or FTAs to which the Republic of Indonesia is a party

[1] AANZFTA (ASEAN-Australia-New Zealand), AIFTA (ASEAN-India), AKFTA (ASEAN-Korea), ACIA (ASEAN Comprehensive Investment Agreement), AJCEP (ASEAN-Japan), ACFTA (ASEAN-China), AHKFTA (ASEAN-Hong Kong), IJEPA (Indonesia-Japan), ICCEPA (Indonesia-Chile).

include any provision safeguarding investors' rights or providing for transitional arrangements in case of modifications or amendments occurred.

B/Legislative and judicial framework

Question 6: Statutory basis or judicial mechanism to recognize and enforce judgments of international courts (as opposed to foreign arbitral awards)

There are no legal provisions or judicial organizations in the Indonesian legal system that deal with the recognition and/or enforcement of judgments delivered by "international courts". Recognition and enforcement of a judgment or decision made by a domestic court of foreign countries is subject to review by the Indonesian courts.

Question 7: Legislative provisions on appeal (as opposed to annulment) by State courts or arbitral tribunals against arbitral awards

In accordance with Article 70 Law Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement, arbitral awards are only subject to annulment by the District Court of Jakarta (without any recourse to any appellate review). The decision of annulment by the District Court of Jakarta may be appealed before the Supreme Court which shall decide the matter as the court of final instance.

H. Note by the Secretariat: proposal of the Comité Maritime International (CMI) for possible future work on cross-border issues related to the judicial sale of ships

(A/CN.9/923)

[Original: English]

In preparation for the fiftieth session of the Commission, the Comité Maritime International (CMI) submitted to the Secretariat a proposal for possible future work by UNCITRAL on cross-border issues related to the Judicial sale of ships. The text received by the Secretariat on 13 April 2017 is reproduced as an annex to this note.

Annex

Proposal of the Comité Maritime International for possible future work on cross-border issues related to the Judicial sale of ships

1. Introduction

The Comité Maritime International (CMI) has been in existence since 1897 when it was formed by a number of far sighted representatives in both government and business who were dedicated to seeking to achieve uniformity in international law in relation to shipping. The object of CMI, as enunciated in Article 1 of its Constitution, is:

> "... to contribute by all appropriate means and activities to the unification of maritime law in all its aspects. To this end it shall promote the establishment of national associations of maritime law and shall cooperate with other international organizations."

There are over 50 National Maritime Law Associations (NMLAs) around the world who are members of CMI.

2. Background to the Judicial Sales project

Following on a paper given by Professor Henry Li of China in 2007 which drew attention to problems arising around the world from the failure to give recognition to judgments in other jurisdictions when ordering the sale of ships, the Executive Council of CMI proposed that an International Working Group (IWG) conduct a preliminary study of the issues in relation to the Judicial Sale of Ships.

3. The draft international instrument

The work which has been done by CMI commenced with a detailed Questionnaire being sent to the Maritime Law Association members of CMI, the results of which were discussed at a Colloquium held in October 2010 in Buenos Aires. Members of IWG summarized the responses which had been received at that time from 19 Maritime Law Associations. Since then at subsequent meetings of CMI, the topic has been discussed and a draft international instrument prepared at numerous meetings including the Beijing Conference in 2012, the Dublin meeting of 2013 and the Hamburg Conference of 2014 where a draft instrument was completed, and approved. The proposal for approval of the final text of the draft international instrument was made by the China Maritime Law Association at the CMI Assembly in Hamburg in 2014. The proposal was supported by 24 acceptances with two abstentions and no vote against. The 24 acceptances comprised the national Maritime Law Associations of Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Malta, the Netherlands, New Zealand, Nigeria, Norway, the Republic of Korea, Spain, Sweden, Switzerland, Turkey, the

United Kingdom of Great Britain and Northern Ireland and the United States of America. The two abstentions were the national Maritime Law Associations of Brazil and Poland. Throughout its preparation it received widespread support from delegations.

It was felt that a simple, largely procedural, international instrument addressing the recognition of foreign Judicial sales would fill a gap left open by the International Convention on Maritime Liens and Mortgages, 1993, the International Convention Relating to the Arrest of Sea-Going Ships, 1952 and the International Convention on the Arrest of Ships, 1999, and meet the commercial needs of the industry.

4. The prevalence of Judicial Sales

While there has been no exhaustive compilation of data on the number of ships sold by way of Judicial sale, the data from four significant maritime jurisdictions in Asia (Republic of Korea, China, Singapore and Japan) show that, during the period 2010-2014, more than 480 ships were sold by way of Judicial sale per year in those countries. It follows that the number of ship sales that would benefit from the certainty provided by the draft international instrument would run to many hundreds of ships a year.

It is apparent that many hundreds of ships are sold each year through some competent form of Judicial sale. The underlying cause or causes of a Judicial sale may be numerous, but usually include the non-payment of debts due and owing by the ship owner.

5. Clean Title; Reflagging

Purchasers, and subsequent purchasers, must be able to take clean title to the ship so sold and be able to de-flag the ship from its pre-sale registry and re-flag the ship in the purchaser's selected registry so as to be able to trade the vessel appropriately without the threat of costly delays and expensive litigation. This, in turn, will enable the purchased ship to trade freely; and ensures that the ship will realize a greater sale price which will benefit all the related parties, including creditors (which could include port authorities and other government instrumentalities that have provided services to a ship owner).

It is important to highlight the important legal principle that flows from a Judicial sale that once a ship is sold by way of a Judicial sale, the ship should, with only very limited exceptions, no longer be subject to arrest for any claim arising prior to its Judicial sale. If purchasers and their financiers lose confidence in the predictability of obtaining a clean title and being able to reflag the vessel after acquiring a ship from a Judicial sale the process becomes less attractive and effective to the detriment of the purchaser and other creditors of the ship owner whose vessel is to be sold by way of Judicial sale.

The purchase of vessels is generally financed by a ship mortgage from a bank where the bank's main security for repayment is the ship itself. The international instrument, once it has received widespread support, will permit banks to provide ship finance with greater confidence that the ship will realize its full market value at a Judicial sale and not the reduced value realisable where there is the risk, as at present, that the ship may be subsequently arrested for claims predating the Judicial sale, and by reason of a general loss of confidence in the sanctity of the process.

6. Judicial Pronouncements

In the English case "Acrux"[1] Mr. Justice Hewson confirmed that Courts must recognise: "proper sales by competent Courts of Admiralty, or prize, abroad — it is part of the comity of nations as well as a contribution to the general well-being of international maritime trade".[2]

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[1] [1962] Vol. 1, Lloyds Law Reports at p. 405.

[2] Ibid., at p. 409.

The study by CMI also drew to light a number of Judicial pronouncements from various jurisdictions that highlighted difficulties that parties had experienced in having a foreign Judicial sale of a ship recognized by another court. In one Canadian decision the court went so far as to say that the matter could only be repaired by an international instrument regulating the Judicial sale of ships and their enforcement. Apart from the reported cases there are many unreported cases and cases which do not go to full hearings of which the maritime legal community is aware.

Most importantly, the judiciaries of many countries have observed that the need to recognize Judicial sales by foreign, competent courts forms part of the comity of nations and contributes to the general well-being of international trade.

There is currently no international instrument that addresses the recognition of Judicial sales. Nor is there any instrument that adequately protects purchasers from prior claims and which addresses the de-registration on re-flagging and re-registration of ships from and to national registries.

As there is currently no international instrument dealing with the recognition of foreign Judicial sales of ships it can be said, with some confidence, that in this regard maritime transportation is neither secure nor efficient and hinders rather than promotes global trade and the world economy. The need for intervention by inter-governmental and international organizations has been clearly recognized both Judicially and by national and international maritime bodies. The recognition of foreign Judicial ship sales is fundamental to international maritime law.

The difficulties that arise when one country will not recognize an order for the Judicial sale of a ship in another country has been succinctly summarized as follows:

(1) It is an affront to the Court and the State ordering the sale;

(2) It represents a refusal by that country to abide by the decisions of a Court in another country, and an exception to a rule honoured by most nations in the world;

(3) If other countries, or other debtors, decided to follow this bad example, it could create confusion in the area which can be effectively controlled only with the good faith of all seafaring nations.[3]

The recognition of Judicial sales at an international level has also been highlighted in the Canadian case of the ship "Galaxias"[4] where the Court noted that:

(1) While a purchaser on a Judicial sale will take a clean title free and clear of all encumbrances according to the laws of Canada and notwithstanding that it is clear that Canadian Courts desire and expect that the Courts and Governments of other nations will respect its orders and judgments, particularly in the area of maritime law, however this was not an area over which a national jurisdiction exercises control, nor is it appropriate that it attempt to do so;

(2) International regulation of the Judicial sales was necessary; and

(3) In order to promote the free flow of maritime traffic, countries have, generally speaking, agreed to apply a uniform set of admiralty rules and laws. This would not, however, prevent any country from legally completely ignoring or setting aside any normally accepted practice or any law which is universally recognized in admiralty matters or even a rule of law which that country might previously have adopted by treaty. This is precisely what territorial jurisdiction means, and, until there exists some world authority with a superior globally enforceable overriding jurisdiction this is what we all must live with.[5]

In commenting on judicial orders for the sales of ships that did not ensure the passing of clean title, the same Court noted that admiralty lawyers and all lay people in the shipping world, involved in any way in the purchase and sale of ships, will invariably feel that this would greatly reduce the amounts which can be obtained from court sales

[3] Associate Chief Justice Noel in *Vrac Mar Inc. v Demetries Karamanlis et al* [1972] FC 430 at p. 434 (Canada).

[4] (1988) LMLN 240, being a judgment of the Federal Court of Canada.

[5] Ibid. at p. 11 of the judgment.

of vessels and render some ships completely unsaleable. The legitimate claims of many local and foreign creditors would thus be defeated by the resulting low bids made at the auction conducted by the court seized of the case.

In order for the recognition of foreign Judicial ship sales to be uniformly accepted by way of an international instrument, the intervention of UNCITRAL would be of considerable benefit to the international maritime community.

Necessary and sufficient protection should be provided to purchasers of ships at Judicial sales by limiting the remedies available to interested parties to challenge the validity of the Judicial sale and the subsequent transfer of the ownership in the ship.

7. Other Conventions

The International Convention on Maritime Liens and Mortgages, 1993 has not been successful as it contains controversial provisions which do not solve the problems of the recognition of foreign Judicial sales, and the wording with respect to recognition is more in the nature of denying recognition, rather than granting recognition of the Judicial sale. However, wherever possible, the draft international instrument has been prepared so that its provisions do not conflict with those set out in the Maritime Liens and Mortgages Convention.

While the International Convention Relating to the Arrest of Sea-going Ships, 1952 seeks to regulate the claims that can be enforced by the arrest of a vessel, it does not provide for the Judicial sale of a ship.

The International Convention on the Arrest of Ships, 1999 mentions the Judicial or forced sale of ships, but only in the context of its article 3.3, allowing, as an exception to the general rule, the arrest of a ship owned by a person not liable for the claim.

8. International Maritime Organization (IMO)

CMI first approached the IMO Legal Committee in view of its past involvement with the Maritime Liens and Mortgages Conventions, and made an information presentation to the IMO Legal Committee in 2015 with a view to making a formal request twelve months later that it add this work to its agenda.

A further presentation was made in June 2016. Two sponsors were required for that work and in the lead up to the IMO Legal Committee meeting in 2016, China and the Republic of Korea agreed to sponsor this work. The IMO Legal Committee did not accept the proposal for the inclusion of this work on its agenda. It was, however, left open for the matter to be raised again at a later date.

The views expressed by delegates at the time included: while it was felt that this was an important subject of interest to the Committee some considered it to be a matter of private and commercial law and did, therefore, not fall within the remit of the Committee; some delegations appeared not to want to take on new work, although other delegations highlighted that they accepted foreign Judicial sales of ships in their national legislation and that it entailed a lot of benefits, in particular because it provided certainty towards stakeholders; others pointed out that it was also an important issue from the perspective of the port industry, as arrests of vessels can negatively affect efficient port operations.

9. Hague Conference on Private International Law (HCCH)

After the IMO Legal Committee had declined to take on this project, CMI approached the Hague Conference, which was working on its project entitled the Recognition and Enforcement of Foreign Judgments. Representatives of CMI attended the recent meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments of HCCH, held between 16 and 24 February 2017 at which a presentation was made on behalf of CMI to suggest that the CMI's draft Instrument on the Judicial Sale of Ships could be accommodated within that work. It was decided, however, by that Commission, not to proceed down that route. CMI was therefore invited to present an information paper to the Council of HCCH on 15 March 2017 so that consideration could be given at the HCCH Council meeting in 2018 to add this project

to its work programme as a new stand-alone topic. Opinions were expressed by some delegations at that time to the effect that such an esoteric and industry-specific topic might be better suited to UNCITRAL and others preferred not to take on new work until the current programme was concluded. The matter is, presently, to be revisited at the Hague Conference's Council meeting in 2018.

10. Conclusion

The failure of States to recognize the Judicial Sale of a ship in another jurisdiction reduces confidence in the international maritime community in the system of Judicial sales. They will only be supported, and proper values for ships fetched, if the prospective purchasers can be confident of receiving the vessel with a clean title, free of any encumbrances and capable of being deleted from its old registry and registered in a new register of the purchaser's choice. Thereafter, the purchaser must also be able to trade the ship without it being subject to arrest in respect of any claim arising prior to its Judicial sale.

CMI has experience working with UNCITRAL, most recently, on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the "Rotterdam Rules"). Members of Maritime Law Associations were appointed to national delegations and were able to assist in the work of UNCITRAL in the development of those Rules, which CMI had initially drafted. CMI does not expect UNCITRAL to rubber stamp its draft international instrument. CMI takes comfort in UNCITRAL's "universal" coverage in terms of the States participating in negotiations; and the fact that it is a specialist organization on private international law that is experienced in working on standards in the area of commercial and international trade law.

CMI is therefore requesting UNCITRAL to add this topic to its work programme. If UNCITRAL decides to add this topic to its work programme (either on its own or in conjunction with another body), CMI will not pursue its requests to IMO or HCCH to pursue this work.

I. Note by the Secretariat on possible future coordination and technical assistance work on security interests and related topics

(A/CN.9/924)

[Original: English]

Contents

I. Introduction

1. This document contains a summary of the considerations and conclusions reached at the Colloquium with respect to possible future coordination and technical assistance work on security interests and related topics.

II. Possible future coordination and technical assistance work topics

A. The law applicable to proprietary effects of assignments of receivables

1. Continued divergence in national law approaches

2. The panel that dealt with the law applicable to proprietary effects of assignments of receivables agreed that national disharmony in the conflict-of-law rules for determining the law applicable to the assignment of receivables is a long-standing problem in private international law. That said, a multilateral consensus appears to have been reached on the following three issues. First, the applicable law should be the same for both the outright assignment of and the grant of security in receivables. Second, relations between the assignor and assignee should be governed by the law applicable to the contract of assignment. Third, relations between the assignee and the debtor of the receivable should be governed by the law applicable to the assigned receivable (meaning the law applicable to the contract giving rise to the receivable in the case of contract-generated receivables). The consensus on these three issues is reflected: (a) at the international level, in the United Nations Convention on the Assignment of Receivables in International Trade (the “Assignment Convention”), the Secured Transactions Guide and the Model Law; and (b) in the European Union,

in article 14 of the Rome I Regulation (Regulation (EC) 593/2008 on the law applicable to contractual obligations).

3. Where consensus remains elusive is with respect to the appropriate connecting factor for determining the law applicable to the proprietary effects of an assignment of receivables against third parties, and the priority of the assignee's right against competing claimants (including the assignor's insolvency administrator). As a result of the uncertainty with respect to the law applicable to these matters, credit on the basis of receivables is less available or is available at a higher cost.

4. Under the UNCITRAL instruments referred to above, the law of the State in which the assignor is located (place of business and, in the case of places of business in more than one State, the centre of main interests) applies as a general rule (subject to exclusions and exceptions for certain types of receivables, notably financial receivables arising from bank accounts, securities, financial market and derivatives transactions, and transactions on regulated exchanges and clearing and settlement systems).

5. As reflected in the panel presentations, however, national laws continue to diverge on this issue. For example, under the statutory conflict-of-laws rules in effect in the territorial units that make up the United States of America and Canada (including in the case of Canada, the civil law province of Quebec), the law of the assignor's location generally applies in both the intrastate and international conflict-of-laws contexts. While this solution is in line with the UNCITRAL approach, Japan's private international law statute, enacted in 2006, refers the effects of an assignment against both the debtor and third parties to the law applicable to the assigned receivable.

2. Current status of the matter in the European Union

6. As explained in the panel presentations, the member States of the European Union have also yet to agree on a uniform solution. In 2005, the European Commission proposed adoption of the law of the assignor's habitual residence in line with the UNCITRAL approach (habitual residence was defined to be close to the place of business and the place of central administration) and the views of the majority of respondents to the European Commission's 2003 Green Paper. It was ultimately decided, however, that the issue required further study and the proposed rule was omitted from the 2008 Rome I Regulation. Instead, article 27(2) required the European Commission to submit a report on the issue, accompanied by a proposal for a potential future European solution. The European Commission engaged the British Institute of International and Comparative Law (BIICL) to carry out a study (published in 2011) and submitted its report in 2016. Based on the BIICL study, the European Commission report confirmed the need for a uniform European legislative solution.

7. Importantly, the European Commission report also emphasized the need for a future proposal to also address the existing disharmony on the conflict-of-laws rules applicable to cross-border transactions in securities. Existing European Union directives have harmonized these rules only to a limited extent and have been transposed into national law in divergent ways. There are also divergent views on whether certain types of intangible assets are more appropriately characterized as securities or receivables.

8. To ensure coordination, the Capital Markets Union (CMU) Action Plan (2015) and CMU Communication (2016) envisages a dedicated legislative proposal from the European Commission on the law applicable to the ownership of securities and the third-party effects of the assignment of receivables. To this end, an inception impact assessment was published in 28 February 2017, to be followed by a detailed online public consultation with stakeholders to be launched in the first quarter of 2017 (the public consultation was in fact launched on 7 April 2017 with a deadline of 30 June for receiving responses). It is also planned to set up an advisory expert group composed of experts on private international law and finance markets. A stakeholders' meeting to discuss the results of the public consultation is envisaged for early

September 2017, followed by publication of an impact assessment of the ultimate proposal in mid-September 2017. Adoption of a proposal by the European Commission is anticipated by December 2017.

3. Possible future solutions in the European Union

9. While confirming the demand for a uniform rule on the law applicable to the third-party effects and the priority of the assignee's rights, the panel noted that the 2011 BIICL study reported divergent sectoral, expert and Member State views as to which law should apply. Based on the alternative drafting proposals set out in the BIICL study (with minor modifications), the 2016 Commission Report presented three possible solutions: (a) the law applicable to the contract between the assignor and the assignee; (b) the law applicable to the assigned receivable; and (c) the law of the assignor's habitual residence (i.e. the UNCITRAL approach). The advantages and disadvantages of each of these possibilities was addressed in the BIICL study and the European Commission report and discussed by the various panel participants.

Law of the assignor's location (the UNCITRAL approach)

10. The principal advantages of this solution are seen to be: (a) facilitation of bulk assignments insofar as a single law applies to an assignment of receivables owed by multiple debtors in multiple States; (b) facilitation of assignments of receivables arising under future contracts insofar as the applicable law can be determined ex ante when the assignment is made; (c) increased legal certainty and predictability insofar as the applicable law can be easily ascertained by both assignees and third parties including the assignor's creditors; and (d) coincidence of the applicable law with the insolvency law in the event of the assignor's insolvency, thereby minimizing potential conflicts and the need to demarcate whether an issue relates to insolvency law or to the proprietary effects of the assignment on third parties.

11. The principal disadvantages are seen to be: (a) separation of the law applicable to the effects of the assignment as against the debtor and as against third parties, raising characterization and demarcation challenges; (b) the potential for multiple laws to apply in the event of: (i) a change in the assignor's location over time with the result that a different law may apply in a priority competition with a subsequent assignee or other competing claimant; (ii) subsequent assignments by the original assignee if the subsequent assignee is located in a different State than the original assignee; and (iii) the assignment of an unseverable debt owed jointly to multiple assignors located in different states; and (c) the potential unsuitability of this approach to certain types of financial claims and instruments.

12. To mitigate certain of these disadvantages, the European Commission report and BIICL study suggest: (a) questions of third-party effectiveness and priority in the event of a change in the location of the assignor over time could be resolved by referring to the law of the State in which the assignor is located as of the date of the last assignment or other event giving rise to a competing right; and (b) the perceived incompatibility of this approach for financial claims could be addressed by a limited exception, pointing to the law governing the assigned receivable (or to some other appropriate law depending on the particular type of receivable).[1] While such an exception is compatible with the exclusions and exceptions in the Assignment Convention and other UNCITRAL instruments, it was noted that demarcating the exceptional group of receivables that should be subject to a special rule would be challenging.

Law applicable to the assigned receivable

13. The principal advantages of this solution are seen to be: (a) the same law applies to the effects of the assignment against the debtor and third parties, thereby avoiding the need to delineate whether an issue is an assignee-debtor issue or an assignee-third-party issue; (b) enhanced stability of the applicable law both because the law governing the assigned receivable is unlikely to change over time and because the

[1] Article 91 of the Model Law addresses this issue.

same law would normally also govern subsequent assignments by the original assignee to a new assignee.

14. The principal disadvantages are seen to be: (a) this solution does not permit a determination of the law applicable to an assignment of future receivables arising under contracts that have not yet been concluded; (b) increased complexity and costs in the case of a bulk assignment of receivables owed by debtors in multiple States insofar as the third-party effectiveness and priority of the assignee's right in the same portfolio of receivables could potentially be subject to multiple applicable laws; (c) the law applicable to the assigned receivable may not always be easy to identify if there is no clear choice of law in the contract between the debtor and assignor or if the receivable assigned is not contractual; (d) risk of prejudice to third parties insofar as: (i) the parties to the assigned receivable can choose the law applicable to it, and could change the applicable law; (ii) there is a lack of transparency with respect to the applicable law for third parties, notably the assignor's creditors, who ordinarily would not have access to the contract giving rise to the receivable in order to determine the applicable law; and (e) uncertainty and demarcation challenges in the event of the assignor's insolvency to the extent the *lex concursus* does not coincide with the law applicable to the assigned receivable.

15. To address the unsuitability of this solution for assignments of receivables under future contracts, the BIICL study and the European Commission report suggest: (a) a specific exception pointing to the law of the assignor's habitual residence; and (b) resolving potential conflicts between different applicable laws in a priority dispute between competing assignees or between an assignee and another right holder by applying the law of the state in which the assignor is located as of the date of the last assignment or other event giving rise to a competing right.

Law of the contract between the assignor and the assignee

16. The principal advantages of this solution are seen to be: (a) flexibility for commercial actors to choose the law which best suits their needs; and (b) potential for the application of a single governing law for bulk assignments and assignments of future receivables.

17. The principal disadvantages are seen to be: (a) potential for abuse of third parties including the avoidance of mandatory registration or other publicity requirements; (b) lack of transparency of the applicable law for third parties, notably creditors who may not have access to the assignment contract to determine the applicable law; (c) potential for different laws to apply to the effects of the assignment against the debtor and against third parties (unless the law applicable to the receivable is the chosen law); (d) uncertainty and demarcation challenges in the event of the assignor's insolvency to the extent the *lex concursus* does not coincide with the chosen law; (e) potential for different conflicting laws to apply to priority in the event of successive assignments of the same receivable to different assignees; and (f) potential instability of the applicable law in the event of a change in the applicable law by the parties.

18. To mitigate the risk of prejudice to third parties, it was noted that the BIICL study and the European Commission report suggest that the available choices be limited to the law of the assigned receivable or the law of the assignor's location. To address the absence of a clear choice of law in the assignment contract, or if the chosen law does not correspond to the permitted choices, the Commission report suggests that the third-party effectiveness and priority of the assignee's right could be governed by the law of the assignor's location. To address the problem of competing assignments governed by different laws, the BICCL study and the European Commission report suggest that the general first-in-time property principle could apply, subject to the sequential application of the rules protecting bona fide acquirers of the law applicable to the second and any later assignments.

4. Conclusions

19. As the panel presentations revealed, while there is a strong demand for a uniform solution, the possible approaches summarized above all have their respective

advantages and disadvantages and all pose problems of delineation insofar as they all contain exceptions and qualifications. It remains an open question whether the European Commission will ultimately propose any of these possible solutions or some other combination of approaches. For what it may be worth, it is noted that in the open discussion that followed the panel presentations, Colloquium participants focussed their remarks on the suitability of the UNCITRAL assignor location approach as a general rule including for securitization transactions.

20. As already noted (see para. 8 above), a dedicated legislative proposal from the European Commission on the law applicable to the ownership of securities and the third-party effects of the assignment of receivables is anticipated by the end of 2017. The Commission may wish to renew the mandate given to the secretariat to coordinate and cooperate with the European Commission and contribute to the stakeholder consultations and meetings leading up to the proposal with a view to avoiding any conflict with the Assignment Convention. Given that the pending proposal will also cover the conflict-of-law rules applicable to rights in securities and financial claims, the Commission may also wish to consider extending the mandate given to the secretariat to seek to avert any incompatibility with the conflict-of-laws rules of the Model Law, notably the rules determining the law applicable to security rights in non-intermediated securities, instruments, and bank accounts.

B. Technical assistance in secured transactions law reform: coordination and cooperation with other organizations

21. The panel that discussed technical assistance issues focused primarily on the discussions that took place at the conference on the coordination of secured transactions reform efforts that was held on 9 and 10 February 2017 at the University of Pennsylvania Law School. The conference was co-sponsored by the International Insolvency Institute, the National Law Center for Inter-American Free Trade and the Organization for the Harmonization of Business Law in Africa (OHADA).

22. A consensus view emerged that coordination in connection with the preparation of secured transactions instruments by international organizations (e.g. by UNCITRAL, Unidroit, and the Hague Conference on Private International Law) was extremely important to first avoid overlap and conflict, and to then facilitate coordination in connection with the implementation of those instruments.

23. The coordination of efforts among international governmental organizations, such as UNCITRAL, Unidroit and the Hague Conference, reflected in their annual coordination meetings and their Joint Publication on Security Interests, was generally thought to constitute a fine example of coordination in the preparation of texts. There was agreement that these annual coordination meetings should continue and the Joint Publication should be updated to include further texts prepared by these three organizations relating to security interests. A suggestion was made that the Joint Publication should also include references to regional security interest texts.

24. The coordination of efforts between international governmental organizations and regional intergovernmental organizations was also discussed and problems were identified that called for increased coordination efforts. There was general agreement that, while regional harmonization efforts were useful, they could not take the place of international harmonization efforts. There was also agreement that international or regional development financing institutions should use to the maximum extent possible international and regional legislative standards.

25. A potential tension was identified between the unitary, functional and comprehensive approach to secured transactions law reform (e.g. the Model Law) and asset-specific approaches (e.g. the Cape Town Convention and Protocols) or more simplified and less comprehensive but not asset-specific approaches. There was agreement that, while the unitary, functional and comprehensive approach should not be undermined, there was room for limited and narrow exceptions (e.g. for high-value, uniquely identifiable equipment that crossed national borders in its normal use). There was also agreement that discussion should continue on the

relative merits of other more simplified and less comprehensive approaches and the contexts in which they might be suitable.

26. There was also agreement that secured transactions law reforms should be coordinated with related reforms (e.g. laws on immovable property, including mortgages, etc.), insolvency laws, general reforms for improving the responsiveness and integrity of judicial systems, in particular as they may be utilized for the enforcement of a security right.

27. Several suggestions were made as to the possible next steps. One suggestion was to organize another conference, such as the February 2017 conference at the University of Pennsylvania Law School, perhaps with a view toward holding such conferences in the future on an annual basis. Another suggestion was that a repository of information should be developed, such as the one established by the International Insolvency Institute (at https://www.iiiglobal.org/node/2036). Yet another suggestion was that an ad hoc informal committee of representatives of principal organizations should be formed to discuss and plan the next steps and ongoing coordination efforts. Finally, the suggestion was made that there should be a standardized annual reporting system by all relevant organizations on the progress and developments in secured transactions law reform efforts.

C. Challenges in integrating a new secured transactions law into an existing legal system

28. At the outset, the panel that discussed the challenges in integrating a new secured transactions law into an existing legal system noted the need for those promoting secured transactions law reform in a State to work with the local administration and local lawyers and to refrain from offering a State with a developing economy a level of sophistication it does not need and is not equipped to use. The panel then went on to discuss the following three topics: (a) the lessons to be learned from the Australian experience in devising and implementing its Personal Property Securities Act 2009 ("PPSA"); (b) the importance of adopting a functional rather than a conceptual approach to secured transactions law reform; and (c) the need to adapt concepts, enforcement rules and legislative drafting style of an Article 9 UCC-type Model Law when introducing its ideas into a civil law jurisdiction.

1. The Australian Personal Property Security Act

29. A motive behind the Australian PPSA, a federal jurisdiction in which each State had its own personal property security law, was the need to streamline, simplify and modernize Australia's outdated secured transactions laws and registers. Particularly important was the task of building consensus, which itself required time and effort in disseminating detailed information about the proposed legislation and the need not only to listen to concerns from the private sector but also to involve it in the drafting process. Introducing a reform of this nature into a complex and developed economy had been a very challenging and complex process, and greater involvement of the private sector in the development of the legislation would have enabled the Act to better reflect the realities of the marketplace and business practice. The view of users is that the registry system also ended up to be too complex and not sufficiently user-friendly, though the Registrar and registry staff had been very receptive to industry input and had been working hard to improve this situation.

30. Awareness of the legislation among small businesses had been limited but had significantly improved as a result of education programmes. The lessons learned from the experience with the Australian PPSA were the need to have a deep understanding of what was proposed, to listen to and involve the private sector, to conduct an extensive education programme and to allow plenty of time to ensure that the legislation meets commercial needs.

2. The functional approach to secured transactions law reform

31. The second theme to emerge from the panel presentations was the need to adopt a functional approach to secured transactions law reform. In essence the goal was not to seek to reconcile differences in legal concepts but to provide best solutions to typical problems; in other words, to produce a results-based harmonization rather than one founded on legal doctrine. The Model Law does indeed adopt a functional approach to the concept of security, treating as secured transactions all those fulfilling a security function, including title-retention devices. This functional approach should be applied not only to the characterization of a transaction but also to the priority rules.

32. UNCITRAL plays numerous important roles in the harmonization and modernization of legal rules on secured transactions, including the offering of methodologies of modernization and harmonization, but it was also important to ensure that any rules proposed were acceptable to private actors in the marketplace. This part of the panel discussion concluded with a brief comment on the modernization of secured transactions law in Japan and a question as to why in certain jurisdictions asset-based lending and priority was more popular than debtor-based lending and priority.

3. The adaptation of the secured transactions model law to civil law systems

33. The last part of the panel session was devoted to the necessary acculturation of the Model Law on secured transactions to the philosophy and concepts of civil law systems. It was stated that the Model Law is not a standard model that could be incorporated as it stood. For civil law jurisdictions it was too close to Article 9 of the Uniform Commercial Code and needed to be "de-Americanised" both for political and for technical reasons. The "re-civilisation" of the instrument was said to pose significant challenges both as to substance and as to form. First, there needed to be an acculturation of concepts. Questions that need to be addressed include: (a) the characterization of the new security interest; (b) whether civil law systems should adopt a unitary approach to security or retain a non-unitary approach; and (c) the way in which the concept of proceeds was to be explained and addressed. It was also pointed out that there is also a choice to be made between clarity and readability with a short and simple text, and completeness and legal security with an elaborate and detailed text. In this respect, questions that need to be addressed include: (a) whether there were provisions that could be rejected as unnecessary in a civil law jurisdiction; and (b) the placement of a new law in a civil code, a commercial code or as a stand-alone text.

34. The final question posed was the role of UNCITRAL in the provision of technical assistance to legislators. It was noted that the draft Guide to Enactment would provide significant assistance. The question was raised whether it would be helpful to have an official commentary for the benefit of users, in view of the limited resources of UNCITRAL. It was also noted that academics world could provide a valuable resource with the establishment of a cadre of academics around the world appointed by UNCITRAL and working pro bono. This could provide a resource to which governments and legislators could turn.

J. Note by the Secretariat on possible future work by UNCITRAL on contractual networks: proposal of the Government of Italy

(A/CN.9/925)

[Original: English]

The Government of Italy has requested the Secretariat to transmit for consideration by the Commission at its fiftieth session a proposal for possible future work by UNCITRAL on alternative forms of organization to corporate-like models (contractual networks). The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat. The proposal was before Working Group I (MSMEs) at its twenty-eighth session (New York, 1-9 May 2017) (A/CN.9/WG.I/WP.102).

Annex

Contractual networks and economic development: a proposal of Italy for possible future work by UNCITRAL on alternative forms of organization to corporate-like models

I. Introduction

1. At the twenty-third session of Working Group I, held in Vienna on 17 to 21 November 2014, Italy and France submitted observations on Possible Alternative Legislative Models for Micro and Small Businesses (A/CN.9/WG.I/WP.87). Such observations aimed at presenting domestic legislative models applicable to micro and small businesses that could provide for the segregation of business assets without requiring the creation of an entity with legal personality, but that could offer limited liability protection. In particular, as for the Italian model, reference was made to cooperation among micro, small and medium-sized enterprises (MSMEs) through the so-called "network contract" (*contratto di rete*). This model not only offers the possibility of segregation of assets and consequently limited liability protection, but also facilitates internationalization of MSMEs and cross-border cooperation. Moreover, it provides a tool to link MSMEs to larger companies by permitting MSMEs to be connected to the supply chain of such companies.

2. Working Group I is currently working on two separate instruments, one on business registration (A/CN.9/WG.I/WP.101 — Draft legislative guide on key principles of a business registry) and another on the statute of a limited liability organization (A/CN.9/WG.I/WP.99 and A/CN.9/WG.I/WP.99/Add.1 — Draft Legislative Guide on an UNCITRAL Limited Liability Organization). At its twenty-seventh session (Vienna, 3 to 7 October 2016), the Working Group agreed to devote some time at its twenty-eighth session (New York, 1 to 9 May 2017) on possible future work once the two mentioned instruments are completed. To complement the observations by Italy and France (A/CN.9/WG.I/WP.87), and being convinced that models to segregate business assets by entrepreneurs as well as to permit internationalization and cross-border cooperation between MSMEs would complement the texts the Working Group is currently working on, Italy submits the present observations to illustrate possible future work on alternative forms of organization to limited-liability entities, and its foreseen benefits for MSMEs. The aim is to fill a gap between issues of business registration, on the one hand, and the establishment of a limited-liability entity, on the other hand, with a flexible contractual instrument. As it will be explained, such a model would particularly fit those economies whose economic environment heavily relies on MSMEs.

II. Business landscape

1. Global value chains offer many opportunities to small and medium-sized enterprises

3. Economic development is increasingly aimed at driving local economies towards global markets. Recent statistics show that, between 1995 and 2011, most developed and developing countries have significantly increased their contributions to global value chains (GVCs), taking advantage of lower trade costs and improved communication technology.[1] Competitiveness of GVCs does not mirror one single national economy but builds on "*bundle of labor, capital and technology*".[2]

4. In this landscape, foreign investments have played a major role. However, even greater prominence has been achieved by the so called "non-equity modes" (NEMs) of international production, such as contract manufacturing, services outsourcing, contract farming, franchising, licensing, management contracts, and other types of "*contractual relationship through which transnational corporations (TNCs) coordinate the activities of host-country firms, without owning a stake in those firms*".[3] Indeed, participation in GVCs requires more and more explicit coordination and, through such coordination, developing countries are called upon to facilitate the upgrading of local economies.[4]

5. What is the role of MSMEs in this context? GVCs offer important opportunities to small and medium-sized enterprises, including those operating in low income and developing countries.[5] By learning from and interacting with other actors in the chain, these businesses can access new technologies and new markets, thereby contributing to the creation of value not only for the benefit of local economies but also for society at large.[6]

2. However, MSMEs experience a number of serious hurdles in accessing global trade and global supply chains

6. One of these is the lack of an appropriate common legal framework. Both micro enterprises (MiE) and SMEs[7] constitute the skeleton of domestic industrial and agricultural production systems.[8] They experience serious hurdles to access global

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[1] See WTO, International trade statistics 2015: "In 2011, nearly half (49 per cent) of world trade in goods and services took place within GVCs, up from 36 per cent in 1995. The tendency of countries to specialize in particular stages of a good's production (known as vertical specialization), brought about by foreign direct investment, has created new trade opportunities, especially for small developing countries and eastern European economies. As a result, world trade in intermediate goods has grown with the rise of vertical specialization".

[2] R. Baldwin, Multilateralising 21st Century Regionalism, OECD Global Forum on Trade, February 2014, at 22.

[3] See UNCTAD, World Trade Investment Report, 2011, explaining that cross-border NEM activity worldwide is estimated to have generated over $2 trillion in sales in 2009. Contract manufacturing and services outsourcing accounted for $1.1-1.3 trillion, franchising for $330-350 billion, licensing for $340-360 billion, and management contracts for around $100 billion.

[4] See OECD, WTO and World Bank Group Report, Global Value Chains: Challenges, Opportunities and Implications for Policy, prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014.

[5] See OECD and World Bank Group Report, Inclusive Global Value Chains Policy options in trade and complementary areas for GVC Integration by small and medium enterprises and low-income developing countries, prepared for submission to G20 Trade Ministers Meeting Istanbul, Turkey, 6 October 2015.

[6] See Inclusive Global Value Chains Policy options, cit.

[7] The differences between micro-enterprises and SMEs suggest that specific policies are required to support their activities and foster their growth both at the national and global levels. Whereas we believe that the objectives are similar, we maintain that legal instruments might differ depending on the size and capacity of the firms and the scope of their activities (whether global or local).

[8] In Italy, with regard to industry, services and construction sectors (no analogous data is available for agriculture), micro enterprises (0-9 employees) make up 95.3 per cent of the total, SMEs with 10-249 employees comprise 4.6 per cent and with 250+ employees represent 0.1 per cent of the total; in terms of value added, the ration is the following: micro enterprises 30.6 per cent, SMEs 38.4 per cent, large firms 31 per cent. In terms of the total number of firms, microenterprises are 83 per cent in the industrial sector, 96.7 per cent in services, and 96.1 per cent in construction;

trade and global supply chains. [9] These hurdles concern in particular: (1) access to capital, (2) access to technology, intellectual property rights, and know how, and (3) access to a qualified and well-trained labour force. [10] In order to ensure the participation of SMEs in global trade, access to critical resources has to be facilitated by promoting an appropriate common legal framework and new industrial policies.

7. The participation of SMEs in global trade is made even more difficult by a fragmented legal framework. National legal systems have developed various instruments, primarily in company law, to promote the integration of SMEs but relatively little has been done to favour contractual collaboration both among SMEs and between them and global chain leaders like transnational corporations (TNCs). Fragmentation is even more problematic when considering national tax legislation, state aids and foreign direct investment (FDI) policies where differences are remarkable and regulatory arbitrage substantial. Harmonization of the law governing interfirm contractual collaboration may reduce regulatory fragmentation and help SMEs taking part in global trade to access resources and opportunities.

3. Complementarity between the establishment of companies and contractual collaboration

8. SMEs' growth is driven, among other factors, by the adoption of an appropriate legal framework to promote their coordination in order to favour economic growth and specialization. Such growth can occur through integration in corporate entities or via contractual collaboration in various degrees.

9. These two families of legal instruments are complementary. The corporate-like family (company, cooperative) supports the integration of existing different enterprises when the level of mutual trust and reciprocal knowledge is high and the industrial project is well defined from the very beginning. The contractual family provides a set-up for enterprises to start new collaborations, in particular when they might not otherwise enter into a demanding and burdensome common industrial project. Lack of steady availability of physical capital or uneven access to financial resources among potential partners may also discourage SMEs from entering into corporate-like forms of integration. The complementarity between corporate-like and contractual modes might establish a process whereby SMEs start with contractual collaboration and end with the creation of new companies that integrate some of their activities.

10. When SMEs have relative little knowledge about their partners, the degree of risk and uncertainty stemming from potential collaboration is higher, and the incentives to invest might initially be lower. In that case, the contractual approach is more appropriate than the creation of a new company. What is needed is a more flexible instrument that maximizes the benefits of cooperation while reducing the costs of conflict and opportunism.

11. Collaboration is a process that might require various steps. The first is through contractual collaboration that may or may not translate into the creation of a company with a higher degree of ownership integration of different types of assets including both tangible and intangible ones. Hence, the evolution of a contractual collaboration over time should be compatible with dissolution, preservation or transformation of the contract into a corporate entity. Contractual networks (i.e.: multiparty contracts between SMEs located in the same or in different jurisdictions) may provide such an instrument with a relatively low level of initial capital, low entry and exit costs, and a light governance infrastructure. Multiparty contracts may facilitate access to capital by providing joint collateral to credit institutions; they can facilitate access to new technologies with the creation of common technological platforms, where common intellectual property rights may be used. Access to qualified labour force may be

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the percentage of SMEs is: 16.7 per cent in the industrial sector, 3.2 per cent in services, 3.9 in construction.

[9] See Inclusive Global Value Chains Policy options, cit.

[10] See ILO, Decent work global chains, International conference, 2016 available at www.ilo.org.

enabled through the possibility of sharing employees who may rotate among the enterprises participating in the network, thus increasing specialization and the effective use of human capital.

4. Existing types of Contractual networks

12. Contractual networks include different existing forms of multiparty contracts ranging from joint ventures to consortia, franchises or patent pools; they can take the form of either a single contract with several parties, or of a set of interlinked bilateral contracts with high levels of coordination and interdependence. These contractual models include production and distribution and can be domestic or international. They can provide SMEs with the legal infrastructure to trade (for example, through e-commerce platforms and payment systems like "Pay-pal"). Legal frameworks exhibit a great degree of differentiation between jurisdictions that make international SME collaboration very difficult. In addition, choice of law and forum rules are unclear for multiparty contracts;[11] and even less clear for interlinked contracts.

13. Essentially two forms of contractual networks are currently in place. **Vertical networks** operate along supply chains that include different stages of production/distribution. Participants in vertical networks (e.g. suppliers) perform activities (e.g. production of intermediate goods, supply of services) to be incorporated into the activity of another chain participant (e.g. an assembler) and the network is aimed at coordinating their interdependent activity along the lines of a chain project, often developed by a chain leader. TNCs often face high transaction costs when investing in developing countries because local enterprises operate in isolation and conventional local intermediaries (such as local leaders, trade associations, or local chambers of commerce, governmental agencies) do not operate very effectively. TNCs look for stable relationships that decrease coordination costs and increase the stability of the supply required by global markets. In order to stabilize the supply chain governance they need stronger coordination between local suppliers of inputs and intermediate goods and chain leaders. This process is reinforced by the increasing number of regulatory requirements, as on safety, environmental and social protection, to be applied along the global chain. In order to facilitate access to global trade, cross border contractual collaboration is necessary and specific legal forms tailored to SMEs are needed. Such forms may contribute to the process of the internationalization of SMEs through or independently from existing global chains. Consolidated international instruments related to sales and distribution currently provide an excellent toolkit for bilateral relationships but do not allow the promotion of multiparty coordination among SMEs contributing to the same production process but located in different jurisdictions.[12] Multiparty contracts linking several SMEs involved in global supply chains can provide a useful collaborative instrument as long as they are designed to make access to critical resources easier and cheaper.

14. **Horizontal networks** are networks in which various SMEs contribute to a common project with their *products or services*, playing a similar role along the supply chain or having similar expectations from the network programme (e.g. new trade opportunities for the sale of final products). The latter may, for example, concern the construction industry, where suppliers of electrical infrastructure may collaborate with plumbers and carpenters to complement the work of the main contractor, or the fashion and garment industry where product design and software in the initial stage of the production process have to be integrated. Horizontal networks can also be found in agriculture, or agri-food industry, where, for example, producers of different final products (such as wines) or commodities (e.g. rice, soy, or corn) collaborate to comprise a richer portfolio of products to enter a new foreign market.

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[11] See Hague Conference on Private International Law, Principles on choice of law in international commercial contracts (approved on 19 March 2015), available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf.

[12] There is some debate about revising the United Nations Convention on Contracts for the International Sale of Goods (CISG) in order to correlate sales contracts into global chains. UNCITRAL might contribute to this debate by coordinating the proposal on contractual networks with proposals to revise existing international contractual instruments.

15. Vertical networks of SMEs are part of broader supply chains that include one or multiple chain leaders. For example, in the agri-food industry supply chains, both a producer of the final product and a large retailer may share the leadership. The contractual relationships between the leader(s) and the SMEs are generally characterized by strong asymmetric power between enterprises located in different jurisdictions. The choice of applicable law and forum becomes very important and may influence the effectiveness of collaboration. Horizontal networks may include SMEs of the same jurisdiction (the majority) or different jurisdictions (more common in the high tech industry or e-commerce). Horizontal networks feature lower asymmetric power distribution.

16. A third relevant dimension of contractual networks is their sheer number. Small collaborative networks (from 2 to 10 enterprises) of SMEs require a different governance structure than those encompassing hundreds or even thousands of SMEs (as it is the case for transnational e-commerce platforms devoted to SMEs).

17. Finally, creativity and innovation with intellectual property protection and management are among the key drivers of competitiveness, growth and development. This underscores the importance of network contracts in giving rise to platforms with a view to jointly exploit intellectual property rights. In particular, SMEs can share existing technology provided by one or more platform members, directly co-produce new technology within the platform itself or acquire technology licensed/transferred by subjects that are not party to the platform. Network contracts may also ease the provision of technical assistance given to SMEs related to intellectual property by business and government bodies, by facilitating the transfer of information and knowledge to a single collective subject and its subsequent dissemination among the network members.

5. Specific issues for micro enterprises

18. Compared to SMEs, MiEs exhibit financial, technological, trade weaknesses that are greater than for other types of enterprises. The role played by public institutions, non-governmental organizations (NGOs), trade or financial intermediaries and even MNCs is often pivotal to determine MiEs' chance to access GVCs. Such access requires a long-lasting process in which strategic collaboration, capacity-building and fair value allocation are key components. Networks aim at this type of collaboration, which is mostly focused on services rather than the mere exchange of goods.

19. Indeed, several types of networks may be distinguished among those involving MiEs:

(a) Those involving only MiEs;

(b) Those involving MiEs and non-business actors such as public entities, NGOs and the like;

(c) Those involving MiEs and business actors such as MNCs and/or trade intermediaries; and

(d) Various combinations of the above.

20. When dealing with networks involving MiEs, a uniform legal instrument should specifically address issues concerning the fairness on which network relations should be based and the guarantees that MiEs should enjoy vis à vis other GVC participants, regardless of whether these members belong to the same contractual network. Whereas such an instrument may envisage the adoption of mechanisms monitoring the fairness of contractual terms and practices in case (c), in the first two instances it could aim at empowering contracting parties (e.g. by establishing common negotiating platforms) in order to reduce power asymmetries along the chain.

21. A legal instrument facilitating collaboration among MiEs should focus on collective capacity-building in order to favour both individual and collective economic growth.

III. Legal framework

22. In light of the above, an international legal instrument could eliminate legal barriers and accommodate the specific needs arising from this model of cooperation. With the sole intent of presenting to the Commission the issues that may be considered, and in the hope of making it easier to assess the potential use of such an instrument, Italy will discuss some of the main issues to be included in a legal framework. These are broad and preliminary considerations to be intended for discussion, with no intention of being exhaustive, nor by any means to suggest a specific policy choice to the Commission.

1. Possible legal approaches to Contractual networks

23. The above-noted differences suggest that a legal framework to address contractual networks might be organized around some functional distinctions:

(a) Horizontal *versus* vertical;

(b) Domestic *versus* international;

(c) Small *versus* large networks;

(d) Networks of MiEe *versus* networks of SMEs; and

(e) For profit *versus* non-profit networks.

2. An integrated modular proposal of an international instrument on Contractual networks

24. Whereas we believe that instruments for MiEs might differ from those for SMEs and that the latter should definitely be part of global trade, we would envisage a modular legal instrument with common general principles and possibly two specific sections, one devoted to MiEs and one to SMEs.

25. These principles might be drafted having in mind a multilevel system: i.e., whatever is not explicitly regulated would be supplemented by national legislation, leaving scope for a certain level of differentiation in legal architecture. The international instrument would define the specific principles and provide the relevant definitions but some aspects (for example, mistake, fraud, or avoidance) could be left to applicable contract law.

26. Most importantly, the structure of such principles should identify the new roles of contract beyond pure exchange, focusing on organizational and regulatory functions in order to ensure that network contracts can also promote compliance with global standards related to environmental, social, and data protection requirements, and should be applicable to both domestic and transnational networks.

27. These rules should ensure both the stability and the flexibility of the contractual network, and distinguish between internal relationships among members and relationships between the network and third parties, in particular, with creditors. Such rules could provide for different degrees of complexity with increasingly structured forms of governance, which could take place inside the network or could use companies controlled by the network to perform specific activities that require limited liability and asset partitioning.

3. Governance, knowledge transfer and innovation

28. When defining a uniform legal framework, strategic importance might be devoted to knowledge transfers and innovation among the enterprises of the network and between the network and third parties. Contract rules become extremely important when knowledge cannot be “propertized” (i.e. cannot be made proprietary) either because no legal devices are available, or because the benefits of sharing are such that individual or even collective ownership would be inappropriate. In particular, two problems usually emerge within network governance: (1) Proportionality between investments, contributions and revenues, since lack of

proportionality often emerges between individual investments and profits, and opportunistic behaviour by some members of the network might arise; and (2) The interest of the contractual networks might require protection against behaviour such as unfair competition, violations of trade secrets, or unauthorized transfers to third parties external to the network.

29. A special regime concerning trade secrets and intellectual property rights might also need to be devised so as to maximize incentives to produce innovation inside the network, but, at the same time, to generate strong safeguards against knowledge leaking outside the network. Since creation and use of intellectual property rights might be too expensive for individual MSMEs, forms of collective ownership and licensed use might be regulated by multiparty contracts making innovation also possible for firms with limited capital.

30. Further, consideration should be given to instruments that permit the segregation of assets and the establishment of limited liability protection for the activities covered by the contractual network (or parts thereof), in order to offer an additional instrument to MSMEs.

31. Finally, specific rules concerning private international law might be appropriate in this context.[13] In multiparty contracts, when enterprises located in different jurisdictions want to collaborate there is a need to identify the applicable law to fill the gaps that are not explicitly regulated by the contract. Freedom of choice of applicable law should be encouraged along the lines of other initiatives established at the international level.[14] The international dimension may also require forms of mutual recognition when enterprises are registered in national registries with different requirements. To this latter extent, it would be advisable that the proposed international instrument permit coordination among the different business registration regimes in the countries of the network's members.

Annex to the proposal

Italian Law on Network Contracts[15]

1. Main features

1. 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.[16] 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).[17] 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.

2. Cooperation can range from a plain undertaking to exchange information or services, to the organization of cooperation, up to the joint exercise of economic

[13] The above considerations are without any prejudice to the competence of The Hague Conference on Private International Law.

[14] See The Hague Conference on Private International Law, Principles on choice of law in international commercial contracts (approved on 19 March 2015), available at https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf.

[15] This Annex is a slightly adjusted version of paras. 8 to 17, A/CN.9/WG.I/WP.87.

[16] 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).

[17] As of 3 January 2017, 3,320 of such contracts have been established, involving almost 17,000 entrepreneurs (http://contrattidirete.registroimprese.it).

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.

3. 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 creating business opportunities otherwise precluded to a single firm. Competitiveness is increased thanks to measures (such as — but not limited to — access to funding, existing fiscal facilitations, participation in public bids and labour law measures for companies in contractual networks) and from endogenous growth factors (such as the overcome of dimensional limits, the creation of marketing opportunities, knowledge exchange etc.). 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 of sale or of acquisition). Under the most recent amendment to the relevant legislation, business networks can also take part in public bids.[18]

4. 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.

2. Minimum content of the contract and registration

5. 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).

6. 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[19] 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

[18] Italian Authority for the Oversight of Public Contracts for Works, Services and Supplies (AVCP), Resolution No. 3/2013.

[19] 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.

each of them. 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.

3. Separate fund

7. 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 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.

8. 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.[20]

4. Governance

9. 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.

5. Legal personality

10. 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.[21]

[20] DL 22 June 2012, No. 83 as converted into Law No. 134/2012.

[21] As of 3 January 2017, 474 business networks were established with legal personality (http://contrattidirete.registroimprese.it).

K. Note by the Secretariat on possible future work on security interests: proposal for a practice guide to the UNCITRAL Model Law on Secured Transactions: proposal of the Governments of Australia, Canada, Japan and the United Kingdom of Great Britain and Northern Ireland

(A/CN.9/926)

[Original: English/French/Spanish]

The annex to this note sets forth a proposal of the Governments of Australia, Canada, Japan and the United Kingdom of Great Britain and Northern Ireland for the preparation by the Commission of a practice guide to the UNCITRAL Model Law on Secured Transactions, as received in English, French and Spanish.

Annex

1. Introduction

At the Fourth UNCITRAL International Colloquium on Secured Transactions (15-17 March 2017), three panels discussed various areas where greater guidance and advice could be given to those involved in actually using the UNCITRAL Model Law on Secured Transactions in a State once it has been enacted. Categories of potential users include secured creditors and grantors (including micro-businesses), their lawyers and advisers, the grantor's other creditors and insolvency representative, transferees of the grantor's encumbered assets, regulatory authorities, judges, arbitrators and those involved in teaching the new regime.

The idea of preparing a practice guide, integrating and refining the ideas discussed at these three panels, attracted wide support among Colloquium participants. Without such a guide, it was feared that even if the Model Law was enacted by a State as recommended, the economic benefits which it aims to achieve (increasing the availability of credit at lower cost by the use of movable property as security for obligations) would not flow. Participants noted that the Guide to Enactment of the UNCITRAL Model Law on Secured Transactions provides essential assistance for legislators enacting the Model Law in a State. However, they observed that it provides insufficient concrete, practical guidance to those actually involved in or affected by the provision or receipt of credit under the Model Law. Nor does it give any advice as to the regulatory and transactional environment required to integrate the new secured transactions regime into the wider economic and policy objectives of the enacting State.

It is therefore proposed that Working Group VI prepare a practice guide along the lines suggested by Colloquium participants. The proposed guide would thus encompass all or most of the matters addressed by the first three Colloquium panels and presented as three distinct possible future work topics in paragraphs 8-44 of A/CN.9/913. As explained in more detail below, the proposed guide would thus include guidance on drawing up the contracts, notices, checklists and other documents needed to enter into and operate secured transactions according to the Model Law. It would also explain the need for users to acquire the practical tools needed to successfully carry out transactions, such as risk assessment, valuation of collateral and extrajudicial enforcement. It would additionally address how to successfully integrate a new regime of secured transactions into an enacting State's broader legal and financial regulation regime and objectives. And while the proposed guide would address the financing of businesses of all sizes, it would pay particular regard to the problems faced in the financing of micro-businesses identified in paragraphs 31-44 of A/CN.9/913.

2. Desirability

There was general agreement among Colloquium participants that matters external to the formal reform and modernization of a State's secured transactions law play a major role in determining whether a State has vibrant and well-functioning secured credit markets that further the overall goal increasing the availability of credit at lower cost. These matters include "capacity-building" in particular among lenders and their advisers, but also among borrowers, other creditors, judges, arbitrators and academics, as well as the development of appropriate related regulatory standards.

Capacity-building means the development of the practical ability to use the tools provided by the Model Law to engage efficiently and profitably in credit transactions with reduced risk of loss from default. It is generally recognized that providing a State with a modern secured transactions law, like the Model Law, does not automatically result in lenders acquiring the practical tools to extend credit in a meaningful way. Rather, creditors often do not embrace transactions newly made possible on a profitable basis by secured transactions law reform until they have the practical capacity to use the new legal rules effectively. Further, unless others involved in implementing the new system, such as administrators, lawyers, and judges, are able to do so effectively and knowledgeably, the system will not operate properly and creditors will be reluctant to rely on it. Thus, law reform without parallel capacity-building may not be effective in achieving its goal.

For example, empirical evidence suggests that, even in States that have adopted modern secured transactions law, lenders that are not familiar with the financing practices relating to movable property made possible by the new law, such as inventory and receivables financing, keep requiring mainly immovable property as security for credit. As the vast majority of immovable property is often owned by a small percentage of the population of a State, this means that, despite the adoption of a modern secured transactions law, credit may still not be available to the sector of the economy that most needs it, that is, micro, small, medium-size enterprises ("MSMEs").

Particular concerns apply to the financing of micro-businesses, which are a vital part of the world economy (i.e. over 90 per cent of all businesses) and which are critically important in developing economies. The amount of collateral available is usually very limited and its type different to that often provided by larger businesses, and there is heavy reliance on personal guarantees. The business and its personal guarantors are likely to be individuals. The amounts lent are often very small and this may have consequences concerning the cost of the transaction and the behaviour of lenders, both at time of the origination and during the lifecycle of the transaction. Thus, there is a need to consider and explain how secured transactions (under the Model Law) generally work for micro-businesses, and, more generally, how they interact with personal guarantees. The small size of a micro-business also puts the trader in a poor bargaining position vis-a-vis financiers. This often creates problems of over-collateralization. It also can lead to abusive interest rates, especially default interest rates.

There is also the need to ensure coordination between lending against movables and national regulatory environments, notably the capital requirements of the enacting State. Absent coordination, regulated financial institutions are induced to assign the same risk-weighting to transactions secured by movable property and receivables as unsecured credit, thwarting the goal of the Model Law to enhance access to credit.

A practice guide to the Model Law would be a significant step towards ameliorating all these concerns. It could explain the types of transactions and financing practices which can be entered into using the Model Law. It could provide users with guidance as to the contractual and other documentary forms and structures needed to achieve the economic benefits of these transactions. It could also provide guidance on the surrounding legal and practical infrastructure necessary for such financing to work, for example, risk assessment including valuation of collateral, and how to carry out extrajudicial enforcement. This would enable users to acquire the skills and practical

tools referred to above. It would also assist those involved in building capacity (whether external agencies or advisors or internal educators or facilitators) in states in which the Model Law is enacted. It could also guide judges and regulators as to the legal and regulatory environment necessary for a modern secured transactions regime to flourish and, in particular, address the specific issues which arise in the critical areas of the financing of micro-businesses and coordination with the capital requirements applicable to regulated lenders.

3. Feasibility

In order to demonstrate the feasibility of the proposed practice guide, this section sets out suggested content. Unlike the Guide to Enactment, which is structured as an article-by-article commentary on the Model Law, the proposed guide takes a more thematic approach, as this would better address the needs of users who have no or little previous experience of a modern secured transactions law. The suggested content draws heavily on the summaries of the three Colloquium panel discussions in A/CN.9/913, where more detailed discussion can be found.

(a) Best contractual and documentary practices

(i) Types of secured financing enabled by the Model Law

The guide could explain the characteristics and advantages of the different types of secured financing made possible by the Model Law with cross-references to the relevant provisions of the Model Law (e.g. inventory and equipment acquisition financing, revolving loan financing, factoring and forfaiting, securitization, term loan financing). It could also explain how the Model Law accommodates the extension of credit not just by lenders but also sellers and financing lessors, again with cross-reference to the provisions of the Model Law that address and accommodate these types of financing.

(ii) Cardinal issues that must be addressed by the parties throughout the life-cycle of a secured transaction

The guide could discuss issues arising at each point of the lifecycle of a secured transaction (e.g. the initial goals of the secured creditor and grantor, the necessary pre-contractual documents, issues relating to the closing of the deal, and post-closing monitoring of the grantor and the collateral).

(iii) Due diligence

The guide could discuss due diligence issues that must be addressed by prospective secured creditors (e.g. the need to obtain essential information about the grantor and the proposed collateral with sample check-lists; the need to conduct searches in secured transactions and other specialized registries, such as intellectual property registers; and the need to obtain information about judgements and tax or similar statutory liens).

(iv) Clear and simple drafting

The guide could explain the benefits of clear and simple drafting of security agreements, notices and other documents relevant to a secured transaction (e.g. to avoid disputes, ensure that the content is understood by the parties or recipients and takes into account their experience and sophistication). It could emphasize the importance of using plain language drafting techniques and provide concrete examples of ineffective drafting (e.g. avoiding legal jargon while still ensuring that the terms used are compatible with the Model Law, avoiding long sentences and long paragraphs, avoiding difficult-to-read fonts).

(v) Party autonomy and mandatory provisions

The guide could demonstrate how the party autonomy principle in article 3(1) of the Model Law enables contracting parties to adapt their agreements to their needs, by providing examples of particular provisions which the parties may derogate from or vary by agreement and explaining how and why they may wish to take advantage of this flexibility.

(vi) Sample documentation

The guide could include model forms of security agreements for different types of secured financing transactions based on widely acceptable international best practices. It could explain the key provisions of the model forms and the manner in which they relate to the provisions of the Model Law. It could provide model forms for making a security right enforceable against third parties by methods other than registration (e.g. "control agreements"). It could provide guidance on preparing and submitting appropriate notice forms to a registry (e.g. sample collateral descriptions), and notices to be given to the grantor and third parties in the context of extrajudicial enforcement of a security right. Difficulties in the service of notices on individuals is a particular potential issue which arises in the context of the financing of micro-businesses, and the guide could address possible solutions to this problem.

(b) Risk assessment, collateral valuation, and effective enforcement capacity

(i) Valuation of collateral

The value of the protection against loss that a secured transaction provides ultimately depends on the value of the encumbered asset when it is likely to be disposed of. The guide could therefore explain that it is critical for users to acquire or obtain (e.g. through employing professional appraisers) expertise in estimating the amount likely be received upon its disposition.

(ii) Administration of secured loans

Secured creditors need to build a relationship of trust with their debtors but due diligence requires that they are also able to verify the facts underlying the decision to extend credit on an ongoing basis. Thus they need to develop expertise in account-keeping and in monitoring the risk profile of the debtor and the continued existence and value of the collateral. The guide could explain these matters and provide assistance in building this capacity.

(iii) Extrajudicial seizure, disposition and distribution of proceeds of collateral

The extrajudicial seizure and disposition of encumbered assets on default may be unknown in a State that enacts the Model Law. Thus, the guide could explain the extrajudicial exercise of post-default enforcement rights and, in particular, the protection of the grantor and third-party rights and circumstances in which alternative dispute resolution methods may be available. Again, the particular concerns in relation to micro-businesses could be addressed here. The guide could also discuss secondary markets for the sale of collateral, including electronic platforms and their advantages and disadvantages.

(iv) Collection of receivables

Financing against the security of collateral in the form of receivables or other rights to the payment of money (e.g. debt securities) may not have been common or, indeed, possible, under the law of a State prior to enactment of the Model Law. The collection from the debtor or other obligor of a monetary claim requires different skills and is subject to different legal rules from repossessing and disposing of tangible assets and the guide could provide guidance in building this capacity.

(v) Investment in legal capacity

Modern secured transactions law is complex, and the exercise of rights is governed by complex rules. The Model Law, when enacted by a State, will not operate in isolation from the other laws of the enacting State. Accordingly, users will require expertise in related areas of law, such as insolvency law, and the law relating to personal guarantees and its interaction with the Model Law, since a guarantee is often provided in support of a loan in addition to the provision of security (this is particularly prevalent in the context of financing of micro-businesses).

(c) Regulatory capacity

(i) Secured transactions and capital requirements

The guide could indicate how to ensure coordination between national regulatory environments and the Model Law. In general terms, the Basel Accords — issued by the Basel Committee on Banking Supervision — look at secured credit with favour and security may reduce (risk-weighted) capital requirements. Nonetheless, it is generally recognized that regulatory requirements are overly cautious, if not sceptical, towards movable property and receivable taken as collateral. It is, in fact, assumed that movable assets cannot be swiftly liquidated — owing to the idea that secondary markets are limited — and that receivables are prone to depreciations. Capital requirements allow for considering movable property and receivables as effective credit protections only if certain conditions are met (e.g., the value of the collateral can be determined through reliable data, the enforceability of security is certain and swift, and a sufficiently liquid secondary market exist). Without understanding and addressing at the national level these relevant issues, lenders may not be prepared to lend or may lend only a higher cost to borrowers.

The guide could illustrate to national regulators how to meet these conditions. Particular attention would be given to the criteria for eligible collateral and past due loans. As a result, sound risk-management practices are promoted, while facilitating access to secured credit at a lower cost.

(ii) Financing of micro-businesses

Some specific characteristics of the financing of micro-businesses under a modern secured transactions regime may demand a particular regulatory response. Inequality of bargaining power often leads to unfair terms in loan and security agreements (such as high default interest rates, unfair termination clauses and definitions of events of default). The guide could discuss ways in which these potential sources of unfairness could be addressed.

The regulation of secured creditor behaviour in relation to lending to micro-businesses would also need to be discussed. Problems here include the fact that the very small size of loans reduces incentives for lenders to do a proper risk assessment and to engage in monitoring, paving the way for the over-collateralization of loans facilitated by the drastic inequality in bargaining power. Deficient monitoring and inefficient reactions to financial distress causes problems for borrowers as well as lenders. The guide could discuss possible solutions to these problems, which include access to more reliable credit rating information (through efficient credit reporting systems), more efficient monitoring practices, more efficient distribution of tasks within financial institutions, adequate implementation of the regulatory framework concerning non-performing loans, and perhaps even redesigned enforcement mechanisms to make them cheaper, quicker and easier.

4. Conclusions

The foregoing has shown that a practice guide to the Model Law is critical if its enactment is to lead to an appreciable increase in the availability of (and/or reduction in the cost of) credit to businesses in the enacting State. Working Group VI has the expertise to prepare such a guide based on its experience in the preparation of the Assignment Convention, the Legislative Guide on Secured Transactions, the Registry Guide, and the Model Law. It would be regrettable if a State were to reform its domestic law in line with the Model Law only to discover that its lenders, businesses and courts were unable to operate it effectively, due to a lack of practical understanding of how the law in the statute book is meant to operate on the ground. Technical assistance initiatives by UNCITRAL and other international agencies have intrinsic limitations. A practice guide would enable these agencies to perform their work far more efficiently and at lower cost.

As the foregoing has also demonstrated, the work that already has been done in preparation for the Colloquium and the resulting summaries in paragraphs 8-44 of A/CN.9/913 can be adapted to serve as the basis for an outline of the content of the proposed practice guide. At its first session, Working Group VI could debate and refine the topics and structure to enable detailed drafting to commence. With commitment from delegates and active engagement between sessions, it is estimated that a draft practice guide could be produced in three sessions.

VII. ENDORSEMENT OF TEXTS OF OTHER ORGANIZATIONS

Note by the Secretariat on endorsement of texts of other organizations: ICC Uniform Rules for Forfaiting (URF 800)

(A/CN.9/919)

[Original: English]

1. By letter of 14 November 2016 (reproduced in annex I), the Secretary General of the International Chamber of Commerce (the "ICC") requested the Commission to consider endorsing ICC Uniform Rules for Forfaiting (ICC Publication Number 800) (the "URF 800") for worldwide use. With its request, the ICC submitted a summary of the URF 800 (reproduced in annex II).

2. The Commission may wish to note that it has already endorsed a number of ICC texts, such as the Incoterms 2010, the Uniform Rules for Demand Guarantees: 2010 Revision (URDG 758), the Uniform Customs and Practices for Documentary Credits (UCP 600), the Incoterms 2000, the International Standby Practices (ISP98), the Uniform Rules for Contract Bonds (URCB), the Uniform Customs and Practices for Documentary Credits (UCP 500) and others.[1]

3. In addition, the Commission may wish to note that the objective of the URF 800 is to facilitate international receivables financing transactions and thus international trade by providing a new set of rules applicable to forfaiting transactions. Moreover, the Commission may wish to note that forfaiting transactions are covered by the United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001),[2] and the URF 800 complement and are consistent with the rules of that Convention. Thus, the Commission may wish to consider endorsing the URF 800.

[1] http://www.uncitral.org/uncitral/en/other_organizations_texts.html.

[2] United Nations publication, Sales No. E.04.V.14.

Annex I

[14 November 2016]

Letter of Mr. John Danilovich, Secretary General of the International Chamber of Commerce

In partnership with the International Trade & Forfaiting Association (the "ITFA"), the International Chamber of Commerce (the "ICC") has developed the first ever global rules for forfaiting, the Uniform Rules for Forfaiting, ICC publication No. 800 (the "URF 800"). The URF 800 is a set of standardized terms and conditions applicable to a forfaiting transaction when the parties indicate that their forfaiting agreement is subject to these rules. The URF 800 drafts were reviewed and commented upon by over 500 members of the ICC Banking Commission and ICC National Committees in 92 countries before adoption by the ICC Banking Commission at its biannual meeting held in Mexico in November 2012. The URF 800 came into effect on 01 January 2013.

A result of a three and half year joint effort by the ICC and the ITFA, the URF are the first ever global rules for forfaiting and have been developed to take into account the legitimate expectations of all relevant sections with the aim of becoming the standard set of rules applied within the forfaiting market worldwide in all developed countries as well as many emerging markets. The current market size of forfaiting is estimated to be close to USD 300 billion per year.

Forfaiting is a trade financing technique based on discounting of an exporter's receivables payable at a future date without recourse to the exporter. The "without recourse discounting" benefits the exporter immensely by eliminating risks typically associated with an international trade transaction such as country risk, commercial risk, interest risk and currency rate risk, improving cash flow of the exporter and enhancing exporter's competitive advantage by offering attractive credit terms to the importers/buyers.

Comprising of a total of 14 articles, the URF 800 cover the entire gamut of a forfaiting transaction starting from the origination of a forfaiting transaction in the primary market and the trading of the forfaited asset in the secondary, market providing access to a deep and liquid market which can provide much needed funding to producers, manufacturers and exporters and also assist banks in managing their portfolios and credit exposures.

We are submitting to you the full URF 800 text along with a summary note on forfaiting. ICC trusts that UNCITRAL will appreciate the efforts made by ICC to promote international trade through forfaiting as a flexible and creative alternative to traditional trade financing, helping exporters to cover the political, commercial and transfer risks in an export transaction, especially involving emerging markets/developing nations and thus facilitating international trade which is now well recognized as an engine for economic development and growth.

Therefore, as with previous requests for endorsement of ICC rules, we hereby request formal endorsement of the URF 800 by UNCITRAL. We hope to receive a favourable response to this request.

Annex II

Summary Document on ICC Uniform Rules for Forfaiting (ICC Publication Number 800)

Executive summary

This document briefly explains forfaiting as a technique for financing trade by discounting exporter's receivables without recourse to the exporter. The discounting is effected by a forfaiter (a specialized financing company, a bank or a financial institution) benefitting the exporter immensely by eliminating risks typically associated with an international trade transaction, improving cash flow of the exporter with an increased speed and simplicity enhancing exporter's competitive advantage due to the availability of finance under forfaiting.

This document also briefly explains and summarizes the key provisions of the URF 800.

What is forfaiting?

Forfaiting is a trade financing technique based on discounting of an instrument representing exporter's receivables payable at a future date without recourse to the exporter, such instrument evidencing a payment claim or a debt obligation of an importer or a bank/financial institution pursuant to a letter of credit, standby letter of credit, guarantee, aval, bill of exchange or a promissory note created under an export transaction.

Since the payment under a forfaiting transaction is without recourse to the exporter, the exporter has no further interest in the transaction. It is the forfaiter who collects the future payments due from the importer or the obligor and bears the risk of non-payment. In return, the forfaiter gets discount (interest) and any agreed fees or commission income.

What are the benefits of forfaiting?

By seeking financing of receivables to the extent of 100 per cent of contract value, using the forfaiting technique the exporter gets access to immediate cash from the forfaiter without recourse to the exporter and therefore his risks in a cross-border transaction such as country risk, commercial risk, interest risk and currency rate risk etc. are eliminated and by availing the forfaiting opportunities, the exporter can enhance his competitive advantage by offering attractive credit terms to the importers/buyers. The documentation associated with a forfaiting transaction that an exporter has to sign is concise, straightforward and are fairly standard.

What is the URF 800?

The Uniform Rules for Forfaiting, ICC Publication No. 800 (the "URF 800") are a set of standardized terms and conditions applicable to a forfaiting transaction when the parties indicate that their forfaiting agreement is subject to these rules. The URF 800 have been developed to facilitate the purchase of a payment claim arising out of a debt instrument such as a bill of exchange, promissory notes, documentary credit and any other instrument that reflects a debt undertaking of an importer, a bank or a guarantor.

The URF 800 are the first ever global rules for forfaiting, a result of a three and half years of joint effort by the International Chamber of Commerce (the "ICC") and the ITFA (the "International Trade & Forfaiting Association"), the erstwhile International Forfaiting Association (the "IFA") which have been developed taking into account the legitimate expectations of all relevant sections with the aim of becoming the standard set of rules applied within the Forfaiting market worldwide.

These rules cover both the primary market in which transactions are originated by exporters and other sellers of goods and the secondary market where those transactions are traded between banks and financial institutions.

Are the URF 800 universally accepted?

The various URF 800 drafts were reviewed and commented upon by over 500 members of the ICC Banking Commission and ICC National Committees in 92 countries before their adoption by the ICC Banking Commission in its meeting held at Mexico in Nov 2012 where representative of more than 60 ICC National Committees were present. Some votes were submitted electronically.

The URF 800 is a globally accepted set of rules. The ICC Banking Commission has constituted an international Forfaiting Task Force to promote the usage and awareness of URF 800 amongst global banks, exporting and importing companies. As a result of the efforts undertaken by both the ICC and the ITFA in developing a set of Frequently Asked Questions, organizing seminars on forfaiting, responding to queries, the URF 800 are fairly known in the international markets and are used by the global banks worldwide.

What are the key provisions of the URF 800?

Comprising of a total of 14 articles, the URF 800 cover the entire gamut of a forfaiting transaction starting from the origination of the transaction in the primary market, the obligations and liabilities of the parties involved, and the trading of the forfaited asset in the secondary market by the primary forfaiter, thus providing access to a deep and liquid market which can provide much needed funding to producers, manufacturers and exporters and also assist banks in managing their portfolios and credit exposures.

Aligning the format and drafting style of the URF 800 with ICC Rules like the Uniform Customs and Practice for Documentary Credit (the "UCP 600") and the ICC Uniform Rules for Demand Guarantees (the "URDG 758"), the URF 800 have been written in an easy to read and clear language and provide separate articles on Definitions and Interpretations. The URF 800 article on definitions (article 2) provides a total of "28" definitions of terms commonly used in a forfaiting transaction or in a forfaiting agreement. The definitions include the definitions of a "forfaiting transaction" and a "forfaiting agreement" apart from the definitions of what constitutes a "buyer, "obligor", a "payment claim", "primary forfaiter", "required documents", "satisfactory documents" etc. amongst others. The definitions ascribe precise and clear meaning to the terms using simple language.

The URF 800 article on "interpretations" (article 3) provides further clarity as to how commonly used phrases in a forfaiting transaction are to be interpreted. A separate article (article 4) clearly defines what the term "without recourse" stands for in international forfaiting markets. The article expressly states that under a forfaiting transaction, "a buyer will have no claim against a seller for the non-payment of any amount due in respect of the payment claim" except as provided under certain circumstances.

Other key provisions of the URF 800 are articles on "forfaiting agreements in the primary market"; "conditions in the primary market"; "satisfactory documents in the secondary market"; "payment", and "liabilities of the parties".

For guidance of the parties as to how a forfaiting agreement in the primary market should be formulated, article 5 of the URF 800 presents aspects that should be included in the forfaiting agreement. Article 6 states, inter-alia, that if the conditions of the forfaiting agreement are not satisfied, the agreement will terminate, however, without prejudice to either party's rights under the agreement or the applicable law. The two articles on "satisfactory documents" (article 6 and article 10) prescribe the initial seller's responsibility in the primary market or that of seller in the secondary market respectively, to deliver required documents to the primary forfaiter no later than the availability date and the course of action that both the primary forfaiter (in case of primary market) and the buyer (in case of a secondary forfaiter) should follow if they determine as per market practice that documents provided are not satisfactory.

To assist the users of the URF 800 in drafting contracts, the URF 800 also provide four model agreements in annexes.

Summing up

As a flexible and innovative alternative to traditional trade financing, forfaiting is a technique that promotes competitiveness and facilitates expansion of trade. By forfaiting without recourse, the exporters cover political, commercial and transfer risks associated to an export transaction especially in emerging markets/ developing countries. As a result, international trade is increased, which is well recognized now as an engine for economic development and growth.

VIII. TECHNICAL ASSISTANCE TO LAW REFORM

A. Note by the Secretariat on technical cooperation and assistance

(A/CN.9/905)

[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 Fiftieth session, see A/CN.9/909). Information on the use and interpretation of UNCITRAL texts is reported annually in a note by the Secretariat entitled "Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts" (see A/CN.9/906).

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-ninth session in 2016 (A/CN.9/872 of 18 April 2016), including those carried out in the region covered by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) that relate to specific UNCITRAL instruments and subject areas. General activities undertaken in the Asia-Pacific region by the UNCITRAL Regional Centre for Asia and the Pacific are set out in a separate document (see A/CN.9/910).

7. A separate document on coordination activities (A/CN.9/908) 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 an UNCITRAL convention, 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 by the Secretariat in the relevant time period are described below. It should be noted that due to lack of resources and time constraints, some of the activities were undertaken by experts on behalf of the

Secretariat. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

Fiftieth Anniversary of UNCITRAL

12. To celebrate the 50th Anniversary of UNCITRAL, the secretariat participated in the conference "Celebrando El Éxito de la CNUDMI", organized by Universidad Carlos III de Madrid (Madrid, 21 July 2016) and two events in the RCAP region (see A/CN.9/910, paras. 5(b) and (c)).

Promotion of the universal adoption of fundamental trade law instruments

13. 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 in which would seem particularly desirable.

14. The Secretariat has jointly organized, participated in, or contributed to the following events which dealt with a number of areas to which UNCITRAL's work relates:

(a) Remote participation at the World Bank Workshop: "Filling the Gaps — Missing Legal Infrastructure in Developing Countries" (18-20 May 2016);

(b) The 6th St. Petersburg International Legal Forum, to increase awareness among Russian legal practitioners about developments in UNCITRAL of relevance to the legal framework of the Russian Federation, in particular cross-border insolvency (St. Petersburg, Russian Federation, 19-21 May 2016);*

(c) Two panel sessions: "Integration in Small States" and "International B2B Dispute Resolution" at a conference on "Integration and International Dispute Resolution in Small States", jointly organized by The British Institute of International and Comparative Law, the Open University and the Centre for Small States (London, 19-20 May 2016);

(d) Fifth Meeting of Trade Ministers of Landlocked Developing Countries, delivering a presentation on becoming party to the key international conventions to facilitate transit transport and trade (Geneva, Switzerland, 23-24 June 2016);

(e) Opening remarks at the One-Belt-One-Road Inclusive and Sustainable High Level Forum hosted by UNIDO (Vienna, 20 October 2016);

(f) Presentation at the business programme of the Russian Export and Investment Fair (REIF) to further promote knowledge of UNCITRAL and its texts in the Russian Federation (Moscow, 24-25 November 2016);*

(g) Global Conference on Sustainable Transport, to address the usefulness of UNCITRAL standards in law reform efforts in the region and in particular how those standards can be used to strengthen the essential links between transport and international trade (Ashgabat, 26-27 November 2016);*

(h) Round-table session, General Meeting on Research on Law and Justice to discuss major issues of today and future developments in matters of law and justice; organized in partnership with research, judiciary and administration, and authority in charge of Higher Education (Paris, 30-31 January 2017); and

(i) French Society for International Law; part of an "SFDI Day", hosted by the Center for International Law in Nanterre (CEDIN) (Paris, 10 March 2017).

15. A number of related activities took place in the region covered by RCAP:

(a) UNCITRAL Thailand Symposium entitled "The Future of Legal Harmonization — New Horizons for International Commerce", co-organized with the Ministry of Justice of Thailand and the Thailand Arbitration Centre, attended by 250 legal professionals from Thailand and from neighbouring States (Bangkok, 8 April 2016);

(b) Incheon Trade Law Forum (Incheon, Republic of Korea, 17-18 May 2016) (see A/CN.9/910, para. 4(a));

(c) 29th LAWASIA Conference, presentation on the past achievements of UNCITRAL in 50 years and the current work and role of the Regional Centre (Colombo, 15 August 2016);

(d) Lecture to 200 Chinese judges on the relevance of UNCITRAL texts and related role of judiciary in the context of the Belt and Road Initiative, Supreme People's Court National Judges College (Beijing, 26 October 2016);

(e) Presentations on the United Nations Convention on the use of Electronic Communications in International Contracts (e-CC) and the UNCITRAL Model Law on International Commercial Arbitration, 2016 Attorney-General's Conference, Fiji (Suva, 9-10 December 2016);

(f) 7th Meeting of the International Law Research Committee of the Supreme Court of the Republic of Korea, presentation on CISG and international commercial arbitration (Seoul, 23 January 2017); and

(g) 12th Annual Generations in Arbitration Conference, presentation on arbitration and CISG (Hong Kong, China, 25 March 2017).

Initiatives for a regional approach

16. The Secretariat continued its collaboration with the Asia-Pacific Economic Cooperation (APEC). During the reporting period, the Secretariat participated in meetings of the Friends of the Chair Group on Strengthening Economic and Legal Infrastructure (SELI) (Lima, 21 August 2016 and Nha Trang, Viet Nam, 25 February 2017) and two workshops organized under the auspices of the APEC Economic Committee and SELI:

(a) Supply Chain Financing and Implementation of Secured Transactions in a Cross-border Context organized by US-APEC Technical Assistance to Advance Regional Integration (US-ATAARI) (Lima, Peru, 19-21 August 2016);* and

(b) The Use of International Instruments to Strengthen Contract Enforcement in Supply Chain Finance for Global Businesses (including MSMEs) (Nha Trang, Viet Nam, 24-25 February 2017).

17. The Secretariat also participated in meetings of the APEC Economic Committee on two occasions:

(a) The APEC Policy Discussion on Improving Participation and Transparency on Policy-Making and Implementation (Lima, 21 August 2016); and

(b) The APEC Policy Discussion on Public Procurement (Nha Trang, Viet Nam, 26 February 2017).

The Secretariat's participation in the APEC meetings mentioned above was made possible through support from US-ATTARI and the Department of Justice, Hong Kong, China.

18. The Secretariat also continued its participation in the APEC Ease of Doing Business (EoDB) project on enforcing contracts and getting credit, which aims at strengthening the legislative and institutional framework in APEC economies. In that context, UNCITRAL participated in the EoDB project for improving the getting credit environment in the Republic of Korea (Wellington and Auckland, New Zealand, 20-22 July 2016* and Singapore, 3-4 October 2016); the EoDB project for improving the enforcing contract environment in Malaysia (Kuala Lumpur, 29-30 September 2016);* and the wrap-up International Conference on EoDB (Seoul, 5-6 December 2016).* The Secretariat's participation in the EoDB project was made possible through voluntary contributions from the Government of the Republic of Korea.

19. It is expected that the Secretariat will continue to cooperate closely with the Republic of Korea, the United States of America, Hong Kong-China and Mexico in implementing the second APEC EoDB Action Plan (2016-2018). The Secretariat is seeking accreditation to the APEC Economic Committee, which will facilitate enhanced cooperation and coordination.

B. Specific activities

Dispute resolution

20. The Secretariat has been engaged in the promotion of UNCITRAL texts in the field of dispute resolution (for example, the UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006,[2] UNCITRAL Model Law on International Commercial Conciliation,[3] and the United Nations Convention on Transparency in Treaty-based Investor State Arbitration[4]), including through a number of training activities and has supported the ongoing law reform process in various jurisdictions. The Secretariat has also developed soft law instruments and tools to provide information on the application and interpretation of those texts (reported in A/CN.9/906). Given the high rate of adoption of those texts, the demand for technical assistance in the field of dispute resolution remains particularly acute. The Secretariat has jointly organized, participated in, or contributed to the following events:

(a) The Arab States in International Arbitration: Current Issues (Tunis, 14-15 April 2016);

(b) IAI Paris Conference on "Treaty-making in investment arbitration" (London, 19 April 2016);

(c) OECD workshop on arbitration for Iraqi government officials (Beirut, 21 April 2016);

(d) ICCA Mauritius 2016 and the first consultative workshop on cooperation among African arbitration initiatives (Port Louis, 8-11 May 2016);*

(e) OECD workshop on Legal Framework for Investment in Jordan (Amman, 10-12 May 2016);*

(f) 41st meeting of Ministers, OHADA and a preparatory expert meeting (Brazzaville, 15-17 June 2016);*

(g) The 2016 ILA Conference "A Critical Assessment of International Commercial Law Harmonization Efforts" (Johannesburg, South Africa, 7-11 August 2016);

(h) Seminar: "*l'arbitrage et la sécurisation des investissements dans l'espace OHADA*" organized by *l'Institut de Droit Communautaire* (IDC-Afrique) (Paris, 1-2 September 2016);

(i) Joint IMI-VIAC-UNCITRAL Event on Mediation (Vienna, 21 September 2016);

(j) Conference on international arbitration in the Middle East, with the aim to follow-up on arbitration law reforms in Iraq and Kuwait (Kuwait City, 9-10 October 2016);*

(k) Second Conference on International Commercial Arbitration organized by the Qatar Chamber for Commerce and Industry (QCCI) (Doha, 17-20 October 2016);*

(l) Multilateral Investment Tribunal Workshop at King's College London (London, 21 October 2016);

(m) Panel on Investor State Dispute Settlement (ISDS) Reform at the United Nations International Law Week, organized by the Indian Permanent Mission (New York, 24 October 2016);

(n) 42nd meeting of Ministers, OHADA (Brazzaville, 27-28 October 2016);

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[2] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), annex I (revised articles only).

[3] General Assembly resolution 57/18, annex (model law only).

[4] General Assembly resolution 69/116.

(o) Presentation on "UNCITRAL's Contribution to the Development of International Arbitration'' at the invitation of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry (Budapest, 17 November 2016);

(p) Sharm El Sheikh VI Conference: The Role of State Courts in International Arbitration (Sharm El Sheikh, Egypt, 19-20 November 2016);

(q) ICC United Kingdom of Great Britain and Northern Ireland Annual Arbitration Conference with focus on transparency standards (London, 30 November 2016);

(r) Colloquium on investment arbitration in Latin America organized by the ICC Court of Arbitration (Paris, 8-9 December 2016);

(s) IDC-Afrique seminar "Traités Bilatéraux d'Investissement, *Code des Investissements et Arbitrag*e" (Paris, 5-9 December 2016);

(t) Third International Conference for a Euro-Mediterranean Community of International Arbitration, jointly organized with OECD and the Institute for the Promotion of Arbitration and Mediation in the Mediterranean (ISPRAMED) (Milan, Italy, 18 January 2017);*

(u) Workshop on "The Modes of Dispute Settlement in Trade and Investment between the OIC Member States" organized by the Islamic Centre for Development of Trade (ICDT), Organization of Islamic Cooperation (OIC) General Secretariat and International Islamic Centre for Reconciliation and Arbitration (IICRA) (Casablanca, Morocco, 20-21 February 2017);*

(v) Vienna Arbitration Day 2017, jointly organized with the Austrian Arbitration Association, the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), ICC Austria and the Young Austrian Arbitration Practitioners (YAAP) (Vienna, 24-25 February 2017);

(w) OECD Investment Conference, followed by a stakeholders meeting and an intergovernmental forum, "Freedom of Investment Round-table", (Paris, 7-8 March 2017);

(x) Investment Moot Frankfurt, including a round-table "Age of Insecurity" (Frankfurt, Germany, 9-11 March 2017);

(y) Conference on International Investment Arbitration for the 25th anniversary of the International Commercial Arbitration Court (Kyiv, 17 March 2017);*

(z) Meeting on United Arab Emirates arbitration legislation reform (Paris, 28 March 2017);*

(aa) 2017 10th anniversary Vis Pre-Moot and Belgrade Arbitration Conference (Belgrade, 31 March-1 April 2017);

(bb) 2017 Joint UNCITRAL-LAC Conference: (Ljubljana, 3-5 April 2017); and

(cc) Arbitration in Africa conference: The Role of African Governments in the Development of Arbitration in Africa and the second consultative workshop on cooperation among African arbitration initiatives (Cairo, 3-5 April 2017).*

21. A number of activities on dispute resolution took place in the region covered by RCAP:

(a) Briefing for the Sri Lanka National Arbitration Centre (Colombo, 13 August 2016);

(b) Briefings for government representatives at the request of the Office of the Attorney General, Fiji (Suva, 30-31 August 2016);

(c) 2nd UNCITRAL South Pacific Seminar "Access to Justice for Better Trade in Pacific Small Island Developing States (PSIDS)", supported by the Department of Justice and Attorney General of Papua New Guinea, the Ministry of Justice of the

Republic of Korea, the Supreme People's Court of China and the Asian Development Bank, (Port Moresby, 20-21 September 2016);

(d) China Arbitration Summit 2016, co-hosted by the Supreme People's Court of China, the China Counsel for the Promotion of International Trade (CCPIT) and the China International Economic and Trade Arbitration Commission (CIETAC) (Beijing, 28-31 September 2016);*

(e) Asia Pacific Regional Arbitration Group (APRAG) Conference "The UNCITRAL Arbitration Rules as a unifying set of arbitration rules for the AEC" hosted by BANI Arbitration Centre (Bali, Indonesia, 6-8 October 2016);*

(f) 5th ADR Asia Pacific Conference (Seoul, 12-13 October 2016) (see A/CN.9/910, para. 4(b));

(g) Two International Dispute Resolution Masterclasses organized jointly with the International Dispute Resolution Academy (IDRA), CIArb East Asia Branch and the ICC-ICA (Shanghai, China, 26 September 2016) and with the China University of International Business and Economics (Beijing, 24 October 2016);

(h) 2nd Asia Pacific ISDS Transparency Observatory Annual Conference, hosted with KCAB and the Asia Pacific Law Institute of the Seoul National University and sponsored by Seoul International Dispute Resolution Center (SIDRC) (Seoul, 16 December 2016);

(i) Conference celebrating the revised arbitration law of Mongolia (Ulaanbaatar, 21 February 2017);

(j) "Training Programme on Chinese and International ADR Law and Practice" with the IDRA and the Macau Legal Affairs Bureau (Macau, China, 23 February-2 March 2017); and

(k) Inter-Pacific Bar Association (IPBA) 27th Annual Meeting and Conference 2017 (Auckland, New Zealand, 6-8 April 2017).

Institutional support

22. Institutional support was provided to a number of events, including:

(a) Somali International Arbitration Summit (SIAS) 2016 (Nairobi, 11 April 2016);

(b) International Bar Association (IBA)-the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) Mediation and Negotiation Competition (Vienna, 28 June 2016);

(c) ICC-ICA training and conference themed "Arbitration in Myanmar" (Yangon, Myanmar, 18-20 August 2016);

(d) CIArb Inaugural Asia Pacific Diploma in International Commercial Arbitration Course (Singapore, 20-28 August 2016);

(e) World Mediation Organization-Thailand Arbitration Centre (WMO-THAC) Mediation Symposium (Bangkok, 23-25 August 2016);

(f) International Conference on "Challenges in Domestic and International Arbitration", organized by the Indian Institution of Technical Arbitrators (Chennai, India, 23-24 September 2016);

(g) Opening event for the Mumbai Centre for International Arbitration (Mumbai, India, 7-8 October 2016); and

(h) 4th International Arbitration Conference, organized by ACICA, CIArb and the Law Council of Australia (Sydney, Australia, 22 November 2016).

Review of enacting legislation and assistance with legislative drafting

23. The Secretariat has reviewed or provided comments on legislation on arbitration and/or mediation of a number of jurisdictions, including Albania; Fiji; Finland; the

Lao People's Democratic Republic; Macao, China; Malaysia; Papua New Guinea; Qatar; the Republic of Korea; Singapore; Timor-Leste; Turkmenistan and Viet Nam. The Secretariat has also reviewed or provided comments on rules of arbitral institutions upon their request. A briefing note on possible accession to the New York Convention was provided to the Minister for Finance and Sustainable Development of Nauru (3 March 2017).

Lectures

24. Lectures on dispute resolution were provided to: Japanese Association of International Business Law (Tokyo, 18 March 2017); East China University of Political Science (Shanghai, China, 22 March 2017), Shanghai International Economic and Trade Arbitration Commission (SHIAC) and Shanghai University of Political Science and Law (Shanghai, China, 23 March 2017).

Electronic commerce

25. The Secretariat has continued promoting the adoption, use and uniform interpretation of UNCITRAL texts on electronic commerce (United Nations Convention on the use of Electronic Communications in International Contracts (e-CC),[5] UNCITRAL Model Law on Electronic Signatures[6] and UNCITRAL Model Law on Electronic Commerce[7]), including in cooperation with other organizations and emphasizing a regional approach. In that framework, the Secretariat has interacted with legislators and policymakers, including by providing comments on draft legislation. Activities included:

(a) Remote participation in the European Forum on Electronic Signature (EFPE) (9 June 2016);

(b) Conference on "Future of Identity" (Tallinn, 1-3 September 2016);

(c) Remote participation in a roundtable on the draft model law on electronic transferable records organized by the Centre for Commercial Law Studies at Queen Mary, University of London (15 February 2017); and

(d) Co-organizing and participating in the United Nations/CEFACT Mini-Conference on "Ensuring Legally Significant Trusted Transboundary Electronic Interaction" (Geneva, Switzerland, 29 March 2017).

26. A number of activities on electronic commerce took place in the region covered by RCAP:

(a) Opening address at the International Legislative Seminar on E-Commerce organized by the Financial and Economic Committee of the National People's Congress of the People's Republic of China (Shanghai, China, 15-16 June 2016);

(b) Meeting with representatives of the Alibaba Group on e-CC and UNCITRAL's possible future work on cloud computing and identity management (Hangzhou, China, 17 June 2016);

(c) International Symposium on the Future of Informedia law: Human-oriented Information and Communication Technology (ICT) and Culture (Seoul, 25 June 2016);

(d) Two briefings on the ratification of e-CC for the Korean Internet and Security Agency (KISA) (Seoul, 9 August and 8 September 2016);

(e) Briefings on e-CC and the UNCITRAL Model Law on Electronic Commerce (1996) to government representatives of the Office of the Attorney General, Fiji (Suva, 30-31 August 2016);

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[5] General Assembly resolution 60/21, annex.

[6] General Assembly resolution 56/80, annex (model law only).

[7] General Assembly resolution 51/162, annex (model law only).

(f) Presentation on e-CC, International Malaysian Law Conference, organized by the Malaysian Bar Council in particular (Kuala Lumpur, 21-23 September 2016);

(g) China-Europe Academic Conference 2016 "E-Commerce Law Forum", hosted by the China-EU School of Law, China University of Political Science and Law (Beijing, 20 October 2016);

(h) Presentation on "Drafting Contracts under the e-CC", 2016 UNCITRAL Viet Nam Workshop, co-hosted with the Faculty of Law of the Foreign Trade University (Hanoi, 24 November 2016); and

(i) Seminar on ratification of e-CC, co-hosted by RCAP, the Korea Association for Informedia Law, the Ministry of Science, ICT and Future Planning and the Korea Internet and Security Agency (KISA) (Seoul, 25 November 2016).

27. The Secretariat has continued its cooperation with the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) on the preparation, implementation and promotion of the Framework Agreement on Facilitation of Cross-border Paperless Trade in Asia and the Pacific ("FA-PT"), which was adopted in Bangkok on 19 May 2016. The FA-PT promotes "legal interoperability", i.e. cross-border legal recognition of electronic transactions and signatures, on the basis of UNCITRAL texts and their underlying fundamental principles (non-discrimination of the use of electronic communications; functional equivalence and technological neutrality). Relevant activities included:

(a) Joint Capacity Building Workshop on Advancement of Cross-Border Paperless Trade and Trade Facilitation jointly hosted by UNESCAP and the Asia Pacific Council for Trade Facilitation and Electronic Business (AFACT), supported by RCAP (Tokyo, 9 November 2016);

(b) A meeting of the Extended UNNExT Advisory Group on Cross-Border Paperless Trade Facilitation (Bangkok, 22-24 November) and a briefing session on the FA-PT (Bangkok, 25 November 2016);

(c) International Seminar on Trade Facilitation in North-East Asia hosted by UNESCAP East and North-East Asia Office and the Greater Tumen Initiative (Incheon, Republic of Korea, 13 December 2016);

(d) Workshop on Cross-border Paperless Trade Facilitation and Single Window Systems in Southern and Central Asia (Bangkok, 14-15 February) and an Expert Group Meeting on the Promotion and Implementation of the FA-PT in Asia and the Pacific (Bangkok, 16-17 February); and

(e) 4th Meeting of the Legal and Technical Working Group on Cross-border Paperless Trade facilitation and the 3rd Meeting of the Interim Intergovernmental Steering Group on Cross-Border Paperless Trade Facilitation for adoption of FA-PT implementing documents organized by ESCAP (Bangkok, 21-24 March 2017).

Review of enacting legislation and assistance with legislative drafting

28. The Secretariat reviewed: the Electronic Transactions Law and assisted in the preparation of the Electronic Transferable Records Law of Bahrain; reviewed Fiji's Electronic Transactions Promulgation 2008; and assisted with drafting legislative texts on electronic signature and e-payments in Madagascar (Antananarivo, 7-10 November 2016). A briefing note was provided to the Ministry of Domestic Trade, Cooperatives and Consumerism of Malaysia on possible accession to the e-CC (2 December 2016).

Lectures

29. A lecture on current UNCITRAL Working Group IV legislative projects was provided to the "UNCITRAL-Beijing Normal University Joint Certificate Programme on International E-Commerce Law: Theory and Practice" (Beijing, 14 June 2016).

Insolvency

30. The Secretariat has promoted the use and adoption of insolvency texts (UNCITRAL Model Law on Cross-Border Insolvency [8] and the UNCITRAL Legislative Guide on Insolvency Law[9]) by disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus promoting their implementation and consulting with legislators and policymakers from various jurisdictions to review enacting legislation and assist with legislative drafting. Activities relating to the dissemination of information included:

(a) An INSOL Europe/R3 conference to provide an update on Working Group V (Insolvency Law) work on insolvency of multinational enterprise groups and to discuss the feasibility of negotiating an international insolvency convention (London, 22 April 2016); and

(b) 7th Africa Roundtable on Insolvency Law Reform 2016, with a focus on insolvency of micro, small and medium-sized enterprises (MSM) (Accra, 6-7 October 2016).*

31. A number of activities took place in the region covered by RCAP:

(a) An international conference on Cross-Border Insolvency co-hosted by UNCITRAL-RCAP and the Legal Execution Department of the Ministry of Justice, Thailand in the context of the ASEAN Government Legal Officers Programme (AGLOP) (Bangkok, 23-24 June 2017);

(b) The 3rd Regional Insolvency Conference, jointly organized by the Law Society of Singapore and the Insolvency Practitioners Association of Singapore (IPAS) (Singapore, 15-16 September, 2016);

(c) Forum on Asian Insolvency Reform (FAIR), to promote adoption of the Model Law on Cross-Border Insolvency and use of the Legislative Guide on Insolvency Law in the region (Hanoi, 21-22 November 2016);

(d) The inaugural Ian Fletcher International Insolvency Moot to award the UNCITRAL prize for the best mooter in the final round (Sydney, Australia, 17 March 2017);

(e) The 12th UNCITRAL/INSOL/World Bank Multinational Judicial Colloquium on insolvency (Sydney, Australia, 18-19 March 2017); and

(f) INSOL 2017, the Tenth World Congress of INSOL International (Sydney, Australia, 20-22 March 2017), presenting on current work of Working Group V (Insolvency Law).

Review of enacting legislation and assistance with legislative drafting

32. The Secretariat reviewed enactments of the Model Law on Cross-Border Insolvency by Singapore and the Dominican Republic.

Micro, small and medium-sized enterprises

33. The Secretariat has encouraged participation and dialogue in respect of its work on micro, small and medium-sized enterprises (MSMEs — Working Group I) through its participation in an academic conference on simplified business registration and discussion of Working Group I hosted by Tilburg University; delivered a presentation

[8] General Assembly resolution 52/158, annex.
[9] United Nations publication, Sales No. E.05.V.10.

and interacted with students, faculty and other presenters at a workshop for International Business Law students (Tilburg, Netherlands, 24-25 November 2016).

Online dispute resolution

34. In the region covered by RCAP, a presentation on the Technical Notes on Online Dispute Resolution (2016) was given at the International Malaysian Law Conference, organized by the Malaysian Bar Council (Kuala Lumpur, 21-23 September 2016).

Procurement and infrastructure development

35. The Secretariat has continued cooperation with other international organizations active in public procurement reform to support the use of the UNCITRAL Model Law on Public Procurement (2011) (the "Procurement Model Law"),[10] its accompanying Guide to Enactment (2012),[11] and the UNCITRAL texts on Privately-Financed Infrastructure Projects.[12]

36. 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 these UNCITRAL texts.[13] The Secretariat is following a regional approach to this cooperation, engaging with the multilateral development banks and regional organizations, addressing the role of public procurement in sustainable development, trade facilitation, good governance and the avoidance of corruption and achieving value for money in government expenditure.

37. The main activities and international events in the year to April 2017, in which the Secretariat has participated as speaker/presenter include the following:

(a) Procurement Week 2016, addressing "Modernization, Flexibility and Simplification of the EU Procurement Directive: A perspective from outside the EU Framework'' (Bangor, United Kingdom, 9-10 June 2016), and Procurement Week 2017, addressing "Rewriting the Public Procurement Playbook" (London, 23 March 2017);

(b) Conference of Internal Investigators, International Anti-Corruption Academy (IACA) (Laxenburg, Austria, 3 October 2016);

(c) OECD Leading Procurement Practitioners' meeting, including on updating OECD-DAC (World Bank) Methodology for the Assessment of Procurement Systems (Paris, 6-7 October 2016);

(d) Public Procurement in "OSCE Anti-Corruption Expert Meeting: Lessons from South East Europe" (Vienna, 24 October 2016);

(e) Office of the United Nations High Commissioner for Human Rights' "United Nations Forum on Business and Human Rights 2016" (Geneva, Switzerland, 16 November 2016);

(f) The second International Conference on Public Procurement Law Africa, hosted by the African Public Procurement Regulation Research Unit, Stellenbosch University (Cape Town, South Africa, 24-25 November, 2016);*

(g) Event hosted by the George Washington University Law School Government Procurement Law Programme on "Perspective on International Cooperation in Procurement — next steps" (Washington, D.C., 9 December 2016);

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[10] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), annex I.

[11] Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

[12] 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.

[13] See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186-189.

(h) Series of workshops on Professionalization in Public Procurement organized by the European Commission held in different EU member States as part of the Single Market Forum 2016-2017 (20 July 2016 (remote participation); Warsaw, 12 December 2016; Amsterdam, 21 February 2017; and Zagreb, 28 April 2017);

(i) German Ministry for Economic Cooperation and Development (BMZ)/Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH event on e-procurement systems in GIZ partner countries as well as in Germany (Bonn, Germany, 23 March 2017);*

(j) WTO workshop on public procurement for Central and Eastern Europe, Central Asian and the Caucasus Countries with the aim to encourage use of the Procurement Model Law in these countries (Vienna, 1 November 2016); and

(k) The African Development Bank and World Bank "Africa High Level Procurement Forum", addressing "How can Public Procurement make PPP succeed in Africa?" (Johannesburg, South Africa, 3-5 April 2017).*

Review of enacting legislation and assistance with legislative drafting

38. The Secretariat has provided advice to the Governments of Armenia,[14] Cambodia,[15] Dominica,[16] Guyana,[17] Kyrgyzstan,[18] Mongolia,[19] Surinam,[20] Tajikistan[21] and Uzbekistan,[22] and to local governmental bodies in Argentina, on reform of their public procurement legal and regulatory framework, including on proposed legislation. Within the framework of the EBRD-UNCITRAL Public Procurement Initiative,[23] the Secretariat assisted Egypt with modernization of its procurement system. In addition to a desk review of draft legislation and remote consultations with local experts, the Secretariat participated in workshops on reforms of the local procurement review system, e-procurement and identification of training needs (Cairo, 6-7 April 2016)* and on framework agreements (Cairo, 7 September 2016).*

Lectures

39. The Secretariat participated as a lecturer in:

(a) 10th and 11th editions of the ITC-ILO Master in Public Procurement for Sustainable Development (Turin, Italy, 31 May 2016 and 14-15 February 2017);

(b) Executive LLM in Public Procurement Law and Policy at the University of Nottingham (January 2017);

(c) Module in a Public Procurement Distance Learning Diploma at King's College, London (December 2016 and March 2017); and

(d) Anti-corruption training at IACA for compliance officers from Siemens; the Audit Board of the Republic of Indonesia; representatives of the EAEU member States; the Thailand National Anti-Corruption Commission (NACC); and the Central Vigilance Commission of India (Laxenburg, Austria).

Sale of goods

40. The Secretariat has continued to promote broader adoption, use and uniform interpretation of the United Nations Convention on Contracts for the International

[14] Under the EBRD-UNCITRAL Public Procurement Initiative, https://www.ppi-ebrd-uncitral.com.
[15] In cooperation with UNEP.
[16] In cooperation with the Inter-American Development Bank.
[17] Ibid.
[18] See footnote 14.
[19] In cooperation with UNEP and under the EBRD-UNCITRAL Public Procurement Initiative, see footnote 14.
[20] In cooperation with UNEP.
[21] See footnote 14.
[22] In cooperation with the World Bank.
[23] See footnote 14.

Sale of Goods (Vienna, 1980) ("CISG"),[24] and of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended (Vienna, 1980),[25] including by organizing or participating in dedicated events:

(a) "Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts" (Lucerne, Switzerland, 8-9 September 2016);

(b) The Seventh Annual Vis Middle East Pre-Moot and Regional Middle East Arbitration Forum (Kuwait City, 9-12 February 2017);

(c) Co-organizing an event on CISG and the Limitation Convention with a view to providing information about the forthcoming withdrawal of declarations on the scope of application of CISG and Limitation Convention by the Czech Republic (Prague, 24 March 2017);* and

(d) 8th Peter Schlechtriem CISG Conference "Cutting Edge Non-Conformity under the CISG" (Vienna, 7 April 2017).

41. A number of activities on the CISG took place in the region covered by RCAP:

(a) Briefings on CISG for the Government of Sri Lanka (Colombo, 13 August 2016); government representatives of the Office of the Attorney General of Fiji (Suva, 30-31 August 2016); the National Law Development Agency of the Ministry of Law and Human Rights of Indonesia (24 November 2016); and government representatives at the request of the Ministry of Foreign Affairs of Thailand (Bangkok, 25 November 2016);

(b) Workshop on CISG at the request of the Ministry of Industry and Trade of the Lao People's Democratic Republic (Vientiane, 21 November 2016);

(c) 2016 UNCITRAL Viet Nam Workshop with the Faculty of Law of the Foreign Trade University, supporting implementation of CISG in Viet Nam following accession, as well as regional introduction of the Joint Proposal on Cooperation in the area of International Commercial Contract Law (with a focus on sales), proposed by the Secretariats of UNCITRAL, the Hague Conference on Private international Law (HccH) and UNIDROIT (Hanoi, 24 November 2016); and

(d) Assistance with the translation of CISG into Laotian, "Lao PDR-US International and Association of Southeast Asian Nations (ASEAN) Integration" (USAID LUNA II) Project.

Lectures

42. Lectures were provided on Uniform Sales Law in a course organized by the University of Vienna Law School (Vienna, Autumn 2016); and on CISG for a delegation of 20 Vietnamese judges attending a training programme organized by the Judicial Research and Training Institute, Supreme Court of the Republic of Korea (Goyang, Republic of Korea, 14 November 2016).

Security interests

43. 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),[26] the UNCITRAL Legislative Guide on Secured Transactions (2007),[27] its Supplement on Security Rights in Intellectual Property (2010), the UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)[28] and the UNCITRAL Model Law on Secured

[24] United Nations, *Treaty Series*, vol. 1489, No. 25567.
[25] United Nations, *Treaty Series*, vol. 1511, No. 26121.
[26] General Assembly resolution 56/81, annex.
[27] United Nations publication, Sales No. E.09.V.12.
[28] General Assembly resolution 68/108.

Transactions (2016)[29] is twofold — disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus promoting their implementation and consulting with legislators and policymakers from various jurisdictions to review enacting legislation and assist with legislative drafting.

44. The Secretariat is continuing its work with the World Bank with regard 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. The work with the World Bank includes, in addition, the comparison of key provisions of the Model Law on Secured Transactions with key provisions of Islamic finance law as part of an initiative carried out by the World Bank Global Islamic Finance Development Center.

45. Activities focussing on disseminating information included the following:

(a) 33rd International Financial Law Conference: a conference co-presented by the IBA Banking Law Committee and IBA Securities Law Committee, supported by the IBA European Regional Forum (Athens, 18-20 May 2016);

(b) Remote presentation at the University of Toronto Global Professional LL.M. Class (26 June 2016);

(c) Annual Congress of INSOL Europe to present the general work of UNCITRAL and the work of Working Group VI (Security Interests) (Cascais, Portugal, 23-24 September 2016);

(d) Annual Conference of the Asociación Americana de Derecho Internacional Privado (ASADIP) and Conference of the Centro de Estudios de Derecho, Economía y Política (CEDEP) to promote our work on security interests (Asunción and Buenos Aires, 7-11 November 2016);*

(e) Conference on reforming secured transactions in Brazil, co-organized by the National Confederation of Financial Institutions (CNF) and the University of São Paulo to discuss the benefits of the UNCITRAL Model Law on Secured Transactions (Brasilia, 26 January 2017);*

(f) Panellist at the 2017 Conference on International Coordination of Secured Transactions Law Reforms, hosted by International Insolvency Institute and the National Law Centre for Inter-American Free Trade (Philadelphia, United States, 9-10 February 2017);

(g) United Kingdom Society of Legal Scholars 2017 Seminar, “The Future for Commercial Law: Ways Forward for Harmonization”, organized by the University of Durham (Durham, United Kingdom, 27-28 February 2017); and

(h) MENA Secured Transaction Reform Workshop organized by the Asia and Middle East Economic Growth Best Practices (AMEG) programme funded by USAID to speak at the session on “A Comprehensive Approach to Secured Transaction Reform” (Nicosia, 13-14 March 2017).*

Review of enacting legislation and assistance with legislative drafting

46. The Secretariat has provided assistance to Pakistan with respect to the Secured Transactions Law at the request of the State Bank of Pakistan (20 May 2016); Paraguay with respect to the draft secured transactions law (7 and 8 November 2016); Bahrain with respect to the draft secured transactions law (Manama, 20-23 November 2016); and the Russian Federation with respect to their draft registry regulations (Moscow, 28-30 November 2016). 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.

[29] General Assembly resolution 71/136; *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), chap. III, sect. A.

Lectures

47. The Secretariat provided lectures on secured financing based on the UNCITRAL texts on security interests in a course organized by the Civil Law Institute of the University of Vienna Law School (Vienna, Autumn 2016 and Spring 2017).

III. Dissemination of information

48. 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

49. 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).

50. In 2016, the website received nearly 800,000 unique visitors, an increase from 2015 (690,000 unique visitors). Of all sessions, roughly 63 per cent were directed to pages in English and 37 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.

51. 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."[30] In this regard, in September 2015, a general UNCITRAL LinkedIn account was established that now has nearly 1,900 followers, an increase from 900 in the last year. This account supplements the Tumblr microblog ("What's new at UNCITRAL?") established in 2014. Both features are accessible from the UNCITRAL website.

B. Library

52. 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 2016, library staff responded to approximately 490 reference requests, originating from over 45 countries. Library visitors other than meeting participants, staff and interns included researchers from over 22 countries.

53. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 12,000 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

[30] General Assembly resolution 70/115.

resources has increased, resources on trade law from many countries are still only found in print, and circulation of print items has remained steady.

54. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna. OPAC is available via the library page of the UNCITRAL website.[31]

55. 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 fiftieth Commission session, see A/CN.9/907). Individual records of the bibliography are entered into 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.

56. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.[32] The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 9,500 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible.

C. Publications

57. 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.

58. The following works were published in 2016: Second Conference for a Euro-Mediterranean Community of International Arbitration,[33] UNCITRAL Notes on Organizing Arbitral Proceedings, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods: 2016 ed., UNCITRAL Model Law on Secured Transactions and the 2013 UNCITRAL *Yearbook*.[34]

59. 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 the 2013 UNCITRAL *Yearbook* was published exclusively in electronic format (CD-ROM and e-book).

D. Press releases

60. 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.

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[31] Available from www.uncitral.org/uncitral/publications/library.html.
[32] Available from www.uncitral.org/uncitral/publications/bibliography_consolidated.html.
[33] Available from www.uncitral.org/uncitral/publications/publications.html.
[34] Available from www.uncitral.org/uncitral/publications/yearbook.html.

61. 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

62. 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. Information lectures in Vienna

63. Upon request, the Secretariat provides information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar, Government officials including judges. Since the last report, more than 20 lectures have been provided to visitors from, inter alia, Austria, China, the Czech Republic, France, Germany, the Republic of Korea, Sweden, Turkey and Ukraine.

IV. Resources and funding

64. 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.

65. 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

66. 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.

67. During the period under review, the Government of the Republic of Korea provided a contribution of US$ 20,681.67 for the participation of the UNCITRAL Secretariat in the APEC EoDB project (see para. 17 above). No further contributions were received for Trust Fund activities.

68. At its 49th Session (New York, 27 June-15 July 2016), 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/71/17, paras. 249-251). Potential donors have also been approached on an individual basis.

69. 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.

70. 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 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

71. 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.

72. In the period under review, no new contributions were received.

73. During the same reporting period, the available Trust Fund resources were used to facilitate participation at the 49th session of UNCITRAL in New York (27 June-15 July) for delegates from El Salvador, Honduras and Sri Lanka, and for participation in the 29th session of Working Group VI in New York (8-12 February), the 53rd session of Working Group IV in New York (9-13 May) and the 65th session of Working Group II in Vienna (12-23 September) for delegates from Armenia, Côte d'Ivoire and Sierra Leone. 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 Daily Subsistence Allowance only.

74. 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.

75. 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 UNCITRAL regional presence: activities of the UNCITRAL Regional Centre for Asia and the Pacific

(A/CN.9/910)

[Original: English]

1. The General Assembly, in its resolutions 67/89 of 14 December 2012, 68/106 of 16 December 2013, 69/115 of 10 December 2014, 70/115 of 14 December 2015 and 71/135 of 13 December 2016, welcomed the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific (RCAP or Regional Centre) in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region.

2. RCAP has carried out its activities in accordance with the priority lines of action identified in the UNCITRAL Secretariat's strategic framework for technical assistance (A/66/17, para. 255 and A/CN.9/724, paras. 10-48), as well as with the specific mandate identified for the Regional Centre, which was revised in the 49th Commission session, namely as to (a) support public, private and civil society initiatives to enhance international trade and development by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL; (b) provide capacity-building and technical assistance services to States in the region, including to international and regional organizations, and development banks; (c) build and participate in regionally-based international trade law partnerships and alliances, including with other appropriate United Nations funds, programmes and specialized agencies; (d) strengthen information, knowledge and statistics through briefings, workshops, seminars, publications, social media, and information and communications technologies, including in regional languages; and (e) function as a channel of communication between States and UNCITRAL for non-legislative activities of the Commission.

3. The activities undertaken in the region covered by RCAP in relation to dissemination of UNCITRAL standards, capacity-building and technical assistance activities on specific topics are incorporated in the relevant Note by the Secretariat (A/CN.9/905, part II). This note provides an overview of the other activities undertaken by RCAP.

Flagship events

4. The Regional Centre has continued to deliver its four flagship events during the reporting period with the objective of streamlining activities to promote UNCITRAL texts and establishing regular opportunities for substantive regional contributions to support the present and possible future legislative work of UNCITRAL:

(a) The Incheon Trade Law Forum, 16-18 May 2016 (third edition) (previously named "UNCITRAL Asia Pacific Spring Conference"), a regional conference held in the host city of Incheon, Republic of Korea, co-hosted with the Hague Conference on Private International Law, Ministry of Justice of the Republic of Korea, the International Bar Association (IBA), the Korea Legislation Research Institute and the Korea International Trade Law Association, comprehensively covering UNCITRAL topics encompassing a Flagship conference, three seminars and a capacity-building workshop, featuring 69 speakers and bringing together more than 230 participants from 41 jurisdictions including representatives from international, regional and national organizations, government officials, judges, general counsels, legal officers, academics, entrepreneurs, experts and practitioners;

(b) The Asia Pacific ADR Conference, 12-13 October 2016 (fifth edition), a regional conference held in Seoul, promoting UNCITRAL standards on arbitration and conciliation, and designed to attract not only experts and practitioners from around the world, but also officials, researchers and scholars from 56 Asia Pacific

States, to share their opinions and research findings related to the conference themes. The conference was supported by the International Chamber of Commerce — International Court of Arbitration (ICC-ICA), the Ministry of Justice of the Republic of Korea, the Korean Commercial Arbitration Board (KCAB) and the Seoul International Dispute Resolution Centre. The conference assembled experts, researchers, scholars, practitioners, representatives from arbitration centres and officials from the region, attracting over 270 participants from 32 jurisdictions;

(c) The UNCITRAL Emergence Conference, 13-14 December 2016 (second edition), held in Macau, China, co-hosted with the University of Macau, supported by the World Trade Centre Macau, ICC-ICA and Asia Business Law Institute and the media partner the Asian Business Law Journal, aimed at promoting academic engagement with UNCITRAL's mandate and future work, based on an academic call for papers. Entitled "Regional Perspectives on Contemporary and Future Harmonization Agenda in International Trade Law", 36 papers were presented and the conference attracted more than 134 participants from 20 jurisdictions. It explored new development areas that UNCITRAL may take note of in the coming years, and several speakers were selected to present their research findings at the UNCITRAL Congress on "Modernizing International Trade Law to Support Innovation and Sustainable Development"; and

(d) The UNCITRAL Asia Pacific Day, during the last quarter of 2016 (third edition), aimed at promoting awareness, encouraging the study, discussion and implementation of UNCITRAL texts and celebrating the establishment of UNCITRAL by the General Assembly on 17 December 1966. Every year, universities from across the region are invited to join the celebrations by proposing a programme that can range from lectures and seminars to public conferences. In 2016, seven universities joined the celebrations, namely: National Law University Delhi, which organized a stakeholder consultation round table, public lecture and symposium focusing on the United Nations Convention on Contracts for the International Sale of Goods (CISG) (New Delhi, 17 October 2016); Gujarat National Law University, which delivered a special lecture series on "Issues of Harmonization of Laws on International Trade from the Perspective of UNCITRAL: The Past and The Current Work" (Gujarat, India, 11 November 2016); the University of Hong Kong, which held a panel discussion on Cross-Border Insolvency (Hong Kong, China, 5 December 2016); Singapore Management University and City University of Hong Kong, which organized a conference on "Towards an Asian Legal Order: Conversations on Convergence" (Singapore, 8-9 December 2016); KIIT University, which held the seminar "Quest Towards Harmonization of Global Trade Rules" (Odisha, India, 20-21 December 2016); and Kobe University, which organized arbitration moot practice sessions and special lectures on "Beyond CISG: Harmonization of contract law for globalizing market societies" and "UNCITRAL's contribution to transparency in Investor-Sate Arbitration" (Kobe, Japan, 23-24 December 2016).

National Coordination Committees

5. RCAP has continued its support to the UNCITRAL National Coordination Committees for Australia (UNCCA), India (UNCCI) and the Global Private Law Forum (GPLF) of Japan. The UNCITRAL National Coordination Committees are private sector initiatives aimed at disseminating international trade norms and coordinating national promotional activities, allowing the Regional Centre to allocate more resources to dissemination of UNCITRAL texts in Least Developed Countries (LDCs), Landlocked Developing Countries (LLDCs) and Small Island Developing States (SIDSs) in the region. During the reporting period, the Regional Centre collaborated with the National Coordination Committees in the following activities:

(a) Second Annual UNCITRAL Australia Seminar organized with the UNCCA which focused on the relationship between UNCITRAL texts and other international instruments (Canberra, 20 May 2016);

(b) "Celebrating UNCITRAL's 50 Years: Global Standards for Rule-based Commerce", organized by UNCITRAL and UNCC for India, with the support of the Permanent Court of Arbitration (New Delhi, 28-29 November 2016);

(c) Regional conference on the 50th anniversary of UNCITRAL, organized by UNCCA (Brisbane, Australia, 2-3 December 2016); and

(d) A book "Emerging Rules of International Commercial Law: Bilingual (English-Japanese)", published jointly by RCAP and GPLF (February 2017).

Supporting attendance of judges and government officials

6. The Regional Centre has supported the attendance of government officials, legal officers and judges from regional LDCs, LLDCs and SIDSs at various activities aimed at capacity-building:

(a) One judge from Timor-Leste and one delegate from the Ministry of Industry and Commerce of the Lao People's Democratic Republic to attend the Incheon Trade Law Forum (Incheon, Republic of Korea, 16-18 May 2016);

(b) Delegates from Fiji, Palau and Vanuatu to attend the Second UNCITRAL South Pacific Seminar on "Access to Justice for Better Trade in PSIDS" (Port Moresby, 20-21 September 2016);

(c) Two judges from the Supreme Court of Bangladesh to attend the International Dispute Resolution Masterclass (Beijing, 24-25 October 2016);

(d) One delegate from the Attorney-General's Department of Sri Lanka to attend the conference "The CISG as a Model for Harmonisation, Convergence and Law Reform" (Singapore, 6-7 January 2017);

(e) One judge from Nepal and one judge from Cambodia to attend the 12th Multinational Judicial Colloquium organized by UNCITRAL, INSOL International and the World Bank (Sydney, Australia, 18-19 March 2017); and

(f) One delegate from the Ministry of National Economy of Kazakhstan to attend the International Conference on CISG and the Convention on the Limitation Period (Prague, 24 March 2017).

Channel of communication between States

7. The Regional Centre has consolidated the function it serves on behalf of the UNCITRAL Secretariat as a channel of communication for non-legislative activities of the Commission between States in the region and UNCITRAL, setting up contact points within governments in the region and engaging in regular consultations with government officials from Australia, Bahrain, China (including the Special Administrative Regions of Hong Kong and Macau), Fiji, India, Indonesia, Iran (Islamic Republic of), Japan, Kazakhstan, Lao People's Democratic Republic, Malaysia, Myanmar, Mongolia, Nauru, New Zealand, Pakistan, Papua New Guinea, Philippines, Qatar, Republic of Korea, Singapore, Sri Lanka, Thailand, Timor-Leste, Turkmenistan, United Arab Emirates and Viet Nam.

New treaty action and enactment of model laws

8. 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 fiftieth session, see A/CN.9/909).

9. In the context of its communication with States, RCAP has monitored progress towards, and assisted States with, the adoption of the following UNCITRAL texts:

(a) In the area of dispute resolution:

UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006: legislation based on the Model Law has been

adopted in Mongolia, the Republic of Korea and in the Australian Capital Territory (Australia);

UNCITRAL Model Law on International Commercial Arbitration (1985): legislation based on the Model Law has been adopted by Turkmenistan;

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) (the "Rules"): the following concluded agreements provide for investor-state arbitration under the UNCITRAL Arbitration Rules, including the Transparency Rules;

i. Bilateral investment treaty between the United Arab Emirates and Greece signed on 6 May 2014;

ii. Bilateral investment treaty between Iran (Islamic Republic of) and Slovakia signed on 19 January 2016;

iii. Bilateral investment treaty between the United Arab Emirates and Mexico signed on 19 January 2016;

iv. Bilateral investment treaty between Iran (Islamic Republic of) and Singapore signed on 29 January 2016;

v. Bilateral investment treaty between Japan and Iran (Islamic Republic of) signed on 5 February 2016;

vi. Bilateral investment treaty between Kyrgyzstan and Austria signed on 22 April 2016;

vii. Bilateral investment treaty between Mongolia and Canada signed on 8 September 2016;

viii. Agreement to amend the Free Trade Agreement between Singapore and Australia signed on 13 October 2016; and

ix. Investment protection agreement between Hong Kong, China, and Chile signed on 18 November 2016;

(b) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996): legislation based on the Model Law has been adopted in Fiji; and

(c) In the area of insolvency:

UNCITRAL Model Law on Cross-Border Insolvency (1997): legislation based on the Model Law has been adopted in Singapore.

Coordination Activities

10. Following its systematic coordination and cooperation efforts with institutions active in trade law reform, the Regional Centre has, during the reporting period, built and participated in regionally-based international trade law partnerships and alliances, including with other United Nations funds, programmes and agencies:

(a) United Nations Delivering as One: UNCITRAL signed the Lao People's Democratic Republic-United Nations Partnership Framework 2017-2021, as a non-resident agency, being tasked, through RCAP, to contribute in "Outcome 7: Institutions and policies at national and local level support the delivery of quality services that better respond to people's needs" and "Outcome 8: People enjoy improved access to justice and fulfilment of their human rights" (Vientiane, 7 September 2016); RCAP agreed to join the preparation of the United Nations Development Assistance Framework (UNDAF) Papua New Guinea (2018-2022) and provided inputs for Country Analysis, the Strategic Prioritization and the UNDAF drafting (25 August 2016); RCAP is engaged with United Nations Development Programme Pacific in preparation of the United Nations Pacific Strategy 2018-2022 (Suva, 30 August 2016);

(b) United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) (see A/CN.9/905, para. 27);

(c) World Bank: with respect to the 12th Multinational Judicial Colloquium (Sydney, Australia, 17-18 March 2017) (see para. 6(e) above and A/CN.9/905, para. 31(e));

(d) Asian Development Bank (ADB): RCAP co-hosted the Second UNCITRAL South Pacific Seminar on "Access to Justice for Better Trade in PSIDS" with the support of ADB (Port Moresby, 20-21 September 2016). On 26 January 2017, ADB and UNCITRAL concluded an exchange of letters aimed at reforming arbitration laws in the South Pacific, focusing on accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). UNCITRAL, through RCAP, in coordination with ADB, will (a) assist States in the preparation and deposit of instruments of accession to the New York Convention; (b) review existing or draft new arbitration laws based on the UNCITRAL Model Law on International Commercial Arbitration, including ensuring conformity with the provisions of the New York Convention; and (c) deliver capacity-building through tailored training programmes for stakeholders (government and judicial officials, arbitration practitioners as well as scholars);

(e) Asia Pacific Economic Cooperation (see A/CN.9/905, paras. 16-19);

(f) Greater Tumen Initiative (GTI) (see A/CN.9/905, para. 27(c));

(g) Hague Conference of Private International Law and its Asia Pacific Regional Office (see para. 4(a) above and A/CN.9/905, para. 41(c));

(h) International Chamber of Commerce — International Court of Arbitration (ICC-ICA): RCAP has continued its close coordination with ICC Arbitration and ADR North Asia and South Asia offices. In that framework, ICC became co-organizer of the Asia Pacific ADR Conference and of the UNCITRAL Emergence Conference, and the Regional Centre supported ICC capacity-building activities in the region; and

(i) Pacific Islands Forum: delivered technical briefing on the activities and mandate of UNCITRAL and discussed further coordination with the Pacific Islands Law Office Forum and the Pacific Legislative Drafter Technical Forum (Suva, 30 August 2016).

Strengthening information, knowledge and statistics

11. To fulfil its objective of strengthening information, knowledge and statistics through briefings, workshops, seminars, publications, social media, and information and communications technologies, including in regional languages, RCAP engaged in the following activities:

(a) Compilation and publication of selected UNCITRAL texts in Japanese (in some cases for the first time) and English, entitled "Emerging Rules of International Commercial Law: Bilingual (English-Japanese) Selected UNCITRAL Texts", in cooperation with GPLF, made available for free online and in hard copies distributed to Japanese law school's libraries;

(b) Publication of the first annual report by the ISDS Asia Pacific Transparency Observatory (Observatory), in support of the activities of the Transparency Registry. RCAP and the Asia Pacific Law Institute of the Seoul National University, with the support of KCAB, established a cooperation framework to monitor transparency in Asia Pacific treaty-based investor-State dispute settlements through the establishment of the Observatory;

(c) Publication of the RCAP website in regional languages, namely Japanese and Korean; and

(d) Managing the Incheon Trade Law Digest, dedicated to Incheon, the host of the first UNCITRAL Regional Centre, an annual online publication of articles on international trade law, which are selected following calls for papers or presented at RCAP events. The publication aims at stimulating interest, research and study on

UNCITRAL and its texts. All papers considered for publication must be relevant to the Asia Pacific.

Outreach

12. To expand the reach of its mandate, both within the hosting community and with regional academia, the Regional Centre continued its national outreach and regional educational programmes to maintain regular dialogue with non-governmental organizations, local and national political stakeholders, other international organizations, academia, the media and the general public on various aspects of RCAP, to enhance cooperation and community support, and increase awareness of UNCITRAL activities:

(a) For the national outreach programme, the Regional Centre has actively participated in the Incheon International Organizations Consultative Partnership and related events held by the Incheon Metropolitan City. In addition, RCAP has opened its doors to visitors including representatives of the Incheon Municipal Council, local students and interns from the Ministry of Justice of the Republic of Korea. Various lectures were delivered to local students on UNCITRAL and its work;

(b) RCAP has continued supporting international trade law moot competitions held in the region, namely: the International ADR Mooting Competition (Hong Kong, China, 8-9 July 2016); the Shanghai Pre-Moot 2017 (21-24 March 2017); and the 14th Vis East Moot (Hong Kong, China, 26 March-2 April 2017); and

(c) Academic engagement was fostered by delivering lectures at a number of universities, including: China University of International Business and Economics, Beijing Normal University, Dankook University, East China University of Political Science, Gachon University, Hitotsubashi University, Incheon National University, National Law University of Delhi, Renmin University of China, Shanghai University of Political Science and Law, Seoul National University and University of Macau.

Resources and Funding

13. RCAP is staffed with one professional, one programme assistant, one team assistant and two legal experts. During this reporting period, 17 interns were hosted at the Regional Centre. The core project budget allows for the occasional employment of experts and consultants. RCAP relies on the annual financial contribution from the Incheon Metropolitan City to the UNCITRAL Trust Fund for symposia to meet the cost of operation and programme. It further relies on the contribution of two non-reimbursable loans of legal experts by the Ministry of Justice of the Republic of Korea and the Government of Hong Kong, China, both of which were extended.

14. According to article 13.3 of the Memorandum of Understanding signed on 18 November 2011, between the United Nations and the Ministry of Justice and Incheon Metropolitan City of the Republic of Korea, the Incheon Metropolitan City extended its financial contribution over a 5-year period (2017-2021) for the operation of the Regional Centre, revising the annual contribution to US$ 450,000.

15. It is expected that interest in UNCITRAL texts in the region will grow with additional requests for technical assistance. Such increase will call for a corresponding increase in available resources. Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals are actively encouraged to make voluntary contributions to the UNCITRAL Trust Fund for symposia and, where appropriate, for the financing of special projects and otherwise to assist the UNCITRAL Secretariat in carrying out technical cooperation and assistance activities. Additional contributions to the RCAP project from member States, or from interested private and public entities recommended by member States, are required to further respond to regional expectations.

IX. CASE LAW ON UNCITRAL TEXTS (CLOUT)

Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts

(A/CN.9/906)

[Original: English]

Contents

I. Case Law on UNCITRAL Texts (CLOUT)

Background

1. CLOUT continues to be an important tool to promote the uniform interpretation and application of UNCITRAL texts, as it facilitates access to decisions and awards from many different jurisdictions. Furthermore, it contributes to the promotion of UNCITRAL legal texts since it demonstrates that the texts are being used and applied in many different countries and that judges and arbitrators at different latitudes are contributing to their interpretation. CLOUT also provides the basis for the analysis of interpretation trends that is a key part of the case law Digests. Background information on CLOUT and the Digests, is provided in the Provisional Agenda of the fiftieth session of the Commission (A/CN.9/894, para. 9).

2. At present, case law on the following texts is reported in the system:

- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention);[1]
- Convention on the Limitation Period in the International Sale of Goods, 1974 and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Limitation Convention);
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules);
- United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG);
- UNCITRAL Model Law on International Credit Transfers, 1992 (MLICT);
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995 (UNLOC);
- UNCITRAL Model Law on International Commercial Arbitration, 1985, as amended in 2006 (MAL);

[1] The Commission may recall that at its forty-first session, in 2008, it agreed that, resources permitting, the Secretariat could collect and disseminate information on the judicial interpretation of the New York Convention. For this reason, the CLOUT system includes only recent case law concerning the Convention. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 360. A comprehensive database of case law on the New York Convention complementing CLOUT can be found at www.newyorkconvention1958.org (see paras. 16-19 below and *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 134-140).

- UNCITRAL Model Law on Electronic Commerce, 1996 (MLEC);
- UNCITRAL Model Law on Cross-Border Insolvency, 1997 (MLCBI);
- UNCITRAL Model Law on Electronic Signatures, 2001 (MLES); and
- United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 (ECC).

3. Case law to be reported in CLOUT is provided by the network of national correspondents that, either as individuals or a specific organ or body, monitor and collect court decisions and arbitral awards and prepare abstracts of those considered relevant in one of the six official languages of the United Nations. The Secretariat collects the full texts of the decisions and awards in their original language and publishes them (see para. 13 below). The abstracts are edited and translated by the Secretariat into the official United Nations languages and published in all such languages as part of the regular documentation of UNCITRAL (under the identifying symbol: A/CN.9/SER.C/ABSTRACTS/...).

4. While the national correspondents are the principal support of the system, in agreement with the correspondents, contributions from scholars or institutions who are not appointed as national correspondents are also accepted, subject to control and prior notification to the relevant national correspondent, if appointed. This practice is consistent with the Commission's recommendation of utilizing all available sources of information to supplement the information provided by the national correspondents. [2] National correspondents meet every two years, when the Commission is in session in Vienna, to take stock of the latest developments and challenges of CLOUT maintenance and improvement.

Abstracts published and received

5. As at the date of this note, 179 issues of CLOUT had been prepared for publication, dealing with 1,661 cases from 65 jurisdictions. [3] Of these, 875 cases related to CISG, 447 cases related to MAL (a number of cases dealt with both MAL and the New York Convention), 112 cases related to MLCBI, 172 cases primarily related to the New York Convention, 34 cases related to MLEC, 18 cases related to the Limitation Convention (8 of which related to the amended version of the Convention), 3 cases related to the Hamburg Rules, 2 cases each related to EEC and MLICT and 1 case each to UNLOC and MLES. A slight discrepancy can be noted with respect to the total number of cases published and the breakdown of the individual UNCITRAL texts. This is due to the fact that in a few decisions more than one UNCITRAL text is applied.

6. With reference to the five regional groups represented within the Commission, no meaningful changes can be recorded in respect of last year as to the jurisdictions providing the abstracts and the figures of this Secretariat's Note coincide almost in full with the figures referred to in A/CN.9/873 (see para. 5). The majority of the abstracts published referred to Western European and other States (64 per cent, approximately), while the other regional groups were represented as follows (all figures are approximate): Asian States (16 per cent), Eastern European States (13 per cent), Latin American and Caribbean States (3 per cent) and African States (3 per cent). A few abstracts pertained to awards of the International Chamber of Commerce (ICC, 1 per cent).

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[2] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 371.

[3] The jurisdictions include: Albania, Argentina, Australia, Austria, Belarus, Belgium, Benin, Bermuda, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Cuba, Czechia, Denmark, Egypt, El Salvador, Finland, France, Georgia, Germany, Hong Kong,China, Hungary, India, Iraq, Israel, Italy, Japan, Kenya, Liechtenstein, Lithuania, Luxembourg, Mexico, Montenegro, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Portugal, Republic of Korea, Russian Federation, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Zimbabwe.

7. Since the Secretariat's last Note to the Commission, 72 new abstracts were received from national correspondents and voluntary contributors. The abstracts referred to the following texts: CISG (21 abstracts), New York Convention (22), MLCBI (13), MAL (10), MLEC (4), ECC (1) and one abstract concerning both the CISG and the Limitation Convention (amended text). The court decisions and the arbitral awards to which the abstracts refer were rendered in the following 22 jurisdictions: Australia, Belarus, Brazil, Canada, China, Colombia, Denmark, Egypt, France, Germany, Hong Kong, China, India, Italy, Mexico, Norway, Poland, Russian Federation, South Africa, Spain, Sri Lanka, United Kingdom and United States. In the same period, 91 abstracts were published concerning CISG (38 abstracts); New York Convention (18), MAL (16), MLCBI (12), MLEC (6), Limitation Convention, amended text (4). For the first time abstracts from Norway and Sri Lanka were published.[4] The slight discrepancy between the total number of abstracts published in the period under review and the breakdown of the individual UNCITRAL texts referred to in the abstracts is due to some court decisions or arbitral awards applying more than one UNCITRAL text (see also para. 5 above).

The network of national correspondents

8. The composition[5] of the current network of national correspondents remained unchanged since the Secretariat's last Note to the Commission. This network will terminate its mandate at the beginning of July 2017, and on the first day of the fiftieth Commission session the new network of correspondents will begin its term for the next five years.[6] At the date of this Secretariat's Note, States that have appointed or reappointed their national correspondents include: Algeria, Austria, Côte d'Ivoire, Denmark, Ecuador, El Salvador, Finland, Gabon, Germany, Indonesia, Japan, Luxembourg, Montenegro, Norway, Republic of Korea, Spain, Serbia, Switzerland and Thailand for a total of 32 national correspondents.

9. As to the materials provided by the current network of national correspondents since the Secretariat's last Note to the Commission, they represented approximately 53 per cent of the abstracts published in that period.[7] The remaining abstracts were received from voluntary contributors or prepared by the Secretariat. Although this figure represents a high contribution of the national correspondents to CLOUT, the Commission may wish to note that the cases were provided by a very small number of correspondents. A large number of correspondents were unable to contribute materials for the entire duration of their appointment.

10. Four CLOUT national correspondents were part of the small group of experts that provided inputs into the revision of the CISG Digest (see para. 15 below).

Maintenance of the system

11. The Secretariat continued making available to users the full text decisions stored in the database's archives. Due to the time-consuming nature of the task, the modest resources available for CLOUT (see also A/CN.9/873) and the non-optimal quality of several scanned full texts, which requires retrieving new copies, it is envisaged that such a task will need several additional months to be completed. The full texts of new case law received by the Secretariat are uploaded upon receipt.

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[4] Abstracts from the following jurisdictions were also published: Australia, Austria, Canada, China, Denmark, Egypt, France, India, Mexico, Netherlands, New Zealand, Norway, Poland, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Sri Lanka, United Kingdom and United States.

[5] At the date of this note, the network is composed of 74 correspondents representing 35 countries, which were as follows: Australia, Austria, Belarus, Bulgaria, Canada, China, Colombia, Cuba, Czechia, Denmark, El Salvador, Finland, France, Germany, Greece, Guatemala, Ireland, Israel, Italy, Japan, Luxembourg, Montenegro, New Zealand, Poland, Republic of Korea, Republic of Moldova, Russian Federation, Singapore, Slovakia, Spain, Sweden, Thailand, Tunisia, United States and Uruguay.

[6] See A/CN.9/873, para. 7.

[7] It can be noted that the figure is higher than the one provided in A/CN.9/873.

12. Since the Secretariat's last Note, the CLOUT database received slightly over 27,000 visitors. According to data provided by free web analytics services, most of the users would be located in Eastern Asia, followed by South America and Europe (in the following order: Western, Southern and Eastern Europe).

13. Since June 2016, regular information on CLOUT's latest releases is posted on the UNCITRAL blog (under the "What's new at UNCITRAL?" pages) and the UNCITRAL LinkedIn account in order to provide an "alert" feature to CLOUT users and raise the visibility of the system at the same time. With regard to increasing CLOUT's visibility, the Commission may wish to note that the system was also cited in several articles and publications of international legal scholars in the last 12 months.

14. The Secretariat explored the opportunity to develop collaboration with the UNALEX project,[8] sponsored by the European Commission, which has the same objectives as the CLOUT system and focuses on European and International Uniform Law with special emphasis on international private and civil procedural law (see also A/CN.9/908, para. 10).

II. The Digests

15. As reported in A/CN.9/873 (see para. 11), a new round of updates of the CISG Digest was finalized in 2016. The updated Digest was published as an e-book, in English, on the UNCITRAL website at the end of last year. At the date of this Secretariat's Note, the Digest is being translated into the other official United Nations languages and it is expected that such translations be finalized by the end of 2017.

16. Work to update the current edition of the MAL Digest is ongoing and finalization of the MLCBI Digest is progressing.

III. A way forward for CLOUT

17. As mentioned in paragraph 1 above, CLOUT continues to be an important tool through which the Secretariat promotes the uniform interpretation and application of UNCITRAL texts. In over 25 years, the system has developed a consolidated modus operandi which meets several of the standards that are said to determine the reliability of legal databases.[9] Within the limits of the human and financial resources available to the Secretariat, the system provides information of consistent quality, with an easy to verify source, which is presented in an immediate and user-friendly way and is regularly updated. After the database upgrade in 2015 (see para. 11, A/CN.9/840), accuracy of information has been further improved by making publicly available the full texts of the case law which is reported in the database. Similarly to its former version, the upgraded database is easy to browse and can be accessed with any standard IT equipment, moreover it allows for improved interactivity with the users who can carry out more accurate searches and simultaneously obtain diverse information on the topic they are inquiring about. Further, the multilingual nature of the database, a key feature since the system was established and was mainly working on paper, greatly enhances the dissemination of information.

18. As mentioned in previous Secretariat's Notes, the system would greatly benefit from further improvements in order, inter alia, to increase content from jurisdictions that are relatively under-represented, as well as of legislative texts where reported cases are few; ensure currency of the materials published more consistently and further improve interaction with the users. However, under the current arrangements,

[8] For further information on the project, see: https://www.unalex.eu/Project/Project.aspx?Project=ExtendUnalex.

[9] See for instance, M. Roznovschi, Features — Update to Evaluating Foreign and International Legal Databases on the Internet, September 2000 (available on LLRX.com) and J. Lee, Gatekeepers of legal information: evaluating and integrating free internet legal resources into the classroom, 2012 (available on Barry Law Review).

achieving those goals within a predictable timespan is not feasible and the same applies to developing additional services (e.g. cross reference of abstracts published in CLOUT to the citations in the Digests, provide texts or links to national enactments of UNCITRAL Model Laws reported in CLOUT), which would enrich the quality of the system and its database even further. Other projects similar to CLOUT in nature and purpose, implemented by other United Nations agencies, have developed into comprehensive knowledge repositories, supported by quite sophisticated web portals, in which collection and sharing of case law (or legislation, according to the focus of the portal) is one component among various other knowledge products that are made available to the users. Those portals attract an extremely high number of users.

19. While developing similar sophisticated products requires resources that are not immediately available to the Secretariat, the approach on which those projects were built should encourage reflection on how to increase CLOUT's capacity to reach out to higher volumes of interested users and provide them with extensive and varied information on the way UNCITRAL texts are applied across jurisdictions. These features are key to meeting the purpose of the system. In this regard, the Commission might wish to consider the context in which CLOUT was established, i.e. a time in which the desired information on the interpretation of UNCITRAL texts was available to a limited extent, and the current wealth of well-established commercial and non-commercial legal resources (whether online or on paper) on domestic and international case law, including case law that applies UNCITRAL texts, that greatly facilitate access to legal information worldwide.[10] If CLOUT is to remain current with its original purpose, then a further strengthening, or perhaps reorganization, of the system should be explored in order to keep ahead of changes occurring since 1988, allowing CLOUT to evolve into an innovative tool for the promotion of harmonized interpretation of UNCITRAL texts.

20. The Commission may thus wish to consider the most appropriate way forward for CLOUT: whether the system should remain in its current setting, or whether a more contemporary approach would be preferable.

IV. Promotion of uniform interpretation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)

21. The publication of the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) was announced by the Commission in July 2016 (see para. 197 of A/71/17). The sixteen chapters of the Guide were made publicly accessible in the six official United Nations languages on the website www.newyorkconvention1958.org.[11] The website provides information gathered in the preparation of the Guide and contains freely and publicly available resources on the Convention, including case law from a growing number of jurisdictions as well as a comprehensive bibliography.

22. The website continued to expand, not only by way of increasing the volume of case law published on the application of the Convention, but also by way of adding information about the jurisdictions which have adopted the Convention. At the date of this Secretariat's Note the database included concise background notes on 40 Contracting States,[12] 1,062 original-language decisions, 119 English-language translations, 1,148 summaries of cases, the *travaux préparatoires* and a bibliography on the New York Convention which consists of the most comprehensive directory of publications relating to the application and interpretation of such text (listing

[10] See also H.M. Flechtner, Globalization of Law as Documented in the Law on International Sales of Goods, in PittLaw, Legal Studies Research paper Series Working Paper No. 2010-09, March 2010, p. 543.

[11] The Guide is also accessible on the UNCITRAL website at www.uncitral.org.

[12] A/CN.9/873 referred to concise background notes for 45 Contracting States. Following the website revision in 2016, and in order to ensure consistency, the project coordinators decided not to include reference to Contracting States for which no court decision was available.

811 books and articles from more than 72 countries in 11 different languages; 199 of such publications are directly accessible through hyperlinks).

23. Over the past twelve months, the website continued to renovate its design and its content in order to improve its accessibility on all electronic supports, as well as the efficiency of the research tools it proposes (see also para. 18 of A/CN.9/873).

24. As in previous years, close coordination between the website and the CLOUT system continued to be maintained (see also para. 19, A/CN.9/873). Several cases on the application of the New York Convention were published in both systems, which allowed for such cases to be available in the six official languages of the United Nations.

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Note by the Secretariat on the status of conventions and model laws

(A/CN.9/909)

[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 17 May 2016, when the last annual report in this series (A/CN.9/876) was issued. The information contained herein is current up to 24 April 2017. 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, accession, or signature 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] 23 States parties; unamended: 30 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).[6] 85 States parties;

(b) In the area of dispute resolution:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[7] New action by Angola (accession); 157 States parties;

UNCITRAL Model Law on International Commercial Arbitration (1985),[8] with amendments as adopted in 2006.[9] New legislation based on the Model Law has been adopted in Turkmenistan (2016). New legislation based on the Model Law as amended in 2006 has been adopted in the Republic of Korea (2016) and Mongolia (2017);

UNCITRAL Model Law on International Commercial Conciliation (2002).[10] New legislation based on the Model Law has been adopted in Malaysia (2012);

United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014).[11] New actions by Iraq (signature), Netherlands (signature), Canada (ratification) and Switzerland (ratification); 3 States parties;

(c) In the area of government contracting:

UNCITRAL Model Law on Public Procurement (2011);[12]

(d) In the area of banking and payments:

United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).[13] 5 States parties;

UNCITRAL Model Law on International Credit Transfers (1992);[14]

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[15] 8 States parties;

(e) In the area of security interests:

United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).[16] 1 State party;

UNCITRAL Model Law on Secured Transactions (2016);

(f) In the area of insolvency:

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[6] United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3. For the complete status of this text, see part I, sect. C.

[7] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. For the complete status of this text, see part I, sect. K.

[8] *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.

[9] United Nations publication, Sales No. E.08.V.4. For the complete status of this text, see part II, sect. A.

[10] *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.

[11] General Assembly resolution 69/116, annex. On 18 April 2017, the conditions for entry into force of the Convention were met. Accordingly, the Convention shall enter into force on 18 October 2017. For the complete status of this text, see part I, sect. J.

[12] *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.

[13] 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.

[14] *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.

[15] United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163. For the complete status of this text, see part I, sect. F.

[16] 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.

UNCITRAL Model Law on Cross-Border Insolvency (1997).[17] New legislation based on the Model Law has been adopted in the Dominican Republic (2015) and Singapore (2017);

(g) In the area of transport:

United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).[18] 34 States parties;

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991).[19] 4 States parties;

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008).[20] 3 States parties;

(h) In the area of electronic commerce:

UNCITRAL Model Law on Electronic Commerce (1996).[21] New legislation based on the Model Law has been adopted in Malawi (2016); Mozambique (2017) and Fiji (2017);

UNCITRAL Model Law on Electronic Signatures (2001);[22]

United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).[23] 7 States parties.

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.[24] 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,[25] 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).[26]

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[17] General Assembly resolution 52/158, annex. For the complete status of this text, see part II, sect. D.

[18] United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3. For the complete status of this text, see part I, sect. B.

[19] *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.

[20] 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.

[21] United Nations publication, Sales No. E.99.V.4. For the complete status of this text, see part II, sect. C.

[22] General Assembly resolution 56/80, annex. For the complete status of this text, see part II, sect. E.

[23] General Assembly resolution 60/21, annex. For the complete status of this text, see part I, sect. H.

[24] All UNCITRAL texts are available in the six official languages of the United Nations on the UNCITRAL website, www.uncitral.org.

[25] 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.

[26] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), annex I. For the status of this text, see part III, sect. B.

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		
Côte d'Ivoire		1 February 2016(†)	1 September 2016
Cuba		2 November 1994(*)	1 June 1995
Czechia[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
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

State	Signature	Ratification, Accession(*), Succession(§) or Participation under Article VIII or X of the Protocol of 11 April 1980(†)	Entry into force
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): 23
Parties (unamended): 30

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
Czechia[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		

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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		
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

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
United States of America	30 April 1979		
Venezuela (Bolivarian Republic of)	31 March 1978		
Zambia		7 October 1991(*)	1 November 1992

Parties: 34

[a] Czechia declared that limits of carrier's liability in the territory of Czechia 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
Azerbaijan		3 May 2016(*)	1 June 2017
Bahrain		25 September 2013	1 October 2014
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
Czechia[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

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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	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
Peru		25 March 1999(*)	1 April 2000
Poland	28 September 1981	19 May 1995	1 June 1996

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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		
Viet Nam[a]		18 December 2015(*)	1 January 2017
Zambia		6 June 1986(*)	1 January 1988

Parties: 85

[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).

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

State	Signature	Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)	Entry into force
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).[27] 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		

[27] United Nations publication, Sales No. E.09.V.12.

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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[c]	6 July 2006	7 July 2015	1 February 2016

Parties: 7

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.

[c] 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.

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(§)*	*Entry into Force*
Belgium	15 September 2015		
Canada	17 March 2015	12 December 2016	18 October 2017
Congo	30 September 2015		
Finland	17 March 2015		

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into Force*
France	17 March 2015		
Gabon	29 September 2015		
Germany	17 March 2015		
Iraq	13 February 2017		
Italy	19 May 2015		
Luxembourg	15 September 2015		
Madagascar	1 October 2016		
Mauritius	17 March 2015	5 June 2015	18 October 2017
Sweden	17 March 2015		
Switzerland	27 March 2015	18 April 2017	18 October 2017
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: 3

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
Andorra		19 June 2015	17 September 2015
Angola		6 March 2017	4 June 2017
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

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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
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
Czechia[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

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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
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

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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

State	*Signature*	*Ratification, Accession(*), Approval(†), Acceptance(‡) or Succession(§)*	*Entry into force*
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
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

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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[28]

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 74 States in a total of 105 jurisdictions:

Armenia (2006); Australia (2010[a,c]), in Australian Capital Territory (2017[a]), 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 (2015); Bangladesh (2001); Belarus (1999); Belgium (2013[a]); Bhutan (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); Maldives (2013); Malta (1996); Mauritius (2008[a]); Mexico (1993); Mongolia (2017[a]); Montenegro (2015); Myanmar (2016); 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 (2016[a,c]); Russian Federation

[28] 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.

(1993); Rwanda (2008[a]); Serbia (2006); Singapore (1994[d]); Slovakia (2014); Slovenia (2008[a]); Spain (2003); Sri Lanka (1995); Thailand (2002); the former Yugoslav Republic of Macedonia (2006); Tunisia (1993); Turkey (2001); Turkmenistan (2016); 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.

C. UNCITRAL Model Law on Electronic Commerce (1996)

10. Legislation based on or influenced by the Model Law has been adopted in 69 States in a total of 145 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]); Bahamas (2003); 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]); El Salvador (2015[d]); Fiji (2017[e]); France (2000); Gambia (2009[e]); Ghana (2008[e]); Grenada (2008); Guatemala (2008[e]); Honduras (2015); 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]); Malawi (2016[e]); Malaysia (2006); Mauritius (2000); Mexico (2000); Mozambique (2017[e]); 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]), Montserrat (2009[g]), and the Turks and Caicos Islands (2000[g]); United Republic of Tanzania (2015[e]); 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 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 43 States in a total of 45 jurisdictions:

Australia (2008); Benin (2015[b]); Burkina Faso (2015[b]); Cameroon (2015[b]); Canada (2005); Central African Republic (2015[b]); Chad (2015[b]); Chile (2014); Colombia (2006); Comoros (2015[b]); Congo (2015[b]); Côte d'Ivoire (2015[b]); Democratic Republic of the Congo (2015[b]); Dominican Republic (2015); Equatorial Guinea (2015[b]); Gabon (2015[b]); Greece (2010); Guinea (2015[b]); Guinea-Bissau (2015[b]); Japan (2000); Kenya (2015); Malawi (2015); Mali (2015[b]); Mauritius (2009); Mexico (2000); Montenegro (2002); New Zealand (2006); Niger (2015[b]); Philippines (2010); Poland (2003); Republic of Korea (2006); Romania (2002); Senegal (2015[b]); Serbia (2004); Seychelles (2013); Singapore (2017); Slovenia (2007); South Africa (2000); Togo (2015[b]); Uganda (2011); United Kingdom of Great Britain and Northern Ireland, in Great Britain (2006), Gibraltar (2014[a]), and the British Virgin Islands (2003[a]); United States of America (2005); and Vanuatu (2013).

[a] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.
[b] Enacting the *Acte uniforme portant organisation des procédures collectives d'apurement du passif* (OHADA), adopted on 10 September 2015 at Grand-Bassam, Côte d'Ivoire.

E. UNCITRAL Model Law on Electronic Signatures (2001)

12. Legislation based on or influenced by the Model Law has been adopted in 32 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); United Kingdom of Great Britain and Northern Ireland, in Montserrat (2009[b]); Viet Nam (2005); and Zambia (2009).

[a] The legislation is influenced by the Model Law and the principles on which it is based.
[b] Overseas territory of the United Kingdom of Great Britain and Northern Ireland.

F. UNCITRAL Model Law on International Commercial Conciliation (2002)

13. Legislation based on or influenced by the Model Law has been adopted in 16 States in a total of 28 jurisdictions:

Albania (2011[d]); Belgium (2005); Bhutan (2013); Canada, in Nova Scotia (2005[b]), and Ontario (2010[b]); Croatia (2003); France (2011[c]); Honduras (2000); Hungary (2002); Luxembourg (2012); Malaysia (2012); Montenegro (2005[c]); Nicaragua (2005); Slovenia (2008); Switzerland (2008[c]); the former Yugoslav Republic of Macedonia (2009); and United States of America, in 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)[29]

14. The UNCITRAL Model Law on Public Procurement as adopted in 2011 forms the basis of or is reflected in the public procurement laws and regulations in the following States. These States have used the Model Law and accompanying Guide to Enactment in reforming their public procurement law and systems, though the extent to which the resulting regulatory framework incorporates the provisions of the Model Law varies, as that framework also reflects legal traditions, domestic policy and other objectives:

Afghanistan, Armenia, Belarus, Egypt, Ghana, India, Jamaica, Kazakhstan, Kenya, Kyrgyzstan, Mexico, Mongolia, Myanmar, Russian Federation, Rwanda, Tajikistan, Trinidad and Tobago, Tunisia, Ukraine, 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:

African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Organization for Economic Cooperation 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,

[29] The UNCITRAL Model Law on Public Procurement (2011) is a revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994), *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I. Historical status information on the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) is available on the UNCITRAL website, www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

(ii) administer arbitral proceedings or provide administrative services under the Rules, and/or (iii) act as an appointing authority under the Rules.[30]

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
	ADR Institute of Canada	x	x	x
China	China International Economic and Trade Arbitration Commission (CIETAC)		x	x
	Shenzhen Court of International Arbitration (SCIA)	x	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		
Czechia	Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the 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
Finland	Arbitration Institute of the Finland Chamber of Commerce (FAI)	x		x
France	International Chamber of Commerce, International Court of Arbitration (ICC)			x
Germany	German Institution of Arbitration (DIS)		x	x

[30] Arbitration centres wishing to provide updated information for this table are invited to contact the Secretariat. The contents of this table are only updated on the UNCITRAL website on an annual basis.

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*
India	Indian Institute of Arbitration and Mediation (IIAM)	x	x	x
	Council for National and International Commercial Arbitration, Chennai (CNICA)	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		
Montenegro	Arbitration Court at the Chamber of Economy of Montenegro (ACCEMN)	x	x	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
	National and International Arbitration Centre of Lima Chamber of Commerce	x		x
Portugal	Centro de Arbitragem Comercial da Câmara de Comércio e Indústria Portuguesa			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*
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
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 andNorthern 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).[31]

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Nigeria-Morocco BIT Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria	3 December 2016		Article 27(1)(b)
Chile-Hong Kong, China SAR BIT Investment Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile	18 November 2016		Article 21(4)(a), Articles 26(2),28*
Argentina-Qatar BIT The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar	6 November 2016		Article 14(3)(e)
Rwanda-Turkey BIT Agreement between the Government of the Republic of Rwanda and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments	3 November 2016		Article 10(2)(b)(ii)
Canada-EU CETA Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union (and its Member States), of the other part	30 October 2016		Article 8.23(2)c, Articles 8.36, 8.37 and 8.38*
Morocco-Rwanda BIT Agreement between the Government of the Republic of Rwanda and the Government Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments	19 October 2016		Article 8(2)(iii)
Canada-Mongolia BIT Agreement Between Canada and Mongolia for the Promotion and Protection of Investments	8 September 2016	24 February 2017	Article 23(1)(3), Articles 30 and 31*
Japan-Kenya BIT Agreement between the Government of Japan and the Government of the Republic of Kenya for the Promotion and Protection of Investment	28 August 2016		Article 15(4)(b)(iii), Article 15.13*
Austria-Kyrgyzstan BIT Agreement on the Promotion and Protection of Investments between the Government of the Kyrgyz Republic and the Government of the Republic of Austria	22 April 2016		Article 14(1)c), Article 14(3)*

[31] International Investment Agreements Navigator, available from http://investmentpolicyhub.unctad.org/IIA. The contents of this table are only updated on the UNCITRAL website on an annual basis.

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Morocco-Russian Federation BIT Agreement between the Government of the Russian Federation and the Government of the Kingdom of Morocco on the Promotion and Mutual Protection of Capital Investments	15 March 2016		Article 9(2)(c)
Canada-Hong Kong, China SAR BIT Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of Canada for the Promotion and Protection of Investments	10 February 2016	6 September 2016	Articles 27 and 29
Iran-Japan BIT Agreement Between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment	5 February 2016		Article 18(2)(b)
TPP Trans-Pacific Partnership	4 February 2016		Article 9.19(4)(c), Articles 9.23 (2-3), 9.24*
Iran-Slovakia BIT Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments	19 January 2016		Article 17(3)(a), Article 14(4)*
Iran-Russian Federation BIT Agreement between the Government of the Russian Federation and the Government of the Islamic Republic of Iran about Promotion and Mutual Protection of Capital Investments	23 December 2015		Article 9(2)(c)
Kuwait-Kyrgyzstan BIT Agreement between the Government of the Kyrgyz Republic and the Government of the State of Kuwait for the encouragement and reciprocal protection of investments	13 December 2015		Article 10(3)(b)**
Azerbaijan-San Marino BIT Agreement between the Government of the Republic of San Marino and the Government of the Republic of Azerbaijan on the Promotion and Reciprocal Protection of Investments	25 September 2015		Article 12(2)(c)
Mauritius-United Arab Emirates BIT Agreement between the Government of the United Arab Emirates and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments	20 September 2015		Article 10(4)d
China-Turkey BIT Agreement between the Government of the Republic of Turkey and the Government of the People's Republic of China concerning the Reciprocal Promotion and Protection of Investments	29 July 2015		Article 9.2(c)

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Japan-Oman BIT Agreement between Japan and the Sultanate of Oman for the Reciprocal Promotion and Protection of Investment	19 June 2015		Article 15.4(c)
Eurasian Economic Union-Viet Nam FTA Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part	29 May 2015	5 October 2016	Article 8.38(b)
Guinea Bissau-Morocco BIT Agreement between the Kingdom of Morocco and the Republic of Guinea-Bissau for the Promotion and Reciprocal Protection of Investments	28 May 2015		Article 9(3)(b)
Canada-Guinea BIT Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea	27 May 2015		Article 24(1)(3), Articles 31 and 32*
Denmark-Macedonia BIT Agreement between the Macedonian Government and the Government of the Kingdom of Denmark for the Promotion and Reciprocal Protection of Investments	8 May 2015	30 June 2016	Article 9(2)(b)
Burkina Faso-Canada BIT Agreement between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments	20 April 2015		Article 25.1(3), Articles 32 and 33*
Cambodia-Russian Federation BIT Agreement Between the Government of the Russian Federation and The Government of the Kingdom of Cambodia on Promotion and Mutual Protection of Capital Investments	3 March 2015	7 March 2016	Article 8(2)(b)
Japan-Mongolia EPA Agreement between Japan and Mongolia for an Economic Partnership	10 February 2015		Article 10.13:4(c)
Japan-Ukraine BIT Agreement between Japan and Ukraine for the Promotion and Protection of Investment	5 February 2015	26 November 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		Articles 21.3(c) and 21(18)*
Kyrgyzstan-Qatar BIT Agreementbetween the Government of the Kyrgyz Republic and the Government of the State of Qatar on the Mutual Promotion and Protection of Investments	8 December 2014		Article 9(3)(d)

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Kyrgyzstan-United Arab Emirates BIT Agreement between the Government of the Kyrgyz Republic and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments	7 December 2014		Article 10(3)(a)
Canada-Côte d'Ivoire BIT Canada-Côte d'Ivoire Foreign Investment Promotion and Protection Agreement	30 November 2014	14 December 2015	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)
Azerbaijan-Russian Federation BIT Agreement between the Government of the Russian Federation and the Republic of Azerbaijan for the Promotion and Mutual Protection of Investments	29 September 2014	16 November 2015	Article 8(2)(b)
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	27 April 2015	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	17 October 2014	Article 10.4

Treaty	*Signature*	*Entry into force*	*Relevant articles*
Republic of Moldova-Montenegro BIT Agreement between the Government of Montenegro and the Government of the Republic of Moldova on Promotion and Reciprocal Protection of Investments	20 June 2014	23 June 2015	Article 8(2)(c)
Republic of Korea-Myanmar BIT Agreement Between the Government of the Republic of Korea and the Government of the Republic of the Union of Myanmar for the Promotion and Protection of Investments.	5 June 2014		Article 11(2)(b)(iii)
Georgia-Switzerland BIT Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments	3 June 2014	17 April 2015	Article 10(2)(b), Article 10(3)*
Eurasian Economic Union TIP Treaty on Eurasian Economic Union	29 May 2014	1 January 2015	Annex 16, Section VII, Article 6(85)(3)
Greece-United Arab Emirates BIT Agreement Between the Government of the United Arab Emirates and The Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments	6 May 2014	6 March 2016	Article 10(3)(b), 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*
Bahrain-Russian Federation BIT Agreement between the Government of the Russian Federation and the Government of the Kingdom of Bahrain about promotion and mutual protection of capital investments	29 April 2014	25 December 2015	Article 8(2)(b)
Belarus-Cambodia BIT Agreement between the Government of the Republic of Belarus and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments	23 April 2014		Article 8(2)(d)**
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.

** Application of the Rules of Transparency, unless otherwise decided by the disputing parties.

XI. COORDINATION AND COOPERATION

Note by the Secretariat on coordination activities

(A/CN.9/908)

[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. Most of such activities have included provision of comments on documents drafted by those organizations and participation in various meetings (e.g. working groups, expert groups and plenary meetings) and conferences. 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 is expected to continue and even increase in the 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.9/905.

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 attended the Unidroit Governing Council and the Conference on "The United Nations Conventions on Contracts for the International Sales of Goods CISG and Unidroit Principles of International Commercial Contracts: Contrast and Convergence", which was held as part of the Governing Council (Rome, 18-20 May 2016).

6. The Secretariat participated in the First Session of the Committee of Governmental Experts on the Mining, Agriculture and Construction Equipment Protocol of the Cape Town Convention on International Interests in Mobile Equipment (Rome, 20-24 March 2017).

Hague Conference on Private International Law (HccH)

7. The Secretariat participated in the following activities of the HccH:

(a) The HccH Special Commission on the Judgments Project for purposes of coordinating the work being done by UNCITRAL on recognition and enforcement of insolvency-related judgments, which draws on work being done by the HccH, in order to ensure consistency between the two instruments (The Hague, the Netherlands, 6-9 June 2016 and 20-24 February 2017);

(b) A conference organized by the HccH and the University of Lucerne at which the relevance of The Hague principles on choice of law in international commercial contracts was discussed (Lucerne, Switzerland, 8-9 September 2016); and

(c) The Council on General Affairs and Policy (The Hague, the Netherlands, 14-16 March 2017).

Joint activities with Unidroit and HccH

8. At its fiftieth session, the Commission will hear a report on the Secretariat's cooperation in the area of international commercial contract law (with a focus on sales) with the secretariats of the HccH and Unidroit (see also A/CN.9/892 and A/CN.9/875).

B. Other organizations

9. In addition to its participation in initiatives of Unidroit and HccH, the Secretariat undertook coordination activities with various other international organizations.

1. General

10. In the context of a potential collaboration with the UNALEX project, which is sponsored by the European Commission, the Secretariat participated in a round table (Zagreb, 29 September 2016) and a conference (Genoa, Italy, 24 February 2017) organized by that project. At both events, the collection and sharing of uniform case law were discussed, among other topics. The UNALEX project is quite similar in nature and structure to CLOUT. Although it emphasizes collecting and sharing decisions on private international and civil procedural law, mainly from European jurisdictions, the project also includes in its database several cases on the United Nations Convention on Contracts for the International Sale of Goods (CISG, 1980) as a result of an informal collaboration with CLOUT.

11. The Secretariat continued its involvement in the Inter-Agency Cluster on Trade and Productive Capacity and took part (remote participation) in the annual meeting of the Cluster (17 October 2016) at which follow-up actions in relation to the

establishment of a Global Multi Donor Trust Fund on Trade and Productive Capacity were further discussed (see also A/CN.9/875, para. 11).

12. The Secretariat attended meetings at the World Bank and International Law Institute and, as in the previous years, participated in the annual meeting of the United States State Department Advisory Committee on Private International Law (Washington, D.C., 14-17 November 2016).

13. The Secretariat participated in the 2016 United Nations Forum on Business and Human Rights hosted by the Office of the High Commissioner for Human Rights (OHCHR), at which it presented on UNCITRAL experience in public procurement (Geneva, Switzerland, 16 November 2016).

14. The Secretariat continued to be involved in the Global Forum on Law, Justice and Development (GFLJD), a permanent global forum, established at the initiative of the World Bank that aims to exchange and disseminate innovative legal solutions for development.[5] As in previous years (see also A/CN.9/875), the Secretariat attended the Law, Justice and Development Week organized by GFLJD at which it appeared as a panelist in a session on sustainable procurement and moderated two sessions, one on public procurement and development and one on public-private partnerships contracts and the Sustainable Development Goals (Washington, D.C., 5-9 December 2016).

Rule of Law

15. The Secretariat remained engaged in the Inter-Agency Task Force (IATF) on Financing for Development (FfD), convened by the Secretary-General to: (a) review progress in implementing the Addis Ababa Action Agenda (AAAA); and (b) advise the intergovernmental follow-up process thereon. In this context, the Secretariat contributed to tracking the progress of the implementation of the AAAA sustainable development goals as they are relevant to the work of UNCITRAL through provision of material for inclusion in the Annex to the 2017 IATF report (in a draft format at the date of this Note).

16. The web page on the Sustainable Development Goals, available on the UNCITRAL website,[6] became operational in all six official United Nations languages (see also A/CN.9/875, para. 20).

17. The Secretariat brought to the attention of the United Nations Legal Counsel the Guidance Note on strengthening United Nations support to States, upon their request, to implement sound commercial law reforms, endorsed by the Commission at its forty-ninth session, in 2016.[7] The Secretariat requested the Legal Counsel to make the Guidance Note a subject of discussion at such United Nations coordination mechanisms as: the United Nations System Chief Executives Board for Coordination (CEB); Rule of Law Coordination and Resource Group (ROLCRG); United Nations Development Group (UNDG); United Nations regional coordinator system and country teams (UNRC and UNCTs) and the United Nations Peacebuilding Commission. The Secretariat also requested the Legal Counsel to bring the Guidance Note to the attention of participants at coordination meetings of legal advisers hosted by the Legal Counsel (e.g. annual meetings of Field Legal Officers; of Legal Advisors and Legal Liaison Officers of the United Nations Offices, Funds and Programs and of Legal Advisors of the Specialised, Related and other Organisations of the United Nations System). This request was made pursuant to the request of the Commission and the General Assembly to the Secretary-General to circulate the Guidance Note as

[5] As explained in A/CN.9/838 para. 11, GFLJD is intended to spur both South-South and North-South collaboration and its multidisciplinary activities address economic, legal and technical dimensions of the targeted issues. The UNCITRAL secretariat was appointed as co-leader of the Law and Economy Working Group, with effect from September 2014 (see also A/CN.9/875, para. 12).

[6] See http://www.uncitral.org/uncitral/en/about/SDGs/Sustainable_Development_Goals.html.

[7] *Official Records of the General Assembly, Seventy-first session, Supplement No. 17* (A/71/17), Annex II.

broadly as possible to its intended users.[8] In that respect, the General Assembly recalled 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 and welcomed the efforts of the Secretary-General to ensure greater coordination and coherence among United Nations entities and with donors and recipients. The Guidance Note was also made available on the UNCITRAL website in all six official United Nations languages.[9]

2. Micro, small and medium-sized enterprises (MSMEs)

18. The Secretariat continued to encourage participation and dialogue in respect of UNCITRAL work on micro, small and medium-sized enterprises (MSMEs, Working Group I) through its participation in the 2017 Corporate Registers Forum (CFR) as well as presenting the latest developments of UNCITRAL work on business registration at such Conference. The Conference is an important annual event that gathers business registrars from all over the world (Hong Kong SAR, China, 7-10 March 2017).

3. Procurement

19. The Secretariat was actively involved in a policy dialogue between the WTO GPA Secretariat and the member States of the Eurasian Economic Union (EAEU) (Armenia, Belarus, Kazakhstan, the Kyrgyz Republic and the Russian Federation) under the EBRD GPA Technical Cooperation Facility[10] established for the purpose of facilitating accession of those countries to the WTO GPA. The Secretariat was requested to provide the expert input on aspects of harmonization of procurement-related provisions of the EAEU Treaty,[11] the CIS Protocol on Public Procurement and procurement legislation of the EAEU member States with the WTO GPA. The Secretariat participated at technical expert meetings on that matter (Podgorica, 6 May 2016,* [12] Geneva, Switzerland, 20 June 2016, and London, 19 April 2017. The Secretariat continues being engaged in EBRD-led coordination with UNCITRAL, the WTO GPA Secretariat, the European Commission and the Open Contracting Partnership[13] on standardizing procurement data collection in electronic procurement systems. In that context, the Secretariat was requested to provide expert input to the discussion of the need for harmonization of requirements for the minimum content of procurement notices and records of procurement proceedings. The Secretariat participated at coordination meetings on that matter (Paris, 5 December 2016 and London, 20 April 2017).

20. At its forty-ninth session, in 2016, the Commission instructed the Secretariat to consider updating where necessary all or parts of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, involving experts.[14] Therefore, the Secretariat hosted two in-person meetings, one in Washington, D.C., (5-7 December 2016 (contemporaneously with the Global Forum on Law, Justice and Development, see para. 14 above)) and one held in Vienna (6-7 March 2017). At those meetings, it was concluded that the recommendations of the existing text reflects good policy and practices, and remains relevant. However, limited revisions to update the PFIPs texts are considered necessary, in order to take account of developments in practice since the existing Legislative Guide was issued in 2000 (for further detail, see A/CN.9/912).

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[8] See *Official Records of the General Assembly, Seventy-first session, Supplement No. 17* (A/71/17), para. 262 and General Assembly resolution 71/135, para. 8 (e).

[9] See www.uncitral.org/uncitral/en/technical_assistance_coordination.html under the heading Integration with United Nations operations.

[10] See http://ebrd-gpa-facility.com/?id=2.

[11] See http://www.eaeunion.org/?lang=en#about.

[12] Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

[13] See http://www.open-contracting.org/.

[14] See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 17* (A/71/17), paras. 359-360 and 362.

21. The Secretariat also issued the second *Call2Action* for the promotion of the UNCITRAL Model Law on Public Procurement (2011) on the occasion of the International Anti-Corruption Day (9 December 2016), joining the global United Nations campaign #UnitedAgainstCorruption, and considering that the Model Law was specifically designed to implement the procurement-related provisions in the United Nations Convention against Corruption (UNCAC, New York, 2003). The campaign was launched in English, Korean, Chinese and Bahasa Indonesia on all RCAP's social media platforms.

22. In addition, the Secretariat participated in the following coordination meetings:

(a) The Conference of the States Parties to UNAC organized by the United Nations Office on Drugs and Crimes (UNODC) (Vienna, 22-23 August 2016); and

(b) The World Bank 2016 E-Procurement Forum on "Moving Forward with E-Procurement". The main objective of the Forum was to provide an opportunity to public procurement agencies from participating developing countries in Europe and Central Asia to share their latest experiences and practices in E-Procurement (Berlin, 13-15 December 2016).

23. The Secretariat reviewed or provided comments on: (a) public-private partnerships in procurement to UNECE (ongoing, April 2016 and January 2017); (b) the UNDP Bangkok Hub Guidance Note on Integrity Risk management in Public Procurement (August-September 2016); and (c) an OECD taxonomy of trade affecting measures in government procurement processes (ongoing since autumn 2016). The Secretariat also provided inputs to UNODC publications and activities related to article 9 of UNCAC.[15]

4. Dispute settlement

24. In line with the decision of the Commission 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, the Secretariat activities in the area of international commercial arbitration and conciliation included participation in various meetings, and consultation with international organizations, in particular in relation to the preparation of possible future work topics on the agenda of the Commission. As mentioned in document A/CN.9/916, the Secretariat coordinated with the International Council for Commercial Arbitration (ICCA) regarding possible work on ethics in international arbitration. The Secretariat also consulted with the International Court of Arbitration of the International Chamber of Commerce on the topic. The Secretariat organized consultations with intergovernmental organizations in relation to possible work on a reform of investor-State dispute settlement, which included consulting UNCTAD, OECD, ICSID, the Permanent Court of Arbitration (PCA), as highlighted in document A/CN.9/917. The Secretariat also took part in meetings of the subcommittee of the International Bar Association (IBA) on investment arbitration.

25. In addition, the Secretariat coordinated with arbitral institutions which expressed interest in using the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in conjunction with their own rules.

26. The Secretariat continued its coordination with the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)[16] GmbH to support a new project, "Application of International Arbitration Standards in South-East Europe" within the Framework of the Open Regional Fund for South-East Europe-Legal Reform (ORF-LR). The project aims both at facilitating increased participation of selected South-East Europe States in UNCITRAL work on dispute resolution and to promote the use of the

[15] E.g. the preparation of the publication "Procurement and Corruption in Small Island Developing States" (available at https://www.unodc.org/documents/corruption/Publications/2016/V1608451.pdf) and retreats and other events organized by UNODC in the context of the review of the implementation of article 9 of UNCAC.

[16] On behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ).

recently adopted UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration (Transparency Rules) in the region.

27. The Secretariat also took part in the following meetings:

(a) An informal meeting with ICCA to consider further collaboration with that organization in particular for the promotion of arbitration in Africa (New York, 8 July 2016);

(b) A round table jointly organized by the World Economic Forum and International Centre for Trade and Sustainable Development (ICTSD) on the new G20 Guiding Principles for Global Investment Policy-making (Geneva, Switzerland, 7 November 2016); and

(c) A meeting to discuss the scope of substantive investment protection standards under the Energy Charter Treaty (Brussels, 26-27 January 2017).

5. Electronic commerce

28. UNCITRAL became a partner of the UNCTAD "eTrade for All" initiative. eTrade for All is a multi-stakeholder initiative aimed to improve the ability of developing countries and countries with economies in transition to use and benefit from e-commerce. It is a demand-driven mechanism in which leading development partners cooperate with the private sector to pool capabilities and resources. The goals of the initiative are: to raise awareness of opportunities, challenges and solutions related to leveraging e-commerce; to mobilize and rationalize financial and human resources to implement e-commerce projects in developing countries; and to strengthen coherence and synergies among partners' activities with a view to avoiding duplication of work and enhancing aid efficiency. The main tool of the initiative is the eTrade for All Online Platform,[17] which aims to help developing countries and donors navigate the supply of and demand for support to e-commerce development, to learn about trends and best practices, and to raise visibility for the various partners' initiatives and resources.

29. In addition:

(a) The Secretariat attended (remote participation) the first meeting of the Working Group on E-Commerce (WGEC) of the World Customs Organization (WCO) participating in the panel "E-commerce: perspectives from other international bodies" (Brussels, 21-23 September 2016); and

(b) In the context of the 29th UN/CEFACT Forum, the Secretariat co-organized with the UN/CEFACT Bureau a Mini Conference on "Ensuring Legally Significant Trusted Transboundary Electronic Interaction", at which it presented on UNCITRAL texts relevant to cross-border recognition of e-signatures and electronic identity management as well as the ongoing work of Working Group IV (Geneva, Switzerland, 29 March 2017).

[17] Available at http://unctad.org/en/Pages/DTL/STI_and_ICTs/eTrade-for All.aspx.

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Summary record (partial) of the 1047th meeting held at the Vienna International Centre, Vienna, on Monday, 3 July 2017, at 10 a.m.

[A/CN.9/SR.1047]

Chair: Mr. Martonyi (Hungary)

The discussion covered in the summary record began at 11.20 a.m.

Micro, small and medium-sized enterprises: progress report of Working Group I (A/CN.9/895 and A/CN.9/900)

1. **Ms. Lannan (**Secretariat), introducing documents A/CN.9/895 and A/CN.9/900, recalled that the Working Group was continuing its work on two legal texts, namely a legislative guide on the creation of a simplified business entity and a legislative guide on key principles of a business registry, which were aimed at reducing the legal obstacles faced by micro, small and medium-sized enterprises both at the beginning of and throughout their life cycle, particularly in developing economies.

2. **Mr. Mishkorudny (Belarus)** said that his country was grateful to Working Group I for its efforts to gather information on States' experience of regulating and improving the mechanisms for the activities of micro, small and medium-sized enterprises. Belarus also attached significance to the work on simplifying administrative procedures, on improving the conditions for conducting business and on protecting the rights and best interests of such enterprises.

3. The Government of Belarus supported the drafting of an UNCITRAL legislative guide on key principles of a business registry and, in order to improve the State trade registry of Belarus by making legal persons and individual entrepreneurs more readily traceable, and to harmonize domestic legislation regulating the operation of micro, small and medium-sized enterprises, frequently referred to the data prepared by the Working Group to facilitate the cross-border exchange of information.

4. **Mr. Gazarian** (Russian Federation) noted with appreciation the work of Working Group I on the draft legislative guide on key principles of a business registry. His country supported continued work on the draft guide and commentary with a view to its adoption by the Commission at its fifty-first session. It was necessary to establish a straightforward and comprehensible system that would promote the registration and operation of micro, small and medium-sized enterprises, taking into account the interests both of States and of stakeholders in commerce and trade.

5. **Mr. Apter** (Israel) said that his delegation also welcomed the work of Working Group I and looked forward to further discussions on establishing common ground with respect to good practices in business registration and the simplification of incorporation. He was confident that the deliberations would result in productive outcomes that would facilitate the life cycle of micro, small and medium-sized enterprises. His country's experts had learned extensively from the experience of other States participating in the discussions, and would continue to share the experience of Israel with regard to the issues being considered by the Working Group.

6. **Ms. Fernandez** (Chile) expressing appreciation for the progress made by the Working Group, said that her delegation would like to see the topics under consideration linked more closely to the work of other groups, such as the work of Working Group V on insolvency law. That would facilitate joint action by States and thus ensure genuine development. It would also be useful to advance work on those topics at the same pace in other forums. In that regard, Chile was to coordinate a dialogue on micro, small and medium-sized enterprises at a World Trade Organization meeting to be held in December 2017. Such joint action, which had always been underscored by UNCITRAL, should also be emphasized in other forums.

7. **Mr. Won** (Republic of Korea) said that UNCITRAL had provided sensible solutions in relation to various cross-border transactions. The UNCITRAL mandate extended to the establishment of enabling environments for rule-based business, investment and trade as critical elements of conflict prevention, post-conflict reconstruction and the promotion of the rule of law and governance in commercial relations. His delegation highlighted the importance to the majority of developing economies of micro, small and medium-sized enterprises, which had limited experience of cross-border trade and limited access to legal advice. The recent efforts of UNCITRAL to provide States with a platform to achieve economic diversification, financial inclusion and resilience to economic crises could facilitate commercial and especially cross-border activities while reducing transaction costs and commercial risks. The world had become so unprecedentedly interconnected that no country or business stood alone; the dimensions and implications of international trade were constantly growing. UNCITRAL could play a leading role in helping States to cope with the globalized and interconnected economy by enhancing transparency and predictability and

encouraging increased cooperation and rule-based conduct by the international community.

8. **Ms. Sekhar** (India) expressed support for the work of Working Group I, in particular on the draft legislative guide on simplified business entities and on reducing the legal obstacles faced by micro, small and medium-sized enterprises. Her country encouraged the Working Group to ensure that its work had a broad impact and that it could assist enterprises of all sizes in the future.

9. **Mr. Marquez García** (Colombia) said that his country greatly valued the work of Working Group I, in which it hoped to continue to participate and share its experience.

Insolvency law: progress report of Working Group V (A/CN.9/898 and A/CN.9/903)

10. **Ms. Clift** (Secretariat), introducing the agenda item, said that in the area of recognition and enforcement of insolvency-related judgments, the Working Group had made good progress in developing a model law, a draft of which was annexed to document A/CN.9/903. Outstanding issues included the final definition of "insolvency-related judgment", the relationship between the draft model law and the UNCITRAL Model Law on Cross-Border Insolvency and one of the grounds for refusal of recognition. She hoped that the draft model law and its guide to enactment would be finalized at the Working Group's fifty-second session so that it could be circulated to States for comment early in 2018, with a view to subsequent adoption by the Commission.

11. Good progress had been made on drafting a set of legislative provisions on facilitating the cross-border insolvency of multinational enterprise groups. Chapter 2 of the draft legislative provisions, on cooperation and coordination, chapter 3 on the conduct of a planning proceeding in the enacting State and chapter 4 on recognition of a foreign planning proceeding and relief were well developed. The discussions on chapter 5 on the treatment of foreign claims, which included a number of optional articles, had to some extent clarified the policy considerations to be addressed, but more work was required to clarify and simplify the draft. Given the complexity of the subject matter, the text would need to be accompanied by a guide to enactment. While the draft provisions might be sufficiently developed for consideration by the Commission in 2018, it was unlikely that the guide to enactment would be completed for consideration at the same time.

12. Regarding the obligations of directors of enterprise group members in the period approaching insolvency, the text supplementing part four of the UNCITRAL Legislative Guide on Insolvency Law was almost completed but would be held in abeyance pending the outcome of the work on enterprise group insolvency. Some elements of directors' obligations relating to enterprise group members might need to be revised in light of the enterprise group text. If that text was developed sufficiently to enable its completion and adoption in 2018, the text on directors' obligations could also be completed and adopted at the same time.

13. The Working Group had not yet addressed in substance the topic of insolvency treatment of micro, small and medium-sized enterprises. The conclusions resulting from the very helpful preliminary discussion held at its fifty-first session, supplemented by presentations by States and international organizations, were set out in document A/CN.9/903, paragraph 14. Given the work on the agenda of the Working Group and the likelihood that the work on insolvency-related judgments and enterprise groups would not be completed until 2018, it was unlikely that that topic would be taken up before the second half of 2018 or early 2019.

14. **Mr. Schnabel** (United States of America) said that the two very complex projects handled by the Working Group might represent some of the Commission's most significant work over the preceding two decades, and he encouraged the Working Group to continue to take an ambitious approach in completing the two instruments that had been developed. The model law on the recognition and enforcement of insolvency-related judgments would provide a broad framework for the circulation of judgments relevant to the insolvency estate, thereby helping to reduce wasteful relitigation and permit easier gathering of assets by the State and ultimately greater recovery for creditors. He hoped that the project would be completed in the coming year and that all outstanding issues would be resolved in an ambitious way, enabling the model law to have a broad impact.

15. It was also encouraging that the Working Group was approaching completion of the model provisions on the insolvency of enterprise groups; that framework would include a variety of tools enabling courts confronted with group insolvencies, which accounted for the majority of significant cross-border insolvency cases, to adopt new approaches. If those tools enabled successful restructuring in cases where liquidation would otherwise have occurred at the group level, the impact of the work would be very significant and could ultimately become an even more important framework than the UNCITRAL Model Law on Cross-Border Insolvency. His country supported the continuation of work on the insolvency treatment of micro, small and medium-sized enterprises. He urged the Working Group to identify an ambitious project on that important topic which would not only identify and meet real-world needs, but would also make a significant difference and ensure the best use of the Working Group's time. Finally, he hoped that the Working Group would soon find time to consider asset tracing and recovery issues, a very significant area for future work which could have an enormous economic impact.

16. **Mr. Apter** (Israel) said that the discussions of Working Group V in 2016 and 2017 had been very useful and constructive. Much work remained to be done, especially with regard to the insolvency of micro, small and medium-sized enterprises, but the progress achieved and the professional and efficient discussions held would likely ensure the completion of the Working Group's mandated work in the near future. He added that the UNCITRAL Model Law on Cross-Border Insolvency would soon be enacted in law in Israel.

17. **Ms. Sabo** (Canada) said that the work of Working Group V was useful and important and that the Working Group was managing its priorities and topics well. Her country welcomed the progress on the provisions on cross-border insolvency of enterprise groups and was pleased to see that workable and practical solutions were being considered, and that there was growing consensus. Canada also supported the work on the recognition and enforcement of insolvency-related judgments, which was useful not only with respect to final reorganization or liquidation judgments, but also in relation to orders issued by insolvency tribunals during the insolvency process. On the important subject of micro, small and medium-sized enterprises, the Secretariat might work with the World Bank to identify areas for improvement for the benefit of developing countries and other countries where such enterprises were particularly important.

18. **Mr. Mishkorudny** (Belarus) expressed his appreciation for the work of Working Group V on improving legal protection for creditors and other interested parties through the recognition and enforcement of insolvency-related judgments, cooperation between jurisdictions and the prevention of duplication of insolvency proceedings. Belarus supported the expansion of the UNCITRAL Model Law on Cross-Border Insolvency and the UNCITRAL Legislative Guide on Insolvency Law. It was important to apply a special regime to micro, small and medium-sized enterprises in line with their specific needs in order to avoid the application of overly strict corporate laws to those enterprises, and to provide such enterprises working in an official economic sector with opportunities for further development. It would also be useful for UNCITRAL to establish grounds to refuse recognition and enforcement of insolvency-related judgments in cases of cross-border insolvency which were connected with public order in a State on whose territory the recognition and enforcement of such judgments were requested.

19. **Mr. Freeman** (United Kingdom) joined previous speakers in welcoming the work achieved by Working Group V on what were very important topics. Cross-border group insolvencies were the most economically significant insolvency proceedings: developing a new legal framework to ensure that such proceedings functioned efficiently and to maximize the possibility of rescuing of a group as a whole would be an important addition to the UNCITRAL Model Law on Cross-Border Insolvency. His country was pleased that the provisions of the new model law on the recognition and enforcement of insolvency-related judgments were now in the final stages of drafting. That text complemented work being done by the Special Commission on the Recognition and Enforcement of Foreign Judgments of the Hague Conference on Private International Law, and once enacted in States it would help to ensure that insolvency-related judgments were enforceable in other jurisdictions, which would be universally beneficial. Lastly, he welcomed the initial work on the insolvency treatment of micro, small and medium-sized enterprises, and looked forward to the establishment of specific guidance on such insolvency procedures, which would be another very helpful addition to the existing legal frameworks.

The discussion covered in the summary record ended at noon.

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Summary record (partial)* of the 1050th meeting, held at the Vienna International Centre, Vienna, on Friday, 7 July 2017, at 2 p.m.**

[A/CN.9/SR.1050]

Chair: Mr. Martonyi (Hungary)

* No summary record was prepared for the rest of the meeting.
** No summary records were issued for the 1048th or 1049th meetings.

The discussion covered in the summary record began at 4.20 p.m.

International dispute settlement: progress report of Working Group II (A/CN.9/896 and A/CN.9/901)

1. **Ms. Montineri** (Secretariat), introducing the agenda item, recalled that at its forty-eighth session, the Commission had granted Working Group II a broad mandate to commence work on the topic of enforcement of settlement agreements, and at its forty-ninth session had requested the Working Group to proceed with its work on the preparation of an instrument on the enforcement of international commercial settlement agreements resulting from conciliation. The Working Group had made considerable progress over the course of its sixty-fifth and sixty-sixth sessions, as detailed in documents A/CN.9/896 and A/CN.9/901, respectively. At the sixty-sixth session of the Working Group, a compromise proposal had been made in relation to five issues, as set out in paragraph 52 of document A/CN.9/901, with a view to moving forward with the drafting of the aforementioned instrument. That compromise proposal had covered a number of issues, including the extent to which agreements resulting from conciliation concluded during judicial or arbitral proceedings should be excluded from the scope of application of the instrument. Since such proceedings were currently covered by a draft convention on judgments being prepared by the Hague Conference on Private International Law, coordination in that area was required. Another issue that had been discussed was the form the instrument was to take. The Working Group had decided, as a compromise and in order to take into account the different levels of conciliation experience of each country, to continue to draft both a legislative text that would complement the UNCITRAL Model Law on International Commercial Conciliation and a convention.

2. **Ms. Morris-Sharma** (Singapore), speaking as Chair of the Working Group, said that over the past year, delegations had been highly constructive in their engagement with the Working Group. There had been a palpable spirit of compromise and delegations had worked to accommodate the different practices and levels of experience of jurisdictions with regard to conciliation. As a result, significant progress had been achieved and a compromise proposal had been made. The working papers produced by the Secretariat had been of outstanding quality throughout the process and the Secretariat had been responsive to all delegations.

3. **Mr. Schoefisch** (Germany) said that his delegation was highly satisfied with the progress made by the Working Group, and reiterated his delegation's support for what was an important compromise proposal. Recalling that there had been some discussion of moving the date of the next Working Group session to October, he said that his delegation was in favour of that change of date.

4. **Mr. Schnabel** (United States of America) said that the project on which Working Group II was working was an important one about which the private sector and the mediation community were enthusiastic. He hoped that work on the topic and, in particular, on a convention, might in the long term give the same boost to mediation at the international level that arbitration had received as a result of the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention). Such a convention would make companies more willing to invest time and resources in mediation and conciliation, as the resulting decision could then be relied upon. At the UNCITRAL Congress just held, it had even been stated that that type of instrument might help to encourage foreign direct investment. Therefore, the Working Group should be as ambitious as possible in moving forward.

5. He commended Working Group II on the compromise proposal developed at its sixty-sixth session. In that connection, he noted with approval the proposal's five interlinked elements, which should meet the needs of each delegation. The proposal allowed States to decide whether to implement the convention or the legislative provisions; it avoided overlap with the 1958 New York Convention and the "Judgments Project" of the Hague Conference on Private International Law by excluding settlements that were enforceable as arbitral awards or judgments; it avoided referring to "recognition"; it provided for exceptions relating to the conduct of conciliators; and it would apply by default, but would have an "opt-in/opt-out" option. The proposal represented a major step forward in resolving significant issues and should allow the project to be completed very soon.

6. **Mr. Apter** (Israel) expressed agreement with the comments made by the previous speakers. His

delegation appreciated the role that had been played by the Chair of Working Group II and the flexibility that had been shown by the delegation of the European Union and other delegations in reaching a compromise. The adoption of a convention on the enforcement of international settlement agreements resulting from conciliation was very important to his delegation, but he supported safeguards to enable litigants' rights to be preserved and ensure flexibility for States, especially with regard to the opt-in/opt-out issue. The compromise proposal fulfilled those objectives. He was confident that the progress made at the sixty-sixth session of the Working Group could be used as a basis for concluding the project within a year, thereby enabling the model legislative provisions and draft convention to be adopted at the fifty-first session of the Commission.

7. **Mr. Ashworth** (United Kingdom) said that his delegation supported the compromise proposal entailing the development of two parallel instruments, which would allow contracting States to decide which instrument was most appropriate for them. Any instrument thus created should establish clear rules guaranteeing legal certainty and predictability for parties to an international settlement agreement, with effective defences for resisting enforcement. In the light of the recent elections held in the United Kingdom, his delegation intended to consult the newly elected ministers on their views, but ministers had, to date, been very supportive of the work being done.

8. **Ms. Sabo** (Canada) expressed her delegation's satisfaction with the progress that had been made by the Working Group.

9. **Mr. Rosner** (Observer for the European Union) said that the sixty-sixth session of Working Group II had provided an opportunity for in-depth discussions, enabling a compromise that encompassed the five different but interlinked issues. That compromise represented a sound basis for further work on the project.

10. **Ms. Nguyen** (Observer for Viet Nam), reaffirming her delegation's commitment to the work of Working Group II, said that she valued the opportunity to engage in the topic under consideration and to reflect on her country's experience of commercial conciliation. Indeed, Viet Nam had enacted a decree on international commercial conciliation and provisions on the enforcement of settlement agreements in the national Court of Civil Proceedings.

11. **Mr. Mishkorudny** (Belarus) said that in 2013, Belarus had adopted a law on mediation that regulated conciliation proceedings. Therefore, the work of UNCITRAL on the enforcement of judgments was important to Belarus and would, it was hoped, promote the use of such proceedings. Belarus had already created a registry of mediators, but a great deal of work lay ahead. It would be appropriate for the draft convention to exclude disputes involving State organizations, since problems had already been encountered with regard to immunity and the implementation of decisions of arbitral tribunals relating to such disputes. He hoped that the work on the draft convention would soon be concluded and that the instrument would be as successful as the 1958 New York Convention.

12. **Ms. Sekhar** (India), expressing her full support for the work of Working Group II, said that the enforcement of settlement agreements was a very important topic for her delegation, which was closely following the Working Group's discussions in that area and was satisfied with the Group's progress. In India, further consideration was being given to the compromise proposal agreed at the sixty-sixth session of the Working Group and to the choice between the drafting of a convention or a model law.

13. **Ms. Gehmacher** (Austria) said that her delegation would continue to participate in the work of Working Group II in a constructive manner. The current dual approach with regard to the form of the instrument on enforcement of international commercial settlement agreements resulting from conciliation should be maintained without prejudice to the future form of the instrument.

14. **The Chair** encouraged Working Group II to continue its good work, and said that a decision regarding the date of the next Working Group session would be made the following week.

15. He took it that the Commission wished to take note of the progress of the Working Group as reflected in documents A/CN.9/896 and A/CN.9/901.

16. *It was so decided.*

The meeting rose at 4.45 p.m.

Summary record of the 1051st meeting, held at the Vienna International Centre, Vienna, on Monday, 10 July 2017, at 9:30 a.m.

[A/CN.9/SR.1051]

Chair: Ms. Morris-Sharma (Vice-Chair) (Singapore)

The meeting was called to order at 9.40 a.m.

Possible future work in the area of international dispute settlement

(a) Concurrent proceedings (A/CN.9/915)

(b) Code of ethics/conduct for arbitrators (A/CN.9/916)

(c) Possible reform of investor-State dispute settlement (A/CN.9/917, A/CN.9/918, A/CN.9/918/Add.1, A/CN.9/918/Add.2, A/CN.9/918/Add.3, A/CN.9/918/Add.4, A/CN.9/918/Add.5, A/CN.9/918/Add.6, A/CN.9/918/Add.7, A/CN.9/918/Add.8 and A/CN.9/918/Add.9)

1. **The Chair**, drawing attention to the documentation under the item, suggested that the Commission should discuss possible reform of investor-State dispute settlement on the basis of that documentation, including the topics of concurrent proceedings and ethics in its consideration of that issue.

2. **Mr. Spelliscy** (Canada) said that his delegation strongly supported the immediate commencement by a working group of work on reform of the framework for investor-State dispute settlement. Such work should consist of three components: first, the Commission should identify and consider concerns regarding existing mechanisms for investor-State dispute settlement. Given that some States had valid concerns regarding the existing system while others were satisfied with that system and doubtful of the need for reform, a multilateral discussion was necessary in order to ensure a clear approach in the face of that lack of agreement. There was a wealth of valuable studies and evidence on which the discussion could be based, including the work carried out by civil society groups, academics and such organizations as the United Nations Conference on Trade and Development (UNCTAD), which had published numerous evidence-based studies on some of the concerns raised and possible options for reform.

3. Secondly, consideration should be given to the question of whether the concerns thus identified should be addressed. In that regard, the way in which the current system was perceived by the public was important, particularly since investment disputes often involved questions of public policy. Moreover, the State's defence and awards made against it in investor-State disputes essentially required taxpayers' money; money that was intended for the provision of important government services. Thus, while governments must be held accountable for the wrongful treatment of investors, the public would accept such decisions only if the system was perceived to be fair and legitimate. On the other hand, some perceptions might be considered misguided or baseless, in which case it might not be necessary to respond to those perceptions with reform. It was therefore important to consider and analyse those perceptions and concerns.

4. Thirdly, if, after rigorous analysis and consideration, reforms to address some or all of the concerns identified were deemed justified, it would be necessary to consider and develop tools to respond to those concerns. To that end, the broadest possible discretion should be given to a working group as to what the options for reform would be, and premature decisions with regard to possible outcomes should be avoided. While his delegation considered that a permanent multilateral investment tribunal should be established, other delegations might feel that alternative approaches were more appropriate. It was important to work collaboratively towards solutions that were acceptable to all, and in that regard the Secretariat should at the same time continue its cooperation with other interested organizations. In view of the significant public interest in the topic, the Commission should also continue its tradition of transparency by inviting observers to participate in the discussion, thus ensuring that all viewpoints were represented. Should the work be undertaken, member and observer States should be encouraged to ensure the participation of officials with the highest possible level of expertise in their delegations.

5. **Mr. Schnabel** (United States of America) proposed that Working Group II should finish its current work on conciliation and then continue to focus on commercial dispute settlement issues. Work was not needed urgently on any of the three proposed topics, although it might be useful to address some of the issues referred to in documents A/CN.9/915 and A/CN.9/916 with respect to concurrent proceedings and a code of ethics/conduct for arbitrators. However, it would be preferable to proceed with only one of the latter two topics rather than allowing all three topics to remain on the Commission's agenda.

6. With regard to a code of ethics/conduct for arbitrators, the suggestions set out in paragraphs 38 and 39 of document A/CN.9/916 were the most promising areas for exploration. Any work in that area should begin with consideration of the relationship between the different sets of ethical rules that might apply to an arbitration procedure, such as those of the forum State and those of the home jurisdictions of the parties, and should address not only fixed rules applicable to

arbitrators but also rules applicable to other actors participating in arbitration. Any effort at the current stage to substantively harmonize ethics rules would be undesirable.

7. With regard to concurrent proceedings, given that the factual circumstances in each of the relatively limited number of cases in which that problem arose varied from case to case, it would be difficult to formulate recommendations for new approaches of general application. However, if other delegations felt that further work in that area was necessary, his delegation would have no objection to work on specific aspects of the topic. For example, work could be done to provide guidance on the discretion of tribunals under existing UNCITRAL arbitration rules, to the extent that tribunals already had tools to deal with the problems posed by concurrent proceedings, and to examine the approaches taken in existing treaties to minimize those problems.

8. His delegation was strongly opposed to work on possible reform of investor-State dispute settlement, as such work was unnecessary, undesirable and unfeasible. The notion of a single investor-State dispute settlement regime was imprecise; there was currently a highly diverse body of some 3,000 international investment agreements with significantly different approaches to both substantive investment protection and dispute settlement, and to refer to such a regime was oversimplistic and led to a narrow view of what reforms might be needed. Moreover, the suggestion that reform of the investor-State dispute settlement system was a new idea and that a multilateral effort was necessary to achieve meaningful reform of that system did not reflect the reality of the past 20 years, during which time States had been advancing such reform in myriad ways. For example, in the United States of America, such reform had been not only a matter of practice for more than a decade but also a core aspect of the legislation establishing negotiating objectives for United States trade agreements. With respect to both substantive treaty standards and provisions on dispute settlement, typical investment treaties concluded by the United States of America over the past fifteen years had already included reform in relation to certain topics and thus were radically different from the treaties typically concluded in Europe, where the issue of reform had only entered policy discourse over the past few years. Those differences in recent practice also happened to correlate with the significant decline in investor-State dispute settlement cases under United States agreements, in contrast to the trend under other treaties, particularly intra-European treaties. The diversity in approaches reflected careful internal deliberation by sovereign States based on their specific social, economic and political circumstances, and best reflected the interests of legislators, regulators and other stakeholders in those States. Some States had elected to modify and supplement existing arbitral rules and some to limit or eliminate access to arbitration, while others had decided to eliminate investment treaties altogether. Indeed, that diversity was the reason why past attempts to forge a single multilateral approach had generally failed; for example, the multilateral agreement on investment negotiated under the auspices of the Organization for Economic Cooperation and Development (OECD) over a period of several years had ultimately not been adopted. Such diversity needed to be respected, as it produced benefits that could be assessed and compared by States that were considering whether to engage in reforms.

9. While a single multilateral approach to reform that would apply to all States was undesirable for the reasons he had already outlined, discussion of the investor-State dispute settlement regime could be useful, as demonstrated by the work carried out in that area by other organizations, such as UNCTAD, if such work was aimed at empirical research, experience-sharing and capacity-building in order to help States to identify and implement approaches that best suited their individual circumstances.

10. Although it had been suggested that work on the topic might proceed on the basis of a broad mandate, without the need to envisage a particular outcome, he was concerned that some delegations would seek the establishment of a multilateral institution that replicated key features of the specific approach that they were pursuing in their bilateral negotiations, rejecting all other approaches on the basis of the claim that those approaches would perpetuate a system that was not fit for purpose. It was not in the interest of UNCITRAL to be a forum for such work, even if that work was framed as the subject of a broad mandate.

11. Any future work on dispute settlement issues should remain within the remit of Working Group II so that that work could benefit from the input of all delegations, including representatives of academia and the private sector, that had contributed to prior projects of that Working Group. His delegation would not favour giving any dispute settlement work as a new topic to Working Group III at the current stage, since the discussion of that topic in a different working group might make it difficult for delegations to attend the meetings of both working groups.

12. **Mr. Brown** (Observer for the European Union), expressing agreement with the representative of Canada that the Commission should give a mandate to one of its working groups to work further on reform of investor-State dispute settlement, said that the Commission should first discuss and identify problems within the existing investor-State dispute settlement system and examine ways to respond to those problems, availing itself of all available expertise and opinions, especially those of international organizations engaged in work on the topic, before envisaging work on particular paths. It was extremely important that the discussions should be multilateral and inclusive in view of the more than 3,000 investment treaties in existence globally and the

difficulties posed by their divergent approaches, as well as the difficulties inherent in the bilateral amendment of treaties. Accordingly, no assumptions should be made regarding the outcomes of those discussions. While the proposed establishment of a multilateral investment tribunal, the consideration of which his delegation would support, was one possible outcome, the advantages and disadvantages of such a solution, and indeed of any other proposals put forward, needed to be examined, especially in view of the important policy decisions involved. Another means of enhancing inclusiveness would be to maximize participation by holding working group meetings in locations other than Vienna and New York. He requested the Secretariat to examine that possibility should the proposed work on reform go ahead. A multilateral approach would itself facilitate the kind of inclusiveness that a bilateral approach could not achieve.

13. **Mr. Romero Martínez** (Mexico) said that it was important to highlight the great diversity among States in terms of their specific concerns and interests, the degree of sophistication of their investor-State dispute settlement mechanisms and their level of experience of investor-State arbitration; some States had extensive experience of being a respondent in such proceedings, while others had none at all.

14. While the work of the various institutions and international organizations with which the Secretariat had consulted on the issue was useful, it was States themselves that should have the main role in the discussion of that issue, because it was essentially their conduct that might give rise to legal action against them by investors, and they were the parties that might consequently be subject to international liability and the payment of compensation.

15. With regard to the suggestion that the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency) could be used as a model for possible reform in the field of investor-State arbitration, as referred to in document A/CN.9/917, it appeared that the questions of the form that such reform should take, the applicability of the reforms and other matters of substance were being considered before the need for and possible scope of reform had been properly addressed; that order should be inverted. Reform of the system of investor-State dispute settlement required coherence and the avoidance of fragmentation of that system. However, it was likely that the maintenance of the existing regime in parallel with a new multilateral regime would defeat those objectives.

16. The lack of common substantive provisions was the main reason for fragmentation and lack of coherence. In that regard, it was important that any reform should take into account the principle of effectiveness (*effet utile*) in treaty interpretation.

17. With respect to the possibility of adjustments to the current investor-State dispute settlement regime, he pointed out that it had always been possible to make such adjustments as circumstances evolved. For example, the Free Trade Commission of the North American Free Trade Agreement (NAFTA) had, in 2001, issued notes of interpretation on public access to documents and minimum standards of treatment, and in 2003 had issued a statement on non-disputing party participation. In addition, Mexico was itself updating a number of its international investment agreements. Those examples showed that the existing regime was sufficiently flexible to permit adaptation without radical change.

18. The matter of perceptions of the investor-State dispute settlement regime had been given substantial consideration during the discussions on the topic to date. However, since perceptions were subjective, they should be carefully evaluated.

19. In general, before any negotiations were initiated, a cautious approach to the question of reform was needed, and radical reform should be avoided; instead, specific aspects of the issue should be considered initially.

20. **Ms. Liu Huan** (China) said that in view of the difficulties experienced by the existing investor-State dispute settlement system as a result of evolving trends, including the diversification of forms of investment, adjustments should be made in a focused manner in order to increase parties' confidence in that regime. To that end, it was necessary to listen to the opinions and encourage the participation of different parties and to proceed on the basis of facts, which should be analysed and assessed objectively, rather than rushing to conclusions on the basis of perceptions. While States should be the main actors, public participation and transparency should also be maintained. The discussions should proceed step by step from the examination of ways to address the problems of the current regime and the reasons for those problems, and neither the time frame for nor the outcome of those discussions should be prejudged.

21. **Mr. Apter** (Israel) said he agreed with the representatives of Canada and the European Union that UNCITRAL should refer work on the reform of investor-State dispute settlement to a working group as a matter of priority. Although other bodies were carrying out work in that area, the Commission was an appropriate forum for discussion of the topic given its multilateral nature and its past successes in achieving consensus on many complex and challenging issues. The mandate for that discussion should be very broad and flexible, ensuring that all options were open, and all delegations should endeavour to find common ground as the basis for discussion. Any mechanism should be sufficiently flexible to accommodate the individual needs and systems of States, thus facilitating consensus, and the process should be inclusive, involving the broad participation of international organizations, observers

and experts. At the same time, that process should essentially be government-led. He agreed with previous speakers that the outcome of the discussions should not be prejudged. The concerns raised by other delegations should not prevent UNCITRAL from dealing with what was an important issue, since those concerns could be satisfactorily addressed during the course of the work. Since it was desirable to begin work on the topic immediately and Working Group II had other work to complete, he saw no potential problems in assigning the work on investor-State dispute settlement to Working Group III.

22. While his delegation had no objection to work on a code of ethics/conduct for arbitrators, the topic of concurrent proceedings should not be assigned to a working group at the current stage.

23. **Ms. Gómez Ricaurte** (Ecuador) said that her country attached importance to the reform of the investor-State dispute settlement system, which was necessary in view of the constant evolution of international law in response to new challenges. Concerns about the current system included the lack of accountability of arbitrators, the lack of an appellate court, the lack of transparency and the lack of a uniform approach to case law. Other important concerns related to the selection of arbitrators and how to determine their fees and the seat of arbitration. Consequently, UNCITRAL should discuss the establishment of a permanent arbitration system, which could resolve much of the uncertainty created by current mechanisms. As part of the United Nations system and as a multilateral body, UNCITRAL was the most appropriate forum for that discussion. She agreed with other speakers that it was important to hold an open discussion on the advantages and disadvantages of reform in order to address the concerns of all delegations. While that discussion should be held among States, it was also important to include experts from other international organizations and representatives of academia who had recently carried out studies on the subject. Such a discussion would be a priority for her country, which would like to see specific issues addressed. With regard to the establishment of a permanent court, in-depth consideration should be given to investor-State dispute cases to date. It would be useful to establish a regional court of first instance, to be supplemented by an appellate court.

24. **Mr. Sá Pires Filho** (Brazil) said that while his delegation did not object to the inclusion of the topic of reform of investor-State dispute settlement on the Commission's agenda, discussions should be limited to the improvement of the existing system. The resulting settlement mechanism should not be considered superior to other mechanisms, nor should the Commission promote its universalization. There was no standard solution that could be applied to all States; rather, countries should remain free to choose among different systems following a broad internal discussion aimed at balancing the interests of investors and States.

25. **Ms. Jamschon Mac Garry** (Argentina) said that she agreed with the criticisms of the current investor-State dispute settlement system as set out in documents A/CN.9/917 and A/CN.9.918, the problems of that system including the lack of independence and impartiality of arbitrators, the lack of coherence in decisions, the lack of corrective mechanisms, the length and cost of proceedings and the lack of transparency. She supported the consideration of the matter by a working group, which could establish the group members' preferred options and whether reform was needed, reporting to the Commission at its fifty-first session. Such work should be without prejudice to reforms on substantive issues or protection under bilateral investment treaties, which might be the outcomes of work conducted in other forums in the future. The discussion should be fully transparent and involve the greatest possible number of government officials from UNCITRAL member and observer States to ensure maximum legitimacy in the reform process, as well as representatives of international organizations such as the Permanent Court of Arbitration, OECD, the International Centre for the Settlement of Investment Disputes and UNCTAD. Subjects discussed could include the number of judges, provenance of arbitrators, selection processes, applicable law, costs and the court's budget, transparency issues and the need for firm and binding awards and decisions that had the same value as those handed down by local courts.

26. **Ms. Light** (Australia), noting the extensive criticism of the existing investor-State dispute settlement system and the fact that there had been much discussion on possible reform in other forums, including in particular the International Centre for the Settlement of Investment Disputes, OECD and UNCTAD, said that her delegation was open to the consideration of possible reforms but would need to consider those reforms fully and understand their implications. It was also important to establish the objective of any such reforms, to avoid adopting any one solution with excessive haste and to ensure that all available and potential options were given due consideration. In that connection, the working group selected to carry out the work should have a broad mandate and establish whether reforms were desirable, pinpointing the problems with the existing system and discussing the range of options for addressing them, which could include consideration of a multilateral court, as well as how any options would fit in with the existing system. She also seconded the view that the process should be government-led because of the important policy questions it posed. Participation in the working group by government officials should be encouraged to ensure the credibility of the process. However, such participation would have significant resource implications for governments. In order to encourage participation from as many regions as possible, she agreed with the observer for the European

Union that working group sessions should be organized in locations other than Vienna and New York. Her delegation was flexible in connection with the timing of the work, which could be conducted by Working Group III.

27. **Mr. Vinogradov** (Russian Federation) said that it would be useful for UNCITRAL to discuss the current investor-State dispute settlement system and possible improvements and reforms to that system. In that regard, the documentation provided by the Secretariat provided a good basis for further work. Such work must remain strictly within the confines of the Commission's mandate. The advantages and shortcomings of existing mechanisms must be understood, as well as the best direction for further development. While some felt that reform was necessary because the current system was failing to meet the expectations of investors, others considered that the system was skewed in the investors' favour. A step-by-step approach was essential, taking into account the advantages and disadvantages of reform and the positions of States, which were crucial actors in the establishment of an investor-State dispute settlement system. Specific initiatives could be undertaken only once a common position was established. Without such consensus, the desired result could not be obtained and attempts to reform that complex system at the unilateral or bilateral level could be counterproductive. Both permanent and ad hoc tribunals were currently used; investors were used to the current system and expected specific results in investor-State dispute settlements. It was important to avoid hasty and poorly planned initiatives that could be detrimental to the existing system. As the issue had not yet been discussed at the intergovernmental level in UNCITRAL, it was premature to refer to specific approaches on an ill-defined, general basis. Conclusions could be drawn only after the strengths and weaknesses of the investor-State dispute settlement system had been identified; it was premature to discuss specific options for reform. His country could support any format for the discussions that was based on consensus and a broad mandate, avoided prejudging any outcome and did not exceed the UNCITRAL mandate.

28. **Mr. Hernández Castilla** (Spain) said that the major shortcomings in the operation of the investor-State dispute settlement mechanism, as evidenced by the research already carried out on the topic and corroborated by users of that mechanism, had implications in terms of costs, fair treatment, efficiency and inclusivity and posed the problem of vested interests. Those shortcomings must be tackled using a multilateral, inclusive approach, and reforms should be undertaken as soon as possible and in an objective manner. He agreed that there was a need for a multilateral investment court, but that matter should be analysed objectively and in depth before any conclusion was reached. States must play a leading role but inputs by all other stakeholders, including experts and international organizations, should be sought.

29. **Ms. Mangklatanakul** (Thailand) said that if reform was to be taken up, one possible way to move forward would be to start working on the basis of a framework agreed upon by the UNCITRAL member States. Inclusiveness was key to successful reform, as many developing countries receiving foreign investment were progressively becoming investors. Considering the current state of play in international investment law, such reforms should not only focus on procedural aspects but also on substantive issues, taking particular account of the differences between the dispute settlement provisions of the various international investment agreements.

30. Thailand would like to see UNCITRAL take a broad approach to the consideration of the topic. Future areas for discussion could include reforms aimed at increasing the involvement of host States in interpreting international investment agreements. Since such agreements were governed by international law, the joint interpretation of treaty provisions by the parties should have some legally binding effect on the arbitral tribunals. That approach had been adopted in some Association of Southeast Asian Nations (ASEAN) foreign trade agreements.

31. Reform should be designed and implemented in such a way as to provide a host country with sufficient policy space under international investment rules to regulate investment activities on its territory in the public interest. There should also be a focus on increasing the transparency of the investment arbitration process, for example, through the establishment of an investment arbitration and appeal mechanism.

32. One area requiring further discussion was how to ensure the principles of independence and impartiality of arbitrators. Problems of conflict of interest arising from the multiple roles an individual could assume in investment arbitration cases could be tackled more efficiently. For example, if clear ethics rules or a code of conduct were established for investor-State dispute settlement procedures, roles could be distributed in a more balanced way.

33. The steady increase in the number of investor-State disputes had led to a wide range of languages and bodies being covered by investment treaties. It would therefore be timely to consider and clarify substantive issues under existing international investment agreements, such as fair and equitable treatment, expropriation and due process of law. Such work was not excessively ambitious for UNCITRAL and it would be more meaningful and beneficial for member States if the scope of that work were not limited to procedural issues.

34. **The Chair** said that both substantive and procedural solutions would be possible if UNCITRAL commenced work on investor-State dispute settlement.

35. **Mr. Kenfack Doujani** (Cameroon) said that the current investor-State dispute settlement system had

given rise to so many grievances that consideration must be given to its improvement. It was encouraging that even delegations that did not wish the Commission to undertake work on the issue agreed that such work would be well within the UNCITRAL mandate. While there were legitimate reasons for avoiding such a discussion, there were also sound reasons for discussing both the procedures and substance of a system that had led to and continued to generate so many problems, including the need for independence and impartiality among arbitrators. In the spirt of United Nations solidarity, even members of the international community that were not affected by such problems should endeavour to understand and assist in resolving those problems.

36. An extensive discussion of how clarity could be enhanced through the establishment of a supranational tribunal, and of a possible ethics code, could shed light on many of the issues raised, although it would be premature to envisage a specific outcome.

37. **Mr. Rundwal** (India) suggested that the Commission should request the Secretariat to provide more technical details on the important matter of preventing concurrent proceedings. Efforts could be made to elaborate general guidance on good practice in preventing concurrent proceedings under bilateral treaties, addressing the issues of forum shopping, treaty shopping and prevention of the misuse of investor-State dispute settlement.

38. Furthermore, there was a need for harmonized rules on ethics in international arbitration. Although existing rules addressed impartiality, independence, disclosures and the scope of ethical standards, ample leeway was still granted to the authority responsible for addressing challenges against the arbitrator. Consequently, specific rules and guidance on ethics were required in order to reduce uncertainty. UNCITRAL might consider formulating such rules along the lines of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, thus providing some clarity on disclosure norms.

39. With regard to possible reform of investor-State dispute settlement, he was unsure whether the Commission should discuss the establishment of a multilateral investment tribunal, because that was a wider policy question that should be discussed in consultation with other international bodies. The Commission could continue technical work on reforms within the existing mechanism, as the UNCITRAL Arbitration Rules were extensively used in investor-State dispute settlement. The Commission could work towards devising rules to address inconsistencies in the existing framework. His delegation would support reforms to address the ethics of arbitrators and conflicts of interest, the lack of a review mechanism, frivolous, unmeritorious and unfounded claims and the costs of proceedings, and strongly encouraged any work by the Secretariat in those areas. With regard to an appeal mechanism, his delegation preferred a review mechanism in the form of appeals and a single appellate body. However, further consultations on that matter should be conducted with other organizations, including with regard to the possible form and structure of such a mechanism. There should also be a focus on alternative modes of dispute settlement, including domestic remedies, compulsory negotiations and conciliation.

40. **Ms. Nguyen Thi Ngoc Quyen** (Observer for Viet Nam) said that her country had negotiated and concluded bilateral investment agreements and foreign trade agreements with several countries, and that many of those agreements provided mechanisms to resolve investor-State disputes. It was important to have an effective and fair mechanism that struck a balance between the right of foreign investors to protection and the host State's right to regulation. Viet Nam therefore welcomed in-depth discussions on increasing the effectiveness of the investor-State dispute settlement mechanism. UNCITRAL was a highly appropriate forum for discussion of that matter, and advantage should be taken of its inclusiveness and the expertise and practical experience of its member States, observer delegations representing international organizations, non-governmental organizations and academia and other relevant stakeholders.

41. The current investor-State dispute settlement system was not uniform but based on some 3,000 international investment agreements. While her delegation highly appreciated the research paper prepared by the Geneva Center for International Dispute Settlement, entitled "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?" (available from the UNCITRAL website), as well as the documentation prepared by the Secretariat to facilitate discussion of the issue, every country should proceed on the basis of its own experience, in consultation with the Secretariat and relevant stakeholders, to review and analyse thoroughly the perceived problems affecting the system and their underlying causes before consensus on any proposed solutions was sought. She supported the view that the mandate should be broad enough to enable the achievement of that objective. Since reform was not necessarily the ultimate objective of the proposed work, it might be preferable to avoid the word "reform" when referring to that mandate.

42. **Mr. Sorieul** (Secretary of the Commission), responding to the suggestion made by the observer for the European Union with regard to the location of working group meetings, said that from the administrative and technical perspectives it was possible to hold those meetings in locations other than Vienna or New York, perhaps on the premises of the regional economic commissions or at the duty stations in Nairobi

or Santiago, where the United Nations had the necessary infrastructure at its disposal. However, there were also financial considerations; the Secretariat did not have a budget for organizing meetings in such locations. Even if the documentation was the same in all locations, Secretariat staff would have to travel, as might some conference service staff and teams of interpreters. The regional commissions might not have much flexibility in their schedules to accommodate additional meetings. Consequently, the extra cost would probably have to be met through extrabudgetary resources and it might be difficult to secure member States' approval for the allocation of resources for such meetings. When UNCITRAL had been established, there had been universal agreement that its meetings should be held alternately in different regions, initially in Geneva and New York and later in Vienna and New York. That agreement already represented a compromise.

43. **Mr. Liptak** (Observer for Slovakia) said that his delegation would support a broad mandate on all three agenda sub-items in order to build confidence in the investor-State dispute settlement system and to maintain its legitimacy. His country's experience as a negotiator of bilateral investment treaties and as a respondent in investor-State dispute settlement cases had highlighted to it the importance of reform of the current system. Public consultations, surveys, conferences and other events on the subject had shown that concerns about that system were valid and should be addressed, particularly at a time when the commercial arbitration community had also begun to consider reform. As more than 3,000 investment agreements currently existed, a multilateral approach to reform was preferable. He endorsed the comments made by the representatives of Canada and the European Union and agreed that UNCITRAL should undertake government-led reform that would also involve experts from non-governmental organizations, academics and other stakeholders.

44. **Ms. Pierotic Mendia** (Chile) said that Working Group II should focus either on the issue of concurrent proceedings or on a code of ethics/conduct for arbitrators rather than the possible reform of the investor-State dispute settlement system. However, if the prevailing view was that UNCITRAL should focus on that reform, her delegation would not stand in the way of a broad mandate in that area. It was, however, important that such work should be progressive and results-based and should begin with the clear identification of problems posed by the system. The outcome should not be prejudged and a diagnostic approach should be adopted in order to identify all possible solutions before discussing and adopting a specific instrument. All concerns expressed during the current discussion should also be taken into account.

45. **Mr. Marquez García** (Colombia) said he agreed that a multilateral approach should be taken to the reform of the investor-State dispute settlement system and that UNCITRAL was an appropriate body to conduct such reform, as experts in arbitration and other organizations that could contribute to the discussion participated in its work. The topic should be approached in a systematic manner, whereby substance should be considered before matters of form, and the concerns raised during the current discussion and the needs of all stakeholders should be taken into account. The effectiveness of any proposed methods of implementing reform should be considered and alternative types of reform evaluated. He supported the proposal for the establishment of a permanent international investment court coordinated by UNCITRAL, but would be open to accepting any outcome of further deliberations in that regard.

46. **Mr. Glenz** (Germany) said that he seconded the view that the reform of investor-State dispute settlement based on a multilateral system should be researched and discussed within UNCITRAL as a matter of priority. That work should be assigned to Working Group III, whereas the important topic of concurrent proceedings in commercial and investment arbitration should be allocated to Working Group II after the Group had finished its current work. He also supported the proposal that a multilateral investment court with a built-in appeal mechanism should be created, but agreed that UNCITRAL should be given a broad mandate, with no premature decisions made as to what form the product of the Commission's discussions should take. The reform process should build on the work of international organizations such as UNCTAD, OECD, the International Centre for Settlement of Investment Disputes, the Permanent Court of Arbitration and the World Trade Organization (WTO) and allow members of those organizations to contribute to the discussions, but should be government-led in order to benefit from the expertise of the government officials of member and observer States in treaty law and investment matters.

47. **Mr. Biris** (Romania) said that his delegation would welcome the inclusion of investor-State dispute settlement reform on the agenda, and the topic should be referred to a working group for in-depth analysis. The possibility of a multilateral investment court should be investigated, as that would provide a solution to the shortcomings of the current system. The establishment of a public forum with highly qualified judges and strict ethical standards would address the concerns of the public about the current system, which was widely seen as being unfair to States, and would reduce opposition among various groups to the adoption or implementation of investment provisions contained in free trade agreements. He hoped that reform would improve transparency, the accountability of adjudicators and the consistency and quality of awards.

48. **Mr. Kozarek** (Czechia) said that his delegation supported the proposal for reform of the investor-State dispute settlement system within the framework of UNCITRAL, on the understanding that the result of such discussions would not be prejudged.

49. **Mr. Lapiere** (Observer for Belgium) said that his delegation would also support, on the same understanding, the in-depth discussion by a working group of possible options for multilateral reform of the investor-State dispute settlement system. The possibility of an international investment court with an appeal mechanism should be examined as part of that discussion. The reform process should be inclusive and transparent, and records of the discussions should be made public and should draw on the work of other international organizations such as OECD, UNCTAD, WTO and the International Centre for Settlement of Investment Disputes.

50. **Ms. Toku** (Japan) said that no empirical evidence had yet been provided in support of the arguments presented in the documentation prepared by the Secretariat and during the discussions to date in favour of investor-State dispute settlement reform and, in particular, the establishment of an international investment court. Instead, repeated reference had been made to perceptions. Although public perception was important, UNCITRAL should not be a forum where United Nations Member States worked solely on the basis of perception. If public perception did not reflect reality, it was the responsibility of governments and international organizations to convince the public that the reality was different, and to provide their constituents, and civil society, with facts and data that enabled them to make accurate and objective judgments.

51. That was precisely what had been done in her country: when Japan had started to negotiate the Trans-Pacific Partnership, there had been considerable criticism of investor-State dispute settlement as infringing State sovereignty, unduly restricting the regulatory space of the State and favouring the rich and powerful. However, following lengthy debate in the National Diet, that criticism had diminished significantly as public understanding of investor-State dispute settlement improved. Japan continued to negotiate and conclude investment treaties that were approved by an overwhelming majority in the Diet, including by members that had previously been the harshest critics of investor-State dispute settlement. It therefore could not be claimed that public perception of the investor-State dispute settlement system was universally negative, and an international organization should not base its work on public perception in only some States.

52. Facts and perceptions aside, an international investment court might not be the best solution to the perceived problems. It had been said that one of the advantages of such a court would be the possibility of ensuring consistency in treaty interpretation. She wondered, however, what kind of consistency was envisaged, given that there were more than 3,000 investment treaties and, under relevant treaty interpretation rules, even identically worded provisions could be interpreted differently when they were in different treaties, since they must be understood in a specific context in each case. If the hope was that such a court would produce a coherent body of international investment law, while such an intention was laudable, that court would be a de facto legislator; a universal administrative court vested with enormous law-making power. States might wish to conclude differently worded treaties to achieve different results, but a permanent international court might well disregard differences in wording as trivial. Moreover, it would be paradoxical to attempt to address the criticism that investor-State dispute settlement infringed State sovereignty by creating a powerful court that could override a State's wishes or treaty negotiations. Therefore, it might not be prudent to take such a step without being able to envisage the consequences. It was important first to garner evidence from research that the current investor-State dispute settlement system was truly flawed, drawing on the practical experience of practitioners and organizations that had been engaged in investor-State arbitration for many years, rather than on perceptions. In the absence of such research, it would be premature to decide on a specific mandate. While her delegation recognized the problems posed by the investor-State dispute settlement system, priority should be given to concurrent proceedings and a code of ethics/conduct for arbitrators, which were recognized in practice as issues that needed to be addressed. Although such an incremental approach might not satisfy those that wished to see a revolutionary change in international investment law, a modest and prudent approach would achieve more. With regard to the suggestion by several delegations that work should be undertaken on identifying current problems posed by the investor-State dispute settlement regime, it was not appropriate to dedicate precious working group time and resources to such preliminary studies on so broad a topic.

53. **Mr. Stifter** (Austria) said that his delegation strongly supported the statements of the representatives of the European Union and Canada. An open and inclusive discussion on the multilateral reform of the investor-State dispute settlement system would be particularly welcome on the basis of a broad mandate given to a working group. Although the legal basis of the current system of investment protection was mostly bilateral, the underlying issues and possible shortcomings were multilateral in nature; deliberations should therefore be held at the multilateral level and UNCITRAL would be an appropriate forum for those deliberations.

54. **Mr. Mathate** (Observer for South Africa) said that his delegation was fully in favour of the review of the investor-State dispute settlement system. The decision of South Africa to replace its current investor-State dispute settlement regime with a State-to-State mechanism in its future bilateral investment treaty negotiations was based on its experience as a respondent in investor-State dispute settlement cases. A review of the current system was therefore critical and should not

simply be a process that legitimized the current system by elevating it to the status of an international regime. Any future system should take public policy issues into account; it should not focus solely on protecting the interests of investors, but should consider a broader range of stakeholders that might be affected by investments. The review needed to strike a delicate balance between the interests of States and those of investors. The option of including the State-to-State dispute mechanism system should be considered as a possibility for States that might not favour the investor-State system. The system should have two tiers so that it provided both for a court of first instance and for an appeal mechanism. If possible, the discussion should not be limited to the review of the investor-State dispute settlement system, but should also involve the review of substantive provisions in order to tackle the shortcomings of the current system fully.

55. **Mr. Bellenger** (France) welcomed the possibility of exploratory discussions concerning possible reform of the investor-State dispute settlement system, which could lead to the creation of a multilateral legal instrument. As several meetings of experts had already been held and the Secretariat had issued a considerable volume of documentation on the topic, and as there was already evidence of agreement on certain issues, it would now be appropriate for a working group to assess the current situation and possible future options.

56. **Mr. Wallberg** (Observer for Sweden) said that his delegation would also support further work on the possible multilateral reform of the current investor-State dispute settlement system. The possibility of establishing an international investment court with a built-in appeal mechanism should be explored, but the outcome of the discussions should not be prejudged. The discussions should be an inclusive, government-led process which would build on the work being carried out by other international organizations and include other participants with the relevant expertise.

57. **Ms. Zaharlieva** (Bulgaria) said that her delegation too was in favour of a broad mandate for the discussion of the proposed reform, which should be multilateral, inclusive and government-led and should offer opportunities for sharing experience and exchanging opinions with stakeholders and relevant international organizations.

58. **Mr. Alafassi** (Kuwait) said that the existence of over 3,000 investment treaties showed the importance of investor-State dispute settlement, and significant progress had already been made in the discussions to date. Important elements to consider further were the code of ethics/conduct of arbitrators, the rules of procedure applicable to arbitration, transparency, conflicts of interest and the execution of awards; however, it would currently be premature to decide on the establishment of an international investment court. Working Group II was the most appropriate body for exploration of the issue.

59. **Mr. Soh** (Singapore) said that he welcomed the open discussion concerning investor-State dispute settlement. As other representatives had already stated, it was important that the outcome of possible further deliberations should not be prejudged and that all options should be considered. The starting point of the discussions should not be a far-reaching proposal to establish a permanent international investment court with an appeal mechanism, but rather to explore the possibility of improving existing mechanisms. All stakeholders should be involved in the discussions and the focus should be on deciding which elements would be desirable in an ideal system rather than criticizing the current system. A multilateral system would require multilateral support, which might not be forthcoming. He would prefer the discussions to focus on the broad objectives of making the existing system more cost-effective and fit for purpose.

60. **Mr. Lee Yongsoo** (Republic of Korea) said that his delegation was open to discussing the reform of the investor-State dispute settlement system, and that UNCITRAL was an appropriate forum for such discussions. It was important that conclusions should not be reached in haste or any outcome prejudged, and previous UNCITRAL experience should not be discounted when considering whether possible solutions might also give rise to additional problems. A key question was whether the working group selected to carry out the work should discuss key issues involving fundamental restructuring or more straightforward issues on which consensus was already in evidence.

61. **Ms. Malaguti** (Italy) expressed support for the statement by the representative of Canada at the outset of the meeting. Noting that the investor-State dispute settlement system presented many problems and shortcomings that needed to be addressed, and that there were many different options to be explored, she said that her delegation stood ready to participate in multilateral and inclusive work on the topic.

62. **Ms. Treier** (Observer for Estonia), expressing support for the statements by the representatives of the European Union and Canada, said that her delegation was also in favour of an inclusive and government-led process and shared the view that UNCITRAL was an appropriate forum to host discussions on that topic.

63. **Mr. Maradiaga** (Honduras) said that States should not lose sight of the fact that dispute settlement was of particular significance in the context of globalization. In that regard, it was important to note the recognized role of UNCITRAL in the international context. In view of the different approaches that had been highlighted, it was important to seek common ground among States, with the participation of the various relevant organizations, and particularly important for experts on the subject to participate in the discussions in order to advise States so that a decision acceptable to all could be adopted. For that reason, the current momentum

should be maintained and all States and organizations should contribute to the overall result.

64. **Mr. Sikiric** (Observer for Croatia) said that his delegation would support work on possible reform of the investor-State dispute settlement system, particularly for the reasons expressed by the representatives of the European Union and Canada. The work should be entrusted to a working group, which should be given a broad mandate. UNCITRAL legal instruments were elaborated in an intergovernmental process involving a variety of stakeholders and in a transparent manner, and were adopted by consensus. It was of utmost importance for future work on reform of the investor-State dispute settlement system to maintain that level of inclusiveness, transparency and consensus, which was a trademark of the legislative activity of UNCITRAL.

65. **Mr. Moollan** (Mauritius), expressing support for the approach suggested by the representatives of Canada and the European Union, said that two different meanings could be attributed to the term "broad mandate"; the first was meaningful and careful engagement with a clearly difficult subject in good faith in order to find consensus at the multilateral level, while the second was a way of turning a blind eye to relevant issues. He was heartened to see that all but two delegations had appeared to take the former approach.

66. Meaningful, albeit careful, engagement was important because the work carried out by the Secretariat had made clear that there was a legal basis for reform of the investor-State dispute settlement system. The need for such reform had also emerged with increasing clarity over the past few years and was now supported by evidence.

67. The political will to pursue such reform had also become clear. It was important to realize that States were at an important crossroads and the opportunity for reform would not arise again. A multilateral forum was needed for results-driven and meaningful discussions. It was inescapable that attempts at reform to date had failed; consequently, the task now fell to States. Legitimacy was about perception, and the negative press coverage of the current investor-State dispute settlement system could not be ignored. The politicization of the system was hindering rather than fostering the development of trade and investment rules, as States that would otherwise welcome such rules were apprehensive of the real or perceived legal risks now associated with them. The way forward might ultimately be the establishment of a new multilateral investment court, most probably using the Mauritius Convention on Transparency as a model; however, his delegation agreed that such an outcome should not be treated as a foregone conclusion.

68. He anticipated that discussions on the matter would focus on establishing the positions of States, rather than on achieving consensus. Since an optional model was being discussed, he urged States that did not support the mandate not to block progress for those interested in taking the matter forward. The Commission should seize what was a unique opportunity to carry out meaningful work on the issue. UNCITRAL was a forum for the harmonization of laws. Fragmentation offered no benefit, and it did not help to advocate such fragmentation simply because it suited a State's own policy interests. States were advocating for more coherent legal principles to be applied to specific treaty language on a context-sensitive basis.

69. **Ms. Szymanska** (Poland) said that her delegation shared the view that reform both of procedural rules and of standards of protection in investor-State dispute settlement was needed. Her delegation was fully aware of the complexity of the issue and the potential for political influence and that many questions would have to be answered by experts before the direction of the work could be determined.

70. With regard to the proposal for an international investment court, she underlined the importance her delegation attached to the appointment of judges, and said that such a court should include judges from all States that were contracting parties to the treaty establishing the court.

71. In view of the difficulties posed by concurrent proceedings, any solution that would limit the likelihood of concurrent proceedings would be welcome. There were also valid reasons for starting work on a code of ethics for arbitrators, but that should not be given priority.

72. **Ms. Teo** (Observer for New Zealand) said she agreed that there were a number of questions that needed to be considered before any further work on possible reform of the investor-State dispute settlement system was carried out, including what the reform was intended to achieve and what problems the existing system posed, and that it was important not to prejudge the outcome of that work. Any mandate for such work should be sufficiently broad to enable consideration of the full range of issues and possible solutions, including possible updates to existing models of investor-State dispute settlement. Her delegation would support a government-led process with the participation of relevant experts. Within a multilateral context, her delegation was ready to continue to exchange information on an informal basis, and to discuss issues at the technical level.

73. **Mr. Nauta** (Observer for the Netherlands) expressed support for the positions of the representatives of the European Union, Canada and Mauritius. Noting that his country was party to ninety bilateral investment treaties, he said that investment protection definitely improved the investment environment, and therefore offered clear added value. Reform of the investor-State dispute settlement system was a necessity, as was widely felt among non-governmental organizations, the public, academia

and other treaty partners. In general, his delegation was in favour of a rule-based multilateral trading system, of which multilateral negotiations were a part. Moreover, trade should not only be about free trade, but also about fair trade. Negotiations should therefore be transparent and inclusive, which would be guaranteed if they were held in the context of UNCITRAL. His delegation therefore supported the idea of starting discussions on reform within UNCITRAL, and was also in favour of the establishment of a multilateral investment court.

74. **Ms. Kaufmann-Kohler** (Switzerland) said that her delegation supported a broad mandate for a review of the need and possible options for reform, including the possibility of rules or other solutions with regard to concurrent proceedings and a code of ethics for arbitrators. UNICITRAL was an appropriate forum for such work, since it was transparent, government-driven and inclusive and benefited from the expertise of various organizations involved in investor-State dispute settlement. A mandate should be given without delay to Working Group III, which was currently available, in order to allow Working Group II to complete its current work without undue pressure.

75. She rejected the argument that there was no need for review or reform of the current investor-State dispute settlement system, as there were many recurrent issues arising from the different dispute resolution treaties and systems within investor-State arbitration that called for a consistent approach. There were no issues of shared concern that would not benefit from common solutions for the harmonization of international law. The suggestion that the work should proceed on the basis of facts rather than perceptions could be discussed further. While there was some evidence of a number of deficiencies in the current system, there were also achievements of the system that should be taken into account.

76. The establishment of a permanent investment court should not be the objective of the discussions; instead, delegations should engage in a review of the needs of the various stakeholders and possible forms of reform, taking all views into account. UNCITRAL was the ideal forum for such a review, since it was experienced in reconciling conflicting views and finding consensus. There should be no prejudgment of the outcome of the review. Future work should not be limited to concurrent proceedings and a code of ethics, although those topics should be included in the discussions on reform as part of a broad mandate. The issue of reform of substantive protection standards could also be discussed, although it was felt by some delegations, including her own, that it would be more feasible to limit work to procedural aspects, on which it would be easier to achieve consensus. The current debate had shown that the issues under consideration were shared concerns that called for multilateral consultations and efforts, which would ensure optimal solutions.

77. **Mr. Cooper** (United Kingdom) said that he supported the objectives of ensuring the fair outcomes of claims, high ethical standards for arbitrators and increased transparency of tribunal hearings. In that context, with regard to possible reform or improvement of the investor-State dispute settlement system, he supported further conceptual work on that subject within UNCITRAL, without prejudgment of the final conclusions. Further analysis was required to develop a robust evidence base that demonstrated how that work would improve the current dispute resolution framework and, especially, help to ensure better, fairer and more consistent decision-making. The establishment of a multilateral investment court was one possible solution, but there were a number of practical considerations that would need to be explored as part of the discussions, including the need to clarify how such a body would be established and resourced. He agreed that it was vital that such future discussions and negotiations should take place in a forum where governments would be represented and States consulted fully and regularly in order to ensure a system that was satisfactory to all, and urged the Commission to take into account the views of the various stakeholders in the course of that discussion, including civil society, the legal community and investors.

78. **The Chair**, summing up the discussion thus far, recalled that two delegations had opposed work on the investor-State dispute settlement system on the basis that such work was neither necessary nor desirable, and might even be premature. It had been stated that public perception of the existing system was not universally negative. The view had also been expressed that it might be inaccurate to describe the investor-State dispute settlement system as a single system because of the network of treaties concerned, and in that regard it had been pointed out that a multilateral investment court might not be able to resolve inconsistencies appropriately. It had also been pointed out that certain solutions might need to be based on context, and that some solutions were already being implemented on a rolling basis.

79. All other delegations that had made statements had either been supportive of or would not object to the commencement of work on reform, beginning with the consideration of concerns with regard to current investor-State dispute settlement mechanisms and possible solutions, if any. A preference had been expressed for a broad mandate to be given to a working group. There would be no assumptions as to the outcomes of that mandate, including whether or not reform was needed. Accordingly, the view had been expressed that the mandate should not refer to reform but, rather, should refer to the topic in a more neutral manner. The Commission had also been encouraged to undertake a fact-based rather than perception-based approach to the proposed work.

80. If reform was to be undertaken as the next phase, the Commission would need to consider which parts of the system were to be reformed and the tools needed. While the importance of a multilateral forum for the discussion had been emphasized, again no assumptions would be made as to whether those tools might be bilateral or multilateral in nature. Most delegations had expressed a preference for procedural solutions, but some delegations had also expressed an interest in discussing substantive solutions, for example, with regard to standards of protection.

81. In general, delegations had appeared open to considering the topics of concurrent proceedings and ethics. Some delegations had expressed support for the establishment of a permanent or regional multilateral tribunal and/or an appellate process, although others had expressed reservations in that regard. However, there appeared to be general agreement that all options needed to remain on the table. It had been felt important to examine how the tools sought would fit into the existing system so as to promote consistency rather than fragmentation, and also to accommodate the different contexts and different levels of experience of States. It had been emphasized that there should not be a one-size-fits-all solution.

82. Delegations had also highlighted the need for a transparent and inclusive approach and for a close collaborative process with relevant experts, especially government experts but also experts from observer States and organizations. It had been felt that the process should be government-led and that States should begin engaging in discussions in an open-minded and careful manner, without haste. In view of the importance of consensus, it had been considered that UNCITRAL was an appropriate forum for the discussions.

The meeting rose at 12.30 p.m.

Summary record of the 1052nd meeting, held at the Vienna International Centre, Vienna, on Monday, 10 July 2017, at 2 p.m.

[A/CN.9/SR.1052]

Chair: Ms. Morris-Sharma (Vice-Chair) (Singapore)

The meeting was called to order at 3.25 p.m.

Election of officers (*continued*)

1. **Ms. Angell-Hansen** (Observer for Norway), speaking on behalf of the Group of Western European and Other States, said that the Group wished to nominate Ms. Sabo (Canada) for the office of Vice-Chair.

2. *Ms. Sabo (Canada) was elected Vice-Chair by acclamation.*

Possible future work in the area of international dispute settlement (*continued*)

(a) Concurrent proceedings (*continued*) (A/CN.9/915)

(b) Code of ethics/conduct for arbitrators (*continued*) (A/CN.9/916)

(c) Possible reform of investor-State dispute settlement (*continued*) (A/CN.9/917, A/CN.9/918, A/CN.9/918/Add.1, A/CN.9/918/Add.2, A/CN.9/918/Add.3, A/CN.9/918/Add.4, A/CN.9/918/Add.5, A/CN.9/918/Add.6, A/CN.9/918/Add.7, A/CN.9/918/Add.8 and A/CN.9/918/Add.9)

3. **The Chair** said that the report of the session would reflect the Commission's earlier agreement to consider the three topics under agenda item 15 together.

4. Since the large majority of delegations had, to a greater or lesser extent, supported the proposal for work on the reform of investor-State dispute settlement, and in order to reflect the discussion in the report of the session, the following text would be included in the section of the draft report on item 15:

> "Having considered the topics in documents A/CN.9/915, A/CN.9/916 and A/CN.9/917, the Commission decided on the following mandate.
>
> The Commission entrusted Working Group [III] with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). In line with the UNCITRAL process, Working Group [III] would, in discharging that mandate, ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be government-led, with high-level input from all governments, consensus-based and be fully transparent. The Working Group would proceed to: (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate, and that any solutions devised would be designed taking into account the ongoing work of relevant international organizations and with a view to allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s)."

While most delegations had appeared to agree that the mandate to work on reform of investor-State dispute settlement should be given to Working Group III rather than Working Group II, there were concerns that that would result in parallel processes that would place a strain on resources, especially the resources of developing countries. She asked the Secretary to provide clarification with regard to the scheduling of the working groups' sessions.

5. **Mr. Sorieul** (Secretary of the Commission) said that Working Group II currently had a number of items on its work programme for its next two sessions. The Working Group's next session was scheduled to take place from 2 to 6 October 2017, subject to confirmation by the Commission at the current session. If those dates were confirmed, the Commission could decide whether or not to interrupt the Working Group's current work to take up the proposed new topic, an idea that might not appeal to all delegations. Another option was to begin work on the topic in Working Group III, the mandate of which had been terminated the previous year. Although some of the conference time that would ordinarily have been available to that Working Group had already been set aside for other working group sessions, as agreed by the Commission at its forty-ninth session, it would be possible to use the remainder of that time to convene a session of Working Group III in Vienna from 18 to 22 December 2017. As of 2018, the conference time allocated to the currently inactive Working Group III could return to normal, allowing a second session to be held in New York from 2 to 6 April 2018. It was for the Commission to decide whether it was advisable for the two working groups to work in parallel. Although that would entail a heavy burden, it was feasible. Numerous documents had already been prepared that could be used as a basis for discussions at the initial session of Working Group III. Therefore, the preparation of sufficient documentation was not a concern. Internal organization would be required in

order to determine how to combine the activities of Working Groups II and III, make available the resources necessary for work to be carried out in both Working Groups, and schedule the sessions of both Working Groups to ensure that they were sufficiently far apart to allow the Secretariat to prepare future documentation. However, those details could be settled at a later stage.

6. **The Chair** added that if Working Group II was given the mandate, the work could perhaps begin during the Group's sixty-eighth session in February 2018 or the following session in September 2018.

7. **Mr. Schoefisch** (Germany) expressed his delegation's support for the draft mandate. It was very important to commence without delay the work that had been discussed at the Commission's 1051st meeting. The mandate to undertake that work could be given either to Working Group III or to Working Group II, either of which could use the two weeks available in December 2017 and April 2018. The Commission could discuss the matter in further detail and make a final decision at the end of the week, during the discussion of its work programme under agenda item 21, to allow other proposals to be made with regard to Working Group III.

8. **The Chair** reminded delegates that the aim of the current discussion was to reach a provisional decision with regard to when the work on investor-State dispute settlement should commence, in order to guide the discussion that would take place under agenda item 21, rather than to determine which working group should be given the mandate to carry out that work.

9. **Mr. Moollan** (Mauritius) said that the draft mandate provided the Working Group with valuable guidance. With regard to the word "consensus-based", his understanding was that the draft mandate simply reflected usual UNCITRAL practice, although there had been occasions on which the Commission had had to move forward without consensus being reached, and interpretations as to what "consensus" meant might differ. While one of the areas of interest to a number of delegations was the creation of a multilateral adjudicatory body, it was unlikely that all delegations would agree to mandate the Working Group to work towards the establishment of such a body. He understood "consensus-based" to refer to deliberations based on broad agreement that an instrument should be developed with a view to its possible adoption, as in the case of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency), rather than consensus that that instrument should be adopted.

10. He agreed with the delegation of Germany that work should commence on possible reform of investor-State dispute settlement as a matter of priority, ideally during the current year. The obvious solution appeared to be to give the mandate to Working Group III, and for that Working Group to hold its next two sessions in December 2017 and April 2018.

11. **The Chair** said that the use of the term "consensus-based" in the mandate was not intended to signal deviation from the way in which consensus was usually understood in UNCITRAL. However the Working Group chose to proceed, it would operate in accordance with that understanding.

12. **Mr. Brown** (Observer for the European Union) said that although he agreed with the Chair's comments, it was important to keep in mind the possibility of a situation in which, as had happened previously in working group sessions, only some States members were ready to move forward. There had been an understanding, during previous work, that those members who were not ready to proceed should not prevent other members from doing so. In that regard, he supported the comments of the representative of Mauritius.

13. With regard to timing, it was desirable for work to begin on the reform of investor-State dispute settlement as soon as possible. Given that that work might begin only in February or September 2018 if Working Group II was given the mandate, he suggested that the Commission should instead give the mandate to Working Group III so that, subject to confirmation of that arrangement under agenda item 21, work could commence before the end of the current year and the Secretariat would have a reasonable amount of time to prepare documentation between sessions of the different working groups.

14. **The Chair**, referring to the comments made with regard to consensus, said that in UNCITRAL, a "consensus-based" process involved evaluating all possible solutions in order to agree on a model enabling all delegations to find a way forward. That understanding was based on the discussion that had taken place with regard to consensus during consideration of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the Mauritius Convention on Transparency.

15. **Mr. Sorieul** (Secretary of the Commission) said that unless stated otherwise, references to a consensus-based process should be understood simply as reiterating usual UNCITRAL working methods. Consensus was always a delicate concept in the United Nations context. It was not the same as unanimity; rather, consensus was a mechanism that did not allow any one country to veto a project. In practice, it meant a substantial majority; in other words, where no more than a few countries objected to a given solution for compelling reasons. If consensus could not be reached, it was possible to use the default procedure of voting, which was generally regarded as undesirable because only a simple majority of members present and voting was required in order for a decision to be adopted; indeed, there had never been a vote on a matter of substance at UNCITRAL.

16. **Mr. Moollan** (Mauritius), clarifying his earlier comments, said that his concern in respect of the use of the wording "consensus-based" had been that certain delegations might seek to use that wording to justify blocking any discussion of an instrument that they did not intend to adhere to, such as a treaty creating a multilateral investment court. That would be contrary to UNCITRAL

practice to date, which distinguished between instruments that were binding on all member States and those that were not. Citing the Commission's earlier work on transparency as an example, he recalled that the UNCITRAL Arbitration Rules had been amended to clarify the link between those Rules and the Rules on Transparency, which had prospective effect for all member States. Delegations had worked together to reach consensus on establishing transparency rules that were acceptable to all. An opt-in mechanism had then been devised to enable those States that wished to apply the Rules on Transparency to their existing treaties to do so. As a further example, the expertise of all delegations had been drawn upon in drafting the Mauritius Convention on Transparency, regardless of whether or not the member States that those delegations represented had intended to accede to it or not. It should also be borne in mind that States also had the option of making reservations in relation to any instrument that was adopted. Thus, the fact that some States might not wish to accede to an instrument relating to the reform of investor-State dispute settlement should not mean that that possibility should not be discussed.

17. **The Chair** said that since there did not appear to be any disagreement with the explanation provided by the Secretary in respect of the word "consensus-based", the Commission could proceed on the basis that the use of that word in the mandate was not intended to deviate from usual UNCITRAL practice.

18. **Mr. Romero Martínez** (Mexico), referring to the suggested dates of working group sessions and the selection of the working group to which the mandate would be assigned, said that no reference had been made at the Commission's previous meeting or in document A/CN.9/917 to any urgency for that work to commence. Since Mexico was a developing country, his delegation was constrained by the great demands that meetings placed on limited human and financial resources. Therefore, it was preferable that Working Group II should be given the mandate. At the previous meeting, it had been stated that inclusiveness was important; matters should not be rushed if UNCITRAL truly wished to be inclusive and allow all member States to participate.

19. **Ms. Pierotic Mendia** (Chile) expressed her agreement with the comments of the representative of Mexico with regard to the limited resources of developing countries. As was the case in respect of other areas of the Commission's work, there was some overlap between the areas covered by the current work of Working Group II and the work that would be undertaken by Working Group III if it were to be given the mandate on investor-State dispute settlement. Her delegation's limited resources meant that the same representatives of Chile would have to participate in both working groups. While it was willing to accommodate that arrangement, the Commission should be aware of such restrictions faced by developing countries.

20. **Ms. Toku** (Japan) said that her delegation had no objection to the proposed wording of the new mandate. However, clarifying her delegation's position as expressed at the previous meeting, she said that although her delegation recognized the problems posed by the current investor-State dispute settlement system and was not opposed to reform of that system, it considered that Working Group II should take up the topics of concurrent proceedings and a code of ethics/conduct for arbitrators.

21. She agreed with the Chair's understanding of the word "consensus", which was confirmed by the opinion of the Office of Legal Affairs that in United Nations practice, consensus was generally understood to mean adoption of a decision without formal objections and vote. She also agreed with the comments of the representative of Mauritius in that regard. However, if in the course of the discussions on reform of investor-State dispute settlement no consensus was reached in respect of a multilateral court as the solution, the question of whether or not a country planned to ratify an instrument establishing such a court would become irrelevant because it would not be possible to proceed with that solution. Her delegation looked forward to the discussion of investor-State dispute settlement reform, with the understanding that the outcome of that discussion would not be prejudged.

22. **Mr. Sorieul** (Secretary of the Commission) said that in order to address the concern expressed in relation to the cost burden of sending delegations to attend the sessions of two different working groups, the possibility could be considered, when planning the sessions of Working Groups II and III in the spring of 2018, of holding those sessions consecutively, which would result in two weeks of meeting time. Although it was not an ideal solution, it might help to reduce the costs incurred.

23. **Mr. Spelliscy** (Canada) said that while his delegation was sensitive to the concerns expressed with regard to the cost burden on developing countries, the aim of UNCITRAL to be inclusive had to be balanced with the urgent need to commence work on the project. If Working Group II was mandated to work on reform of the investor-State dispute settlement system, there would be an approximate delay of over one year, which was not acceptable. He therefore urged the Commission to consider the options proposed by the Secretary to reduce the cost burden of that work, which would enable the work to begin as soon as possible.

24. **Mr. Apter** (Israel) expressed support for the aptly-drafted mandate, and for the comments of the Secretary with regard to consensus. In that regard, the opt-out mechanism offered by the Rules on Transparency was a good example of flexibility and compromise, and indeed his country had availed itself of that mechanism since the adoption of the Rules.

25. His delegation had no strong preference with regard to dates, but wished to note that although the option of holding back-to-back sessions of Working Groups II and III might reduce the cost burden on States whose delegations in those Groups comprised the same representatives, it might be problematic, for his delegation at least, if two representatives from the same office or department had to attend such back-to-back sessions.

26. With regard to resources, if Working Group III was given the mandate to work on reform of investor-State dispute settlement and the Group's initial session on that topic was held in December 2017, that would create difficulties for his delegation, which had already submitted its annual travel plan for 2017. He therefore suggested holding that session in 2018, either in April or, if that was too distant, slightly earlier. While work should begin as soon as possible, the process should be inclusive. In that regard, greater participation could be ensured by giving States a few more months to plan their travel accordingly.

27. **The Chair** said that there appeared to be agreement that the current work of Working Group II, which was scheduled to meet in October 2017 and February 2018, should not be disrupted. Dates were available in December 2017, April 2018 and September 2018 for the work on reform of investor-State dispute settlement, possibly in Working Group III. It was a question of striking a balance between commencing work as soon as possible and taking into account the concerns that had been expressed by delegations of developing countries. Holding the first session on the topic in April 2018 would perhaps allow States to make use of the budget cycle and make arrangements to attend that session and following sessions. A decision should be made first with regard to dates and then concerning which Working Group would be given the mandate.

28. **Mr. Moollan** (Mauritius), expressing agreement with comments made by the representative of Canada, said that work should begin on reform of investor-State dispute settlement as soon as possible and, if taken up by Working Group II, should ideally take priority over that Group's work on conciliation, given the current state of investor-State dispute settlement and its real impact far beyond that field itself. Responding to the comments made with regard to the resource limitations of developing countries, he pointed out that since the following year would most likely be spent on preliminary work based on documents that had already been submitted, that work need not entail an excessive financial burden on delegations. He suggested that a first session on the project should be held in December 2017, followed by a second session in April. If that was not possible, there should at least be two working group sessions before the fifty-first session of the Commission, to the detriment of the work of Working Group II on conciliation if necessary.

29. **Mr. Saadi** (Observer for Algeria) said that he fully supported the mandate as read out by the Chair and believed that the proposed multilateral body or appellate court was inextricably linked to the creation of a code of ethics/conduct for arbitrators. Consideration should be given to establishing such a code, which would facilitate the work of the aforementioned body.

30. **Ms. Kaufmann-Kohler** (Switzerland) asked the Secretary whether it would be possible for Working Group III to use the February 2018 dates tentatively scheduled for the sixty-eighth session of Working Group II to begin work on reform of investor-State dispute settlement. That would address the concerns expressed in relation to planning and budgeting for an additional meeting during the current year, while also satisfying those delegations that wished to proceed with the work as soon as possible.

31. **Mr. Sorieul** (Secretary of the Commission) said that, ideally, there should be an interval of six months between sessions of the same working group to enable documentation to be prepared and consultations to take place. That consideration would need to be taken into account if the February dates mentioned were used by Working Group III, as Working Group II would presumably have to meet in April instead, and there might not be a sufficient interval between that session and its following session.

32. **Ms. Kaufmann-Kohler** (Switzerland) said that work should commence on the reform project as soon as possible, but she understood that that could create difficulties for certain delegations. It would be preferable for Working Group III to be given the mandate to carry out that work.

33. **Ms. Pierotic Mendia** (Chile) said that her delegation's preference would be to hold back-to-back sessions of Working Groups II and III, as proposed by the Secretary, in order not to place a strain on the limited resources of delegations of developing countries.

34. **Mr. Maradiaga** (Honduras) suggested that the session dates should be left to the good judgment of the Secretariat, with due account taken of the comments made.

The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.

35. **The Chair** said that following informal consultations, there appeared to be consensus with regard to dates of the working group sessions, although a final decision concerning which working group would be mandated to carry out the work on investor-State dispute settlement would be made under agenda item 21. Accordingly, there was provisional agreement that that work should be taken up by Working Group III at an initial session from 27 November to 1 December 2017 in Vienna. The following session would be held in February in New York, back to back with the sixty-eighth session of Working Group II. The first set of dates would entail swapping a session with Working Group V.

36. **Mr. Sorieul** (Secretary of the Commission) said that the suggestion of the Chair was feasible from the Secretariat's perspective. However, before a final decision was made, the delegations of Working Group V should be consulted on the proposal, as their schedule would be affected.

37. **The Chair**, expressing agreement with the Secretariat, emphasized that the proposed solution was a provisional agreement and was subject to further discussion under agenda item 21. She also reminded delegations that there was a travel trust fund to which all delegations were invited to make voluntary contributions.

38. **Mr. Schneider** (Swiss Arbitration Association) proposed that, since there might be interest in pursuing further topics in commercial arbitration as well as the work

to be undertaken in the area of investment arbitration, UNCITRAL should consider work on adjudication, which had recently become a prominent topic in arbitration rules and practice. That proposal was based on a proposal by the International Academy of Construction Lawyers concerning cost and loss of time in arbitration, which was a major concern, and inspired by the practice of adjudication as originally developed in the United Kingdom in relation to construction disputes, which provided for the urgent resolution of such disputes through summary decisions that could be enforced immediately but were subject to possible revision. In the United Kingdom, a large number of construction disputes had been settled through adjudication. The reason why it was important for an international body such as UNCITRAL to take up that topic was the difficulty of enforcing summary decisions that were not final. He therefore recommended that UNCITRAL should work on an instrument in that area, possibly as an addition to the UNCITRAL Model Law on International Commercial Arbitration (1985) as amended in 2006 or as a separate document, in order to assist countries that wished to adopt the practice of adjudication and thereby simplify or eliminate a large number of costly disputes.

39. **The Chair** suggested that in view of the time constraints, that very substantive proposal should be presented in greater detail and considered at the Commission's fifty-first session.

40. *It was so agreed.*

The meeting rose at 5 p.m.

Summary record (partial) of the 1053rd meeting, held at the Vienna International Centre, Vienna, on Tuesday, 11 July 2017, at 9.30 a.m.

[A/CN.9/SR.1053]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The discussion covered in the summary record began at 10.20 a.m.

Finalization and adoption of a model law on electronic transferable records and explanatory notes (A/CN.9/897, A/CN.9/920, A/CN.9/921, A/CN.9/921/Add.1, A/CN.9/921/Add.2, A/CN.9/921/Add.3 and A/CN.9/922)

1. **Mr. Castellani** (Secretariat), introducing the agenda item, said that the draft model law on electronic transferable records and explanatory notes, contained in document A/CN.9/920, had been finalized on the basis of the discussions of Working Group IV (Electronic Commerce) at its fifty-fourth session and, in accordance with usual UNCITRAL practice, subsequently circulated by the Secretariat among States and relevant international organizations for comment. The Commission was invited to consider that document together with the comments received, which were reproduced in documents A/CN.9/921 and its addenda, and the amendments proposed by the Secretariat in document A/CN.9/922, which were based on informal consultations with experts. On completing its consideration of the draft model law and explanatory notes, the Commission might wish to consider the relationship of the model law with other UNCITRAL texts in the area of electronic commerce, particularly the UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts, and the possibility of consolidating and compiling the provisions of those texts for the benefit of enacting States, as explained in document A/CN.9/922.

2. **The Chair** invited the Commission to consider the draft model law and accompanying explanatory notes, as contained in document A/CN.9/920, article by article.

Chapter I. General provisions

Article 1 and explanatory notes thereto

3. **Mr. Castellani** (Secretariat) said it had been suggested that the key principle that the model law was not intended to affect substantive law should be clarified as applying to such areas as privacy and data retention. However, the fact that that principle was of general application was adequately explained in paragraph 5 of the explanatory notes to article 1 and in section C of the proposed introduction to the explanatory notes (A/CN.9/922, para. 14).

4. **Mr. Fujita** (Comité Maritime International), referring to paragraph 22 of document A/CN.9/922 and drawing attention to his organization's comments as set out in document A/CN.9/921/Add.1, said that the exclusion from the scope of application of the model law of electronic transferable records whose substantive law was medium-neutral was important in order to avoid the possible interference of the model law with the application of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), which contained parallel provisions on transport documents and electronic transport records that were almost identical except with respect to the issuance of multiple originals. If a State were to ratify the Rotterdam Rules, a carrier that entered into a contract of carriage to which the Rotterdam Rules applied could issue both a transport document and an electronic transport record that were each subject to those Rules. However, if the State had also established legislation based on the model law, that would raise the question of whether it would be possible for the carrier to issue an electronic transferable record incorporating the rights under the same contract of carriage but subject to that legislation. That should not be allowed, as it would make it possible to circumvent the provisions of the Rotterdam Rules on electronic transport records. The rights under the contract of carriage to which the Rotterdam Rules applied must be incorporated in an electronic document in the manner provided for by those Rules.

5. If the Rotterdam Rules were considered to constitute medium-neutral substantive law, the exclusion proposed in paragraph 22 of document A/CN.9/922 might suffice. However, it would be useful to add a more explicit reference to the Rotterdam Rules in the footnote to paragraph 3 of article 1 of the model law, to read along the lines of "rights and obligations under a contract of carriage to which the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea applies", so that any rights or obligations and any bill of lading under the Rotterdam Rules would be completely excluded from the scope of the model law.

6. **Ms. Peters** (Germany) said that in paragraph 13 of document A/CN.9/922, it was unclear to what the term "medium-neutral electronic transferable records" referred; that term might give the impression that there was a third category of transferable instruments that the model law did not address. Since the wording of paragraph 22 of the document subsequently clarified that medium neutrality referred to the substantive law

applicable to the instrument rather than to the instrument itself, the term should be removed from paragraph 13.

7. The possible general exclusion suggested in paragraph 22 of document A/CN.9/922 was too broad, as it might be difficult to determine whether a provision of substantive law was medium-neutral. Her delegation therefore disagreed that the explanation contained in paragraph 23 of A/CN.9/922 should be included in the explanatory notes. In particular, the meaning of the term "contractual integration" and the implications of its use were unclear; references to contractual integration, and indeed any references to contracts or agreements, always merited careful examination in the context of securities law.

8. Although her delegation would not oppose the addition of a specific reference to the Rotterdam Rules to footnote 1 of the model law, it did not consider there to be a conflict between the provisions of the model law and the Rotterdam Rules, as the scope of the provisions of the model law was broader, those provisions applying to securities in general.

9. **Ms. Guo** Yu (China) said that the reference in document A/CN.9/922 to the medium neutrality of substantive law might lead to misunderstandings. Since the reason for that reference was essentially to exclude all documents and instruments without a corresponding paper-based document or instrument from the scope of application of the model law, she suggested that item (c) of the footnote to article 1, paragraph 3, should be amended to read "electronic transferable records without a corresponding paper-based document", which would avoid the need to refer to medium-neutral substantive law.

10. As one of the purposes of the model law was to support the implementation of the Rotterdam Rules, the Rules should not be excluded as proposed. Such an exclusion would also overly restrict the scope of application of the model law. The provisions of the Rotterdam Rules were not comprehensive with respect to electronic transferable records and would in fact be improved and complemented by the provisions of the model law. Given that it was only under article 15 of the model law that a conflict with the relevant provisions of the Rotterdam Rules might arise, that incompatibility should be addressed under that article.

11. **Mr. Coffee** (United States of America) said that, with regard to paragraph 22 of document A/CN.9/922, it was important to bear in mind that the model law focused on functional equivalence. A law that either was medium-neutral or applied to electronic transferable records that had no paper-based equivalent would in any case allow the use of electronic transferable records. The suggested additional type of exclusion was therefore unnecessary, and might cause confusion. The explanation suggested in paragraph 23 also appeared unnecessary, as the point made was simply that contracting parties could, subject to the relevant legislative provisions, include in a contract between them any language they wished in relation to electronic transferable records existing only in an electronic environment and electronic transferable records whose substantive law was medium-neutral.

12. His delegation agreed with the proposal made by the representative of the Comité Maritime International to add a reference to the Rotterdam Rules to footnote 1 of the model law. In any case it would be for enacting States to decide what they excluded from the scope of their implementing legislation, and whether they wished to apply both instruments if they were party to the Rotterdam Rules. Moreover, since the Rules already provided for the use of electronic transferable records in the form of electronic transport records, in some situations it might suffice for a State to apply only the Rules.

13. **Mr.** Kah Wei **Chong** (Singapore) proposed that, since the issue raised by the representative of the Comité Maritime International concerned only article 15 of the model law, that issue could be addressed through the insertion of an additional paragraph in article 1, or perhaps elsewhere if appropriate, to state that article 15 did not apply to documents or instruments to which the Rotterdam Rules applied. None of the other articles appeared to present difficulties with respect to the application of the Rotterdam Rules; those articles would thus remain applicable.

14. **The Chair** suggested providing further clarification in the explanatory notes, for example, by indicating that States could decide whether they wished to exclude the application of the model law when the Rotterdam Rules applied.

15. **Mr. Castellani** (Secretariat) said that there was unanimous agreement that the model law should not affect substantive law in any manner. The suggestion made by the representative of the Comité Maritime International to exclude the Rotterdam Rules from the scope of application of the model law highlighted the fact that the Rotterdam Rules in effect constituted substantive law, since they dealt with the rights and obligations of parties, whereas the model law was intended to avoid any impact on such rights and obligations. Subject to the discussion of article 15 of the model law in relation to the Rotterdam Rules, the explanatory notes could clarify that the model law would not affect the application of substantive law, including the Rules.

16. The system for the management of electronic transferable records should operate regardless of the applicable substantive law. In order to ensure the relevance and impact of the model law, it was important to avoid the impression that its provisions would restrict the possibility of managing different types of electronic transferable record.

17. **Mr. Fujita** (Comité Maritime International) said that, in the light of the comments made by the

representative of the Secretariat to the effect that a reference to rights and obligations would be understood as concerning matters of substantive law, the language originally proposed by his delegation for inclusion in the footnote to article 1 could be modified to refer simply to transport documents to which the Rotterdam Rules applied. Although it had been suggested that only article 15 of the model law was problematic with respect to the application of the Rotterdam Rules, he was not certain that that was the case. For example, the concept of integrity of an electronic transferable record under article 10 of the model law differed from the concept of integrity of a negotiable electronic transport record under article 9 of the Rotterdam Rules, which might cause confusion. However, since there appeared to be agreement that article 15, at least, of the model law would be problematic if applied to a transport document that was subject to the Rotterdam Rules, he proposed that the additional item under footnote 1 should read along the lines of "transport documents under the scope of the Rotterdam Rules, especially regarding the application of article 15 of the Model Law".

18. **The Chair** said that it might not be appropriate to refer to article 15 of the model law in the footnote to article 1, particularly since that article had yet to be discussed. However, the proposed reference to transport documents to which the Rotterdam Rules applied was clear.

19. **Mr. Coffee** (United States of America) said the inclusion of the words "especially regarding the application of article 15 of the Model Law" in the proposed additional item under footnote 1 appeared to add nothing, since the model law would either apply or not apply to transport documents under the scope of the Rotterdam Rules. The question of whether explicit reference should be made to article 15 of the model law would depend on the Commission's discussion of that article. His delegation was in favour of the inclusion in the footnote of a reference to transport documents to which the Rotterdam Rules applied, but, if there was insufficient support for that solution, his delegation would also support the Chair's proposal that the matter should be addressed in the explanatory notes. It should be explained that the list in the footnote was illustrative only and that there might be other items that could be excluded, including transport documents that were subject to the Rotterdam Rules.

20. **The Chair** suggested that, given the lack of consensus regarding the inclusion of a reference to the Rotterdam Rules in the footnote to article 1 (3), the text of the footnote should be left unchanged and the notes accompanying the article should explain, possibly at the end of paragraph 11, the issue raised by the Comité Maritime International and invite enacting States to consider whether to exclude the Rotterdam Rules from the scope of application of their law on electronic transferable records.

21. *It was so decided*.

22. **Ms. Peters** (Germany), drawing attention to her delegation's suggestion with regard to paragraph 9 of the explanatory notes as contained in document A/CN.9/921, said that the point that the instruments to be counted as securities would be determined by substantive law was very important and, moreover, reflected the discussions of Working Group IV during the drafting of article 1 (3) of the model law.

23. **Mr. Coffee** (United States of America) expressed a preference for retaining the language of paragraph 9 of the explanatory notes as drafted. The term "investment instruments" was broad and could include such instruments as promissory notes, which might be covered by the model law, thus potentially causing confusion. The words "securities and other" helped to clarify that only a certain set of investment instruments was referred to, and also provided context with respect to the meaning of article 1 (3).

24. **The Chair** asked whether the matter could be resolved by leaving the first sentence of paragraph 9 of the explanatory notes as drafted but adding the sentence "The general determination as to which instruments are to be counted as securities is a matter of substantive law", as in the comments by the Government of Germany set out in A/CN.9/921.

25. **Ms. Peters** (Germany) said that that addition would not resolve the problem entirely because the current wording of the first sentence of that paragraph gave the impression that securities were excluded. That did not reflect the Working Group's decision to exclude only capital markets securities. She asked the representative of the United States to clarify his delegation's concern with regard to the consequences of the proposed amendment, as it was her understanding that the change would not affect the intended meaning of article 1 (3) or paragraph 9 of the explanatory notes. Even if the proposed new sentence were added, the reference to securities in the first sentence was still too broad.

26. **The Chair** wondered whether it was necessary to retain the reference to securities given that the proposed deletion of that reference would in any case not change the implied meaning of the original sentence that securities were a type of investment instrument; if a security was an investment instrument, it would be excluded from the scope of application of the model law.

27. **Mr. Coffee** (United States of America) said that while the interpretation that securities were a subset of investment instruments was possible, it was important to modify the paragraph in such a way as to clarify that it did not refer to all investment instruments, thus avoiding an overly broad interpretation that would be inconsistent with the text of article 1 (3). Possible solutions would be to replace the words "securities and other investment instruments" with the words "investment instruments such as securities" or with the words "investment securities".

28. **The Chair** pointed out that the second sentence of paragraph 9 was not intended to provide an exhaustive list of what was meant by "investment instruments". Since there appeared to be no agreement on the amendment of the paragraph, and bearing in mind the Working Group's deliberations on that text, she suggested that the paragraph be retained as drafted.

29. **Ms. Peters** (Germany) said that the inclusion of the sentence "The general determination as to which instruments are to be counted as securities is a matter of substantive law" would be a very helpful first step. She also supported the proposal by the representative of the United States to amend the first sentence of paragraph 9 to refer to investment securities.

30. **Mr. Castellani** (Secretariat) said that, if the proposed changes were accepted, the first part of paragraph 9 of the draft explanatory notes would read "Paragraph 3 clarifies that the Model Law does not apply to investment securities. The general determination as to which securities are to be counted as investment securities is a matter of substantive law." The original second sentence would thus become the third sentence and would remain unchanged except for the possible replacement of the term "investment instruments" with the term "investment securities". The final sentence of the paragraph would remain as drafted. The text of the amended paragraph as a whole would need to be further refined to reflect the fact that the term "investment instrument" was no longer being used.

31. **Ms. Peters** (Germany) pointed out that in the original version of the proposed additional sentence, the word "instruments" was not incorrect, as it was intended as a general term rather than as referring to investment instruments. Consequently, it should not be changed to "securities".

32. **The Chair** said that, in that light, the word "instruments" would be retained in that sentence. She took it that the proposed amendments to paragraph 9 of the draft explanatory notes were otherwise acceptable.

33. *It was so decided*.

34. **The Chair** recalled that it had been suggested that item (c) of the footnote to article 1 (3) should be modified to refer to "electronic transferable records without a corresponding paper-based document", in order to avoid the need to refer to electronic transferable records whose substantive law was medium-neutral. However, since that suggestion had attracted no support in the Working Group, she suggested that that item remain as drafted.

35. *It was so agreed*.

Article 2 and explanatory notes thereto

36. **Mr. Castellani** (Secretariat) suggested that paragraphs 24 and 25 of document A/CN.9/922, which reflected comments received from the International Maritime Organization, should be reproduced, subject to minor drafting, in a footnote to the term "insurance certificates" in paragraph 20 of the draft explanatory notes.

37. *It was so decided*.

38. **Mr. Coffee** (United States of America) said that his delegation objected to the proposal by the Government of Germany set out in document A/CN.9/921 to modify the second sentence of paragraph 19 of the explanatory notes, particularly the proposed reference to "the (rightful) holder". Given that the concept of "control" had been discussed extensively by the Working Group over the course of many sessions, the reference to "the person in control" should be retained. The holding of a document or instrument was a fact rather than a legal conclusion, and the insertion of the word "rightful" would introduce some additional legal elements. Whether a holder was the rightful holder would be determined by the applicable substantive law; it was not the purpose of the model law to displace that law.

39. **Ms. Cap** (Austria) said that she supported the proposal by the Government of Germany insofar as, for reasons of consistency, the sentence should refer to the equivalent of "person in control" in the paper world, i.e. the "possessor", since the explanatory notes to article 11 explained that "control" was the functional equivalent of "possession". However, she agreed with the representative of the United States that the applicable substantive law would determine who was the rightful holder.

40. **The Chair** suggested that, to reflect the comments made, the words "person in control" should simply be replaced with the word "possessor" in the second sentence of paragraph 19 of the explanatory notes.

41. *It was so decided*.

Article 3 and explanatory notes thereto

42. *Article 3 and the explanatory notes thereto were approved*.

Article 4 and explanatory notes thereto

43. **Mr. Castellani** (Secretariat) said that, during informal consultations, a large number of representatives of States and intergovernmental and non-governmental organizations had suggested that more guidance should be provided as to the provisions from which parties could derogate.

44. Recalling that party autonomy was addressed in other UNCITRAL model laws, as summarized in paragraphs 30 and 31 of the explanatory notes, he said that efforts had been made to strike a balance between two guiding principles, the first being that party autonomy was an expression of the principle of privity of contract, and the second being that rules of mandatory application, such as those on public policy, limited party autonomy. He also recalled that, during the discussions of Working Group IV, it had been said that derogation

from functional equivalence rules should not be permitted.

45. He noted that party autonomy was particularly relevant to chapter III, on the use of electronic transferable records.

46. **Ms. Guo** Yu (China), supported by **Mr. Sarapkin** (Russian Federation) said that article 4 should be amended to clearly identify the provisions from which parties could derogate, particularly since most of the provisions of the model law appeared to be of mandatory application.

47. **The Chair** said that if it was indeed the intention that most of the provisions of the model law should be of mandatory application, it might be appropriate to provide enacting States with more guidance. To that end, one possibility would be to adopt the suggestion, set out in paragraph 6 of the comments of the International Federation of Freight Forwarders Associations in document A/CN.9/921/Add.2, that articles 1 to 3, 5 to 12 and paragraph 2 of article 20 should be identified as rules of mandatory application, while parties could derogate from the remaining articles.

48. **Ms. Peters** (Germany) pointed out that paragraph 1 of article 4 reflected the compromise reached by the Working Group following extensive discussion and should therefore remain as drafted, leaving the decision as to the provisions from which parties could derogate to the enacting State.

49. **Mr. Coffee** (United States of America) said that the Working Group had indeed considered the matter on numerous occasions and had failed to reach agreement on the provisions that should be of mandatory application. It would be time-consuming to attempt once again to reach such a decision. Moreover, given the nature of the instrument, it would be more appropriate for national legislators to assess each provision to determine from which provisions parties could derogate. The article should therefore remain unchanged.

50. **Mr. Castellani** (Secretariat) said that some of the States that were considering early enactment of the model law had indicated that they would not enact article 4. It would therefore be useful to monitor the enactment of that article closely and seek feedback from States on the different ways in which they were enacting the model law as a whole. It would then be possible to supplement the guidance currently set out in the explanatory notes on the basis of that experience.

51. **Mr. Coffee** (United States of America) said that consideration should be given not only to the ways in which the model law was enacted but also to the ways in which its provisions were applied, since practical experience would be based on use of the model law rather than its enactment alone.

52. **The Chair** said she took it, in the light of the comments made, that the Commission wished to approve article 4 and the explanatory notes thereto unchanged.

53. *It was so decided*.

Article 5 and explanatory notes thereto

54. **Ms. Alshaiji** (Kuwait), drawing attention to her country's comments on the draft article, as contained in paragraph 4 of document A/CN.9/921/Add.1, said that the exemptions from liability referred to in those comments applied unless otherwise provided for in regulations governing the disclosure of and access to information. Similar provisions should be established in article 5 of the model law.

55. **The Chair** said that the discussion of article 5 would be deferred.

Article 6 and explanatory notes thereto

56. **Ms. Guo** Yu (China) drew attention to her country's proposal with respect to the article, as contained in paragraph 2 of document A/CN.9/921/Add.3.

57. **Ms. Peters** (Germany) said that the proposed addition of the words "as permitted by law" following the word "information" appeared to be unnecessary given that, in accordance with article 1, paragraph 2, of the model law, all information in an electronic transferable record must meet the requirements of substantive law governing transferable documents or instruments. Also, since functional equivalence with respect to electronic transferable records to which information was added was covered by article 10, the concern raised was amply addressed. Moreover, she was concerned that the proposed wording would have the unintended consequence of restricting the addition of technical data or useful information produced during the life cycle of an electronic transferable record unless the addition of such information was explicitly provided for.

58. **Mr. Coffee** (United States of America) said that his delegation did not support the proposal of the Government of China, for the reasons given by the representative of Germany.

59. **Mr.** Kah Wei **Chong** (Singapore) said that although he appreciated the intention behind the proposal made, he agreed with the representative of Germany that the concern raised related to restrictions under substantive law and was therefore already addressed by paragraph 2 of article 1. The possible unintended consequence of the proposed amendment, as also pointed out by the representative of Germany, would defeat the purpose of article 6.

60. **Mr. Sarapkin** (Russian Federation) said he agreed that the information that could be added to an electronic transferable record would be determined by substantive law. However, he also agreed that some restrictions should be established, either in the model law itself or in the explanatory notes, with respect to the type of information that could be added, in order to ensure that electronic transferable records to which information was

added were not substantively altered, compromised or rendered invalid.

61. **Ms. Guo** Yu (China) said that if her country's proposal was not supported by other delegations, it could be clarified in the explanatory note that "additional information" referred to technical information.

The meeting rose at 12.35 p.m.

Summary record of the 1054th meeting, held at the Vienna International Centre, Vienna, on Tuesday, 11 July 2017, at 2 p.m.

[A/CN.9/SR.1054]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 2.05 p.m.

Finalization and adoption of a model law on electronic transferable records and explanatory notes (*continued*) (A/CN.9/897, A/CN.9/920, A/CN.9/921, A/CN.9/921/Add.1, A/CN.9/921/Add.2, A/CN.9/921/Add.3 and A/CN.9/922)

The Chair invited the Commission to resume its consideration of the articles of the draft model law and accompanying explanatory notes as contained in document A/CN.9/920.

*Chapter I. General provisions (*continued*)*

*Article 6 and explanatory notes thereto (*continued*)*

1. **Mr. Castellani** (Secretariat) suggested that, in order to address the concerns raised at the previous meeting, a sentence could be added to the explanatory notes on article 6 to clarify that article 1, paragraph 2, of the model law precluded the insertion in an electronic transferable record of information not permitted under substantive law.

2. **Ms. Peters** (Germany) pointed out that paragraph 40 of the explanatory notes provided some examples of the types of additional information that could be included in an electronic transferable record. Consideration could be given to whether those examples were sufficient.

3. **Mr. Sarapkin** (Russian Federation) said that a compromise solution would be to expand paragraph 40 of the explanatory notes to establish restrictions with regard to the types of information that could be added to an electronic transferable record.

4. **The Chair** suggested that article 6 should remain unchanged and that the matter should be addressed in the explanatory notes, as suggested by the Secretariat. That additional text, together with the examples given in paragraph 40, would provide the necessary clarification.

5. *It was so decided.*

Article 7 and explanatory notes thereto

6. **The Chair**, drawing attention to paragraph 27 of document A/CN.9/922, said she took it that the Commission wished to accept the suggested revision of paragraph 48 of the explanatory notes to reflect the fact that not all token-based systems and distributed ledger-based systems lacked a centralized operator.

7. *It was so decided.*

Chapter II. Provisions on functional equivalence

Article 8 and explanatory notes thereto

8. *Article 8 and the explanatory notes thereto were approved.*

Article 9 and explanatory notes thereto

9. **Mr. Castellani** (Secretariat), drawing attention to paragraph 28 of document A/CN.9/922, said that the proposed clarification in the explanatory notes that "reference to electronic signatures in article 9 of the Model Law is intended also as reference to electronic seals or other methods used to enable the signature of a legal person electronically" was necessary because in some laws, including European Union Regulation No. 910/2014 on electronic identification and trust services for electronic transactions in the internal market, electronic seals were referred to as only one of various identification measures. In that Regulation, electronic seals referred to the method used to identify legal persons while electronic signature referred to the method used to identify natural persons; however, "electronic signature" was defined more broadly in the UNCITRAL Model Law on Electronic Signatures and was not defined at all in the model law on electronic transferable records.

10. **Mr. Coffee** (United States of America) expressed concern that the use of the term "legal person" in the proposed text could cause confusion. He would prefer the text to clarify, on first reference to a person, that that person might be legal or natural.

11. **The Chair** said that since the purpose of the proposed text was not to clarify that an electronic record could be signed by a legal person but that references to electronic signatures also encompassed electronic seals and other methods, the word "legal" could be removed from the text to avoid any possible confusion. She took it that, subject to that modification, the Commission wished to accept that text.

12. *It was so decided.*

Article 10 and explanatory notes thereto

13. **Mr. Castellani** (Secretariat) suggested that the Commission should begin its consideration of the article by examining the proposals made by the Government of China in document A/CN.9/921/Add.3. In addition to those proposals, a suggestion had been made in informal consultations to replace the phrase "the electronic transferable record" with the phrase "that electronic transferable record" in subparagraph 1 (b) (iii) of the article, in order to bring that subparagraph into line with subparagraphs 1 (b) (i) and (ii).

14. **Mr.** Kah Wei **Chong** (Singapore), referring to paragraph 3 (1) of document A/CN.9/921/Add.3, expressed support for the proposed change to the title of article 10, which would be consistent with the naming of the other provisions relating to functional equivalence.

15. **The Chair** said she took it that the Commission wished to accept the proposed change.

16. *It was so decided.*

17. **The Chair** said that the concern expressed in paragraph 3 (2) of document A/CN.9/921/Add.3 in respect of the definite article in subparagraph 1 (b) (i) of the article in the English version revolved around the question of how to render the idea of singularity in and ensure consistency between the six language versions of the text. Given that the matter involved linguistic rather than substantive issues, it should be dealt with through linguistic consultations, in conjunction with paragraphs 77 and 78 of the accompanying explanatory notes contained in document A/CN.9/920.

18. *It was so agreed.*

19. **The Chair** drew attention to the proposal made in paragraph 3 (3) of document A/CN.9/921/Add.3 to insert the word "exclusive" before the word "control" in subparagraph 1 (b) (ii) of the article. In the absence of support for that proposal, the text would remain unchanged.

20. She asked whether there were any objections to the proposal to replace the phrase "the electronic transferable record" with "that electronic transferable record" in subparagraph 1 (b) (iii).

21. **Mr. Coffee** (United States of America) pointed out that since the chapeau of paragraph 1 referred to an electronic record rather than an electronic transferable record, it would be unclear to what "that electronic transferable record" in subparagraph 1 (b) (iii) referred. Clarification was therefore needed.

22. **Mr. Castellani** (Secretariat) suggested that, in order to address that concern, the word "transferable" should be removed from subparagraph (b) (iii), which would thus read "To retain the integrity of that electronic record". That subparagraph would then be in line with subparagraph 1 (b) (ii).

23. *It was so decided.*

24. **Mr. Sarapkin** (Russian Federation) recalled that at a previous session of Working Group IV, it had been decided to delete the word "authoritative" before the words "electronic transferable record" in subparagraph 1 (b) (i). However, given that the definite article could not be expressed in Russian or Chinese, it should be replaced or supplemented with another word that made it clear that the electronic transferable record was authoritative and met the relevant requirements.

25. **The Chair** asked the delegation of the Russian Federation to raise that matter during the linguistic consultations that would be held to address the use of the definite article.

26. **Ms. Peters** (Germany) drew attention to her Government's suggestion, set out in document A/CN.9/921, to modify the second and third sentences of paragraph 63 of the explanatory notes to read "Uniqueness of a transferable document or instrument aims to prevent the circulation of multiple documents or instruments relating to the same performance and thus to avoid the existence of multiple claims for performance of the same obligation. Providing a guarantee of uniqueness in an electronic environment functionally equivalent to an original or authentic document or instrument in the paper world has long been considered a peculiar challenge."

27. **Mr. Castellani** (Secretariat) said that the suggestions made with regard to the second sentence were of an editorial rather than a substantive nature; they merely improved the clarity of the text. Meanwhile, the suggestion relating to the final sentence involved a more substantive change. It might therefore be appropriate to consider the proposed sentences separately.

28. **The Chair** said she took it that the Commission wished to accept the proposed changes to the second sentence of paragraph 63 of the explanatory notes.

29. *It was so agreed.*

30. **Mr. Coffee** (United States of America) said that he did not agree with the proposed change to the final sentence of paragraph 63, as it would create confusion. Uniqueness served to prevent multiple claims. As long as that objective was met, functional equivalence with respect to singular claims was achieved and the question of uniqueness became irrelevant. The original text, which made that point more clear, should therefore be retained. The proposed new language appeared to focus on the document or instrument itself, whereas the focus should be on the singularity of claims.

31. **Mr. Gabriel** (International Law Institute), expressing support for the revised sentence as proposed, suggested the insertion of the word "paper" after the word "authentic" in that sentence in order to clarify the idea that the purpose of uniqueness in its traditional sense was to avoid multiple claims with respect to paper documents or instruments.

32. **Ms. Peters** (Germany) said that the intention of the proposed wording was to express the difficulty of achieving a functional equivalent of uniqueness in the electronic environment. Since uniqueness referred to paper documents and instruments, the proposed wording did not affect the notions of singularity of claims or singularity of a document or instrument. She doubted the need to insert the word "paper" in the revised third sentence given that the proposed wording already referred to "the paper world" and "transferable document or instrument" was defined in the model law as documents or instruments issued on paper, as was also reflected in paragraph 64 of the explanatory notes.

33. **Ms. Cap** (Austria) said that while she agreed that "transferable document or instrument" clearly referred to a paper document or instrument, if other delegations felt that clarification was necessary, her delegation would not object.

34. She noted that the proposed revision appeared to introduce a shift in emphasis; while it seemed to be aimed at explaining the functional equivalent of uniqueness in the sense that it referred to the uniqueness of an original or authentic document or instrument, the wording of the original sentence appeared to emphasize the guarantee of uniqueness, namely possession of the paper instrument or document.

35. **Mr.** Kah Wei **Chong** (Singapore) expressed support for the proposed reformulation. Article 10 of the model law related to the functional equivalent of uniqueness in the electronic environment. The purpose of paragraph 63 was to explain that providing a guarantee of uniqueness in an electronic environment was a peculiar challenge. That intended meaning was expressed more clearly in the proposed revision than in the original sentence, in which the reference to possession confused matters.

36. **The Chair** said that on the basis of the comments made, she took it that the Commission wished to accept the revised third sentence of paragraph 63 of the explanatory notes as proposed by the Government of Germany.

37. *It was so decided.*

38. **The Chair** said she took it that the Commission wished to accept the proposals made by the Government of Germany in document A/CN.9/921 with regard to the first and third sentences of paragraph 64 of the explanatory notes.

39. *It was so agreed.*

40. **The Chair** drew attention to the further proposal by the Government of Germany to delete the reference to the combination of the "singularity" and "control" approaches in paragraph 65 of the explanatory notes.

41. **Mr. Coffee** (United States of America) said that while his delegation could agree to the other two proposals by the Government of Germany with respect to the same paragraph, namely the addition of "the existence of" before the word "multiple" and the replacement of the word "requests" with the word "claims", it was desirable to retain the reference to the combination of the two approaches mentioned. The paragraph would thus read "Article 10 aims at preventing the possibility of the existence of multiple claims to perform the same obligation by combining two approaches, i.e. 'singularity' and 'control'".

42. **The Chair** said she took it that that compromise was acceptable to the Commission.

43. *It was so decided.*

44. **The Chair** asked the representative of Germany to explain her Government's proposal to delete the reference to control in paragraph 67 of the explanatory notes.

45. **Ms. Peters** (Germany) said that since control was the functional equivalent of possession, it was not appropriate to refer to control in the context of that paragraph.

46. **Mr. Coffee** (United States of America) said that he opposed the proposed deletion given that the concept of control was a core element of the model law.

47. **The Chair** said that in the light of that objection, she took it that the Commission wished to retain the original wording of paragraph 67 unchanged.

48. *It was so agreed.*

49. **The Chair**, drawing attention to the proposal by the Government of Germany to insert the word "also" before the phrase "have an evidentiary value" in the last sentence of paragraph 68 of the explanatory notes, said she took it that that proposal was acceptable.

50. *It was so agreed.*

51. **The Chair** asked the delegation of Germany to clarify the statement in document A/CN.9/921 that "paragraph 70 should be made subject only to paragraph 4".

52. **Ms. Peters** (Germany) said that the suggestion made by her Government with respect to paragraph 70 of the explanatory notes was intended not to focus on the reference to paragraph 4 of the explanatory notes but, rather, to clarify the fact that the nominative instruments given as examples in the second sentence of paragraph 70 were only straight or nominative instruments if they were issued as instruments not to order.

53. **Mr. Castellani** (Secretariat) expressed doubt that the addition of the words "if these are issued as instruments not to order" to the second sentence of paragraph 70 would provide clarity. Documents or instruments were normally transferable. However, under substantive law, it was possible to make such documents or instruments non-transferable, whereupon they became straight. Since a straight document or instrument was not transferable, the model law would not apply; such documents or instruments would circulate as normal electronic records. Meanwhile, electronic transferable records were subject to additional requirements because of their peculiar legal value. The original paragraph had been intended to highlight the fact that the system for managing electronic transferable records should be able to manage both transferable and non-transferable records, although the phrase "in certain jurisdictions" in the second sentence might be unnecessary.

The meeting was suspended at 3.45 p.m. and resumed at 4.05 p.m.

54. **Ms. Cap** (Austria) said that a compromise proposal had been reached during informal consultations to replace

the first and second sentences of paragraph 70 with the following words: "The definition of 'electronic transferable record' does not cover certain documents or instruments which are generally transferable but whose transferability may be limited due to other agreements, for example in the case of straight bills of lading".

55. **The Chair** said she took it that the Commission wished to accept the proposed wording.

56. *It was so decided.*

57. **Mr. Coffee** (United States of America), referring to the comments of his Government in document A/CN.9/921, suggested redrafting the second sentence of paragraph 76 of the explanatory notes to read "That requirement implements the requirement of a singular claim.", because the current focus of the paragraph was incorrect.

58. **Ms. Peters** (Germany) said that that second sentence should be retained as drafted, because singularity of claims was the final effect, rather than the purpose, of article 10, paragraph 1 (b) (i).

59. **Mr.** Kah Wei **Chong** (Singapore) said that he too was in favour of retaining the existing wording of the second sentence which, although short, accurately reflected the work of Working Group IV. The singularity approach related to the singularity of the record, not the singularity of the claim. As had just been pointed out, the singularity of the claim was the final effect rather than the object of article 10, paragraph 1 (b) (i), which was to achieve the singularity of the record.

60. **Ms. Cap** (Austria) said she agreed that the notion of singularity referred to records rather than claims.

61. **Mr. Coffee** (United States of America) said it was his understanding that the purpose of paragraph 1 (b) (i) of article 10 was to identify the document that would be regarded as the electronic transferable record in conjunction with the concept of control, in order to require the performance of an obligation. The focus was on the performance of the obligation, i.e. the singular claim, not on the singularity of the electronic record. There might be multiple, similar electronic records. Therefore, it was not appropriate to indicate that only one record was relevant.

62. **Mr. Gabriel** (International Law Institute) said that the first sentence of paragraph 76 set out a requirement and the second sentence stated the purpose of that requirement. Accordingly, he supported the suggestion made by the United States Government in document A/CN.9/921, which was merely to clarify the purpose of that requirement.

63. **Mr. Sarapkin** (Russian Federation), referring to paragraph 77 of the explanatory notes, said that while it had been stated that the definite article in the English, French and Spanish language versions of the model law sufficed to indicate the singularity approach, the same meaning was not so readily conveyed in the Chinese and Russian language versions.

64. **The Chair** said that the linguistic issues raised would be discussed during the linguistic consultations.

65. With regard to paragraph 76, it appeared that there was insufficient support for the proposal submitted by the United States Government. Therefore, the original wording of paragraph 76 would be retained.

66. *It was so agreed.*

67. **Mr. Coffee** (United States of America) suggested the deletion of the words "as opposed to other electronic records that are not transferable" in the first sentence of paragraph 77 to avoid potential confusion, given that an electronic record was not transferable unless it was an electronic transferable record.

68. *It was so decided.*

69. **Ms. Cap** (Austria) said that the second sentence of paragraph 77 of the explanatory notes was confusing because it did not state clearly that an electronic transferable record entitled its holder to the same rights and obligations as a corresponding transferable document or instrument.

70. **Mr. Castellani** (Secretariat) said that it might be possible to add that information to the explanatory notes. However, it might be more appropriate to include it in the proposed introduction to the explanatory notes as set out in document A/CN.9/922. Those possibilities could be discussed when the Commission considered that introduction.

71. **Mr.** Kah Wei **Chong** (Singapore) said that it might be more fruitful if further discussion of the meaning of the second sentence of paragraph 77 was deferred until the next meeting, by which time the linguistic consultations on the definite article would have taken place. In the meantime, the Commission could move on to consider other parts of the explanatory notes.

72. **The Chair** said that that linguistic issue in relation to paragraph 77 was separate from the problem identified with regard to the second sentence of that paragraph. Since it was important to ensure a common understanding of the meaning of the sentence in question, she supported the proposal to defer further consideration of that sentence.

73. **Mr. Coffee** (United States of America) suggested that the second sentence should be deleted in order to avoid confusion, and could be reinstated if its meaning was subsequently clarified.

74. **The Chair** suggested that a decision on the sentence should be deferred. If no common understanding could be reached, its deletion could be considered.

75. *It was so agreed.*

76. **Ms. Guo** Yu (China), referring to her Government's comments in document A/CN.9/921/Add.3, said that

paragraph 78 of the explanatory notes should be deleted because the reference to "other legislation on electronic transferable records" might cause confusion. If there was no support for that proposal, the paragraph should be amended so that its focus was on the difference between "singularity" and "uniqueness".

77. **The Chair** suggested that the concern raised might be addressed by deleting only the words "Unlike other legislation on electronic transferable records" from the beginning of the paragraph.

78. **Mr.** Kah Wei **Chong** (Singapore) said that since paragraph 78 also raised the same linguistic issue concerning the definite article that had been mentioned previously, it would be preferable to defer further consideration of the paragraph.

79. *It was so decided*.

80. **Mr. Castellani** (Secretariat), drawing attention to the proposal of the Government of China, contained in document A/CN.9/921/Add.3, to delete paragraph 80 of the explanatory notes, said that the concern expressed in relation to that paragraph was unfounded because article 12 of the model law, which established a general reliability standard, applied to article 10 in its entirety. Rather than deleting paragraph 80, a cross reference to article 12 could be added to that paragraph. The reference would be similar in language and scope to that contained in the final part of paragraph 81 of document A/CN.9/920.

The Chair said she took it that that suggestion addressed the concern raised by the delegation of China and was acceptable to all other delegations.

81. *It was so decided*.

82. **Mr. Castellani** (Secretariat), referring to paragraph 29 of document A/CN.9/922, said that in paragraph 81 of the explanatory notes, the reference to the reliable method used to retain integrity was described as being relative or subjective. Paragraph 81 went on to state that the general reliability standard contained in article 12 of the model law applied to the assessment of that method. However, in paragraph 119 of the notes, the general reliability standard was described as being objective. It might be necessary to clarify the relationship between the concept of integrity and the application of a general reliability standard to that concept in order to avoid any inconsistency.

83. **Mr.** Kah Wei **Chong** (Singapore), supported by **Mr. Coffee** (United States of America), suggested that that issue could be resolved by deleting the words "or subjective" in paragraph 81.

84. **Mr. Castellani** (Secretariat) said that the reference to relativity might be connected to the fact that the general standard was implemented differently for each method. A cross reference to article 12 might be useful in explaining that notion in relation to article 10.

The meeting rose at 5 p.m.

Summary record of the 1055th meeting, held at the Vienna International Centre, Vienna, on Wednesday, 12 July 2017, at 9.30 a.m.

[A/CN.9/SR.1055]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 9.30 a.m.

Finalization and adoption of a model law on electronic transferable records and explanatory notes (A/CN.9/897, A/CN.9/920, A/CN.9/921, A/CN.9/921/Add.1, A/CN.9/921/Add.2, A/CN.9/921/Add.3 and A/CN.9/922)

1. **The Chair** invited the Commission to resume its consideration of the articles of the draft model law and accompanying explanatory notes as contained in document A/CN.9/920.

*Chapter II. Provisions on functional equivalence (*continued*)*

*Article 10 and explanatory notes thereto (*continued*)*

2. **Mr. Castellani** (Secretariat), reporting on the linguistic consultations that had been held following the previous meeting, recalled that it had been considered that the use of the definite article in article 10, paragraph (1) (b) (i), of the model law to qualify "electronic transferable record" was important in conveying the notion of singularity of an electronic transferable record. However, since definite articles were not used in Chinese or Russian, further discussion had been necessary in order to identify an appropriate linguistic solution that would convey exactly the same meaning in all six languages. The conclusion reached on the basis of the consultations was that there were two possible options: the first would be to use the qualifying adjective "singular" before the words "electronic transferable record" in all six language versions, and the second would be to use the definite article in the Arabic, English, French and Spanish language versions and an appropriate equivalent of the adjective "singular" in the Chinese and Russian versions, and to include in the explanatory notes a paragraph explaining the reason for that decision.

3. **Ms. Guo Yu** (China) said that use of a single equivalent in all six language versions would be the most desirable solution, as it would ensure that the model law was as clear as possible and facilitate interpretation and comparison of those versions. Her delegation was concerned that the second option could lead to differences in meaning. However, by way of compromise, she suggested that that second solution should be adopted but the approach should be explained in order to prevent any misunderstanding. To that end, she proposed that the paragraphs 77 and 78 of the explanatory notes should be reformulated to read:

> "77. The purpose of the provision is to identify the electronic transferable record which is an equivalent to a paper-based document.
>
> "78. "The combination of the article 'the' and singular noun in the Arabic, English, French and Spanish language versions of the Model Law suffices to point at the singularity approach. A qualifier is omitted to avoid interpretative challenges, because a qualifier could be interpreted as referring to the notion of "uniqueness", which has been abandoned, and could ultimately foster litigation. A qualifier is used in the Chinese and Russian language versions because a proper qualifier can be found in these languages and avoids the interpretation problem. All the six language versions intend to convey the same notion."

4. **The Chair** said she agreed that the ideal solution would be for a common word to be used in all language versions, but the suggestion made by the representative of China would also resolve the issue.

5. **Mr. Sarapkin** (Russian Federation), **Ms. Cap** (Austria) and **Ms. Finocchiaro** (Italy) expressed support for the proposal made by the representative of China.

6. **Ms. Peters** (Germany) said that the proposal was a useful compromise that accurately reflected the understanding of Working Group IV with regard to the notion of singularity underlying the text of article 10 of the model law.

7. **Mr. Coffee** (United States of America) suggested that the word "functional" should be inserted before the word "equivalent" in the proposed modified text of paragraph 77.

8. **Mr. Kah Wei Chong** (Singapore), expressing support for the proposals made by the representative of China and the United States, said he agreed that it was important for the intended meaning to be conveyed clearly in the explanatory notes to avoid the possibility of misinterpretation or misapplication.

9. **Mr. Bellenger** (France) said that while his delegation would have preferred use of the adjective "particulier" to qualify the noun "document éléctronique" in the French language version of the text, his delegation did not object to the proposed solution.

10. **Mr. Maradiaga** (Honduras) said that his delegation supported the proposals made by the representatives of China and the United States.

11. **The Chair** said she took it that the Commission wished to revise paragraphs 77 and 78 of the explanatory notes to reflect the proposals made.

12. *It was so decided.*

13. **Mr. Castellani** (Secretariat) recalled that, at the previous meeting, it had been suggested that the words "or subjective" in the second sentence of paragraph 81 of the explanatory notes should be deleted. The general reliability standard established in article 12 applied to each instance in which a method was used to achieve a specific function, and was therefore objective. Since each method was different, the assessment of the reliability of each method was relative to that specific function. He suggested that that explanation of the notion of relativity should be given in the explanatory notes to article 10, together with a cross reference to article 12, and that the words "or subjective" should be deleted as proposed.

14. *It was so decided.*

15. **Ms. Peters** (Germany), drawing attention to her Government's proposals, as set out in document A/CN.9/921, with regard to paragraphs 82 and 83 of the explanatory notes, said that the aim of the proposed amendments was not to change the substance of the provisions but, rather, to ensure that the discussions of the Working Group were clearly reflected. Specifically, the proposed amendment to paragraph 83 was aimed at reflecting clearly the meaning and purpose of article 10.

16. **Mr. Coffee** (United States of America) requested clarification as to the meaning of "dynamic notion of 'original'" in the text of paragraph 82 as proposed by the Government of Germany.

17. **Mr. Castellani** (Secretariat) said that that wording was explained by the second sentence of paragraph 82 of the draft explanatory notes: article 8 of the UNCITRAL Model Law on Electronic Commerce (1996) referred to a static notion of "original", while electronic transferable records were meant, by their nature, to circulate. Although that Model Law established functional equivalence for the notion of "original", article 8 was based on the assumption that a document was in its final form and would not be changed. That applied, for example, to contracts, modification of which was possible but usually neither necessary nor frequent.

18. Since the adoption of the Model Law, however, the modification of electronic records, such as through the addition of metadata, had become increasingly frequent. In the draft model law on electronic transferable records, the singular electronic transferable record fulfilled the same functions as the original transferable document or instrument but by its nature was meant to circulate, and would not be final until presentation. Therefore, the notion expressed in article 8 of the Model Law on Electronic Commerce could not be used to capture functional equivalence because although at the time of issuance of an electronic transferable record there was one original, that record would necessarily change during its life cycle. He suggested inserting that clarification in the draft explanatory notes.

19. **Mr. Coffee** (United States of America), welcoming that suggestion, said that in the light of the Secretariat's comments, his delegation had no objection to the proposal by the representative of Germany.

20. **The Chair** said she took it that the Commission wished to accept the proposals of the Government of Germany with regard to paragraphs 82 and 83 of the draft explanatory notes on the understanding that the concepts of "dynamic" and "static" should be clarified as proposed.

21. *It was so decided.*

22. **Mr. Castellani** (Secretariat), referring to paragraphs 84–86 of the explanatory notes, drew attention to the Secretariat's suggestion in paragraph 30 of document A/CN.9/922, which was intended to clarify that, in practice, integrity would be ensured through the use of certain types of electronic signature — such as signatures based on public key infrastructure — that provided a reliable assurance of the link between the electronic signature affixed on the electronic transferable record and the content of that record at the time the electronic signature was affixed.

23. **The Chair** said she took it that the Commission wished to accept the Secretariat's suggestion.

24. *It was so decided.*

Article 11 and explanatory notes thereto

25. **Ms. Guo Yu** (China) drew attention to her country's written proposals with respect to the article, as contained in document A/CN.9/921/Add.3.

26. **Mr. Coffee** (United States of America), referring to the proposal to change the title of article 11 to "Possession", recalled that the Working Group had agreed that that title should deviate from the naming style of the other articles of the draft model law relating to functional equivalence because of the novelty and relevance of the concept of "control" and the importance of highlighting that concept in the title of the article itself. His delegation therefore preferred to retain the title "Control".

27. **The Chair** suggested that, in view of those comments and the fact that the explanatory notes explained the link between possession in the paper world and control in the context of the model law, the title of article 11 should be left unchanged.

28. *It was so agreed.*

29. **Mr. Castellani** (Secretariat), referring to the proposal to insert the word "publicly" before the word "identify" in subparagraph 1 (b) of article 11, said it was his understanding that that proposal was intended to emphasize the need to identify the person in control vis-à-vis all concerned or potentially concerned parties. However, it should be borne in mind that the draft model law provided for anonymity and the use of pseudonyms in certain cases, as explained in the explanatory notes. Whenever the anonymous circulation of a transferable document or instrument was permitted under substantive law, the anonymous circulation of an electronic transferable record should also be possible, although that did not preclude the identification of the person in control for purposes other than those of commercial law, such as law enforcement. He therefore suggested that subparagraph 1 (b) of article 11 should remain unchanged and the issue that the proposal was intended to address should be dealt with in the explanatory notes.

30. **Ms. Peters** (Germany), supported by **Ms. Cap** (Austria), welcomed that suggestion. The problem identified by the delegation of China would be better addressed by providing clarification in the explanatory notes than by adding the qualifier "publicly", which had not been discussed by the Working Group and was unclear in the context of article 11; moreover, it would have certain implications with regard to substantive law in that it might be understood as referring, for example, to public registries providing protection for bona fide third parties.

31. **The Chair** said she took it, in the light of those comments, that the Commission wished to accept the solution suggested by the representative of the Secretariat.

32. *It was so decided.*

33. **Ms. Peters** (Germany), drawing attention to the proposal in document A/CN.9/921/Add.3 to insert the word "exclusive" before the word "control" in paragraph 2 of article 11, said that her delegation did not support that proposal; however, if it was supported by other delegations, the meaning of "exclusive control" in that context should be clarified in the explanatory notes, using wording along the lines of paragraph 92 of document A/CN.9/920.

34. **Ms. Guo Yu** (China) said that if the word "exclusive" was not included, paragraph 2 would be inconsistent with paragraph 1 of the article and the difference between "exclusive control" in paragraph 1 (a) and "control" in paragraph 2 would be unclear, which might lead to difficulties in interpretation. One option would be to add an explanation in the explanatory note; however, it would be more helpful to deal with the issue in the paragraph itself in order to ensure correct interpretation of the article.

35. **Mr. Castellani** (Secretariat) recalled that the Working Group had agreed that only article 11, subparagraph 1 (a), establishing the functional equivalent of possession, should refer to "exclusive" control for the reasons given in paragraph 92 of the explanatory notes, several delegations having expressed concern with regard to the meaning of exclusivity in the context of paragraph 2, which established transfer of control as the functional equivalent of delivery, i.e. transfer of possession. If there was concern that paragraph 2 as drafted might suggest that the transfer of control satisfied the requirement established in that paragraph even if control was not exclusive, paragraph 100 of the explanatory notes could be expanded to clarify that transfer of control implied transfer of exclusive control for the reasons explained in paragraph 92.

The meeting was suspended at 11 a.m. and resumed at 11.20 a.m.

36. **Ms. Guo Yu** (China) reiterated her position that the addition of the word "exclusive", possibly accompanied by an appropriate explanation, in article 11 would be preferable to the amendment of the explanatory notes, given the importance of consistency between the two paragraphs in terms of the requirements they established.

37. **Mr. Coffee** (United States of America) said that his delegation favoured the suggestion of the Secretariat that the text of article 11 should not be changed but, instead, paragraph 100 of the explanatory notes should be expanded to provide the necessary clarification.

38. **Mr. Kah Wei Chong** (Singapore) said that while he appreciated the point made by the representative of China, he supported the Secretariat's suggestion to add a reference to paragraph 92 in paragraph 100 of the explanatory notes. As paragraph 95 of the explanatory notes also explained how exclusive control could be exercised by more than one person, it would be helpful to refer to that paragraph also, in order to explain the various contexts in which control might be transferred.

39. **Mr. Maradiaga** (Honduras) expressed support for the comments made by the representatives of Singapore and the United States.

40. **The Chair** said she took it that the Commission wished to retain the text of article 11, paragraph 2, unchanged but to expand paragraph 100 of the explanatory notes as suggested by the Secretariat, drawing on paragraphs 92 and 95 of the notes.

41. *It was so decided.*

42. **Mr. Coffee** (United States of America) said that during his delegation's consultations with various stakeholders, security rights experts had expressed the concern that paragraph 1 of article 11 focused merely on whether the law required possession, thus failing to reflect the fact that security rights could be made effective against third parties by various methods, such as by taking possession or control or registering notice of the security right. In order to ensure that the article would apply in such cases, and to achieve consistency

with other provisions of the model law, he proposed that the words "or permits" should be added after the word "requires" in the chapeau of article 11. In addition, the matter should be explained in the explanatory notes. To that end, he proposed the wording: "This law is not intended to restrict the security rights of creditors that would be able to create such rights in transferable instruments or documents. Thus, control under article 11 provides a substitute for those cases where the security rights would be created by the possession of a paper document or instrument. This Model Law is also not intended to limit the creation of security rights where the rights would be created by the registration of the rights in a public registry." That proposal was not intended to alter the substance of the provision.

43. **The Chair** said that it was indeed important to avoid inconsistency with UNCITRAL texts in the area of security interests, including the UNCITRAL Model Law on Secured Transactions. She suggested that the word "creditor" should be avoided, as security rights could be created by persons other than creditors.

44. **Mr. Coffee** (United States of America) suggested that the first sentence of the proposed text should be modified accordingly to read: "This law is not intended to restrict the creation of security rights in transferable documents or instruments."

45. **The Chair** suggested that the Commission should request the Secretariat to ensure that the terminology used in the proposed text was consistent with the UNCITRAL texts relating to security interests.

46. **Ms. Peters** (Germany) proposed that, since the word "substitute" in the proposed text was unclear, that word should be replaced with "functional equivalent".

47. **The Chair** said that the words "an alternative" in place of "a substitute" might be suitable. A further solution would be simply to delete the words "a substitute".

48. **Mr. Coffee** (United States of America) said that he would support any of the three proposed formulations.

49. **The Chair** said that since the suggested reference to "a functional equivalent" appeared to accurately convey what was intended, she took it that the Commission wished to accept the proposed addition of the words "or permits" after the word "requires" in the chapeau of article 11 and the proposed accompanying explanation, to be included in the explanatory notes, that "control under article 11 provides a functional equivalent for those cases where the security rights would be created by possession of a paper document or instrument", subject to the necessary terminological adjustments to be made by the Secretariat.

50. *It was so decided.*

51. **Ms. Peters** (Germany), drawing attention to her Government's proposal, contained in document A/CN.9/921, with regard to paragraph 94 of the explanatory notes, said that the end of the first sentence should be corrected to read "identify the person in control as such" or "identify the person in control of the electronic transferable record as such".

52. **The Chair** noted that, like the Government of Germany, the Government of China had proposed, in document A/CN.9/921/Add.3, that the word "holder" should not be used with reference to electronic transferable records in paragraph 94 of the explanatory notes. She therefore took it that the Commission wished to accept the reformulation proposed by the Government of Germany, as orally amended.

53. *It was so decided.*

54. **Mr. Castellani** (Secretariat), drawing attention to the proposal made by the Government of Germany, contained in document A/CN.9/921, with respect to paragraph 96 of the explanatory notes, said that the comments accompanying that proposal raised the question of whether the explanatory notes should provide additional clarification with respect to securities held with intermediaries, although, according to article 1 (3) of the model law, the model law did not apply to securities.

55. **Ms. Peters** (Germany) said that the proposed amendment was important in light of the Commission's decision to amend the explanatory notes to article 1 (3) to state that the general determination as to which instruments were to be counted as securities was a matter of substantive law. Paragraph 96 of the explanatory notes should reflect the possibility that there were types of securities to which the model law applied that were held in accounts maintained and operated by intermediaries and that, under the substantive law of an enacting State, those intermediaries might have or be regarded as having possession of an electronic transferable document.

56. **Mr. Coffee** (United States of America) suggested, as a matter of drafting, that the second sentence of the proposed text should be modified slightly to read "It does not imply or exclude the possibility that the third-party service provider or any other intermediary is a person in control. Rather, this is to be determined by the applicable substantive law."

57. **The Chair** pointed out that any further drafting changes deemed necessary would be made at the stage of final editing of the report. She took it that the Commission wished to accept the proposed reformulation of paragraph 96 of the explanatory notes.

58. *It was so decided.*

59. **The Chair**, drawing attention to the proposal by the Government of Germany, in document A/CN.9/921, with respect to paragraph 102 of the explanatory notes, said she took it that the Commission wished to accept the proposed changes.

60. *It was so decided.*

Chapter III. Use of electronic transferable records

Article 12 and explanatory notes thereto

61. **Mr. Sarapkin (**Russian Federation), referring to the written comments of his Government as set out in document A/CN.9/921/Add.2, said that in article 12, the criteria for determining the reliability of the method referred to were non-mandatory, whereas the article should establish basic principles from which no deviation was permitted.

62. **Ms. Guo Yu** (China), drawing attention to her Government's proposal with respect to the article, as contained in document A/CN.9/921/Add.3, said that the additional items proposed for inclusion in paragraph (a) of article 12 were intended to ensure that the article addressed not only the reliability of the computer system but also the reliability of the method used, since a reliable computer system did not necessarily mean that the method used was also reliable. If those additional items were not added to the article itself, they should be included in the explanatory notes.

63. **Ms. Peter**s (Germany) said that she shared the view that certain criteria for determining the reliability of the method used should be mandatory rather than subject to derogation or modification on the basis of party agreement. In that regard, she drew attention to her Government's comments on the article, as set out in document A/CN.9/921.

64. **Mr. Castellani** (Secretariat) said that article 12 already reflected the elements that the Working Group had identified as particularly relevant, and the chapeau of paragraph (a) made clear that the list set out was not exhaustive but, rather, was aimed at providing guidance in assessing reliability.

65. With regard to the assurance of data integrity, which some Governments had highlighted in their written comments as one of the criteria that should be mandatory, he pointed out that paragraph 110 of the explanatory notes explained the important distinction between the implications of the term "integrity" for the purposes of article 12 and "integrity" as an essential element of an electronic transferable record under article 10.

66. With respect to the ability to prevent unauthorized access, which had also been highlighted as a possible mandatory criterion, he suggested expanding paragraph 111 of the explanatory notes to further explain the relationship between unauthorized access and exclusive control.

The meeting rose at 12.30 p.m

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Summary record of the 1056th meeting, held at the Vienna International Centre, Vienna, on Wednesday, 12 July 2017, at 2 p.m.

[A/CN.9/SR.1056]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 2.05 p.m.

Finalization and adoption of a model law on electronic transferable records and explanatory notes (*continued*) (A/CN.9/897, A/CN.9/920, A/CN.9/921, A/CN.9/921/Add.1, A/CN.9/921/Add.2, A/CN.9/921/Add.3 and A/CN.9/922)

1. **The Chair** invited the Commission to resume its consideration of the articles of the draft model law and accompanying explanatory notes as contained in document A/CN.9/920.

Chapter III. Use of electronic transferable records (continued)

*Article 12 and explanatory notes thereto (*continued*)*

2. **Ms. Finocchiaro** (Italy) recalled that the Working Group had not been able to reach a consensus as to which of the elements listed in article 12, paragraph (a), should be defined as mandatory, despite extensive discussion. It was therefore doubtful that reopening that discussion would yield a different result, and doing so would be undesirable given the delicate nature of the matter. Since those elements were explained in the explanatory notes, and additional guidance could be provided if necessary, the current wording represented a good compromise. It should also be borne in mind that, as the text was a model law, States incorporating it into their legislation could derogate from any of its provisions.

3. **Mr. Soh** (Singapore) said that he shared the reservations expressed by the representative of Italy. When domestic stakeholders had been consulted on the model law, nearly all those in the banking sector had raised concerns over the reliability requirement, noting that no system could ever be completely secure and that it was impossible to guarantee that no system problems would ever arise. The question was whether the list of criteria in article 12 (a) should be expanded or whether a new list of mandatory requirements should be introduced. Both possibilities would require significant reformulation of the article, since mandatory requirements could not feature in a list introduced by the chapeau of paragraph (a) as currently drafted. If any of the elements currently listed were to be highlighted as mandatory, they would have to be removed from the list and reformulated as separate provisions. However, mandatory requirements might well lead to a range of practical problems; for example, a party wishing to initiate legal action in connection with an electronic transferable record would have to prove that the system used was reliable in order to be able to assert its rights with respect to that record. Moreover, any restrictions imposed on contracting parties would have to be worded very carefully. If the assurance of data integrity, for example, was a requirement from which no derogation was possible, consideration would have to be given to the question of whether parties would be prevented from establishing in an agreement concluded between them that they would not, having previously examined and approved the system to be used to ensure data integrity, file a claim in respect of data integrity. Although he did not oppose going into such detail, it would take up more time than was available to the Commission.

4. **The Chair** suggested that, in the light of the comments made, the text of article 12 should be left unchanged. However, the issue could be further explained in the explanatory notes.

5. **Mr. Sarapkin** (Russian Federation) said that while he agreed that it would not be appropriate to amend article 12 itself, items (ii), (iii) and (iv) of paragraph (a) should be identified in the explanatory notes as the elements that should be given priority.

6. **Ms. Peters** (Germany) proposed that paragraph 104 of the explanatory notes should be amended to reflect the view that certain elements listed in article 12 should be mandatory; that parties should not be able to derogate from those requirements by party agreement; and that those elements should be objective requirements, especially in the cross-border context, in which objective, mandatory and reliable standards were particularly important. Accordingly, she proposed the insertion in that paragraph of a new second sentence reading “In particular, elements such as data integrity, access protection and hardware and software security are conditions which are known to establish reliability especially in a cross-border context”. Similar text could also be inserted in paragraph 119.

7. **The Chair** sought clarification as to whether the elements in question should be highlighted as mandatory or as being of particular importance.

8. **Ms. Peters** (Germany) said that her delegation’s view was that those elements should be mandatory. However, since the Commission had agreed not to amend the text of article 12 itself, the explanatory notes should underscore that there was a view that certain objective elements should be mandatory, given their importance.

9. **Mr. Sarapkin** (Russian Federation) expressed support for the proposal of the representative of Germany.

10. **Mr. Coffee** (United States of America) said that the identification of items that were mandatory or more important than other items, whether in article 12 itself or in the accompanying explanatory notes, would be both problematic and unacceptable, for the reasons already given by previous speakers. Moreover, it would require the detailed analysis of each element when such an analysis had already been conducted by the Working Group.

11. **The Chair** suggested that the Commission should consider how the relative importance of each element might be highlighted when reviewing paragraphs 109–116 of the explanatory notes, which addressed each element in turn.

12. **Mr. Sarapkin** (Russian Federation) said that he appreciated the point that the Working Group had worked extensively on article 12 and the accompanying explanatory notes and therefore wished to propose, as a compromise solution, that items (ii), (iii) and (iv) of paragraph (a) of article 12 should be identified in the explanatory notes not as mandatory criteria but as criteria that parties were particularly encouraged to comply with.

13. **Mr. Gabriel** (International Law Institute) said that the words "which may include" in paragraph (a) of article 12 clearly indicated that the list of elements was not exhaustive but merely illustrative, and the relevance of each item would depend on the circumstances. Consequently, the elements in such a list could not be ranked in order of importance.

14. **Ms. Peters** (Germany) said that, in view of the comments made, the complexity of the issue and the fact that the Working Group had already discussed the matter at length, she wished to withdraw her proposal with regard to paragraphs 104 and 119 of the explanatory notes.

15. **The Chair** said she took it that the Commission wished to leave paragraphs 103 to 108 of the explanatory notes unchanged.

16. *It was so agreed.*

17. **Mr. Castellani** (Secretariat), drawing attention to paragraph 32 of document A/CN.9/922, which related to paragraphs 115 and 116 of the explanatory notes, recalled that concerns had been raised over the reference to "any applicable industry standard" in article 12 (a) (vii), as that reference could lead to the imposition of a specific technological standard, for example. Given that a standard might be accepted in only one specific business field, the reference to industry standards should not be interpreted as favouring the industry standards of one sector over those of other sectors, as that could hinder supply chain management.

18. **The Chair** said she took it that the Commission wished to include in the explanatory notes the clarifications proposed in paragraph 32 of document A/CN.9/922.

19. *It was so decided.*

20. **Mr. Castellani** (Secretariat) drew attention to the written proposal submitted by the International Federation of Freight Forwarders Associations, in document A.CN.9/921/Add.2, to delete paragraph 119 of the explanatory notes so that the role of party autonomy could be interpreted more freely under article 12.

21. He proposed that the last sentence of paragraph 119 should be moved to the beginning of paragraph 120, which was a more appropriate location for that text.

22. Recalling the Commission's decision that under article 4 of the model law it should be left to enacting States to identify which provisions could be derogated from or varied by agreement, he pointed out that if parties were to be encouraged to comply with certain elements among those listed in article 12 (a) — as suggested by the representative of the Russian Federation — in paragraph 119 of the explanatory notes, it was important to bear in mind that the question of whether such matters might be subject to party autonomy would necessarily relate back to article 4.

23. **Ms. Peters** (Germany) said that her delegation wished to confirm that it was withdrawing the written proposal submitted by her Government in relation to paragraph 119 of the explanatory notes in the light of the Commission's discussion of paragraph 104 of the notes.

24. **Mr. Coffee** (United States of America) said that he supported the proposal to delete paragraph 119 on the basis of the explanation provided by the International Federation of Freight Forwarders Associations for that proposal.

25. **Mr.** Kah Wei **Chong** (Singapore), supported by **Ms. Peters** (Germany) and **Mr. Sarapkin** (Russian Federation), said that he objected to the proposed deletion of paragraph 119, which would undo the Working Group's considerable work on the issue of party autonomy in the context of article 12.

26. **The Chair** said that, since there was insufficient support for the proposal to delete paragraph 119, she took it that the Commission wished to retain the text of that paragraph unchanged but, as suggested by the representative of the Secretariat, to move the final sentence of the paragraph to the beginning of paragraph 120.

27. *It was so decided.*

Article 13 and explanatory notes thereto

28. **The Chair**, drawing attention to the proposal of the Government of China with respect to the draft article, as set out in document A/CN.9/921/Add.3, said she took it that the Commission wished to accept that proposal.

29. *It was so decided.*

Article 14 and explanatory notes thereto

30. **Mr. Coffee** (United States of America), drawing attention to his Government's proposal, in document A/CN.9/921, to change the title of the article from "Determination of place of business" to "Place of business", pointed out that the text of article 14 did not apply to the determination of the place of business but merely included certain factors that did not apply when considering what constituted the place of business.

31. **The Chair** said she took it that the Commission wished to accept the proposed change.

32. *It was so decided.*

33. **Mr. Soh** (Singapore) said that since there were no other provisions of the model law itself that dealt with place of business, article 14 might be interpreted as applying where related rules of substantive law included reference to a place of business, which could raise conflict-of-laws issues. He therefore sought clarification as to the purpose of the article and when it might apply.

34. **Mr. Coffee** (United States of America) said that he shared the concerns expressed by the representative of Singapore and would support the deletion of the article. Although "place of business" was relevant in other UNCITRAL instruments relating to electronic commerce, that was not the case with regard to the draft model law on electronic transferable records, and it was unclear in what respect article 14 was relevant to the remainder of the model law.

35. **Mr. Gabriel** (International Law Institute) said that "place of business" would be relevant to the creation of an electronic transferable record and the performance of the obligation indicated in that record. Since in both cases the place of business would be determined by substantive law, as was indeed suggested by the fact that the article offered no positive elements for such determination, article 14 served no purpose and might even interfere with substantive law.

36. **Mr. Sarapkin** (Russian Federation) said that, since article 14 had been discussed over a lengthy period by the Working Group, with the input of many experts, its deletion would not be appropriate. The Working Group had clearly concluded that the article was necessary. Moreover, given that the Commission had been cautious during the current discussions about introducing even minor changes in the wording of the model law, it was doubtful that the deletion of an entire article would be appropriate at the current late stage of proceedings.

The meeting was suspended at 3.30 p.m. and resumed at 3.50 p.m.

37. **Mr. Soh** (Singapore) said that the outcome of informal consultations was that the retention of article 14 might be justified on the basis that the article might serve as an independent rule governing the determination of place of business in relation to electronic transferable records where no such rule existed under the substantive law of an enacting State.

38. **The Chair** suggested that article 14 should be retained, in view of the various reasons given for its retention.

39. *It was so decided.*

Article 15 and explanatory notes thereto

40. **Mr. Fujita** (Comité Maritime International) drew attention to his organization's comments and proposals, set out in document A/CN.9/921/Add.1, with regard to article 15, in particular its proposal to delete that article. In that regard, he pointed out that the concerns expressed by his organization in that document were shared by the International Federation of Freight Forwarders Associations, as reflected in document A/CN.9/921/Add.2.

41. **Ms. Yamanaka** (Japan) expressed support for the proposal of the Comité Maritime International. It was doubtful that the article was necessary given the nature of electronic records. Although historically, multiple originals of documents had been required because documents could be lost in the course of distribution, modern transfer speeds meant that it was rare for paper documents to be lost, and electronic records were never lost in the course of distribution. It was therefore questionable whether there was a business need for multiple originals. Moreover, as electronic records were easy to copy, it was difficult to distinguish between originals and copies, as a result of which the issuance of multiple originals could lead to disputes. Even if a functional equivalence approach was taken, it was important to consider the implications of issuance of multiple originals and whether the rationale for their issuance applied to electronic transferable records. As a minimum, consideration should be given to the extent of business demand for the issuance of multiple originals of electronic transferable records and the appropriateness of a provision such as article 15 in the model law.

42. **Mr. Maradiaga** (Honduras) said that the points raised by the Comité Maritime International were important, particularly since one of the main aims of instruments such as the model law was to ensure legal certainty. As the issuance of multiple originals in the electronic environment could lead to disputes, his delegation supported the deletion of article 15, subject to guidance from the Secretariat.

43. **Ms. Finocchiaro** (Italy) said it was important to bear in mind that, according to article 15, if the law did not permit the issuance of more than one original of a transferable document or instrument, the article did not apply. While she had no strong view as to whether article 15 should be preserved or deleted, she wondered what the consequences of deletion of article 15 would be; presumably its deletion would not prevent the issuance

of multiple originals of electronic transferable records in future business practice. If the article was deleted, the possible consequences of its deletion should be set out in the explanatory notes.

44. **Ms. Cap** (Austria), expressing support for the comments made by the representative of Italy, said it should be borne in mind that the model law did not seek to establish substantive rules on the matter. Since article 15 sought to establish functional equivalence with the paper-based environment and, moreover, was the product of lengthy discussion, it should be retained.

45. **Ms. Peters** (Germany), also expressing agreement with the statement made by the representative of Italy, said that since the model law applied not only to those instruments covered by the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) but also to those covered by article 1 of the model law itself, i.e. to securities in general, albeit subject to certain exceptions and exclusions, it was not necessarily the case that the model law should adopt the same approach as that taken in the Rotterdam Rules.

46. Given that the model law was intended to establish functional equivalence, it was beyond the scope of the model law to address the question of whether a certain practice that might be permitted or prohibited under substantive law was desirable in the electronic world. Even if article 15 were deleted, multiple originals could be issued under article 10 if their issuance was permitted by substantive law. Therefore, the deletion of article 15 would not prevent the issuance of multiple originals in jurisdictions where that practice was allowed.

47. **Mr. Coffee** (United States of America) recalled that, throughout the Working Group's discussions on article 15, it had been considered that there might be a business need for multiple originals of electronic records and that the article might therefore be helpful, hence its inclusion. However, such a need had in fact never been established, as confirmed by the comments submitted by the Comité Maritime International and the International Federation of Freight Forwarders Associations, which indeed suggested that the provision might in fact be detrimental. As no industry stakeholders had expressed support for preserving article 15, many having instead stated objections to the provision, the article should be deleted. As had been pointed out, the absence of the provision would not preclude the issuance of multiple originals; moreover, it might well be that the function to be achieved could be fulfilled through the notion of "control", as already established by the model law, if the intention was to provide for the issuance of multiple originals to multiple parties.

48. **Mr.** Kah Wei **Chong** (Singapore), expressing support for the comments made by the representative of Germany, said that the Working Group, when considering the article, had merely sought to achieve functional equivalence rather than to make policy decisions affecting substantive law. He was therefore in favour of retaining article 15.

49. **The Chair** said that there appeared to be considerable support for deleting article 15 and, as had been pointed out, deletion of the article would not preclude the issuance of multiple originals under substantive law. It also appeared that among those in favour of deletion, it was felt that while the practice of issuing multiple originals should perhaps not be prohibited, it should not be encouraged. She therefore suggested that article 15 should be deleted but the explanatory notes on the issuance of multiple originals should be retained, subject to the Commission's review and possible modification of those notes.

50. *It was so decided.*

51. **Mr. Castellani** (Secretariat), drawing attention to paragraphs 131 to 136 of the explanatory notes, suggested that the second and third sentences of paragraph 131 should be deleted and the first sentence should be merged with paragraph 132, the text of which would remain unchanged except for the reference to article 15, which would be replaced with a reference to the model law. Paragraph 133 could either be amended as proposed by the Government of Germany in document A/CN.9/921 or remain as drafted, and paragraph 134 could remain unchanged. In paragraph 135, he suggested that the first sentence should be deleted and the words "that obligation" in the second sentence should be replaced with the words "an obligation to indicate whether multiple originals have been issued". In paragraph 136, the reference to article 15 should be replaced with a reference to the model law as a whole. Those changes would reflect the lengthy discussions of the Working Group and the important point that the model law did not prevent the practice of issuing multiple originals, whether in electronic form or on different media.

52. **Ms. Peters** (Germany), expressing support for the proposed changes, said that she wished to withdraw her Government's proposal to revise paragraph 133 in view of the fact that the Commission had not accepted the Government's proposal to delete the reference to the "singularity" and "control" approaches in paragraph 65 of the explanatory notes.

53. **Mr. Coffee** (United States of America) suggested that the words "The Model Law aims to enable" in the proposed revised text of paragraph 132 should be replaced with the word "enables", or possibly the word "permits".

54. **The Chair** said she took it that the Commission wished to accept the amendments proposed by the representatives of the Secretariat and the United States.

55. *It was so decided.*

Article 16 and explanatory notes thereto

56. *Article 16 and the explanatory notes thereto were approved.*

Article 17 and explanatory notes thereto

57. *Article 17 and the explanatory notes thereto were approved.*

Article 18 and explanatory notes thereto

58. **Mr. Castellani** (Secretariat), referring to the submission of the Government of Colombia in document A/CN.9/921, suggested that text should be added to paragraph 157 of the explanatory notes, or possibly to the section of the notes on the issuance of multiple originals, to explain that paragraph 3 of article 18 did not apply where additional originals were issued on a medium or on media different from that used for the first original, in which case the first original would not cease to have validity.

59. Drawing attention to the submission of the Interparliamentary Assembly of the States members of the Commonwealth of Independent States, contained in document A/CN.9/921/Add.2, he noted that while a transferable document or instrument or an electronic transferable record might cease to have effect or validity with respect to a specific function or specific functions, some of the information it contained might nonetheless remain valid for other purposes that were not related to transferability. For example, a bill of lading provided evidence of a contract for the carriage of goods. He therefore suggested that further additional text to that effect should be inserted in paragraph 157 of the explanatory notes.

60. **The Chair** said she took it that the Commission wished to amend paragraph 157 of the explanatory notes as proposed.

61. *It was so decided.*

Article 19 and explanatory notes thereto

62. **Mr. Castellani** (Secretariat) said that a number of comments had been received, including in documents A/CN.9/921 and A/CN.9/921/Add.1, to the effect that the explanatory notes should provide guidance on data storage and archiving and, in that context, clarification with regard to data privacy and protection. In that regard, he recalled that an earlier draft of the model law had contained an article on the retention of information in an electronic transferable record, and certain points raised during the Working Group's discussion of that article, which was reflected in paragraphs 74 and 75 of document A/CN.9/834, had received broad support. The first point was that all applicable retention requirements found in other law, including legislation on privacy and data retention, must be complied with, in line with the principle that substantive law should not be affected. The second point was that when an electronic transferable record was terminated, it was not the record itself that was retained but, rather, the information contained in that record. It was therefore suggested that, in order to explain those two points, a paragraph containing guidance on storage and archiving should be inserted before the section of the explanatory notes concerning third-party service providers (paragraphs 167–170), including a reference to document A/CN.9/834.

63. **The Chair** said she took it that the Commission wished to accept that proposal.

64. *It was so decided.*

Chapter IV. Cross-border recognition of electronic transferable records

Article 20 and explanatory notes thereto

65. **Mr. Sarapkin** (Russian Federation), drawing attention to his Government's comments and proposal regarding article 20 as contained in document A/CN.9/921/Add.2, said that although the principle of non-discrimination was undoubtedly both positive and necessary, it was important to clarify the scope of application of that principle either in article 20 itself or, if that were not possible, in the explanatory notes.

66. **Ms. Peters** (Germany) said that since the proposal affected the substance of article 20 and the accompanying explanatory notes, a decision on the matter should be deferred so that the proposal could be given proper consideration.

67. **Mr. Castellani** (Secretariat), drawing attention to the comments submitted by the World Trade Organization (WTO) in document A/CN.9/921 with respect to article 20, suggested that the text of the final paragraph of that submission, from the words "underlying domestic criteria", should be included in the explanatory notes to the article.

68. **The Chair** suggested that the Commission should take a decision on the two proposals at its next meeting.

69. *It was so agreed.*

The meeting rose at 5 p.m.

Summary record of the 1057th meeting, held at the Vienna International Centre, Vienna, on Thursday, 13 July 2017, at 9.30 a.m.

[A/CN.9/SR.1057]

Chair: Ms. Sabo (Vice-Chair) (Canada)
Later: Mr. Martonyi (Hungary)

The meeting was called to order at 9.50 a.m.

Finalization and adoption of a model law on electronic transferable records and explanatory notes (*continued*) (A/CN.9/897, A/CN.9/920, A/CN.9/921, A/CN.9/921/Add.1, A/CN.9/921/Add.2, A/CN.9/921/Add.3 and A/CN.9/922)

1. **The Chair** invited the Commission to resume its consideration of the articles of the draft model law and accompanying explanatory notes as contained in document A/CN.9/920.

*Chapter IV. Cross-border recognition of electronic transferable records (*continued*)*

*Article 20 and explanatory notes thereto (*continued*)*

2. **Mr. Castellani** (Secretariat), recalling his earlier proposal to add to the explanatory notes the text of the final paragraph of the comments submitted by the World Trade Organization (WTO) in document A/CN.9/921, from the words "underlying domestic criteria", said that the proposed paragraph highlighted important considerations concerning the cross-border use and recognition of electronic transferable records.

3. **Ms. Peters** (Germany), supported by **Ms. Cap** (Austria), said that she did not support that proposal as the text in question would affect domestic substantive law, or substantive law in general, and would have the undesirable effect of broadening the scope of article 20.

4. **Mr. Sarapkin** (Russian Federation), recalling his Government's proposal, set out in document A/CN.9/921/Add.2, to amend article 20 or the explanatory notes thereto in such a way as to limit application of the principle of non-discrimination of electronic transferable records, said that the rationale for that proposal was echoed in paragraph 14 of the submission of the Government of Kuwait in document A/CN.9/921/Add.1 and was also supported by other delegations.

5. **The Chair** said that unless there was support for adding the proposed text to article 20 itself, she would take it that the Commission wished to consider the proposal in the context of the explanatory notes.

6. *It was so decided*.

7. **Mr. Gabriel** (International Law Institute) said that the proposed text appeared to be unnecessary, and might present problems. It implied that if an electronic transferable record did not meet the reliability standard established in article 12 of the model law, it would not be enforceable in a jurisdiction other than the one in which it was issued; however, under article 10, an electronic transferable record which did not meet that standard would in any case not be considered an electronic transferable record.

8. In the cross-border context, standards in different jurisdictions might develop differently over time, as a result of which an electronic transferable record deemed valid in one jurisdiction might be deemed invalid, or as not constituting an electronic transferable record, in another jurisdiction where its enforcement was sought. The question of whether the second jurisdiction should enforce the electronic transferable record, while important, was a matter of substantive law that was in fact answered by paragraph 2 of article 20. It was undesirable and unwise to dictate a universal and absolute answer as to how jurisdictions should address what was a question of private international law; instead, as paragraph 2 already provided, it should be left to each individual jurisdiction to determine the answer, given that there might be a variety of approaches. He therefore strongly supported the retention of article 20 and the explanatory notes thereto as drafted.

9. **Ms. Finocchiaro** (Italy) said that she did not support the proposed addition to the explanatory notes to article 20, as it would go beyond the scope of the article.

10. **Mr. Maradiaga** (Honduras) said that while he appreciated the rationale for the proposal of the Russian Federation, the proposed text would make the notes unclear and its inclusion would be counterproductive. For the sake of clarity, and in order for the Commission to be able to proceed more expeditiously, the explanatory notes to article 20 should be retained as drafted.

11. **The Chair** said that the Secretariat had pointed out that only the second part of the text proposed by the Russian Federation, reading "if such records do not meet the criteria determining the reliability of the method used, as set out in article 12", was problematic. The first part, reading "The principle of non-discrimination of electronic transferable records may not in itself constitute a ground for recognizing the legal effect, validity or enforceability of foreign electronic transferable records", was consistent with the model law and in fact clearer than the related text found in the second sentence of paragraph 176 of the explanatory

notes. She therefore suggested that that first part of the proposed text should be included in that paragraph.

12. *It was so decided.*

*Article 5 and explanatory notes thereto (*continued*)*

13. **Mr. Castellani** (Secretariat) said that the proposal made by the Government of Kuwait with respect to the article, in document A/CN.9/921/Add.1, appeared to concern matters of substantive law. The issue raised was in fact addressed by the additional text that the Commission had decided to add to the explanatory notes to article 19, in which it was explained that all applicable data retention requirements found in other law, including legislation on privacy and data protection, must be complied with.

14. **Ms. Peters** (Germany) said that she did not support the proposal of the Government of Kuwait as that proposal touched upon issues of substantive law concerning liability that were beyond the scope of the model law.

15. **The Chair** said she took it that the Commission wished to approve article 5 and the explanatory notes thereto unchanged.

16. *It was so decided.*

Proposed introduction to the draft explanatory notes (A/CN.9/922)

17. **Mr. Castellani** (Secretariat), introducing the proposed introduction to the explanatory notes as set out in paragraphs 4–21 of document A/CN.9/922, said that the content of that introduction was mainly historical and procedural in nature and that its structure followed that of similar UNCITRAL texts.

18. **Mr. Fujita** (Comité Maritime International), drawing attention to the second sentence of paragraph 8, said that in article 14, paragraph 3, of the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) it was stated that bills of lading might be signed by any mechanical or electronic means; however, as that text had been drafted in 1978, it was unclear whether "electronic means" meant the same as "electronically" in the current sense. He therefore proposed that that sentence should be amended to read "Article 14, paragraph 3, of the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules") may be interpreted as implying the possible use of electronic bills of lading", which would be a less categorical and more cautious formulation.

19. *It was so decided.*

20. **Mr. Castellani** (Secretariat) said that during informal consultations, it had been suggested that the reference to medium-neutral electronic transferable records in paragraph 13 should be replaced with a reference to electronic transferable records for which applicable substantive law was medium-neutral.

21. **Ms. Peters** (Germany), expressing support for that suggestion, recalled that she had pointed out during the Commission's discussion of the explanatory notes to article 1, with reference to paragraphs 22 and 23 of document A/CN.9/922, that the term "medium-neutral electronic transferable records" should be avoided.

22. **Mr. Castellani** (Secretariat) suggested that the final sentence of paragraph 13 should be divided into two sentences, to read: "Consequently, the Model Law does not apply to electronic transferable records existing only in electronic form as those records do not need a functional equivalent to operate in the electronic environment. The Model Law does not affect medium-neutral substantive law applicable to electronic transferable records."

23. **Mr. Coffee** (United States of America) suggested that the word "Consequently" should be deleted, since that word did not follow on logically from the preceding sentence; i.e., the fact stated was not a consequence of the fact that the law of each jurisdiction would determine which documents or instruments were transferable.

24. **The Chair** said she took it that the Commission wished to accept the proposed amendments.

25. *It was so decided.*

26. *Subject to the agreed amendments, the introduction to the explanatory notes was approved.*

Relationship of the draft model law with other UNCITRAL texts in the area of electronic commerce

27. **Mr. Castellani** (Secretariat), referring to paragraphs 38 to 41 of document A/CN.9/922, said that the Commission might wish to provide guidance to States that had enacted the UNCITRAL Model Law on Electronic Commerce (1996) or were intending to enact it, particularly with respect to articles 16 and 17 of that Model Law. In that regard, he drew attention to the suggestions in paragraphs 40 and 41.

28. **The Chair** said that, in the absence of comments, she took it that the Commission did not wish to accept those suggestions, on the basis that it should be left to States to determine how they wished to address the relationship between the Model Law on Electronic Commerce and the model law on electronic transferable records. However, the Secretariat could provide guidance in that regard as part of its technical assistance activities, on a case-by-case basis.

29. *It was so decided.*

30. **Mr. Castellani** (Secretariat), drawing attention to paragraphs 42 to 48 of document A/CN.9/922 on methods of enactment of the model law and their effect on functional equivalence standards, said that if those matters were considered too technical to be addressed in the explanatory notes, one possible option would be for the Commission to address them in a more

general context during its deliberations on agenda item 17, in conjunction with paragraphs 49–53 of document A/CN.9/922 on the possible compilation of consolidated UNCITRAL model provisions on electronic commerce. That work could be assigned to Working Group IV (Electronic Commerce), which could further examine the relationship between the model laws on electronic commerce and report to the Commission with recommendations.

31. **The Chair** asked whether the Commission wished to provide additional guidance in the explanatory notes along the lines suggested in paragraphs 47 and 48 of document A/CN.9/922 or to consider the issues concerned under agenda item 17, as a possible area of future work for Working Group IV.

32. **Mr. Schoefisch** (Germany) said that while guidance on the issues raised would be useful, it was undesirable for the Working Group to undertake such a project given that it would require significant work.

33. **Mr. Soh** (Singapore) said that he did not support the addition of the proposed guidance to the explanatory notes, since the issues concerned were very detailed and technical. It would be preferable for the Working Group to engage in further discussion and broad consultation and to consider possible recommendations before the Commission made a firm decision with regard to future work on those issues. In the meantime, States could be provided with relevant guidance in the form of technical assistance, as necessary.

34. **Mr. Coffee** (United States of America) recalled that the draft model law had been drafted largely in isolation from the other UNCITRAL instruments on electronic commerce. In States where the Model Law on Electronic Commerce and the UNCITRAL Model Law on Electronic Signatures (2001) had been enacted, those texts had not necessarily been enacted verbatim. Consequently, it was unclear how the model law on electronic transferable records would interact with domestic laws based on those model laws. As suggested by the Chair, it would be more appropriate to deal with that question on a case-by-case basis than to make recommendations.

35. He did not support the suggestion made in paragraph 48 of document A/CN.9/922, since article 12 of the model law on electronic transferable records had been drafted in order to give context to the remainder of that model law, rather than with reference to the Model Law on Electronic Signatures.

36. Setting aside the question of whether UNCITRAL should consolidate and compile the provisions of its model laws on electronic commerce, as suggested in paragraph 53 of document A/CN.9/922, Working Group IV should not consider specific issues concerning the relationship between those model laws at the current time, since its agenda was already full.

37. **The Chair** said she took it that the Commission did not wish to add guidance to the explanatory notes on the interaction between existing UNCITRAL instruments on electronic commerce and the model law on electronic transferable records, particularly since such guidance might not be useful where domestic legislation departed from the provisions of those instruments and it was therefore best to approach the matter on a case-by-case basis.

38. *It was so decided.*

Draft decision on finalization and adoption of a model law on electronic transferable records and explanatory notes (A/CN.9/L/CRP.5)

39. *The draft decision was adopted.*

The meeting was suspended at 11.10 a.m. and resumed at 11.25 a.m.

40. *Mr. Martonyi (Hungary) took the chair.*

Electronic commerce: progress report of Working Group IV (A/CN.9/897 and A/CN.9/902)

41. **Mr. Castellani** (Secretariat), introducing the agenda item, drew attention to the recommendations on priority of work contained in paragraphs 93 and 96 of document A/CN.9/902. Referring to paragraph 99 of the same document, he said that while paperless trade facilitation had not been discussed formally at the level of the Working Group, the Secretariat continued to carry out intersessional work on the topic and to report on that work to the Working Group. In particular, the Secretariat was currently involved in preparations for the Eleventh Ministerial Conference of WTO, at which electronic commerce was to be discussed. UNCITRAL would provide technical information on how its texts on electronic commerce could support paperless trade facilitation and how they interacted with free trade agreements. That work was ongoing and both the Working Group and the Commission would continue to be informed of developments, including any suggestions received by the Secretariat that the Working Group should play a more active role in that area.

42. **Mr. Apter** (Israel) welcomed the work that had been carried out by the Working Group on the issue of cloud computing and the decision to start work on a checklist of contractual issues in that area. He hoped that the Working Group's discussions on the checklist would be concluded as soon as possible. The next step should be more substantive work on cloud computing, including the elaboration of substantive rules, and in that regard he called upon other delegations to encourage their Governments and experts in the field of cloud computing to participate in the Working Group's deliberations. UNCITRAL should be involved in that field as cloud computing was now the basis for trade between companies of all sizes, and was increasingly used in the regulation of international trade. UNCITRAL should therefore take the opportunity to

create, at the least, some form of non-binding universal guidance on the topic. Government experts from Israel could participate in meetings to promote work on such guidance. He encouraged UNCITRAL to play a leading role in addressing the legal challenges that States and other international actors faced in the area.

43. **Mr. Sarapkin** (Russian Federation) said that while the topics of cloud computing and identity management and trust services were both of importance, the Working Group's discussions had indicated that priority should be given to work on the latter subject, which was of key importance in trade transactions.

44. **Mr. Lapiere** (Observer for Belgium) said that identity management was a fundamental requirement underpinning the bulk of the work undertaken by Working Group IV. Reliable identity management and trust services had become essential requirements for electronic commerce activities owing to the increasing importance and sensitivity of online transactions, and were of key importance to economic operators wishing to conduct risk management.

45. It was clear that the topics of identity management and trust services were closely interlinked. Work on identity management necessarily entailed work on trust services, since identity management was a means to an end — typically being the first step in any electronic transaction — rather than an end in itself, while electronic transactions generally called for the use of one or more trust services.

46. It was essential to continue and deepen the work on identity management and trust services in order to support the security and trustworthiness requirements of commercial transactions. The objective should be to provide a general framework applicable to both identity management and trust services, including appropriate provisions to foster international cross-border legal and technical interoperability. In that context, it might be useful to note that the European Union had a comprehensive legal framework for both electronic identification and authentication and trust services for electronic transactions in the internal market, known as the eIDAS Regulation, which was the result of an agreement reached by the 28 member States of the European Union in spite of their different approaches to both identity management and trust services.

47. If, owing to resource constraints, it was not feasible to continue work on the topics of cloud computing and identity management and trust services in parallel, the Commission should give priority to the latter topic.

48. **Mr. Meier** (Switzerland) said that the preparation of a checklist of contractual issues relating to cloud computing was an appropriate and useful approach to that topic, work on which should be carried out in parallel with work on identity management and trust services.

49. **Mr. Schoefisch** (Germany) said that he welcomed the work on cloud computing carried out to date and supported the preparation of a checklist on contractual issues in that area. However, it was doubtful whether further work on the topic should be carried out and whether such work would be useful; moreover, there were other bodies that already dealt with cloud computing, particularly the Hague Conference on Private International Law. Priority should therefore be given to work on identity management and trust services, which should be carried out in parallel with work on the checklist.

50. **Mr. Bellenger** (France) said that, in view of the broad nature of the topics of identity management and trust services, it would be difficult to advance work both on those topics and on cloud computing. He therefore suggested that the work on cloud computing should be delegated to an expert group.

51. **Mr. Cooper** (United Kingdom) said that it was clear that identity management and trust services were a key foundation of electronic commerce. In that regard, the comprehensive and predictable legal framework developed in the European Union for electronic identity and trust services, the eIDAS Regulation, was a very good example of cooperation between States to establish a framework for mutual recognition and interoperability between electronic identity and trust services. The value of that framework was increasingly evident from the great interest it had generated in the commercial world, and from the fact that it supported other areas of legislation. While he acknowledged the value of the work on cloud computing, the topics of identity management and trust services should be prioritized given their considerable importance and the interest they attracted.

52. **Mr. Coffee** (United States of America) said that his delegation was sceptical of the utility of a checklist on cloud computing. However, recognizing that other delegations were interested in that work, it would not object to the Secretariat's continuing work on the checklist provided that the document was reviewed by the Working Group and that such review entailed only limited use of the Working Group's time and resources. His delegation did not support future work on cloud computing beyond the checklist at the current time, but was willing to consider any proposals at a future session.

53. Identity management was important in public-service and commercial transactions and was being considered by a number of forums globally. Noting that the current international focus seemed to be on standards and government-based systems, he said that UNCITRAL should not be involved in the development of standards in the area of identity management given that some governments might establish an identity management system both for commercial purposes and for public services.

54. The preparation of a useful legal instrument in the area of identity management might therefore be unrealistic. However, given the importance of the topic, he supported continued dialogue within the Working Group to determine whether it could clarify the relevance of trust services to identity management and recommend a mandate for future work. On the basis of those discussions, the Commission might be able to decide in 2018 whether to task the Working Group with a specific project on the subject.

55. **Ms. Sabo** (Canada) said that it would be necessary to determine the order of priority of the topics under consideration only if there was a conflict in terms of resources and timing. She had received the impression from the most recent Working Group session that both projects could be managed — over the course of the coming year at least — in parallel. Work on cloud computing at the current stage would not take up a significant amount of the Working Group's time, and appeared to be manageable from the Secretariat's perspective.

56. The subject of identity management was of interest to Canada and should be further explored. She encouraged the Working Group to agree on what work should and could feasibly be carried out in that area, on the basis of the discussions at the most recent Working Group session, although consensus might be difficult to achieve given that views on the most appropriate approach had been divided.

57. She looked forward to more detailed discussions and a decision on both cloud computing and identity management at the Commission's next session. While future work in the area of cloud computing would be an interesting possibility, it was currently premature to discuss work in that area beyond the preparation of the checklist.

58. **Ms. Cap** (Austria) expressed support for the comments made by the representatives of Belgium, France, Germany and the United Kingdom, particularly the suggestion that the work on cloud computing should be conducted by an expert group. She also shared the view that it would be premature to take a decision regarding future work in that area. With regard to identity management and trust services, the key principles and definitions already identified by the Working Group should be the starting point for further discussions, regardless of the type of instrument that might ultimately be produced.

59. **Mr. Kozarek** (Czechia), expressing support for the comments made by the representatives of Austria, Belgium and France, said that work on identity management and trust services should be conducted in the light of the close interrelationship between those two topics.

60. **Mr. Apter** (Israel), expressing agreement with the comments made by the representatives of Canada and Switzerland, said that the Commission should reaffirm the mandate that had been given to Working Group IV in 2016, as that mandate reflected a well balanced approach. He hoped that the Working Group would continue to engage in work on cloud computing over the coming year, after which the situation could be reviewed.

61. **Ms. Treier** (Observer for Estonia) said that her delegation shared the views expressed by the representatives of Austria, Belgium, Germany and the United Kingdom and was in favour of reaffirming the current mandate of the Working Group.

62. **Ms. Alampi** (Observer for the European Union) expressed support for the position that priority should be given to work on identity management and trust services in light of their importance with regard to electronic commerce transactions. Given the progress already made with regard to that topic, the Working Group should advance beyond that exploratory work, possibly beginning on the drafting of an instrument in that area. In that regard, her delegation was willing to consider all possibilities with regard to the type of instrument to be developed.

63. While the topic of cloud computing was important, any work beyond the checklist of contractual issues should be conducted in close cooperation with the Hague Conference on Private International Law given that that organization was also conducting work on the topic.

64. **Ms. Liu** Huan (China) said that while both cloud computing and the topic of identity management and trust services were important and necessary areas of work, parallel work on both topics could cause difficulties for the Working Group in terms of time and capacity. As a first step, key elements of the work in both areas should be identified and further discussed in order to determine what work should be conducted in the future.

65. **Ms. Finocchiaro** (Italy) said that the scope of the work on cloud computing was already well defined and good progress was being made, whereas the topic of identity management and trust services was newer and more ambitious, concerned more sensitive issues and had generated greater interest, as well as highlighting the diversity of approaches to those issues. In order to make progress on the latter topic, and in view of the exploratory work already carried out, a more specific mandate was needed: the Working Group should begin discussing the possible structure and provisions of a draft text.

66. **Mr. Mbabazize** (Uganda) said he agreed that work on identity management and trust services should continue and that work should begin on a legal instrument in that area in order to guide and give more focus to the discussion. The issue of cloud computing required more extensive technical deliberations and further research, given its complexity and the fact that it

concerned cross-border legal relations and various areas of law.

67. **Mr. Lapiere** (Observer for Belgium) said that his delegation supported the comments made by the representatives of Austria, the European Union, Germany and Italy, particularly with regard to the need to begin drafting an instrument on identity management and trust services, which would ensure that good use was made of the time and resources of the Working Group.

68. With regard to cloud computing, he agreed that it would be premature to go beyond the checklist. The suggestion that further work on that topic should be conducted by an expert group that would then report to the Working Group on its activities was worth further consideration.

69. **Mr. Coffee** (United States of America) said that the helpful and productive discussions of the past year on identity management and trust services should continue with a view to the establishment of a clear mandate to determine what kind of instrument, if any, the Working Group should draft. No drafting should begin without further discussion of the possible nature and objectives of an instrument in that area and clear agreement on the approach to be taken; otherwise, such drafting would be counterproductive.

70. **The Chair** said there appeared to be consensus that the mandate given to the Working Group at the Commission's forty-ninth session should be reaffirmed and that work in both areas should continue, without any formal assignment of priority. The Working Group could establish an expert group on cloud computing, as suggested, if it deemed such a course of action to be appropriate.

71. **Mr. Castellani** (Secretariat) said it should be borne in mind that the further discussion of identity management and trust services and a decision on the instrument to be produced, if any, might well take time. Consequently, it would be unrealistic to draft a text within a matter of months. However, he encouraged delegations to submit possible texts for consideration in order to facilitate the Secretariat's work and the Working Group's deliberations.

72. The work on cloud computing was already taking place informally at the level of experts. Delegations were encouraged to include additional experts in that field in the discussions on the topic, not only in order to assist the Secretariat through additional input and feedback but also to ensure that all regions and all legal and economic systems were represented. Welcoming the suggestion that expert group meetings on specific issues should be organized, he suggested that such meetings should be convened shortly before Working Group sessions in order to enable the expert groups to report to the Working Group on progress and new developments.

73. **Mr. Schoefisch** (Germany), responding to the Chair's summary, said it was his understanding of the Commission's discussion that the majority view was that the topic of cloud computing should not take up too much time or too many resources of the Working Group or the Secretariat and, consequently, it was desirable for work on that topic to be carried out, to the extent possible, by experts. Mere reaffirmation of the existing mandate of the Working Group would therefore not reflect the Commission's discussion entirely accurately.

74. **Ms. Sabo** (Canada) said that there would be sufficient time for the Working Group to discuss both topics. Given the progress made to date on identity management and trust services, there might be less concrete work for the Secretariat on that topic between sessions, although intersessional work by the Secretariat on cloud computing would be necessary. She therefore agreed that the existing mandate of the Working Group should be reaffirmed and, at the Commission's next session, reviewed in the light of the progress of the two projects.

75. **Mr. Apter** (Israel), expressing support for the comments by the representative of Canada, said that while the majority of delegations appeared to be in favour of giving priority to work on identity management and trust services, it was unnecessary to change the mandate of the Working Group. He had no objection to the organization of expert meetings prior to the sessions of the Working Group, as indeed had been done before by the other working groups. It would be premature to draw any conclusions from the work done to date on cloud computing.

76. **Mr. Sorieul** (Secretary of the Commission) said that, in order to avoid any misunderstanding, a clear distinction should be made between working groups and expert groups: working group meetings were intergovernmental meetings to which member and observer States were invited, whereas expert groups, rather than being subsets or smaller versions of working groups, represented a working method whereby the Secretariat could learn more about the topic under consideration and gather information for subsequent review at the intergovernmental level. The more informal atmosphere of expert group meetings provided the opportunity for preliminary discussion, brainstorming and the further development of ideas with a view to proposing a basis for legislative drafting. The checklist on cloud computing was a good candidate for work of that kind, as were guidance materials. The question of how many days were spent on a given topic at the working-group level was therefore less important than the question of which topic was more mature or on which topic the most information was available, which would be the basis for justifying what was a costly and elaborate intergovernmental process. The time and resources of the working groups were better spent when a specific project was ready to be discussed. If a proposal was made for a future legislative instrument, it

would probably have to be reviewed at the expert-group level before being submitted to the Working Group for formal consideration. Both working methods had been used successfully to date and could be used in combination. The Secretariat was confident that with the resources available, and provided that it continued to receive input and feedback, work on both cloud computing and identity management and trust services could continue. As always, the Working Group would be kept fully informed of progress, and efforts would be made to ensure balanced representation in the composition of any expert group that was established.

77. **The Chair** said he took it that the Commission wished to reaffirm the Working Group's current mandate and to request the Secretariat to convene expert group meetings as necessary in order to facilitate the Secretariat's work.

78. *It was so decided*.

The meeting rose at 12.30 p.m.

Summary record of the 1058th meeting, held at the Vienna International Centre, Vienna, on Thursday, 13 July 2017, at 2 p.m.

[A/CN.9/SR.1058]

Chair: Mr. Martonyi (Hungary)

The meeting was called to order at 2.15 p.m.

Legal developments in the area of public procurement and infrastructure development (A/CN.9/912)

1. **Ms. Nicholas** (Secretariat), introducing document A/CN.9/912, recalled that no working group had been involved in work on public procurement since the adoption of the UNCITRAL Model Law on Public Procurement in 2011 and the accompanying Guide to Enactment in 2012. At its forty-ninth session, the Commission had agreed that it would be premature to engage in any further legislative work on public procurement and infrastructure development, but had instructed the Secretariat to continue to monitor developments in those areas, particularly with regard to public-private partnerships. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000), and the Model Legislative Provisions on Privately Financed Infrastructure Projects (2003), were now slightly out of date, but the fundamentals remained apposite. The Commission had therefore decided that the Secretariat should consider updating all or parts of the UNCITRAL Infrastructure Projects Guide (2000), with the involvement of experts.

2. As instructed by the Commission, the Secretariat had continued to monitor developments in suspension and debarment in public procurement and to promote relevant UNCITRAL texts, especially the UNCITRAL Model Law on Public Procurement. While there had been some convergence in areas such as procedural consistency, transparency and fairness, there remained significant divergence in policy and practice with respect to key parameters for a suspension and debarment system. The Secretariat recommended that progress towards convergence should continue to be monitored and that the topic should remain on the Commission's agenda, as it continued to be extremely important, but legislative development by UNCITRAL in the area was not presently feasible.

3. In order to assess the extent to which the UNCITRAL Infrastructure Projects Guide (2000) would need to be updated, the Secretariat had consulted experts in policy, law reform and practice in public-private partnerships on the Guide and accompanying legislative recommendations and the Model Legislative Provisions. The experts had concluded that most of the recommendations of those texts reflected good policy and practice and remained relevant, but that limited revisions were required to ensure that the texts contained up-to-date terminology and reflected current practice. The texts should also reflect the objectives and requirements of the United Nations Convention against Corruption. Most of the provisions of the Convention that addressed public procurement and management of public finances were also reflected in the UNCITRAL Infrastructure Projects Guide (2000), but some minor amendments were required, as the Guide focused on legislative but not institutional requirements. Guidance should also be provided to ensure that enacting States had appropriate institutional structures and capacity and legislative provisions to implement the public finance aspects of the Convention.

4. The review carried out by the Secretariat to date indicated that it would be feasible to update the UNCITRAL Infrastructure Projects Guide (2000) within current resource constraints through a project led by the Secretariat, with the assistance of experts. The Secretariat would then report back to the Commission in 2018, possibly with a draft revised legislative guide for its consideration.

5. **Mr. Coffee** (United States of America) said that, in light of the Secretariat's limited resources, time should not be devoted to monitoring legal developments in public procurement and infrastructure development. If the Commission were to decide otherwise, it should provide a narrower mandate to the Secretariat.

6. **Mr. Tirado Martí** (Spain), expressing agreement with the Secretariat's report and recommendations, said that while procurement and public-private partnerships were extremely important topics, they should not be assigned to a working group.

7. **Mr. Apter** (Israel) said that his delegation did not object to the continuation of work on public-private partnerships, subject to resource constraints. However, in view of those constraints, the issue of suspension and debarment in public procurement should not be taken up at the current stage. The United Nations Convention against Corruption, to which 181 States had acceded, included a specific article on public procurement in the context of corruption. In June 2016, the process of review of implementation by all States parties of chapter II of the Convention, which contained that provision, had begun. On completion of that five-year review cycle, the United Nations Office on Drugs and Crime would publish recommendations and best practices, which were expected to address the issue of sanctions in public procurement. Meanwhile, the Organization for Economic Cooperation and Development (OECD) Working Group on Bribery in International Business Transactions had carried out a significant amount of work on the issue of debarment

for corruption-related activities. As the important issue of suspension and debarment was being addressed in other forums and any duplication of efforts should be avoided, UNCITRAL should not pursue the topic, although it could do so in the future if appropriate.

8. **Mr. Bellenger** (France) said that he supported the recommendations of the Secretariat, particularly with regard to public-private partnerships. That area was of significant interest, especially to developing countries, which did not have the necessary resources to create a suitable legislative framework. He therefore supported the approach taken to date by the Secretariat. Although it was not currently possible for the work to be conducted by a working group, the item should remain on the agenda.

9. **Ms. Sabo** (Canada) expressing support for the comments of the representative of Israel, suggested that the topic of suspension and debarment should be removed from the Commission's agenda on the understanding that the Secretariat might revisit the topic at a later stage and report back to the Commission in 2020 or 2021. In view of resource constraints, the importance of revising the texts on privately financed infrastructure projects should be noted but no decision should be taken as to whether the Secretariat should undertake that work until other possible areas of future work had been considered, including in terms of their resource implications. The proposal might take lower priority than other proposed work, given that the existing texts concerning private-public partnerships were still serviceable.

10. **Mr. Meier** (Switzerland) said that while the importance of public procurement was incontestable, UNCITRAL might not be the most appropriate forum for work on suspension and debarment, as the topic was more closely related to corruption than to international commercial law. As it was not currently possible for UNCITRAL to conduct any legislative work in the area of suspension and debarment, the item should be removed from the agenda.

11. Given that representatives of various States, including States with developing economies, had spoken in favour of work in the area of public-private partnerships at the Commission's forty-ninth session, it was appropriate for the Secretariat to present a report and recommendations in that regard in 2018.

12. **Ms. Cap** (Austria) said that she supported the Secretariat's suggestions in relation to public-private partnerships.

13. **Ms. Gómez Ricaurte** (Ecuador) expressed support for the comments made by the representative of Israel regarding the topic of suspension and debarment. She agreed with the representative of Canada that while the topic of public-private partnerships was of interest, priority in terms of resources should be given to items that were of greatest interest to the majority of delegations.

14. **Ms. Nicholas** (Secretariat) said that since the UNCITRAL Infrastructure Projects Guide (2000) had been adopted, there had been growing consensus on issues that would not previously have been considered appropriate subjects for model legislative texts. The convergence of good practices would facilitate consolidation of the various texts and the expansion of legislative provisions in place of simple guidance.

15. **The Chair** noted that while differing opinions had been expressed with regard to the degree of priority of work on public-private partnerships, most delegations considered the topic to be important. He therefore took it that the Commission wished the Secretariat to continue its review and revision work in that area, subject to the availability of resources. He also took it, in light of the comments made, that the Commission wished to remove the topic of suspension and debarment in public procurement from its agenda.

16. *It was so decided.*

Possible future work in the area of security interests and related topics (A/CN.9/913, A/CN.9/924 and A/CN.9/926)

17. **Mr. Bazinas** (Secretariat), introducing documents A/CN.9/913 and A/CN.9/924, recalled that at its forty-ninth session, the Commission had reaffirmed its earlier decision that the preparation of a contractual guide on secured transactions and a text on intellectual property licensing should be retained on its future work programme. It had also added to that work programme the consideration of possible expansion of the UNCITRAL Model Law on Secured Transactions and its Guide to Enactment to address secured financing for micro-enterprises; the question of whether future work on a contractual guide should cover contractual issues of concern to micro-enterprises; warehouse receipt financing; alternative dispute resolution in connection with security agreements; and secured financing. In order to provide the Commission with feedback on those issues and thus facilitate its consideration of future work in the area of security interests, the Secretariat had organized the Fourth International Colloquium on Secured Transactions, which had been held in March 2017.

18. With regard to contractual issues, it had been concluded that a practice guide to the UNCITRAL Model Law on Secured Transactions, rather than a contractual guide, should be prepared to address issues of concern to users of legislation implementing the Model Law and its registry-related provisions, including parties to transactions, practitioners, academics, judges and arbitrators. It had been noted that the draft Guide to Enactment of the Model Law was directed mainly at legislators and that, without the provision of guidance to those users, States might not benefit from the adoption of implementing legislation. The issues that such a practice guide could address were set out in document A/CN.9/913. The text could be similar in nature to the UNCITRAL Practice Guide on Cross-Border

Insolvency Cooperation or could be directed at practitioners, in the manner of the UNCITRAL Notes on Organizing Arbitral Proceedings (2016).

19. With respect to transactional and regulatory issues, such as valuation and monitoring of collateral, administration of secured loans and collection of receivables, examples had been given of States that had adopted a new secured transactions law but had not made optimal use of it, for such reasons as a lack of understanding of the law among practitioners and persons at whom the law was directed, and the failure of lenders to accept modern secured finance practices such as receivables and inventory financing.

20. It had been noted that the Model Law on Secured Transactions addressed issues relating to secured financing for small and medium-sized enterprises, but a number of issues of interest specifically to micro-businesses were not covered, such as types of microfinance transaction, notifications, personal guarantees and enforcement of security rights. It had been concluded that the practice guide should address contractual, transactional and regulatory issues that were of relevance to micro-businesses.

21. A further conclusion reached at the Colloquium was that the Commission should consider preparing a text on warehouse receipts in cooperation with other international organizations involved in supply chain and warehouse receipt financing. It had been noted that the UNCITRAL Model Law on Secured Transactions and the UNCITRAL Model Law on Electronic Transferable Records addressed warehouse receipts only if they were treated as negotiable documents under the law of the enacting State governing negotiable documents and instruments. In addition, a number of issues had been identified that were not addressed in either model law, particularly non-negotiable warehouse receipts, which served as valuable collateral that could improve access to credit for small agricultural businesses in particular.

22. When the Commission had prepared the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property, it had considered that future economic development would depend largely on innovation, which would in many cases be covered by intellectual property rights legislation, but that funding for new ideas was often insufficient. Intellectual property financing, involving the use of intellectual property rights as collateral, had been identified as one possible way of obtaining such funding. The Colloquium had identified both a need for a uniform law text on intellectual property licensing and a gap in the law in respect of contractual matters in that context, both of which could be addressed by model rules prepared in cooperation with relevant organizations.

23. It had been further noted at the Colloquium that the UNCITRAL Model Law on Secured Transactions, while not precluding the use of alternative dispute resolution, did not address issues such as arbitrability, disputes arising in the context of enforcement of a security right or the effect of its provisions on third-party rights. The Commission was therefore invited to consider whether model rules should be prepared to cover those issues.

24. There had been some support at the Colloquium for the preparation of a text on real estate financing, as many developing countries that were currently reforming their secured transactions laws required guidance on security interests in both movable and immovable property; however, doubt had been expressed as to whether real estate financing was a topic that lent itself to unification at the international level.

25. The Colloquium had also generated feedback with respect to coordination, cooperation and technical assistance. The Commission continued to work with the European Commission on a coordinated approach to the issue of the law applicable to the perfection and priority of security rights in receivables. The European Commission had also held discussions with the Secretariat regarding the law applicable to third-party effects of transactions involving receivables and securities, which had an impact on the application of the relevant rules of the UNCITRAL Model Law on Secured Transactions. The importance of the functional approach to the reform of secured transactions law in achieving the harmonization of that body of law, and the need to adapt the Model Law to concepts and approaches found in civil-law systems, had also been discussed.

26. Discussions had also been held on cooperation and coordination in the area of secured transactions, including the continuing work on the updating of the joint publication *UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests*. It had been suggested that further efforts should be made to ensure the continuation of that coordination, but no mandate was currently sought for work in that area.

27. **Mr. Sorieul** (Secretary of the Commission) said that, when deciding on future work on security interests and related topics, the Commission should bear in mind that conference time and Secretariat resources were limited, particularly in view of the Commission's decision to give a new mandate to Working Group III, and that Working Group VI might hold only one session before the Commission's fifty-first session. Priorities would therefore need to be established.

28. **Ms. Sabo** (Canada) said she agreed that priorities should be decided on, particularly since the Commission had already tasked Working Group VI with a number of projects.

29. Drawing attention to document A/CN.9/926, she said that the proposal set out in that document offered a way of addressing a number of the topics that had been raised by the Secretariat.

30. **Ms. Gullifer** (United Kingdom), introducing the proposal, said that the proposed practice guide to the UNCITRAL Model Law on Secured Transactions would complement the Guide to Enactment by providing guidance, information and context for those using a new system resulting from enactment of the Model Law.

31. The proposal drew on the work of the three panels at the Colloquium that had dealt with contractual matters, transactional and regulatory matters, and financing of micro-businesses. It had received broad support and had been seen as an essential part of the work on the UNCITRAL Model Law on Secured Transactions. The draft Guide to Enactment was an excellent guide for legislators seeking to incorporate the Model Law into domestic legislation; however, legislation enacting the Model Law would be used very little, incorrectly or not at all — and the economic benefits it was designed to bring to States would not materialize — unless those involved in its application understood it properly.

32. A practice guide would provide a wide range of users with detailed and practical advice on how to carry out transactions in accordance with the Model Law. Many of the types of transaction envisaged by the Model Law might rarely or never have been carried out in enacting States. Therefore, users might be unfamiliar with, for example, the use of movable property or intangible assets, such as receivables, as security. A practice guide would explain those transaction types and practices and provide guidance on issues such as the valuation of collateral and the administration of secured loans. It would also provide advice on building legal capacity in unfamiliar areas of law, such as extrajudicial enforcement and related areas such as insolvency law and the law relating to personal guarantees.

33. The practice guide could address the building of regulatory capacity by discussing the interrelationship between financial regulation and the economic benefits of secured transactions under the Model Law. It could also address the needs of specific types of business, such as micro-businesses, and enable international agencies that provided technical assistance to perform their work far more efficiently and at lower cost.

34. It was proposed that the topics to be included in the guide should be discussed and the content of the draft guide refined at an initial session of Working Group VI, building on the excellent work that had already been carried out in preparation for the Colloquium. It was estimated that the practice guide could then be completed in two or three further sessions.

35. **Ms. Yamanaka** (Japan) said that her country, as a sponsor of the proposal, believed that a practice guide would greatly enhance the usability and benefits of the UNCITRAL Model Law on Secured Transactions and related instruments.

36. **Mr. Whittaker** (Australia) said that the experience of his country, which was also a sponsor of the proposal, in reforming its domestic legislation on secured transactions had shown that the availability of a practice guide was important and the Model Law would be incomplete without it. Such a guide would maximize the Model Law's practical value. Although Australia had a well-developed economy, a sophisticated financial sector, an active legal and academic community and a high-quality judiciary, the transitional process had not been easy as the new rules had made the legal and business environments very uncertain, especially initially, and at first it had not been understood by all how to use the new system. Materials such as the proposed practice guide would have been of great assistance to the business, legal and consumer communities in explaining how the new regime was expected to work and how they could turn it to best advantage. Enacting States with developing economies would benefit even more from the proposed guide, which would ensure that the full potential of the Model Law to be of practical value was exploited.

37. **Mr. Schoefisch** (Germany) said that Working Group VI need meet only once before the fifty-first session of the Commission. Only three of the topics referred to in document A/CN.9/913 were suitable areas of future work by the Working Group: the most important was the practice guide proposed in document A/CN.9/926 and the others were warehouse receipts and financing of micro-businesses. The topic of alternative dispute resolution in relation to secured transactions was better suited to Working Group II, and no work should be undertaken on real estate financing, as it would not be possible for consensus to be reached on the desirable outcome of such work.

38. **Mr. Riffard** (France) said that his delegation, which had long supported the idea of an official commentary to the UNCITRAL Model Law on Secured Transactions, considered the practice guide to be the only feasible project in the short term. As so many diverse issues would be covered by the guide, preparatory work by the Secretariat would be required to ensure that the Model Law and the various instruments produced in connection with it did not overlap or contradict each other. A single session of Working Group VI before the Commission's fifty-first session was preferable, as that would give the Secretariat time to complete the preparatory work and submit a well-constructed preliminary draft to the Working Group. The preparation of such a draft before the Working Group session was essential, as the initial session of the Working Group on the topic should not be dedicated to preliminary discussions concerning the possible nature or structure of the practice guide.

39. **Mr. Meier** (Switzerland) said that the proposed practice guide was unnecessary, as UNCITRAL had already issued comprehensive instruments on secured transactions. Some of the aspects of the proposed work, such as the inclusion of advice on the preparation of contracts, was not within the remit of UNCITRAL and

there was a danger that work in the area would become self-perpetuating. It would be more appropriate for the Working Group to explore the various interesting proposals presented at the UNCITRAL Congress held the previous week, such as the topic of blockchain technology.

40. **Mr. Tirado Martí** (Spain), welcoming the proposal presented in document A/CN.9/926, said that the production of a practice guide was essential in order to provide a clear explanation of the Model Law to those who would be applying its provisions. Indeed, failure to produce such a guide would constitute a waste of the resources dedicated by the Commission to the preparation of the Model Law and its other texts on secured transactions, which were of tremendous importance and relevance with respect to the financing of small and medium-sized enterprises and, in general, the economies of developing nations, but extremely technical and difficult to implement.

41. Many of the concepts in the UNCITRAL Legislative Guide on Secured Transactions and the UNCITRAL Model Law on Secured Transactions related to common-law jurisdictions, so were unfamiliar to most civil-law jurisdictions. If developing countries, which were likely to be civil-law jurisdictions, attempted to implement the Model Law without further guidance, their legislators might be able to rely on the Guide to Enactment, but it was doubtful that users in those jurisdictions, such as judges, insolvency representatives and regulators of the financial sector, would be able to understand many of the concepts it referred to. A practice guide similar to the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation was needed.

42. **Mr. Castellano** (Italy), expressing support for the proposal set out in document A/CN.9/926, said that the proposed practice guide would be of particular help to regulatory authorities. Working Group VI was the most appropriate body to provide clear guidance on how to interpret the Model Law.

43. **Mr. Apter** (Israel) said that the proposed practice guide should be the main focus and priority of Working Group VI, and should include issues relating to microfinance if possible. However, the issue of warehouse receipts could also be explored. He agreed with the representative of Germany that the other topics proposed in document A/CN.9/913 should not be considered by the Working Group.

44. **Mr. Coffee** (United States of America) said that he shared the view that priorities should be established. Work should be undertaken on the proposed practice guide so that parties to transactions, especially creditors, their attorneys, the judiciary and regulators could develop the expertise they needed to exploit the potential created by a modern secured transactions law. However, the guide should not cover matters that were the subject of general debt or creditor law, such as effective credit reporting systems, or non-legal matters such as the more effective distribution of tasks within financial institutions.

45. Warehouse receipts would be an appropriate topic for Working Group VI to consider after completing its work on the practice guide, for the reasons given in document A/CN.9/913. The Secretariat should conduct a study to determine the appropriate scope and form of an UNCITRAL instrument on warehouse receipts, taking into account the need for harmonization and modernization, the current state of domestic and regional reforms, the contribution of other international and regional organizations and the advisability and feasibility of various forms of instrument, such as a legislative guide or a model law. It was not currently appropriate for Working Group VI or UNCITRAL to take on any of the other projects suggested in document A/CN.9/913.

46. **Ms. Sabo** (Canada) said that she was in favour of the exploration of contractual issues, some transactional and regulatory issues and financing of micro-businesses as identified in document A/CN.9/913, as those topics would be covered in the practice guide proposed in document A/CN.9/926. The precise contents of the practice guide should be decided by the Working Group. She did not support further work in the area of alternative dispute resolution in the area of secured transactions, and the topic of real estate financing should be reconsidered at a much later date. Although the topic of warehouse receipts was not a pressing issue, the Secretariat could explore the feasibility of achieving some harmonization in that area, subject to the availability of resources and other priorities of the Commission. The practice guide should be the Commission's current priority.

47. Referring to document A/CN.9/924, she said that the Secretariat should continue its efforts in respect of coordination and cooperation with other organizations, particularly concerning the law applicable to proprietary effects of assignments of receivables. There was a lack of harmony between the United Nations Convention on the Assignment of Receivables in International Trade (2001) and European Union law. Given that the European Union was currently revising its legislation in that area, the Secretariat should take advantage of that window of opportunity by devoting resources to addressing the issue. It was important that the European Union should be able to implement legislation that would enable it to participate in a broader global community in which common rules applied to the assignment of receivables.

48. **Mr. Soh** (Singapore) said that he supported the preparation of a practice guide but, in view of limited resources, it was important to consider how the work should be conducted. If the guide were to focus on legal advice, a document produced by experts could simply be approved by the Commission rather than the work being assigned to a working group.

49. **Mr. Brennan** (International Film and Television Alliance) said that intellectual property licensing remained a matter of interest to his organization. During the drafting of the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property, it had been pointed out that there was a lack of legislation governing the terms of intellectual property contracts. Intellectual property was a fast-growing area and the financing of receivables in that context was of particular interest, as receivables in intellectual property licensing were not as straightforward as those in traditional markets, but could be of tremendous value with regard to secured financing. The harmonization of contracting rules would make such financing easier and would make collateral more transparent to lenders.

50. Although the Commission had limited resources, and other worthwhile projects were being considered, such as the proposed practice guide, intellectual property licensing should remain on the agenda for UNCITRAL to consider at an appropriate time, because it would make an important and valuable contribution to international trade law.

51. **Ms. Portillo Rodríguez** (El Salvador) said that she supported the proposal in document A/CN.9/926. Since El Salvador had not implemented specific legislation on topics such as warehouse receipts or intellectual property licensing, instead relying on generic legislation, the discussion of those issues by the Commission or in the practice guide would facilitate the enactment of additional national legislation.

52. **Mr. Weise** (American Bar Association), likewise expressing support for the proposal to prepare a practice guide, said that the American Bar Association had itself produced a practice guide at the time of reform of the secured transactions law of the United States of America, and that guide had been welcomed by a wide range of users.

53. **Mr. Maradiaga** (Honduras) said that the many instruments that had been produced by UNCITRAL were significant achievements, and the international harmonization of law was increasingly important. It was therefore vital that, at a time of financial constraints, Member States, including those with developed economies in particular, should continue to support UNCITRAL.

54. **Mr. Brink** (Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry) said that priority should be given to the preparation of the practice guide proposed in document A/CN.9/926, as such a guide would be an important resource for the legal profession and its drafting would provide an opportunity to revisit the text of the Model Law to check whether its provisions were valid in an electronic environment, given that the world economy was becoming increasingly virtual.

55. **The Chair** suggested that, if the Commission agreed to the preparation of the proposed practice guide, Working Group VI should be selective when deciding on the substance of the guide and priority should be given to legal issues in view of the purpose of the text.

56. **Ms. Sabo** (Canada) said that the practice guide need not be strictly limited to legal issues. It might cover, for example, the forms that would need to be used in the electronic registry system, which was a key part of the Model Law. Although it had been suggested that the practice guide should not cover contractual issues, the overall objective was to provide information sufficient to enable users to make full use of the system. Therefore, confining the practice guide to legal issues might be overly restrictive and prevent the guide from fulfilling its purpose.

57. **The Chair** said that it might not be easy to identify what constituted a legal issue. Accordingly, the Commission should ask the Working Group to be selective in its choice of content in order to create a practice guide that would benefit users such as judges, arbitrators, lawyers and banking professionals in their everyday work.

58. **Mr. Tirado Martí** (Spain) said he agreed that the Working Group should focus on legal issues. The list of topics set out in the proposal should be used as the basis for discussions. The estimate that a draft version of the guide could be produced within three sessions was reasonable.

59. **Ms. Sabo** (Canada) said that any possible disagreement as to what constituted a legal issue could be avoided by agreeing that the Working Group should start its discussions on the basis of the list of topics outlined in document A/CN.9/926. The time frame provided was only approximate and was intended to indicate that the project would not be overly time-consuming; it might even be possible to complete the work in fewer sessions. Since it was unrealistic to impose a time frame, the work should simply be done as quickly as possible.

60. **Mr. Schoefisch** (Germany) and **Mr. Castellano** (Italy) expressed support for the proposal set out in document A/CN.9/926.

61. **Mr. Riffard** (France) said that identifying the content that future users of the practice guide would find useful was a priority. Preparatory work should therefore be carried out by the Secretariat in the form of consultations with future users to ascertain their needs, and with experts. It was premature to set a deadline for the work, although a minimum of two sessions seemed reasonable. However, those sessions should follow the Secretariat's preparatory work.

62. **Mr. Tirado Martí** (Spain) said he agreed that there should be no fixed time frame for the work, but that it should be completed as quickly as possible.

63. **Mr. Whittaker** (Australia) said that in his experience, users did not know what should be included in a practice guide until they had actually used the system themselves. Therefore, an initial survey of users might delay the work of the Working Group. There would be sufficient knowledge among those members of the Working Group who had personal experience of the system or had guided other States through the process to make it possible to determine which questions the practice guide should address.

64. **The Chair** said that each of the approaches proposed by the representatives of France and Australia had its merits. The Working Group would be free to choose its own methods of working on the practice guide and could ask the Secretariat to conduct a preliminary study as suggested if that was found to be appropriate. He agreed that the work should start as soon as possible.

65. **Ms. Sabo** (Canada) said she was confident that the Secretariat would draw on the knowledge and experience of experts who would be able to provide the information needed.

66. **Mr. Bazinas** (Secretariat) sought clarification as to whether the practice guide should cover the financing of micro-businesses, as that topic had been included in the proposal in document A/CN.9/926.

67. **The Chair** said that while it was his understanding that it would be for the Working Group to decide on the topics that the practice guide should address, the Commission could request the Working Group to include the topic of financing of micro-businesses among those topics in view of the desirability of providing help and encouragement to micro-businesses. However, it would be prudent to avoid listing issues for inclusion at the current stage, as that list could become overly long.

68. **Mr. Tirado Martí** (Spain) said that the practice guide should not cover general access to finance for micro-businesses but, rather, how the application of the Model Law should be considered in the specific case of micro-businesses, which accounted for the vast majority of businesses that would be using the Model Law in practice.

69. **Mr. Riffard** (France) said he agreed that Working Group VI should be able to adjust the scope of the proposed practice guide as appropriate, but disagreed that the Working Group should define the scope of the guide at its first session on the topic, as that might lead to protracted discussions, which would not be the most efficient use of UNCITRAL resources. The Commission should instruct the Secretariat to prepare an initial draft of the practice guide on the basis of document A/CN.9/926, which would provide the starting point for the Working Group's discussions.

70. **Ms. Sabo** (Canada), expressing support for the comments made by the representative of Spain, noted that there had not yet been any discussion of document A/CN.9/924, which she had referred to in her earlier comments. She suggested that the Commission should simply renew the Secretariat's mandate as referred to in paragraph 20 of that document.

71. **Mr. Coffee** (United States of America) said that he fully supported renewal of that mandate. He sought clarification as to whether work would be undertaken in the area of warehouse receipts.

72. **Mr. Schoefisch** (Germany) said his understanding was that work on that topic was not supported but there was general consensus that work on the proposed practice guide to the UNCITRAL Model Law on Secured Transactions should be undertaken on the basis of document A/CN.9/926, and that the topic of financing of micro-businesses should be included in that work.

73. **The Chair** said he took it that the Commission did not wish to pursue the topic of warehouse receipts but wished to request Working Group VI to proceed with the preparation of a practice guide to the UNCITRAL Model Law on Secured Transactions on the basis of document A/CN.9/926 and the relevant sections of document A/CN.9/913. While no time frame for that work would be imposed, it was desirable for the Working Group to complete the work as expeditiously as possible. The Working Group should define the scope, structure and content of the guide, keeping in mind that the guide should be as specific as possible and should not touch on, for example, general economic issues. He also took it that the Commission wished to renew the mandate given to the Secretariat in respect of the matters addressed in document A/CN.9/924.

74. *It was so decided.*

Election of officers (*continued*)

75. **Mr. Mbabazize** (Uganda), speaking on behalf of the African Group, said that the Group wished to nominate Mr. Moollan (Mauritius) for the office of Rapporteur.

76. *Mr. Moollan (Mauritius) was elected Rapporteur by acclamation.*

The meeting rose at 4.40 p.m.

Summary record (partial) of the 1059th meeting, held at the Vienna International Centre, Vienna, on Friday, 14 July 2017, at 9.30 a.m.

[A/CN.9/SR.1059]

Chair: Mr. Martonyi (Hungary)

The discussion covered in the summary record began at 10 a.m.

Work programme of the Commission (A/CN.9/911, A/CN.9/923 and A/CN.9/925)

1. **Ms. Nicholas** (Secretariat), introducing document A/CN.9/911, recalled that the Commission had already taken note of the progress made both by the working groups and in the various support activities undertaken by the Secretariat as reported earlier during the session, including technical assistance and coordination activities and the promotion of ways of ensuring the uniform interpretation and application of UNCITRAL legal texts. It was the Secretariat's understanding of the Commission's deliberations thus far that the Commission wished those activities to continue.

2. The Commission had always emphasized the importance of a strategic approach to the allocation of its limited resources, inter alia, to legislative development, and at the current session had confirmed its role in setting the UNCITRAL work programme, especially in relation to the mandates of the working groups.

3. The Commission had considered future legislative activity in several areas during the current session. With regard to electronic commerce, it had confirmed that Working Group IV should continue its projects concerning the contractual aspects of cloud computing and legal issues relating to identity management and trust services.

4. The Commission had also decided that Working Group III should be given a broad mandate to work on the possible reform of investor-State dispute settlement, including the issues of concurrent proceedings in the field of investment arbitration and a code of ethics in international arbitration. It had agreed that the Working Group should identify and consider concerns relating to investor-State dispute settlement, decide whether reform was appropriate and, if so, identify solutions to be recommended to the Commission, taking advantage of the widest possible range of expertise among all stakeholders.

5. With regard to public procurement and public-private partnerships, the Commission had decided that the Secretariat, with the assistance of experts, should continue to update and consolidate the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000) and associated texts, and should report to the Commission at its next session.

6. Lastly, the Commission had decided that a practice guide on secured transactions should be prepared by Working Group VI and should address contractual, transactional and regulatory issues arising in the context of secured transactions, including the financing of micro-businesses.

7. **The Chair** said he took it that the Commission wished to confirm its decisions concerning the current legislative programme of the Commission.

8. *It was so decided*.

9. **Ms. Nicholas** (Secretariat) drew attention to the proposals set out in documents A/CN.9/923 and A/CN.9/925 concerning possible future work.

10. **Ms. Malaguti** (Italy), introducing her Government's proposal as contained in document A/CN.9/925, recalled that Working Group I, in the course of its work on the draft legislative guide on key principles of a business registry and the draft legislative guide on a limited liability organization, had identified a grey area between the stages of business registration and the establishment of a limited liability entity, noting that elements of limited liability protection were possible prior to the creation of an entity with legal personality. The proposal concerned the development of solutions enabling businesses that were registered but not incorporated to access credit more easily and benefit from other advantages offered by governments. To that end, her Government proposed work on contractual networks that would enable micro- and small enterprises to internationalize their business, engage in cross-border cooperation and join supply chains by entering into contracts with larger companies. By forming a network, micro- and small enterprises were able to work together to ensure that they met the standards required by large companies when concluding contracts, which would not be possible if they operated alone. Both large companies and micro- and small enterprises would benefit from an instrument in that area. However, contractual networks could raise conflict of laws issues, including with respect to liability.

As Working Group I intended to present the draft legislative guide on key principles of a business registry to the Commission in 2018, it might be possible for the Working Group to work on the proposal in parallel with the work on the two legislative guides. The delegation of Italy therefore sought endorsement of the project in principle, on the understanding that some delegations might require additional information, and that it would accordingly undertake further research, possibly in the form of a study with a small network of universities and

any other delegations wishing to take part, before presenting its findings to the Commission in 2018.

12. **Mr. Meier** (Switzerland), expressing support for the proposal, said that it was both appropriate and desirable to complement the work on the legislative guides with work on alternative forms of business organization.

13. **Mr. Bellenger** (France) said that he was also in favour of further research on contractual networks as an alternative business model that could be very useful for small and medium-sized enterprises.

14. **Ms. Sabo** (Canada) said that her delegation was interested in the proposal but had many questions and was therefore not currently in a position to endorse it in principle. However, it would support the preparation of further information to be presented to the Commission in 2018 and would welcome the opportunity to consult at the national level. A broader mandate to cover businesses in general should be considered, although she understood that the issue was of particular interest to micro-, small and medium-sized enterprises. There was no urgent need to take a decision on the matter, as Working Group I would be occupied with its current workplan in the coming year.

15. **Mr. Schoefisch** (Germany) and **Mr. Coffee** (United States of America) said that they shared the position expressed by the representative of Canada.

16. **Ms. Malaguti** (Italy) asked delegations to contact her directly with initial feedback and questions so that her delegation could conduct appropriate research and present the required information to the Commission at its fifty-first session.

17. **The Chair** said he took it that that approach was acceptable to the Commission.

18. *It was so decided*.

19. **Mr. Lux** (Comité Maritime International), introducing his organization's proposal for possible future work on cross-border issues related to the judicial sale of ships, as set out in document A/CN.9/923, said that the rationale for that proposal was that there was currently a significant gap in the existing legislation on the topic that could be bridged by an international instrument. The Comité Maritime International had prepared a draft text containing 10 articles, which provided a possible solution and a starting point for the Commission's discussions.

20. Over 95 per cent of world trade moved by sea and, as ships traded, they often incurred a wide range of debts, including to crew, mortgagees, port authorities, salvors, charterers and suppliers of fuel and other services such as insurance. In the current sluggish freight market, ship owners did not have the income to service debt, and even well-established companies had gone out of business. Such debts gave rise to maritime claims enabling creditors to arrest a vessel for non-payment. In the majority of such cases, following judgment or, exceptionally, prior to judgment, application could be made for judicial sale of the vessel. The sale was intended to ensure that all prior debts were covered by the proceeds from that sale and that the purchaser obtained clean title to the ship, free and clear of previous claims and encumbrances.

21. However, there had been numerous cases in which a judicial sale in one State had not been recognized in another State. For example, if a shipowner borrowed money from a bank and gave a mortgage on a ship as security, the value of the security would be drastically reduced if, when the ship came to be sold by a court, there was any doubt as to whether the purchaser would acquire title to the ship free of encumbrances and debts. No purchaser would be prepared to pay the market price for a vessel when there was a risk that pre-existing claims might still be enforceable against the ship, particularly because a recovery against the previous owner would not be successful.

22. If States or debtors refused to comply with judicial sale proceedings and enforce the decisions of courts located in other States, that would create confusion in an area which could be controlled only on the basis of the good faith of all seafaring nations or by an international instrument such as the one proposed.

23. There were several key consequences if a judicial sale went wrong. For example, purchasers might be unable to delete the vessel from the previous register and re-register the vessel in the register of their choice, which would prevent them from trading the vessel in the manner that they preferred.

24. In addition, the purchaser and the vessel might be exposed to prior claims of an unknown amount in multiple jurisdictions, which gave rise to the danger of further ship arrest and even a further judicial sale if the purchaser could not meet those prior claims. Therefore, purchasers would bid less for vessels at judicial sale. That worked to the disadvantage of all sectors of the industry: financiers might lend only a reduced sum or not be prepared to finance the purchase at all, and in turn, ship owners would be less able to obtain funds to finance the purchase and operation of their fleet. For creditors, including State entities such as port authorities, lower sale proceeds would mean that there would be less money to meet accrued claims. While claims could be pursued against the vessel under its new ownership, the prospects of recovery would at best be uncertain, and the creditor might find the vessel to be in a jurisdiction where the prior judicial sale was not recognized. Moreover, non-recognition of a judicial sale in another State could impede or delay world trade and lead to valuable space in ports being occupied by vessels arrested in respect of claims under their previous ownership. Ultimately, the reduced availability of money in the system would lead to an older and less well-maintained global fleet, to the disadvantage of all.

25. The problems described could be addressed in a short, simple, self-contained instrument conceptually similar to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958. Prior claims would be recoverable from the ship sale proceeds and the previous ship owner, and the purchaser would acquire clean title and would therefore be prepared to pay the market value for the ship. The Comité Maritime International therefore requested the Commission to consider taking up the proposal as part of its work programme.

26. **Ms. Lee** Song Joo (Republic of Korea) expressed appreciation for the efforts of the Comité Maritime International in preparing a draft international instrument on the topic of judicial sales of ships, which raised unique issues in relation to international trade and international private law. Because of the nature of the vessels and the international nature of the stakeholders, the issue was closely connected to the mandate of UNCITRAL to promote the progressive harmonization and unification of international law. Accordingly, the topic merited the attention of UNCITRAL and her delegation supported the proposal.

27. **Ms. Jamschon Mac Garry** (Argentina) said she agreed that the Commission should undertake work on the topic.

28. **Mr. Apter** (Israel), welcoming the proposal, said that the issue was important and of interest. However, the International Maritime Organization (IMO) might be a more relevant body to conduct work in that area, as the topic related to maritime commerce. While UNCITRAL had dealt with such specific topics in the past, recent projects had had a more universal character. Given the full agenda of the Commission, which would soon have six working groups operating simultaneously, it would be difficult to include in the work programme a highly specific issue relevant only to some member States. The Commission could address such work in the future or simply take note of and endorse the proposal of the Comité Maritime International.

29. **Mr. Tirado Martí** (Spain), also welcoming the proposal, asked which working group might deal with work on the topic.

30. **Mr. Sorieul** (Secretary of the Commission) said that it would be difficult to undertake work on the topic given the full agendas of the working groups. As IMO, the Hague Conference on Private International Law and the International Institute for the Unification of Private International Law had also received the proposal of the Comité Maritime International and considered the topic, the organizations could coordinate at the secretariat level in the coming year to determine which organization was best placed to incorporate the matter into its work programme.

31. **Mr. Diyachenko** (Russian Federation) agreed with the representative of Israel that the topic should not be included in the Commission's work programme at the current time. While the issue was important and topical, all the working groups had full agendas, and the limited resources available should be used rationally. Furthermore, the topic was already under consideration by other organizations.

32. **Mr. Schoefisch** (Germany) said that while the topic was important, UNCITRAL might not be the most appropriate body to discuss it. He supported the suggestion that the Secretariat should remain in contact with other organizations on the issue, which could be reconsidered at the Commission's fifty-first session.

33. **Mr. Von Ziegler** (Switzerland) said that his Government had been following the topic for some years and had been involved in the work of the Comité Maritime International, because the issue was not a maritime one but a commercial problem that was hindering trade and the flow of cargo unnecessarily. Ships that had been subject to judicial sales might become subject to arrest; cargo was blocked in harbours and banks and creditors were losing assets. That was attributable to a gap in the legislation that had become evident only recently owing to the current commercial situation in which ship owners were increasingly unable to pay off debts, as a result of which a growing number of ships were subject to judicial sale. The matter needed to be addressed in order to prevent such cases from coming before the courts unnecessarily.

34. UNCITRAL was the most appropriate body to deal with the issue because it took a broad view of the commercial aspects of world trade and dealt with harmonization at a high level, with the involvement of many interest groups. The matter was not yet on the agenda of any other relevant organizations; they were only giving the proposal initial consideration. UNCITRAL should take the lead in the work. While the matter might not seem relevant to all States, addressing it could have a significant impact and would not entail a substantial increase in workload. Although UNCITRAL would have to work within its own programme and on its own terms, it would have the consistent support of the Comité Maritime International. Furthermore, the issue was not politicized and would not lead to conflict among interest groups over specific aspects. However, it should be addressed within a defined time frame, given the current commercial situation. Contact with businesses and industry stakeholders would make more information available to the Commission. His delegation stood ready to provide assistance in that regard.

Mr. Maradiaga (Honduras) said that the fact that his country had both Atlantic and Pacific coastlines had led to the substantial development of its maritime commerce activities. UNCITRAL should play a leading role in work on the topic proposed, but that might entail the establishment of an additional working group, which was subject to budgetary constraints. It was important to determine how much work on the topic would be feasible.

36. **Ms. Sabo (**Canada) said that when the Comité Maritime International had presented its proposal to the Hague Conference on Private International Law, that organization had decided against including it in its work programme, although it might consider it again in the future. However, many delegations, including her own, had suggested that UNCITRAL might be the appropriate body for such work. To her knowledge, the topic was not part of the workplan of the International Institute for the Unification of Private International Law, which was established every three years. Given that there appeared to be interest among delegations with regard to the proposal, the Comité Maritime International might wish to organize a colloquium to raise awareness of the issues concerned and enable the Commission's member States to take a more informed decision at its next session. There was currently no capacity for such work given the very full agendas of the working groups and the limited resources available.

37. **Mr. Lux** (Comité Maritime International) welcomed the suggestion that his organization should organize a colloquium to raise awareness of what was a complex subject. With regard to the relevance of the subject to other organizations, when the proposal had been presented to IMO, doubts had been expressed as to whether the topic, as a matter of private law, fell within the mandate of that body, which was primarily concerned with public law and technical, safety and environmental issues.

38. **Mr. Sorieul** (Secretary of the Commission) said that the issue had not been included in the work programme of the International Institute for the Unification of Private International Law or the Hague Conference on Private International Law. The topic had been discussed preliminarily at the most recent coordination meeting between UNCITRAL and those organizations, at which it had been felt that the topic might fit well into the current work programme of the International Institute for the Unification of Private International Law. The proposed colloquium would provide valuable additional information.

39. **The Chair** suggested that the Commission should take note of the proposal but should not refer the matter to a working group at the current time. Instead, the proposed colloquium could be organized by the Comité Maritime International and UNCITRAL could participate in that colloquium and contribute its expertise, together with other international organizations. Following the colloquium and additional studies, further consideration could be given to the questions of whether to incorporate the topic into the Commission's workplan and, if so, whether the relevant international organizations would be involved in the work.

40. **Mr. Von Ziegler** (Switzerland) said that it was important for UNCITRAL to participate and, indeed, play a leading role in the colloquium, because such an event would provide a platform for delegations to meet industry representatives and experts and an opportunity for them to express their views.

41. **Mr. Apter** (Israel), expressing support for the proposed colloquium, said that it would be helpful if the Comité Maritime International approached its national chapters to raise awareness of and increase interest in the topic. The Secretariat should report on the colloquium at the Commission's fifty-first session.

42. **The Chair** said he took it that the Commission wished the Comité Maritime International to organize a colloquium on the cross-border issues arising from the judicial sale of ships, with UNCITRAL support and participation, as proposed. The issue would be taken up again by the Commission as necessary in the light of developments.

43. *It was so decided.*

The discussion covered in the summary record ended at 11.05 a.m.

Summary record (partial) of the 1060th meeting, held at the Vienna International Centre, Vienna, on Friday, 14 July 2017, at 2 p.m.

[A/CN.9/SR.1060]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The discussion covered in the summary record began at 3.20 p.m.

Adoption of the report of the Commission (A/CN.9/L/CRP.1/Add.12)

1. **Mr. Sorieul** (Secretary of the Commission) invited the Commission to consider document A/CN.9/L/CRP.1/Add.12, which contained the sections of the draft report relating to the Commission's deliberations on possible future work in the area of international dispute settlement under agenda item 15.

2. **Ms. Knieper** (Secretariat), drawing attention to paragraph 1 of the addendum, pointed out that the square brackets around the second sentence would be deleted, because the Commission had indeed reaffirmed the conclusions reached during its preliminary discussion upon its consideration of agenda item 21.

3. **Mr. Diyachenko** (Russian Federation) proposed that the words "on the basis of those notes" in the second sentence of paragraph 3 should either be deleted or replaced with the words "taking note of those notes", since the mandate for work on that topic had not been formulated on the basis of those notes. The text as drafted suggested that Working Group III would be obliged to work strictly in accordance with the notes, whereas the Commission had in fact agreed that the Group's mandate would be a broad one.

4. **The Chair** suggested the wording "taking into account those notes" and the insertion of the word "including" before the words "on the basis of those notes".

5. **Mr. Diyachenko** (Russian Federation) expressed a preference for the Chair's suggested wording.

6. **Mr. Apter** (Israel) said he agreed that the wording in question should be clarified. It was his understanding that paragraph 3 referred to the beginning of the discussion rather than describing the mandate ultimately decided on.

7. **Ms. Montineri** (Secretariat) said that the words "on the basis of those notes" simply reflected the fact that the Commission's discussion had been based on the documentation considered under the agenda item. However, it would not be problematic to change that wording to "taking into account those notes".

8. **The Chair** said she took it that the Commission wished to accept that change.

9. *It was so decided.*

10. **Mr. Coffee** (United States of America) proposed replacing the word "necessary" with the word "possible" in the first sentence of paragraph 4. That change would be consistent with the use of the words "possible solutions" at the end of paragraph 9, and would avoid the impression that a decision had already been made that new solutions were necessary, given that the Working Group would be tasked with determining whether or not that was the case.

11. **Mr. Diyachenko** (Russian Federation) expressed support for that proposal. He also proposed replacing the word "restore" with the word "ensure" in the second sentence of paragraph 4, as the former implied there was no confidence in the system, which was untrue. There was confidence in the system, and that confidence needed to be maintained.

12. **Mr. Rosner** (Observer for the European Union), supported by **Ms. Sabo** (Canada), said that it would be preferable to replace the word "necessary" with the words "any relevant", which had been used in item (iii) of paragraph 25. He did not support the proposal of the representative of the Russian Federation, as the word "restore" accurately reflected the discussion that had taken place.

13. **Mr. Meier** (Switzerland) and **Ms. Gómez Ricaurte** (Ecuador) expressed support for the retention of the word "restore".

14. **The Chair** said she took it that the Commission wished to replace the word "necessary" with the words "any relevant" in the first sentence of paragraph 4, but to retain the word "restore" in the second sentence.

15. *It was so decided.*

16. **Mr. Meier** (Switzerland), supported by **Mr. Apter** (Israel), proposed that the information contained in paragraph 8 — save for the last sentence of that paragraph, which served to introduce paragraph 9 — should be placed after paragraph 4, since it reflected the positive outcome of the discussions. It would be more appropriate for that information to come before the information contained in paragraphs 5, 6 and 7, which reflected the doubts expressed by delegations regarding the desirability and feasibility of work on possible investor-State dispute settlement reforms.

17. **Mr. Schoefisch** (Germany), supported by **Mr. Lapiere** (Observer for Belgium), said that while his delegation supported the rationale behind the proposal of the representative of Switzerland, it would be preferable to retain the existing paragraph order and to instead insert the words "In spite of this criticism, there

was broad support for UNCITRAL to undertake work on ISDS reform" at the beginning of paragraph 8.

18. **Mr. Diyachenko** (Russian Federation) said that the existing paragraph order accurately reflected the chronology of the discussion that had taken place and should therefore be retained.

19. **Mr. Coffee** (United States of America), expressing agreement with that view, said that it would be more appropriate for paragraph 8, wherever it was located, to begin with the words "The prevailing view of the Commission was that UNCITRAL should undertake work on ISDS reform".

20. **Mr. Rosner** (Observer for the European Union), expressing support for that suggestion, said that while the proposal of the representative of Switzerland was logical, the existing paragraph order should be retained.

21. **The Chair** said that the structural change proposed by the representative of Switzerland could disrupt the logic of the text.

22. In the absence of support for that proposal, she took it that the Commission wished to retain the existing structure but to insert the additional wording proposed by the United States representative at the beginning of paragraph 8.

23. *It was so agreed.*

24. **Ms. Yamanaka** (Japan) proposed the addition of the words "more than" before the words "3,000 international investment agreements" in the second sentence of paragraph 5. She also proposed the insertion of the words "It was stated that" before the word "reforms" at the beginning of the sixth sentence of the same paragraph, to clarify that that sentence reflected an opinion expressed by some but not all delegations.

25. *It was so decided.*

26. **Mr. Rosner** (Observer for the European Union) suggested amending the words "However, doubts were expressed on" in the first sentence of paragraph 5 to read "However, some delegations expressed doubts on".

27. **Mr. Diyachenko** (Russian Federation) said that a significant number of States, rather than only some, had expressed doubts as to the desirability and feasibility of UNCITRAL undertaking work on possible reform of investor-State dispute settlement.

28. **Mr. Rosner** (Observer for the European Union) said that his suggested wording was intended to reflect the fact that only a limited number of delegations had expressed doubts during the Commission's initial discussion of the issue.

29. **Mr. Diyachenko** (Russian Federation) said that it was unnecessary to indicate the proportion of delegations that had supported a suggestion or view. He was willing to accept the suggestion for the sake of enabling the Commission to proceed with its consideration of the addendum, but considered the amendment to be unnecessary.

30. **Mr. Coffee** (United States of America), **Mr. Meier** (Switzerland), **Ms. Kiselyová** (Observer for Slovakia), and **Ms. Light** (Australia) expressed support for the suggestion made by the observer for the European Union.

31. **Mr. Schoefisch** (Germany) pointed out that since UNCITRAL had 60 member States, the words "some delegations" might easily be taken to mean more than just a few. Therefore, it was preferable to retain the existing wording.

32. **The Chair** suggested that, as a compromise solution, the word "some" should be inserted before the word "doubts" in the first sentence of paragraph 5.

33. *It was so decided.*

34. **Ms. Light** (Australia) proposed that the words "they generally followed similar patterns with regard to their structure and were centred around a number of core principles" in the penultimate sentence of paragraph 5 should be replaced with the words "there are many issues which are recurrent under different international investment agreements which would benefit from a consistent approach", which was a more accurate reflection of the discussion that had taken place.

35. **Mr. Diyachenko** (Russian Federation) said that he would prefer to retain the existing wording, as the specific elements of international investment agreements that might benefit from a unique approach had not been discussed.

36. **The Chair** said that unless there was support for the proposed change, the sentence of paragraph 5 would remain as drafted.

37. **Mr. Coffee** (United States of America), supported by **Mr. Rosner** (Observer for the European Union) proposed the insertion of a new second sentence in paragraph 6 along the lines of "It was pointed out that reform is neither something new, nor something that can only be pursued multilaterally, as countries have advanced ISDS reform in myriad ways for many years", to reflect a point made by his delegation during the discussions, and the deletion of the words "It was pointed out that" in the following sentence, which would thus begin with the existing words "Some States had elected to modify".

38. *It was so agreed.*

39. **Mr. Coffee** (United States of America) proposed deleting the words ", in particular" from the final sentence of paragraph 6, as the sentence was not intended to refer to forms of multilateral work on the subject beyond those listed.

40. He further proposed inserting the words ", rather than seeking to develop a single, multilateral approach that should apply to all countries" after the words "individual circumstances" at the end of paragraph 6, in

line with the comments made by his delegation during the discussion in question.

41. **The Chair** said that it was not feasible to incorporate the specific comments of individual delegations in the report of the session

42. She took it that the Commission wished to accept the first proposal by the representative of the United States, but not the second.

43. *It was so agreed.*

44. **Ms. Yamanaka** (Japan) said that while she appreciated the point made by the representative of Canada with regard to the reflection of delegations' individual statements in the report of the session, the wording of the first sentence of paragraph 7 did not accurately reflect the comments that had been made by her delegation, the essence of those comments being that it had not yet been verified whether or not the criticism of the existing investor-State dispute settlement regime was based on fact, and that UNCITRAL should not undertake work on the topic on the basis of perceptions. She therefore proposed amending the sentence to read "It was stated that those who emphasized the necessity of ISDS reform pointed out that the current ISDS regime was perceived to be illegitimate, but whether such perceptions collectively represented the reality of ISDS was not verified, and that UNCITRAL should not undertake work based on mere perceptions, but on facts."

45. **Mr. Schoefisch** (Germany) expressed support for the comments made by previous speakers to the effect that delegations' comments need not be reflected individually and that, similarly, it was unnecessary to indicate the proportion of delegations that had supported a suggestion or view. The report reflected the discussions sufficiently and there was no need to reflect additional comments.

46. **Mr. Diyachenko** (Russian Federation) said that while he agreed that it was important not to reproduce too many statements in the report, the proposal by the representative of Japan was an amendment to the existing language rather than an addition. It would be inappropriate to prevent a delegation from ensuring that its statement had been properly reflected.

47. **Mr. Meier** (Switzerland) said he was confident that the Secretariat's summary of the Commission's deliberations was as accurate and balanced as possible.

48. **The Chair** said that unless she heard any further objections to the wording of paragraph 7 as drafted, that paragraph would remain unchanged.

49. **Mr. Coffee** (United States of America) proposed that in paragraph 8, the words ", and those that opposed further work on general investor-State dispute settlement reform issues" should be added at the end of the second sentence in order to accurately reflect all views expressed.

50. **The Chair** pointed out that the paragraph was intended to reflect the views expressed in support of work on investor-State dispute settlement reform.

51. **Mr. Mbabazize** (Uganda), expressing agreement with the representative of Canada, said that the paragraph as currently drafted sufficiently reflected the discussion that had taken place.

52. **The Chair** said that in view of the comments made, the paragraph would be retained as drafted.

53. **Ms. Gómez Ricaurte** (Ecuador) pointed out that in paragraph 12 of the Spanish-language version of the addendum, the wrong acronym was used for the World Trade Organization and should therefore be corrected.

54. **Ms. Yamanaka** (Japan) proposed that the words "and organs" should be added after "intergovernmental organizations" in the second sentence of paragraph 12, as the United Nations Conference on Trade and Development (UNCTAD) was an organ of the United Nations rather than a stand-alone organization.

55. **The Chair** said she took it that the Commission wished to accept the proposed amendments to paragraph 12.

56. *It was so decided.*

57. **Mr. Apter** (Israel) said that in paragraph 15, the words "in the context of such reforms" should be added to the end of the second sentence in order to make it clear that the issues of concurrent proceedings and a code of ethics would be addressed only as part of the topic of investor-State dispute settlement reforms.

58. **The Chair** said that in the absence of support for that proposal, the text would remain unchanged.

59. **Mr. Diyachenko** (Russian Federation), supported by **Mr. Coffee** (United States of America), proposed inserting the word "possible" before the words "ISDS reforms" in the second sentence of paragraph 15, as the Commission had given the Working Group a mandate to simply consider whether reforms were necessary and was not prejudging the outcome of those deliberations. He noted that that qualifier was used elsewhere in the addendum and that the word "solutions" was also qualified throughout by "necessary", "possible", "relevant" and "any".

60. **Ms. Sabo** (Canada) said that the amendment was not necessary as it was implicit, whenever the term "ISDS reforms" was used in the addendum, that those reforms were only a possibility.

61. **Ms. Yamanaka** (Japan) said that while she understood that objection, she supported the proposal.

62. **Ms. Kiselyová** (Observer for Slovakia) said that as the section of the draft report was entitled "Possible future work in the area of international dispute settlement", there was no need to include the word "possible".

63. **The Chair** said that, in the light of that comment, and unless there were further objections, the paragraph could be retained as drafted.

64. **Ms. Yamanaka** (Japan) proposed that a sentence should be added at the end of paragraph 16 to read along the lines of "It was also pointed out that a permanent investment court could possess law-making power to override the intentions of treaty negotiators", in order to reflect the point raised by her delegation during the discussions.

65. **Mr. Rosner** (Observer for the European Union), supported by **Ms. Sabo** (Canada) and **Mr. Schoefisch** (Germany), said that he objected to that proposal because the report was a summary, not a verbatim report, as had already been pointed out by other speakers. If the point raised by the delegation of Japan was included, the responses of other delegations would also have to be reflected, including that of his own delegation, which had fundamentally disagreed with the point made.

66. **Ms. Gómez Ricaurte** (Ecuador), expressing support for that position, said that while she understood the concern expressed by the representative of Japan, the paragraph did not suggest that the establishment of a permanent multilateral investment court was a foregone conclusion.

67. **The Chair** said that in the absence of support for the proposal of the representative of Japan, the text would remain unchanged.

68. **Mr. Diyachenko** (Russian Federation) said that in the second sentence of paragraph 16 of the Russian-language version of the addendum, the word "возможно" should be deleted as the English equivalent "possibly" was not included after the words "It was suggested that while" in the English-language version of the document.

69. **Mr. Sorieul** (Secretary) said that any typographical, grammatical and translation errors would be corrected at the stage of preparation of the final report of the session. He asked delegations to submit any corrections in writing to the Secretariat.

70. **Mr. Soh** (Singapore) proposed that in the first sentence of paragraph 19, the word "reflected" should be replaced with the word "considered" and the words "could be affected" should be added after "States".

71. **Mr. Rosner** (Observer for European Union) said that he agreed with the proposal to change the word "reflected" to "considered", which more accurately reflected the Commission's intention, but did not support the second proposal as the reason for the proposed amendment was unclear.

72. **Ms. Sabo** (Canada) said that she shared the view expressed by the observer for the European Union; the proposed additional language would render the clause ungrammatical and was overly restrictive.

73. Speaking as Chair, she said she took it that the Commission wished to accept only the first proposal of the representative of Singapore.

74. *It was so agreed.*

75. **Mr. Dennis** (United States of America), supported by **Ms. Yamanaka** (Japan), proposed replacing the words "there was general agreement" with the words "it was said", or, alternatively, "the prevailing view was" in paragraph 19, as the current wording was misleading.

76. **Ms. Sabo** (Canada), supported by **Mr. Apter** (Israel), said that the sentence should be retained as currently drafted, as it referred to UNCITRAL in a general sense, but if there was strong support for the proposal, the wording "the prevailing view was" would be preferable.

77. **Mr. Coffee** (United States of America) said that the sentence as drafted appeared simply to reflect praise for UNCITRAL rather than explaining why the Commission was an appropriate forum for work on investor-State dispute settlement. If the intention was to indicate that the prevailing view was that UNCITRAL was an appropriate forum for that work owing to its inclusive nature, that should be clarified.

78. **Mr. Diyachenko** (Russian Federation) said he agreed that the paragraph referred to UNCITRAL in a general sense; however, it should be considered in the context of the preceding and following paragraphs. For that reason, he supported the proposal of the United States representative.

79. **The Chair** said she took it that the Commission wished to accept the words "the prevailing view was that", as proposed by the United States representative.

80. *It was so decided.*

81. **Ms. Gómez Ricaurte** (Ecuador), supported by **Ms. Portillo Rodríguez** (El Salvador), proposed the deletion of the words "a widely prevailing majority and" in the second sentence of paragraph 20, since it was her understanding that consensus was based on the absence of a formal objection but not on a widely prevailing majority, in line with the opinion of the United Nations Office of Legal Affairs on the matter. It might be useful to refer to that opinion for clarification.

82. **Mr. Pires Filho** (Brazil), recalling that the view that consensus was based on a widely prevailing majority had been expressed by only one delegation, said that he supported the proposal of the representative of Ecuador. If the original wording was retained, language should be added to the sentence to indicate that that view was not the general view of the Commission.

83. **Mr. Rosner** (Observer for the European Union) said it was his recollection that the view in question had been expressed by more than one delegation. The sentence should be retained as drafted, as it usefully reflected the Secretariat's explanation of UNCITRAL

practice and the discussion that had taken place on the meaning of consensus.

84. **Mr. Sorieul** (Secretariat) said that the sentence accurately reflected UNCITRAL practice. The proposed deletion would not necessarily resolve the issue of how consensus was defined, which might re-emerge at a future session.

85. **Mr. Pires Filho** (Brazil) said it should be made clear that the practice to which the sentence referred was the practice of UNCITRAL but not necessarily that of all United Nations bodies.

86. **Mr. Sorieul** (Secretariat) said that although there might not be time to amend the text in a manner sufficient to address the concerns that had been raised, the explanation of the meaning of consensus could be clarified as referring only to UNCITRAL practice. However, there was little doubt that in UNCITRAL practice it was insufficient to refer only to the absence of a formal objection, which according to other legal opinions might be understood as triggering a request for a vote. Consensus at UNCITRAL meant agreement among a large majority, more than a simple majority, as had been discussed by States when reviewing the Commission's working methods.

87. **The Chair** suggested as a possible solution the insertion of a reference to UNCITRAL practice in the second sentence of paragraph 20 of the addendum. The Secretariat would provide interested delegations with the relevant legal opinions in order to clarify the concept of consensus.

88. *It was so decided.*

89. **Mr. Fu** Liongliong (China) proposed that the word "broad" should be deleted from the first sentence of paragraph 25; that the words "relevant solutions" in the penultimate sentence of the paragraph should be replaced with the words "possible options"; and that the last sentence should be reformulated to read "The Commission instructed the Working Group to take into consideration the ongoing work of relevant international organizations in this respect."

90. **Mr. Pires Filho** (Brazil) said that he did not support the proposal to change the last sentence, as that sentence reflected the possibility for States to choose any dispute settlement option.

91. **Ms. Montineri** (Secretariat) said that the mandate set out in paragraph 25 could not be changed as it had been agreed upon by the Commission under item 21 of the session agenda. Any changes would cast doubt on the transparency of the UNCITRAL process.

92. **Mr. Schoefisch** (Germany) said that he also disagreed with the proposals. He suggested that the square brackets around "III" should be deleted as it had been decided that Working Group III would be entrusted with the work on possible reform of investor-State dispute settlement.

93. **Mr. Apter** (Israel), supported by **Mr. Lapiere** (Observer for Belgium), said that the mandate had been very carefully worded and should therefore remain as drafted, with the exception of the deletion of the square brackets.

94. **The Chair**, noting that there was no support for the proposals of the representative of China, said she took it that the Commission wished to delete the square brackets in paragraph 25.

95. *It was so decided.*

96. *Document* A/CN.9/L/CRP.1/Add.12*, as orally amended, was adopted.*

The meeting rose at 5.10 p.m.

Summary record of the 1061st meeting, held at the Vienna International Centre, Vienna, on Monday, 17 July 2017, at 9.30 a.m.

[A/CN.9/SR.1061]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 9.45 a.m.

Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6; A/CN.9/L/CRP.2 and A/CN.9/L/CRP.3)

1. The Chair invited the Commission to consider the parts of the draft guide to enactment as set out in document A/CN.9/914 and its addenda. She suggested that the Commission should focus on matters of substance and that drafting matters should be left to the Secretariat.

A/CN.9/914

Preface and general part

2. **Mr. Dennis** (United States of America) said that it was unnecessary to refer in the first sentence of paragraph 4 to the instruments relating to secured transactions that had previously been adopted, as those instruments were already listed in section I, paragraph 1.

3. The primary purpose of the Model Law, namely to assist States in harmonizing and modernizing their secured transactions laws, should be stated more clearly in paragraph 4. To that end, the wording should be brought more closely into line with the wording of the decision of the Commission on the adoption of the Model Law and the relevant General Assembly resolution (71/136), to the effect that the purpose of the Model Law was to assist States in developing a modern secured transactions law and that enactment of the Model Law would assist businesses, especially small and medium-sized enterprises, to obtain much-needed working capital. Such a statement would be helpful, particularly since States might wish to include a preamble when enacting the Model Law. It would also be useful if paragraph 1, in referring to all UNCITRAL texts on secured transactions, included language along the lines of "Together, these texts will provide comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime", that language being drawn from General Assembly resolution 68/108.

4. The guide to enactment should also point out that the Model Law was designed for implementation in States with different legal traditions, possibly drawing on the useful language contained in paragraph 3 of the introduction to the UNCITRAL Legislative Guide on Secured Transactions.

5. **Mr. Tirado Martí** (Spain) expressed support for those comments. If a reference to the harmonization of laws was included in section II, it might be necessary to change the heading of section III to reflect the content of that section — which did not address harmonization in an obvious way — more accurately.

6. **The Chair** said she took it that the Commission wished to adjust paragraph 4 and possibly the heading of section III on the basis of the points raised.

7. *It was so agreed*.

8. **Mr. Tirado Martí** (Spain), drawing attention to his country's proposal in document A/CN.9/L/CRP.2, said that Spain firmly believed in the potential of the Model Law to help countries to achieve economic growth through the increased availability of credit at lower cost. To that end, the Model Law should be used by as many countries as possible. However, many States were likely to view the Model Law as a text intended to be enacted in full, and might therefore be inclined to reject it if they already had well-developed secured transactions systems. Nonetheless, those States should be encouraged to incorporate as many of the principles and provisions of the Model Law as possible in their domestic legislation. Accordingly, the idea behind the proposal was to provide States with greater flexibility in implementing all or part of the Model Law.

9. **Mr. Dennis** (United States of America) said that he did not support the proposal because the Commission's decision on the adoption of the Model Law and the relevant General Assembly resolution merely encouraged States to consider enacting the Model Law, and in any case it was the prerogative of States to decide whether and to what extent to enact the provisions of such an instrument. Therefore, since the aim was to encourage States to modernize and, in particular, harmonize their laws, it was undesirable to include a paragraph in the guide to enactment that highlighted the possibility for States to depart from the provisions of the Model Law.

10. **Ms. Gullifer** (United Kingdom) said that although the concern expressed by the United States representative was understandable, she agreed with the rationale for the first sentence of the proposed paragraph. In order to increase the likelihood that countries would adopt the Model Law in part or in full, it was important to bear in mind that certain aspects of existing domestic laws were considered to work well

and would not be changed. Therefore, if that first sentence could be drafted in such a way as to dispel the concern raised, she would support its inclusion. She was not in a position to comment on the remainder of the proposed paragraph since it did not apply to the United Kingdom.

11. **Mr. Riffard** (France) said that while he agreed with the delegation of Spain that the Model Law was designed to be adapted by legislators, which necessitated a certain degree of flexibility, that information was already reflected in paragraphs 5 to 8 of document A/CN.9/914. It would be inappropriate to include the proposed paragraph in the guide to enactment because it might be interpreted as encouraging a non-unified approach.

12. **Mr. Brink** (Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry) said that it was important to bear in mind the complexity of the Model Law. As a practitioner, he could imagine that it might be frustrating for legislators in a country with an emerging economy to attempt to incorporate all the provisions of the Model Law in domestic legislation at the same time. Those provisions would need to be discussed in depth in such countries, and some provisions might need to be incorporated gradually over the course of several years, particularly if a certain type of secured transaction posed problems in the country concerned. However, that process should not prevent countries from achieving progress in other areas of their secured transactions regimes. Therefore, the call for flexibility should be supported.

13. **Mr. Whittaker** (Australia), expressing support for the comments made by the representatives of the United States and France, said that while he appreciated the rationale for the proposed paragraph and the desirability of achieving the use of the Model Law in as many jurisdictions as possible, he was concerned that that paragraph essentially constituted an open invitation to States to enact only parts of the Model Law, at the risk of overlooking other important provisions. For that reason, and in view of the objective of maximizing the harmonization of secured transactions laws worldwide, he would prefer not to include the proposed paragraph.

14. **Ms. Gross** (Israel) said that she agreed with the views expressed by the representatives of the United States, France and Australia. The first sentence of the proposed paragraph undermined the Commission's and the Working Group's focus on uniformity of application of the Model Law and the objective of encouraging the adoption of the instrument as a whole. As a compromise solution, she suggested that wording should be added to the proposed paragraph to the effect that partial implementation of the Model Law was not the recommended approach and the Model Law was designed to be, and should be, adopted as a whole, notwithstanding paragraphs 5 to 8 of the draft guide to enactment.

15. **Mr. Maradiaga** (Honduras) said that although he understood the arguments for the proposal, it was important not to lose sight of the fundamental objective of preparing instruments that had broad scope. In the context of globalization, it was essential to create uniform law. Model instruments should be implemented in the manner intended, in order to avoid problems with regard to the scope and interpretation of those instruments.

16. **The Chair** said that in the light of the comments made and the fact that the Working Group, in drafting the guide to enactment, had discussed the same issue and reached the same conclusion, the text proposed by Spain would not be included in the guide.

Chapter I. Scope of application and general provisions

17. **Ms. Gullifer** (United Kingdom) suggested deleting or explaining the reference to recommendation 6 of the Secured Transactions Guide in paragraph 28 of document A/CN.9/914, because that recommendation and article 1, paragraph 4, of the Model Law were not the same.

18. **Mr. Dennis** (United States of America), expressing support for that suggestion, said that while cross references to the Secured Transactions Guide were useful, detailed discussion of the manner in which specific issues were addressed both in that Guide and in the Model Law was confusing to the reader. It was important to focus on explaining how the Model Law dealt with those issues. One possible solution would be to move the reference to recommendation 6 of the Secured Transactions Guide to a footnote explaining that reference, so as not to interrupt the flow of the text; however, he would prefer its deletion.

19. **The Chair** said she took it that the Commission wished to delete the reference to paragraph 6 of the Secured Transactions Guide in paragraph 28.

20. *It was so agreed*.

21. **Mr. Deschamps** (Canada) suggested that the final sentence of paragraph 29 should be deleted, because the Model Law did not contain any provisions on consumer protection. Article 24 of the Model Law related to the effectiveness against third parties of an acquisition security right in consumer goods rather than to consumer protection.

22. *It was so decided*.

23. **Mr. Bazinas** (Secretariat), drawing attention to the note by the Secretariat contained in document A/CN.9/L/CRP.3, pointed out that paragraph 31 of document A/CN.9/914 was inconsistent in stating that the Commission had decided not to include rules on security rights in attachments in the Model Law yet at the same time suggesting that States should include such rules on the basis of the relevant recommendations of the Secured Transactions Guide when enacting the Model Law, particularly since the purpose of the Model

Law was to implement those recommendations and the guide to enactment was intended to explain any differences between the recommendations and the Model Law. Consequently, paragraph 31 made it unclear how States should implement the recommendations of the Secured Transactions Guide when enacting the Model Law. The model provisions set out in document A/CN.9/L/CRP.3 had been prepared in order to address that problem. However, if the Commission decided that those provisions should not be included in an annex to the guide to enactment, as suggested, paragraph 31 would nonetheless need to be revised.

24. Drawing attention also to the notes to the Commission in document A/CN.9/L/CRP.3 on specialized registration, he said that the relevant recommendations of the Secured Transactions Guide were not reflected in the proposed model provisions because the Working Group had decided that, since specialized registration was not addressed in the Model Law itself, it should be referred to only generally in the guide to enactment.

25. **Ms. Gullifer** (United Kingdom) said that it would be unwise, particularly since the Commission was at the stage of finalizing the guide to enactment and had limited time, to attempt to draft model provisions dealing with what was a difficult and very technical area of law. The topic of security rights in attachments was particularly complex in relation to immovable property, legislation on which varied greatly from State to State. An ill-considered set of model provisions would be worse than none at all. For those reasons, paragraph 31 should be amended rather than a new text produced.

26. **Mr. Dennis** (United States of America), expressing support for the comments made by the representative of the United Kingdom, said that the issue of security rights in attachments to immovable property might indeed be dealt with under domestic law governing immovable property rather than a secured transactions law, as provided for in recommendation 21 of the Secured Transactions Guide. Moreover, the approach taken in the Secured Transactions Guide to security rights in attachments was not necessarily the one always followed, and each enacting State would have to consider the issue on the basis of its specific needs. Paragraph 31 should therefore be redrafted to reflect the variety of approaches to the issue.

27. **Mr. Riffard** (France) said that while he understood the concerns expressed by the representative of the United Kingdom, it would be useful, in the context of a guide to enactment, to go beyond the current formulation of paragraph 31 and provide guidance in the form of model provisions such as those proposed by the Secretariat in document A/CN.9/L/CRP.3, particularly given the importance of the issue of security rights in attachments and the fact that legislators would need to consider that issue. Guidance on the subject could also be provided in the practice guide on secured transactions that was to be prepared by the Working Group.

28. **Mr. Tirado Martí** (Spain), supported by **Mr. Deschamps** (Canada), said he agreed that it was important to provide as much guidance as possible to legislators. It would be unwise to give the issue under discussion only light treatment at the current session, given its importance. He would support the inclusion of guidance on security rights in attachments in the guide to enactment provided that only attachments to movable property were addressed. More detailed guidance on the issue could be provided in the planned practice guide on secured transactions.

29. **Mr. Whittaker** (Australia) said that although he appreciated the desirability of providing as much information to enacting States as possible, even if the Commission decided to limit the proposed guidance to attachments to movable property, the fact that few of the delegations present had had an opportunity to consider those provisions in detail could lead to lengthy discussions. Given the current time constraints, it would be more appropriate to conclude discussion of the guide to enactment than to spend time on an additional document.

30. **The Chair** suggested that the discussion of document A/CN.9/L/CRP.3 and paragraph 31 of document A/CN.9/914 should be held in abeyance until delegations had had an opportunity to further consider the parts of document A/CN.9/L/CRP.3 that would be relevant if guidance was to be limited to attachments to movable property, the question of whether such guidance would be reliable and the question of how paragraph 31 might be adjusted, including in relation to attachments to immovable property.

31. *It was so agreed*.

32. **Mr. Deschamps** (Canada) suggested that the last sentence of paragraph 40 should be deleted, as although the statement that a control agreement did not need to be in a single written document was likely to be true under many national laws, that matter fell under the law of evidence rather than the Model Law.

33. *It was so decided*.

34. **Mr. Deschamps** (Canada) suggested that in paragraph 43, examples should be provided of assets that, depending on their use, could be characterized as “equipment”, “consumer goods” or “inventory”.

35. *It was so decided*.

36. **Mr. Whittaker** (Australia) said that he was concerned about the scope of the second sentence of paragraph 44, which related more to the nature of the assets in which a grantor could grant a security right than to the definition of the term “grantor”. It would be more appropriate to place the information contained in that sentence elsewhere in the guide to enactment, possibly where the term “encumbered asset” was discussed.

37. **The Chair** said she took it that the Commission wished to accept that proposal.

38. *It was so decided*.

39. **Mr. Deschamps** (Canada) suggested the deletion, in the second sentence of paragraph 53, of the example in parentheses, as the example was not correct: the issuer in the case in question did not have possession of the negotiable document through the various persons responsible for performing parts of the contract.

40. *It was so decided*.

41. **Mr. Dennis** (United States of America) recalled that Working Group VI had decided at its thirty-first session that the wording of paragraph 71 should be more closely aligned with that of paragraph 98 of the report of the Commission on the work of its forty-ninth session (A/71/17). Accordingly, he proposed that the second sentence of paragraph 71 should be split into two new sentences, the first ending with the words "to attract investment" and the second beginning with the words "Inefficient judicial enforcement mechanisms" and continuing as per the existing text. In addition, the word "resolution" following the words "prejudice the" in the final sentence should be replaced with the word "discussion", as the meaning of the word "resolution" in that instance was unclear.

42. Drawing attention to paragraph 74, he proposed that the words "is inspired by" and "based on" in the first sentence of that paragraph should be replaced with wording along the lines of "follows the language of", because article 5 was not based on the provisions referred to.

43. **The Chair** said she took it that the Commission wished to accept those suggestions.

44. *It was so decided*.

A/CN.9/914/Add.1

Chapter II. Creation of a security right

45. **Mr. Dennis** (United States of America), drawing attention to paragraph 1, proposed that the final three sentences of that paragraph should be reformulated along the lines of "Some asset-specific rules such as those dealing with receivables are essential for a well-functioning modern system and should not be omitted. Others should be omitted only if it is unlikely that those assets can serve as the basis for greater availability of credit at lower cost in the enacting State." Although he understood the intention behind the sentence, States should be encouraged to enact all the provisions of the Model Law, omitting provisions only if they had good reason to do so. Some of the asset-specific rules were essential and the number of instances in which a State might decide not to enact those rules was limited to those in which it was unlikely that assets of the type in question could serve as the basis for greater availability of credit at lower cost in the enacting State.

46. **The Chair** said she took it that the Commission wished the Secretariat to redraft paragraph 1 so that the wording encouraged the enactment of the asset-specific rules of the Model Law, particularly those on receivables.

47. *It was so decided*.

48. **Mr. Whittaker** (Australia), recalling his earlier comments regarding the definition of "grantor" in paragraph 44 of document A/CN.9/914, said that the explanation beginning in the second sentence of paragraph 3 of document A/CN.9/914/Add.1 was incomplete. For example, the paragraph did not explain the basis on which a lessee under a financial lease would be able, under the Model Law, to create a security right not only in its rights as lessee but also, under the priority rules, in the asset as a whole. Since that had been a major difficulty for his country in the context of its Personal Property Securities Act, it would be useful to provide States with a more detailed explanation of how a person that did not have full ownership of an asset was able in some circumstances to grant a security right in that asset.

49. **Mr. Deschamps** (Canada), expressing support for the comments of the representative of Australia, said that his delegation had submitted drafting suggestions to address the same point.

50. **Mr. Weise** (American Bar Association) said that it was appropriate to clarify that a lessee could create a security right only in its rights under the lease. There was nothing in the Model Law or the guide to enactment to suggest that a lessee could create a security right in the leased item as a whole.

51. **Mr. Gabriel** (International Law Institute) said that he agreed fully with the comments made concerning paragraph 3. The paragraph was important as it explained one of the basic building blocks of the entire Model Law, namely the prerequisites for the creation of a security right in an asset in terms of ownership of or the power to encumber that asset. While that point was quite easy to understand, it was swamped by the lengthy and convoluted discussion of how a security right could be granted in a receivable that had already been transferred. Although that explanation was important in the specific context of the transfer of receivables, it was not essential in making the general point about the power to create a security right in an asset. He therefore suggested that it should be set out in a separate paragraph either within the current section or together with other paragraphs concerning receivables or the transfer of receivables.

52. **Mr. Weise** (American Bar Association), expressing support for the comments made by the representative of the International Law Institute, said that the statement that a grantor was entitled to create a security right in its rights under a lease agreement was

correct, as such a grantor would not have a right under a standard lease to grant a security right in any other rights, such as the actual ownership rights of the lessor. The fundamental point was that although it was sometimes possible, in the case of negotiable types of encumbered asset, to create a security right in more than was owned, a lessee's rights were not negotiable rights. If that point was unclear, it should be clarified. However, as he understood it, the current wording of the paragraph seemed to address the concern of the representative of Australia.

53. **Mr. Whittaker** (Australia) said that the approach taken would depend on the legal tradition of the State concerned. Under the Personal Property Securities Act of Australia, a lessee under a financial lease would be regarded as having the ability to grant a security right not only in its rights as lessee but also in the entirety of the leased asset. That was necessary in order for the priority rules under the Personal Property Securities Act to function as intended, and should also be the case under the Model Law; otherwise, it would not be possible to determine the order of priority between the security rights granted by the lessor and those granted by the lessee.

54. **Mr. Dennis** (United States of America) suggested clarifying the wording of the third sentence of paragraph 3 by reformulating it along the lines of "Where the grantor is in possession of the asset on the basis of an agreement, such as a lease agreement, with the owner of the asset, the grantor has a right to create a security right in its rights under the agreement". The precise wording could be agreed upon during informal consultations.

55. He supported the suggestion of the representative of the International Law Institute to move the discussion of receivables from paragraph 3, as its inclusion in that paragraph was confusing given that receivables were not the subject of article 6.

56. **Ms. Gross** (Israel) said that she too supported that suggestion. It would suffice to state in paragraph 3 that the creditor of a receivable had the power to create a security right in the receivable. The remaining part of paragraph 3 on receivables could be included in the section of the guide on the priority of a security right.

57. **Ms. Gullifer** (United Kingdom) pointed out that the third sentence of paragraph 3 referred not necessarily to a financial lease or a lease that would be treated under the Model Law as a security agreement but, rather, to any kind of lease, such as a short-term hire agreement. Therefore, presumably, it could be agreed that the sentence was correct.

58. However, paragraph 3 should also make the point that where a financial lease right was treated as a security right but no notice was registered in respect of that security right, under the priority rules, the lessee could create a security right in the leased asset as a whole, in which case that security right would have priority over the unregistered financial lease right of the lessor. The same was true of receivables: if the transfer of a receivable was not registered, priority would be given to a subsequently registered transfer. The question was where those points should be made.

59. **The Chair** said there appeared to be agreement that the various matters covered by paragraph 3 should be clarified and dealt with separately, and that the treatment of financial leases should be explained in paragraph 3, while the issue of receivables should be addressed elsewhere.

60. **Mr. Weise** (American Bar Association) said that in order to address the concerns raised, it should simply be clarified that under a financial lease, a lessee could grant a security right in the leased asset as a whole, whereas under a non-financial lease, the lessee could create a security right only in its contractual rights to use the leased asset.

61. **Mr. Deschamps** (Canada) said that paragraph 3 should address only situations in which, under general principles of law, a person had the power to dispose of an asset. A separate paragraph should provide an explanation of situations in which, by virtue of the priority rules, a person that would not normally have the right to grant a security right in an asset would be regarded as having the same rights as an owner, such as a lessee under an unregistered financial lease. In such a case, the lessee would be regarded as having the power to grant a security right in the asset because, under the priority rules, the secured creditor to whom the lessee had granted a security right would rank above the lessor, i.e. the security right thus granted would have priority over the ownership rights of the lessor.

62. **Mr. Riffard** (France) said that he agreed with the Chair's summary. Paragraph 3 explained a fundamental point, namely the conditions under which a grantor could create a security right, which was straightforward if the grantor was the owner of the asset, but more problematic if the grantor was only the person in possession of the asset. The proposed clarification with regard to general and financial leases would therefore be helpful.

63. The discussion of receivables in paragraph 3 was important and should be retained in that paragraph. In particular, the point that a creditor of a receivable could create a security right in that receivable even if it had already transferred the receivable might not be obvious to all readers of the guide.

64. **The Chair** said she took it that the Commission wished the Secretariat to redraft paragraph 3 by reordering its contents and explaining in greater depth some of the points raised, including those relating to financial leases and unregistered security rights in that context. The discussion of receivables could be retained but should be set out in a separate paragraph.

65. *It was so decided*.

66. **Mr. Deschamps** (Canada) suggested the deletion of the last two sentences of paragraph 8 as the Model Law did not establish any requirement for the determination of the maximum amount under a security agreement, as a result of which the amount specified could be — and in reality often was — extremely high. Thus, the determination of a maximum amount did not offer grantors protection.

67. *It was so decided*.

68. **Mr. Dennis** (United States of America) proposed that paragraph 10 should reflect the final sentence of recommendation 17 of the Secured Transactions Guide by stating that any exceptions to the rule that a security right could encumber any type of asset should be described in a clear and specific way. Thus, paragraphs 9 and 10 would reflect that recommendation in full. Furthermore, since paragraph 9 referred to recommendation 17, paragraph 10 should include a reference to recommendation 18 of the Guide, for the sake of greater clarity and consistency.

69. He also proposed the deletion of paragraph 11, which seemed neither necessary nor appropriate.

70. **Mr. Riffard** (France) said that paragraph 11 provided helpful reassurance with regard to the protection of creditors and should therefore be retained or moved elsewhere.

71. **Mr. Von Ziegler** (Switzerland) said that he too supported the retention of paragraph 11, as it posed no problems, was useful and facilitated understanding of article 8 (e) of the Model Law.

72. **Mr. Bazinas** (Secretariat) said that paragraph 9 could be amended to clarify that the only part of recommendation 17 of the Secured Transactions Guide that was not reflected in article 8 of the Model Law was the final sentence of that recommendation.

73. Paragraph 10 referred to article 1, paragraph 6, of the Model Law because that paragraph implemented recommendation 18 of the Secured Transactions Guide. Consequently, the part of the draft guide to enactment concerning that provision, namely paragraph 30 of A/CN.9/914, referred to that recommendation. Once the various parts of the guide to enactment were compiled in a single document, a cross reference to that paragraph could be added to what was currently paragraph 10 of document A/CN.9/914/Add.1. Since the various parts of the draft guide to enactment were currently contained in several documents and had been prepared at different times, it had not been possible to add such cross references to date; instead, references had been made to articles rather than parts of the guide.

74. **The Chair** said that since the matter was one of drafting, the Secretariat would ensure that appropriate cross references were added as necessary at the stage of final review of the guide as a whole.

75. **Mr. Dennis** (United States of America), drawing attention to paragraph 14, proposed that the final sentence of that paragraph and the words “, although only up to the amount of the secured obligation” in the penultimate sentence should be deleted, as they did not concern proceeds specifically; moreover, he was not entirely convinced of their accuracy.

76. **Mr. Bazinas** (Secretariat) pointed out that the last sentence of paragraph 14 was intended to further explain the rationale for the rule contained in article 10, paragraph 1, of the Model Law by describing how the secured creditor would be affected in the absence of that rule.

77. **Ms. Gullifer** (United Kingdom) said that any explanation that enabled States to understand the purpose of a particular rule was useful. For that reason, she did not support the proposal to delete the final sentence of paragraph 14, as it was important to provide an explanation of the rule under article 10 to States that were unfamiliar with, or might not otherwise understand the need for, the rule that a security right could exist both in an encumbered asset and in its proceeds.

78. **Mr. Weise** (American Bar Association) said that the words “, although only up to the amount of the secured obligation” in the penultimate sentence of paragraph 14 stated a general rule that was generally applicable throughout the Model Law, namely that a secured creditor could enforce its security right in collateral only up to the amount necessary — if that amount was easily divisible — to pay the secured obligation, whether that collateral was the original collateral or the proceeds of collateral. It might be more useful to state that point in the part of the guide relating to chapter VII of the Model Law on the enforcement of a security right.

79. Since the last sentence of the paragraph was both accurate and useful, the question as to whether it should be deleted depended on the extent to which the Commission considered it desirable to explain the rationale for the rule in question and indeed for all other rules explained in the guide to enactment.

80. **Mr. Gabriel** (International Law Institute) said he agreed that the point made in the penultimate sentence of the paragraph was not limited to proceeds but, rather, was a general point that should be addressed in the part of the guide on enforcement of a security right. However, care should be taken to ensure precise wording so as to avoid the impression that an amount larger than the value of the secured obligation could be retained if, for example, a large asset secured only a small obligation.

81. Welcoming the explanation provided by the representative of the Secretariat with regard to the last sentence of paragraph 14, he said that the difficulty in understanding the meaning and appropriateness of that sentence arose partly from its location in the paragraph, as it seemed to explain the two preceding sentences, to

which it in fact did not relate. In the light of the explanation given by the representative of the Secretariat and the reasons given by the previous speakers in support of retention of the sentence, he suggested placing the sentence earlier in the paragraph for the sake of clarity.

82. **Ms. Walsh** (Canada) recalled that the issue raised had been discussed by the Working Group, which had agreed that although a security right could be enforced against both the original collateral and the proceeds, the amount that could be recovered was limited to the value of that original encumbered asset at the time it was disposed of, because otherwise the secured creditor would receive a windfall. It was therefore incorrect to state that the amount was limited to the value of the secured obligation; rather, the amount received would be limited to the value of the encumbered asset at the time of disposition.

83. **Mr. Bazinas** (Secretariat) said that the wording "although only up to the amount of the secured obligation" was meant not to refer to the general rule that the security right was limited to the amount of the secured obligation but, rather, to address the concern that without that wording the sentence would give the impression that the secured creditor could, by enforcing its security right both in the original encumbered asset and in the proceeds, receive more than it was owed. He was unsure whether it would be appropriate to refer to the value of the encumbered asset at the time of disposition rather than to the amount of the secured obligation.

84. With regard to the suggestion by the representative of the International Law Institute that the final sentence of paragraph 14 should be moved, the Secretariat could give that possibility further consideration as a drafting matter.

85. **Mr. Gabriel** (International Law Institute) said that he shared the understanding of the Secretariat with regard to the penultimate sentence of the paragraph, rather than that of the representative of Canada, whose explanation suggested that the wording "although only up to the amount of the secured obligation" was intended to limit the amount that could be collected from the proceeds to a sum related to the value of the original collateral. He recalled that the Working Group had discussed the issue extensively when drafting the Secured Transactions Guide, and that the position of the representative of Canada had not been the prevailing view. He had expressed support for the deletion of that wording not because the point it made was incorrect but, rather, because the way in which the sentence was drafted suggested that that point was tied to enforcement, which did not seem appropriate. While a fuller explanation of the point could be given in the enforcement chapter, paragraph 14 should be clarified to ensure a common understanding.

86. **Mr. Bazinas** (Secretariat) suggested that although the first sentence of paragraph 14 already referred to paragraphs 72 to 89 of chapter II of the Secured Transactions Guide, it would be useful to clarify the penultimate sentence by reference to paragraphs 82 to 85 of that chapter, particularly paragraph 85, which explained the essence of recommendations 19 and 20 of the Guide, namely that the secured creditor could enforce its security right in the original encumbered asset and in the proceeds of its disposition up to the value of the outstanding obligation, even when the amount obtained was greater than the value of the original encumbered assets at the time of disposition. The remainder of the paragraph went on to explain the rationale for that result.

87. **Ms. Walsh** (Canada) suggested, in the light of that explanation, that a new sentence should be added with a cross reference to the Secured Transactions Guide in order to clarify that, where a secured creditor enforced a security right both in the original encumbered asset and the proceeds, it was entitled to recover the amount of the secured obligation without being limited to the value of the original encumbered asset.

88. **The Chair** said she took it that the Commission wished to accept the Secretariat's proposal to clarify the penultimate sentence of paragraph 14, including by adding a cross reference to the Secured Transactions Guide.

89. *It was so decided*.

90. **Mr. Dennis** (United States of America), drawing attention to paragraph 15, proposed that the part of the third sentence beginning with the words ", as well as a negotiable warehouse receipt" should be deleted, as it was questionable whether such warehouse receipts constituted proceeds. He also proposed that the last sentence of the same paragraph should be deleted and that the matter it dealt with should be addressed in the planned practice guide on secured transactions rather than in the guide to enactment.

91. **Ms. Gullifer** (United Kingdom) said that she supported the proposal to delete the reference to negotiable warehouse receipts. According to article 2 (bb) of the Model Law, the definition of "proceeds" was "whatever is received in respect of an encumbered asset"; however, a warehouse receipt merely represented an encumbered asset rather than being something that was "received" in respect of an encumbered asset.

92. She agreed that the last sentence of paragraph 15 would be more useful in the practice guide, as, rather than explaining the rationale for the rule, it explained the effect of application of the rule in a given situation.

93. **Mr. Riffard** (France) said that while he supported the proposal to delete the reference to negotiable warehouse receipts, the last sentence of the paragraph should be both retained in the guide to enactment and

reflected in the practice guide, as it was important to draw users' attention to the value of including in the description of the encumbered assets any possible proceeds. The sentence would also enable legislators to understand the provisions of the Model Law relating to the description of encumbered assets.

94. **Mr. Weise** (American Bar Association) said that the last sentence was inaccurate, as an item received as proceeds could be both original collateral, if it was described in the security agreement, and proceeds of the collateral described. In the case of a security right both in inventory and in receivables, a receivable generated by the sale of the inventory would constitute both original collateral — because it was described in the security agreement — and proceeds of the inventory. In order to avoid a lengthy discussion on that point, it would be better to delete the sentence from the guide to enactment and consider addressing the issue in the practice guide on secured transactions.

95. **Mr. Bazinas** (Secretariat) recalled that the issue had already been discussed and resolved by the Working Group. The sentence was intended to explain the interrelationship between articles 6 and 10 of the Model Law and would be useful to legislators even if the same point was to be explained differently in the practice guide.

The meeting rose at 12.30 p.m.

Summary record of the 1062nd meeting, held at the Vienna International Centre, Vienna, on Monday, 17 July 2017, at 2 p.m.

[A/CN.9/SR.1062]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 2.10 p.m.

Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (*continued*) (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6; A/CN.9/L/CRP.3)

1. **The Chair** invited the Commission to resume its consideration of the part of the draft guide to enactment contained in document A/CN.9/914/Add.1.

Chapter II. Creation of a security right (continued)

2. **Mr. Gabriel** (International Law Institute), referring to the Commission's discussion of the final sentence of paragraph 15 at its previous meeting, recalled that the Working Group had decided that if a security agreement described, for example, inventory and receivables that if not thus described would be proceeds of that inventory, those receivables would be regarded as original collateral because they were described in the security agreement. However, it had not decided that such receivables could no longer be characterized as proceeds of the inventory in cases where that characterization was important. In insolvency regimes, for example, it often made a difference whether assets that were acquired after insolvency proceedings had commenced were new assets or proceeds of pre-insolvency collateral. It also made a difference whether a registered notice that only mentioned the original collateral was sufficient to cover the proceeds. Assets that were described in the security agreement could therefore be treated as proceeds when appropriate. Accordingly, if the language of the final sentence of paragraph 15 was retained, it should be revised in such a way as to avoid the opposite impression.

3. **The Chair** said that, in the light of those comments and the Commission's discussion at its previous meeting, she took it that the Commission wished to delete the words ", as well as a negotiable warehouse receipt issued by the warehouse in which new inventory may be stored" in the third sentence of paragraph 15 and to retain the final sentence of that paragraph, subject to drafting changes by the Secretariat to reflect the points made.

4. *It was so decided*.

5. **Mr. Gabriel** (International Law Institute) suggested that paragraphs 16 and 17 should refer to "money or funds" credited to a bank account, in line with article 10, paragraph 2, of the Model Law, rather than only to "funds".

6. The rationale given for the lowest intermediate balance rule in the final sentence of paragraph 17 was somewhat imprecise in that that rule applied only to changes in the balance that occurred after the proceeds were commingled. Accordingly, the sentence should be revised to explain that if the balance of a bank account fell below the amount of the proceeds deposited, subsequent increases would not be the result of those deposits.

7. **The Chair** said she took it that the Commission wished to accept those two suggestions.

8. *It was so decided*.

9. **Ms. Gullifer** (United Kingdom) suggested that the final two sentences of paragraph 20 should either be redrafted or separated from the rest of the paragraph to create an additional paragraph, for the sake of clarity.

10. **The Chair** said that that drafting suggestion could be left to the Secretariat.

11. **Mr. Dennis** (United States of America) said that paragraphs 20 and 21 should be revised to clarify that the limitation of the security right related to quantity in paragraph 20 and to value in paragraph 21, and explain why that was the case. The difference was that in the case of a mass, the components of the mass could be counted, as in the given example of litres of oil, whereas that was not the case with regard to products, such as bread.

12. **Ms. Gullifer** (United Kingdom), expressing support for that suggestion, said that the last two sentences of paragraph 20 should be modified to clarify that a security right in a mass was limited by reference to the quantity of the mass irrespective of the value of the goods.

13. **The Chair** said she took it that the Commission wished to accept those suggestions.

14. *It was so agreed*.

15. **Mr. Deschamps** (Canada), drawing attention to the second sentence of paragraph 28, questioned the accuracy of the statement that the rule established in article 13, paragraph 1, of the Model Law, if applied to financial receivables, could affect obligations undertaken by the financial institution towards third parties. It would be difficult to explain the exclusion of

financial receivables from the scope of that rule, because even in the case of trade receivables it could be said that the invalidation of an anti-assignment agreement could affect obligations undertaken by the debtor towards third parties. Therefore, it would be preferable to delete the explanation provided.

16. **Mr. Bazinas** (Secretariat) pointed out that the second and third sentences of paragraph 28 had been reproduced verbatim from paragraph 108 of chapter II of the UNCITRAL Legislative Guide on Secured Transactions.

17. **The Chair** suggested explaining in the guide to enactment the way in which obligations towards third parties might be affected.

18. **Mr. Deschamps** (Canada) recalled that a policy decision had been made to exclude financial receivables in general from the scope of invalidation of anti-assignment clauses. Such exclusion was relatively easy to explain in some cases, such as in the case of a receivable arising from a derivatives agreement or from a foreign exchange contract, but more difficult to explain in others, such as in the case of a loan. He therefore suggested that the explanation in the second sentence of paragraph 28 should simply be replaced with wording to the effect that article 13, paragraph 3, of the Model Law reflected a policy decision that had been made at the time of drafting of the United Nations Convention on the Assignment of Receivables in International Trade and subsequently confirmed in the Secured Transactions Guide.

19. **Mr. Bazinas** (Secretariat) said that since, as had been pointed out by the representative of Canada, the explanation provided was correct with respect to derivative and foreign exchange contracts, the problem might lie in the understanding of "financial receivables". Noting that the third sentence of paragraph 28 referred to receivables arising from or under securities or financial contracts, which were excluded from the scope of the Secured Transactions Guide, he wondered whether the term "financial receivables", while in quotation marks precisely because of the subsequent reference to securities and financial contracts, was too broad in the second sentence of the paragraph, and whether the solution would therefore be to refer not to financial receivables but to "receivables arising from or under securities, derivatives or other financial contracts".

20. **Mr. Gabriel** (International Law Institute) expressed agreement with the comments made by the representative of Canada. The suggestion was not to change the rule in article 13, paragraph 1, of the Model Law, which was based on the Assignment Convention and had been confirmed and reconfirmed many times. Indeed, the Working Group had been mandated to ensure consistency with the Convention and with the Secured Transactions Guide. Rather, the point raised was that the explanation provided in paragraph 28 might not be sufficient. Article 13, subparagraph 3 (a), of the Model Law described the receivables to which the rule applied, rather than describing the exceptions to the rule. However, since the rule applied to contracts for the supply or lease of goods or services "other than financial services", it did not apply to bank loans, for example. During the drafting of the Assignment Convention, there had been discussion of the possible unintended effects of the relevant provisions of that Convention on loan and other similar markets in which banks and other lenders participated, and it had been agreed that the rule typically applied to situations in which money was owed for goods and services, not to loans. The policy decision referred to by the representative of Canada would be supported more effectively by an explanation of the situations in which the rule applied than by the explanation currently provided in paragraph 28 as to why the rule did not apply to financial receivables, which did not stand up to close scrutiny.

21. **Mr. Dennis** (United States of America) said that the point raised by the representative of Canada was a valid one that warranted clarification in the guide to enactment along the lines suggested.

22. **Ms. Gullifer** (United Kingdom) said she agreed that the current explanation as to why financial receivables were not included in the scope of the rule set out in article 13, paragraph 1, was insufficient and should be clarified.

23. **Mr. Bazinas** (Secretariat) said that in the light of the statements made, one possibility would be to delete the second sentence of paragraph 28; however, an explanation of the first sentence of the paragraph would still be needed. It was his understanding that the scope of the rule in article 13, paragraph 1, of the Model Law was limited to trade receivables because in the case of what were broadly described as "financial receivables" — receivables arising from securities, derivatives and financing transactions excluded from the scope of the Model Law — obligations undertaken by financial institutions towards third parties, i.e., third-party relationships under financial contracts, could be affected. However, if that was not an appropriate explanation of the rule, an alternative solution would need to be found.

24. **Ms. Gullifer** (United Kingdom) said that, rather than deleting the second sentence of the paragraph altogether, it was important to provide a clearer explanation of the rule and of the reason why financial receivables were excluded from its scope. The explanation given by the representative of the International Law Institute went some way towards explaining why the rule was limited to trade receivables, and could be used in the redrafting of the second sentence of paragraph 28. By way of example, in the United Kingdom, the reason for the exclusion of financial receivables was that in the case of a syndicated loan agreement, there would always be an anti-assignment clause to prevent the loan being assigned to a vulture or hedge fund. That was standard practice, yet was not adequately covered by the explanation in paragraph 28

as currently drafted, which referred to cases in which the debtor of the receivable was a financial institution, whereas in the case of a syndicated loan agreement the creditor was a financial institution.

25. **Mr. Deschamps** (Canada) said that it was unnecessary to explain why the rule did not apply to receivables arising from financial contracts, because such receivables were in any case excluded from the scope of the Model Law. However, article 13, paragraph 3, excluded some financial receivables that did not arise from financial contracts, including loan receivables. On the other hand, it included receivables representing the payment obligation for a credit card transaction. Therefore, the explanation put forward by the representative of the United Kingdom, and the example given of a loan issued not to a financial institution but by a financial institution to a commercial borrower, might be more appropriate than a reference to financial receivables. Furthermore, if a loan was issued under a syndicated credit arrangement, some of the lenders might have an interest in ensuring that one of their co-lenders did not assign its share of the loan. On that basis, it could be explained that obligations undertaken by a lender under a syndicated credit agreement towards other lenders might be affected.

26. **Mr. Gabriel** (International Law Institute) expressed support for the cogent explanations provided by the representatives of the United Kingdom and Canada as to why the scope of the rule was limited. It would be helpful to explain that the overriding of anti-assignment agreements was very much justified in the cases described in article 13, paragraph 3 — for example, contracts for the supply of goods or services were usually assigned in bulk, and the cost of examining each contract individually would be high and would increase the cost of credit for all involved, whether or not they had negotiated an anti-assignment clause — but not so with respect to the types of financial receivables described by the representatives of the United Kingdom and Canada, hence the limitation of the rule. Given that the rule being described was new or unusual to many jurisdictions, it was important to explain the rationale underlying both the rule itself and the exceptions to it.

27. **The Chair** drew attention to the fact that the rationale for the rule was explained in paragraph 24 of document A/CN.9/914/Add.1.

28. **Mr. Brink** (Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry) recalled that the policy decision in question had been discussed at length at the time of drafting of the Assignment Convention. The aim of the Convention was to provide cheaper sources of credit and financing, and one source of credit and financing was factoring. The overriding of anti-assignment clauses enabled factors to purchase receivables that usually arose as trade receivables from the supply of goods or services. That was evidently not true of all financial receivables. Banks at the time had insisted that financial receivables could not be assigned, owing to the need to comply with money-laundering laws and the "know your customer" approach, it being a general principle that banks should "know" their customers whether as creditors or debtors. If a receivable of which a bank was a debtor was assigned to a person whose identity the bank was unable to establish, the bank would have no control over who its counterparty would be. The need to avoid such situations was one of the reasons why it had been decided that certain financial receivables should be excepted from the general exclusion of such receivables under article 9 of the Convention. He suggested that that should be explained in the guide to enactment.

29. **Mr. Bazinas** (Secretariat) said that it might be helpful to refer to the explanatory note on the Assignment Convention, given that article 9 of that Convention had served as the basis for the text of article 13 of the Model Law. Both provisions were formulated in such a way as to encompass a wide variety of receivables, including consumer and sovereign receivables, as explained in paragraph 10 of the explanatory note. The explicit exclusion of financial service receivables in article 9, paragraph 3 (a), of the Convention was intended to ensure that receivables excluded from the scope of the Convention were not brought back within its scope through that provision. However, subparagraphs (c) and (d) made it clear that the article did apply to the assignment of certain financial service receivables, namely receivables arising from credit card transactions and receivables arising upon net settlement of payments due pursuant to a netting agreement involving more than two parties. In paragraph 3 (d), reference was made only to multilateral netting arrangements so as to avoid exclusion of the application of the article to assignments of trade receivables on the sole basis of a netting arrangement between the assignor and the debtor. Thus, the explanatory note offered additional clarification as to why the rule applied to trade receivables, although trade receivables were described very broadly and included certain financial service receivables.

30. **The Chair** wondered whether there might be a way to reaffirm the relevant part of the explanatory note on the Convention or refer to it as the source of the rationale for the rule in article 13, paragraph 1, of the Model Law.

31. **Mr. Dennis** (United States of America) suggested that, in the interests of efficiency, it might be more appropriate to return to paragraph 28 at a later stage, after delegations had had time to work on redrafting suggestions.

32. *It was so agreed*.

33. **Mr. Dennis** (United States of America), drawing attention to paragraph 24, said that the focus of the second sentence of that paragraph should be not on the prevention of the grantor from creating a security right but on the fact that article 13, paragraph 1, of the Model Law did not prevent a security right created by the

grantor from being effective. He therefore suggested that the part of the sentence following the information in parentheses should be amended accordingly.

34. **Mr. Weise** (American Bar Association) said that he supported that suggestion, as the key point was that article 13 (1) of the Model Law addressed the question of whether the receivable could be encumbered at all in the context described.

35. **The Chair** said she took it that the suggestion was acceptable to the Commission.

36. *It was so decided*.

37. **Mr. Dennis** (United States of America) said that the suggestion in paragraph 29 that article 13 of the Model Law should be read together with article 14 of that Law was confusing, because the fact that article 13 applied only to trade receivables meant that the type of asset described in paragraph 29 did not fall within the scope of that article, unless the intended meaning was that article 13, paragraph 3, should be understood more broadly in the light of article 14.

38. **Mr. Bazinas** (Secretariat) recalled that the information in paragraph 29, which was based on recommendation 25 (d) of the Secured Transactions Guide, had originally been set out in a draft version of article 14 of the Model Law but had subsequently been deleted by the Working Group on the basis that it would suffice for the matter to be addressed in the guide to enactment, hence the reference to article 14 in paragraph 29 of document A/CN.9/914/Add.1.

39. **The Chair** said that in the light of those comments, she took it that the Commission wished to delete the reference to article 14 of the Model Law in paragraph 29.

40. *It was so agreed*.

41. **Mr. Gabriel** (International Law Institute) said that whereas the rule in article 14 of the Model Law applied equally to personal or property rights that secured or supported payment or other performance of encumbered assets, paragraph 30 of document A/CN.9/914/Add.1 appeared to seek to categorize some of those rights as personal rights and others as property rights, and in so doing to categorize certain rights as securing payment and others as supporting payment of a receivable. However, since that categorization did not apply in all legal systems and might therefore give rise to debate, it should be avoided.

42. **Mr. Bazinas** (Secretariat) pointed out that not only the Model Law but also the Assignment Convention and the Secured Transactions Guide referred to rights that secured payment and rights that supported payment. Examples of each type had been included in the guide to enactment in order to explain the distinction to enacting States. The focus of those examples was not on whether a right was a personal right or a property right, but whether that right secured or supported payment or performance of a receivable. However, if the categorization of a right as a personal or property right was considered problematic, the third sentence of the paragraph could be revised to refer not to "a personal or property right" and "a personal right" but simply to "a right" in each instance.

43. **Mr. Gabriel** (International Law Institute) said that although he had no objection to the inclusion of an explanation of the two different categories of rights, examples that in many jurisdictions would be considered inaccurate should be avoided. In some jurisdictions, for example, secondary guarantees or suretyships would fall within the same category as independent guarantees; in other words, they would support rather than secure payment. Given that the paragraph already contained one good example of a right that secured payment of a receivable, namely a security right in immovable property, it would be preferable either to limit the text to that one example, or to devise another example that did not apply only to certain jurisdictions.

44. **Mr. Bazinas** (Secretariat) said that it was important to bear in mind that the text of paragraph 30 had been discussed at length by the Working Group.

45. **Mr. Dennis** (United States of America) expressed support for the comments made by the representative of the International Law Institute. The suggested change would clarify the text.

46. **Mr. Riffard** (France) said that it would be undesirable to modify paragraph 30 given that that text had been agreed on by the Working Group after lengthy discussion and various revisions, and represented a good compromise.

47. **Mr. Dennis** (United States of America) expressed concern that the examples provided in paragraph 30 might be inconsistent with the explanatory note on the Assignment Convention, which could prove problematic when the guide was presented to legislators in his country. The Secretariat should therefore clarify the examples provided, in the light of the Commission's discussion.

48. **Mr. Bazinas** (Secretariat) said that article 10 of the Assignment Convention reflected the generally accepted principle that an accessory security right, such as a suretyship, pledge or mortgage, was transferred automatically with the principal obligation, while an independent security right, such as an independent guarantee or a standby letter of credit, was transferable only with a new act of transfer. Thus, accessory rights were referred to as securing payment of an assigned receivable and independent security rights were referred to as supporting rights. While the examples in paragraph 30 could be changed in order to resolve the issue raised, those examples would have no impact on the implementation of the Assignment Convention.

49. **Mr. Weise** (American Bar Association) suggested that, in order to address the concerns raised while avoiding the need for any substantive change to the text,

wording along the lines of "in some States" should be added at the beginning of the third sentence of paragraph 30.

50. *It was so decided*.

51. **Mr. Dennis** (United States of America) said that the first two sentences of paragraph 31 were rendered superfluous by the statement in paragraph 30 that the first sentence of article 14 reflected the thrust of recommendation 25 of the Secured Transactions Guide. It was unnecessary to provide such a detailed discussion of the Secured Transactions Guide. He suggested that if the information in the first two sentences of paragraph 31 was deemed necessary, it should be moved up to follow the first sentence of paragraph 30, or moved to a footnote to that paragraph.

52. Furthermore, it was unnecessary to explain why it was self-evident that article 14 did not apply to matters not addressed in it. Thus, the paragraph as a whole served only to distract the reader from the explanation of article 14.

53. **Mr. Bazinas** (Secretariat) said that the Working Group had mandated the Secretariat to explain any differences between the articles of the Model Law and the recommendations of the Secured Transactions Guide throughout the guide to enactment, hence the explanation in paragraph 31. However, if the Commission was satisfied that the reason for the difference between article 14 and recommendation 25 would be clear to users, paragraph 31 could be deleted.

54. **The Chair** said that it was important to strike a balance between providing too much information and the need to explain the differences between the Model Law and the Secured Transactions Guide. She suggested that the Secretariat should therefore look at ways of making paragraph 31 more concise; for example, the paragraph could be modified simply to state that subparagraph (g) of recommendation 25 of the Secured Transactions Guide was reflected in articles 57 and 58 of the Model Law and that it had been unnecessary to include subparagraph (h) of that recommendation in article 14.

55. **Mr. Dennis** (United States of America) suggested that that information should be added in parentheses at the end of the first sentence of paragraph 30 and paragraph 31 deleted altogether.

56. **The Chair** said that if the suggested changes were acceptable to the Commission, the precise drafting could be left to the Secretariat.

57. *It was so agreed*.

Chapter III. Effectiveness of a security right against third parties

58. **Mr. Deschamps** (Canada), referring to paragraph 42 of document A/CN.9/914/Add.1, suggested that the rationale for preserving the continuity of third-party effectiveness, namely to preserve the priority achieved through the initial method of effectiveness against third parties, should be explained.

59. *It was so decided*.

60. **Mr. Whittaker** (Australia) said that the example given in the final sentence of paragraph 46 was unrealistic, as the cost of registration was in fact likely to be very low compared to the cost of typical durable household goods. He therefore suggested that the example should be modified accordingly.

61. *It was so decided*.

62. **Mr. Dennis** (United States of America) said that paragraph 52 was neither necessary nor appropriate, especially given that not all States that enacted the Model Law would be parties to the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, while the United Nations Convention on International Bills of Exchange and International Promissory Notes had not yet come into force. He suggested that either the information in that paragraph should be moved to a footnote to paragraph 53, which would need to be modified accordingly, or the two paragraphs should be replaced with a brief reference to the conventions and the need for States parties to those conventions to take the provisions in question into account when enacting the Model Law.

63. **The Chair** recalled that when the Commission had adopted the Model Law, it had decided that the guide to enactment should address the relationship between the Model Law and the two conventions.

64. **Mr. Tosato** (Italy) said that paragraphs 52 and 53 were acceptable to his delegation in their current form, and reflected the decision referred to by the Chair.

65. **Ms. Walsh** (Canada) said that paragraph 53 (a) should be revised to refer to certificated non-intermediated securities rather than non-intermediated securities in general, because it was not possible to endorse uncertificated non-intermediated securities.

66. Furthermore, paragraph 53 (b) unintentionally implied that an endorsement of an instrument or of a certificated non-intermediated security constituted an alternative to registration or possession as a method of third-party effectiveness. However, that was not her understanding of the effect of the conventions referred to; since an endorsement was in favour of the holder, i.e. the person in possession, the priority and third-party effectiveness of the security right would be determined by possession rather than by endorsement. The best approach would be to draw the attention of States that had enacted one of the conventions to the fact that where a secured creditor under the Model Law was in possession of a negotiable instrument or a certificated non-intermediated security, an endorsement on that instrument or security would have the effect determined by the convention in question in terms of the secured creditor's rights. That would suffice for the purposes of the guide.

67. **Mr. Tosato** (Italy) said that he agreed with the representative of Canada, whose comments provided all the more justification for retaining paragraph 52.

68. **Mr. Bazinas** (Secretariat) recalled that the Working Group had discussed the issue on a number of occasions, including most recently at its thirty-first session, and had concluded that it was satisfied with the substance of the paragraphs under consideration given their importance to States parties to the conventions concerned.

69. **Mr. Dennis** (United States of America) said that while he agreed with the representative of Canada that the content of paragraph 53 was not accurate and should be redrafted, since the matter was one of substance, the Secretariat should be asked to draft a revised version of the text for the Commission's further consideration rather than it being left to the Secretariat to resolve the issue.

70. **Ms. Walsh** (Canada) suggested that paragraph 53 (a) should be either clarified as she had proposed or deleted, and that paragraph 53 (b) should be revised to refer only to article 49, paragraph 3, and article 51, paragraph 1.

71. **The Chair** suggested that the matter should be discussed further in informal consultations.

The meeting was suspended at 4.10 p.m. and resumed at 4.30 p.m.

72. **Ms. Walsh** (Canada) said that following the informal consultations, it had been agreed that the heading of the section containing paragraphs 52 and 53 should be revised to read along the lines of "Additional considerations for States that have adopted the Geneva Uniform Law or the Bills and Notes Convention". Paragraph 52 should be retained. With respect to paragraph 53, there appeared to be agreement that endorsement of a certificated non-intermediated security or of a negotiable instrument was not a method of third-party effectiveness, nor did it affect application of the priority rules of the Model Law. Therefore, it was proposed that paragraph 53 (b) should be revised to read along the lines of "A State that has enacted the Geneva Uniform Law (or the Bills and Notes Convention) may wish to note that a secured creditor in possession of a negotiable instrument or certificated non-intermediated security may have, in addition to its rights under the Model Law, the rights afforded by the Geneva Uniform Law (or the Bills and Notes Convention) where the instrument or the security contains an endorsement contemplated by the Geneva Uniform Law or the Bills and Notes Convention".

73. **The Chair** said the Secretariat had suggested that the heading should read "Additional considerations for States parties to certain conventions for negotiable instruments and certificated non-intermediated securities". She took it that, subject to that change, the Commission wished to accept the proposals presented by the representative of Canada.

74. *It was so agreed*.

A/CN.9/914 (continued)

Chapter I. Scope of application and general provisions (continued)

75. **The Chair** invited the Commission to resume its consideration of paragraph 31 of document A/CN.9/914 in conjunction with document A/CN.9/L/CRP.3.

76. **Mr. Bazinas** (Secretariat) recalled that the Commission had yet to decide whether it wished to include model provisions on security rights in attachments as an annex to the guide to enactment, or to include only provisions on attachments to moveable property. Regardless of that decision, it would be necessary to redraft paragraph 31 of document A/CN.9/914. If the Commission decided to include provisions on attachments to moveable property, which was a matter that would fall within the scope of a domestic secured transactions law, only article 1, paragraph 1, article 2 and article 7, paragraph 1, of document A/CN.9/L/CRP.3, together with the definition of "attachment to a movable asset" in paragraph 2 of that document, could be retained, as all the other provisions dealt with attachments to immovable property. In addition, the Commission might wish to refer in the guide to enactment to the fact that specialized registration in relation to attachments to movable property was not addressed in the Model Law.

77. The Commission was also invited to consider the recommendation of the Working Group, referred to in paragraph 3 of document A/CN.9/L/CRP.3, to issue a corrigendum to the Model Law in order to correct two errors.

78. **Mr. Dennis** (United States of America) requested that further consideration of the issue of security rights in attachments be postponed until the following meeting to give delegations a chance to discuss the matter in informal consultations.

79. **The Chair** said she took it that that suggestion was agreeable to the Commission. She also took it that the Commission wished to authorize the issuance of the proposed corrigendum to the Model Law.

80. *It was so decided*.

A/CN.9/914/Add.2

Chapter IV. The registry system

81. **Mr. Dennis** (United States of America) said that although paragraph 2 of document A/CN.9/914/Add.2 was drawn from footnote 8 of the Model Law, it failed to reflect the first sentence of that footnote, which made an essential point. He therefore proposed the insertion, at the end of the paragraph, of a new sentence reading along the lines of "A separate law or other legal instrument that incorporates the provisions relating to

the registry system should be enacted and take effect simultaneously with the secured transactions law".

82. **The Chair** said that although it was important to avoid reproducing too much of the Model Law in the guide to enactment, it was worth mentioning that if the Model Registry Provisions were enacted separately from the Model Law, the two texts should take effect simultaneously.

83. **Mr. Gabriel** (International Law Institute) said that the manner in which the Chair had expressed that point was in fact clearer than the first sentence of footnote 8 of the Model Law, which suggested that the Model Registry Provisions would take effect on the date the Model Law was enacted, whereas they could not take effect until the secured transactions law implementing the Model Law became effective, as the registry would not come into existence until that time. The footnote also failed to reflect the fact that the entry into force of the secured transactions law might be delayed, for the reasons explained in the part of the draft guide to enactment relating to article 107 of the Model Law. Therefore, it should ideally be clarified, either in the guide to enactment or through a corrigendum to footnote 8, that the registry provisions should take effect when the secured transactions law itself became effective.

84. **The Chair** recalled that during the Working Group's discussion of the Model Registry Provisions, it had been pointed out that in certain jurisdictions, the provisions would have to be effective in order for the registry to be established and operational when the Model Law was enacted. It might therefore be unwise to issue a corrigendum to footnote 8 of the Model Law; instead, the first sentence of the footnote should be reflected in the guide to enactment, as had been pointed out.

85. **Ms. Gullifer** (United Kingdom) said that she was in favour of the modification of paragraph 2 of document A/CN.9/914/Add.2 along the lines proposed by the United States representative.

86. **The Chair** said it was important for the Commission to agree on precise wording in order to ensure that that paragraph was consistent with the footnote in terms of substance.

The meeting rose at 5 p.m.

Summary record of the 1063rd meeting, held at the Vienna International Centre, Vienna, on Tuesday, 18 July 2017, at 9.30 a.m.

[A/CN.9/SR.1063]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 9.35 a.m.

Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (*continued*) (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6; A/CN.9/L/CRP.3)

1. **The Chair** invited the Commission to resume its consideration of paragraph 31 of document A/CN.9/914 in conjunction with document A/CN.9/L/CRP.3. The Commission's discussions thus far suggested that there was emerging consensus that security rights in attachments to immovable property should not be addressed in the guide to enactment, except, possibly, through wording to the effect that that matter was governed by the legislation of the enacting State on immovable property. It remained to be decided whether the issue of attachments to movable property should be dealt with by including model legislative provisions in the guide to enactment or whether, instead, the matter should simply be addressed in paragraph 31 of document A/CN.9/914. A further option would be not to address the matter of security rights in attachments to movable and immovable property at all; however, given that some States that were considering enacting the Model Law had already approached the Secretariat for advice on how to address the issue, it appeared that guidance would be useful.

2. **Mr. Dennis** (United States of America), supported by **Mr. Sono** (Japan), said that the matter of security rights in attachments to movable and immovable property was addressed sufficiently in the UNCITRAL Legislative Guide on Secured Transactions. For that reason, and given that the model provisions set out in document A/CN.9/L/CRP.3 did not represent any changes in policy, it was unnecessary to include separate provisions on such security rights in the guide to enactment, even if those provisions were to deal only with movable property. He proposed that, instead, paragraph 31 of document A/CN.9/914 should be modified to state that the general rules of the Model Law would apply with respect to attachments to movable property, referring enacting States to the relevant provisions of the UNCITRAL Legislative Guide on Secured Transactions for guidance, and, as suggested by the Chair, that the treatment of security rights in attachments to immovable property would depend on domestic legislation governing immovable property.

3. With respect to priority, while the Secured Transactions Guide referred to the priority of competing security rights in attachments made effective against third parties by registration in a specialized registry, the normal priority rules would apply to movable property. That could be pointed out in the guide to enactment. With regard to enforcement, reference should also be made to situations in which an attachment was removed from the movable property to which it was attached and the value of the property decreased as a result.

4. **Ms. Gullifer** (United Kingdom), expressing support for the proposals made by the representative of the United States, said that during informal consultations, delegations had found that those of the model provisions proposed in document A/CN.9/L/CRP.3 that dealt with movable property simply restated the general rules of the Model Law, with the exception of the final sentence of the proposed article 7, paragraph 1, which dealt with liability for damage to movable property. Consequently, and since the difficulty of attempting to reach agreement on a possible set of model provisions would outweigh the benefit of incorporating such a text, the guide to enactment should simply state that the general rules of the Model Law applied to security rights in attachments to movable property with regard to creation, third-party effectiveness, priority and enforcement. As had already been concluded, it would be too difficult for the Commission to address the difficult issue of attachments to immovable property given the limited time available.

5. **Mr. Bazinas** (Secretariat) pointed out that paragraph 31 of document A/CN.9/914 referred to the recommendations of the Secured Transactions Guide with regard to attachments to both movable property and immovable property, and that with respect to the latter, the Guide essentially deferred to national immovable property law. Consequently, if the guide to enactment referred States to the recommendations of the Secured Transactions Guide only in relation to movable property and stated that the issue of security rights in attachments to immovable property was a matter for the domestic legislation of the enacting State, that would give the false impression that the Secured Transactions Guide failed to address that issue altogether. He therefore asked the Commission to clarify whether the guide to enactment should refer to the general rules of the Model Law when addressing attachments to movable property and to the recommendations of the Secured Transactions Guide with respect to both movable and immovable property, making clear that with regard to the latter, those recommendations deferred to national immovable property law.

6. **The Chair** said she agreed that, for the sake of completeness, the guide should point out that the Secured Transactions Guide addressed the issue of attachments to immovable property insofar as it deferred to the immovable property law of the enacting State.

7. **Mr. Maradiaga** (Honduras) said that he too supported the proposal made by the representative of the United States of America. It was important for the information in the guide to enactment to be clear and free of contradictions.

8. **Mr. Whittaker** (Australia) expressed support for the comments made by the representatives of Honduras, the United Kingdom and the United States of America.

9. **Mr. Riffard** (France) said that since the Commission's task was to finalize the guide to enactment, not to draft further model provisions, paragraph 31 of document A/CN.9/914 should simply be revised to explain that the issue of security rights in attachments was not addressed in the Model Law because of the difficulty in establishing a uniform approach to that issue, particularly as it concerned property law. It should then be pointed out that the enacting State would need to consider the matter and that the Secured Transactions Guide set out some general principles on which the Commission had reached consensus. While legislators were free to decide not to adopt those solutions if they were incompatible with national law, it was important to emphasize that the fundamental elements of the Model Law should remain intact in order to preserve the general balance achieved by the text, regardless of the manner in which the issue of attachments was addressed.

10. **Mr. Deschamps** (Canada) said that the general rules of the Model Law did not necessarily resolve all issues relating to attachments to movable property. However, in view of the limited time available to the Commission, it might not be possible to consider that point further.

11. **Mr. Bazinas** (Secretariat) said that, on the basis of the comments made, it was his understanding that the Commission wished to revise paragraph 31 of document A/CN.9/914 to state that the general rules of the Model Law applied to security rights in attachments to movable property and that the Model Law did not address security rights in attachments to immovable property because that matter did not lend itself to harmonization. The paragraph would then refer the reader to the relevant recommendations of the Secured Transactions Guide.

12. The guide to enactment could also explain that the general provisions of the Model Law applied to movables that were attachments to other movables, in order to reflect the statement made in article 1, paragraph 1, of the proposed model provisions in document A/CN.9/L/CRP.3, if that statement was not obvious. With regard to the third-party effectiveness of a security right in an attachment, the statement made in article 2 of those provisions could also be reflected in the guide to enactment if it was not considered obvious.

13. The first three sentences of paragraph 1 of article 7 of the proposed model provisions in effect did little more than restate the rights of a secured creditor with a security right in an attachment to a movable asset, those rights being unaffected if the attachment was itself a movable asset. The only element of document A/CN.9/L/CRP.3 relating to attachments to movable property that was mentioned neither in the Model Law nor in the draft guide to enactment was the statement made in the final sentence of paragraph 1 of article 7 with regard to the liability of the secured creditor for damage to the movable asset. That statement could be added as a new sentence to paragraph 31 of document A/CN.9/914. Lastly, it would be useful to include in the guide to enactment the definitions of "attachment to a movable asset" and "attachment to immovable property" set out in paragraph 2 of document A/CN.9/L/CRP.3.

14. **The Chair** said that that summary appeared to capture all of the points that had been raised, with the exception of the comment by the representative of France that the fundamental elements of the Model Law should remain intact regardless of the manner in which legislators chose to address the issue of security rights in attachments. That point should be emphasized.

15. **Mr. Dennis** (United States of America) said that he too agreed with the summary, which was consistent with his earlier proposal. However, the revised text of paragraph 31 of document A/CN.9/914 should clarify that a security right could be created in a tangible asset that was an attachment to movable property at the time of creation of the security right and that a security right could continue in a tangible asset that became an attachment after the creation of that security right. Those two possibilities were not made clear in article 1, paragraph 1, of the model provisions proposed in document A/CN.9/L/CRP.3, although he understood that the language used in that text might not necessarily be reproduced in the guide to enactment.

16. **The Chair** pointed out that the language used in that article had been taken from recommendation 21 of the Secured Transactions Guide. However, the proposed clarification might be helpful, and would not change the substance of the text.

17. **Ms. Walsh** (Canada) said she agreed that the two distinct situations described by the representative of the United States were not explained clearly in article 1, paragraph 1, of the proposed provisions and should be clarified in the guide to enactment.

18. With regard to her delegation's earlier comment that the general rules of the Model Law might not cover all situations with regard to attachments to movable property, she noted that the Model Law established no rules governing the priority competition between a security right in a tangible asset that was or became an

attachment and a security right in the asset to which the attachment was attached. Under general accession law in many jurisdictions, an attachment to movable property automatically became a part of that movable property; consequently, the matter did not simply concern the rules of immovable property law with respect to fixtures but also concerned accession rules with respect to movable property. Clear priority rules were needed in order to deal with such situations adequately, but in view of the time that would be needed in order to formulate such rules, the guide to enactment should simply explain that such priority competitions were not addressed, although they might be dealt with under the accession law of the enacting State.

19. **Mr. Bazinas** (Secretariat) pointed out that the matter raised by the representative of Canada was referred to in the note to the Commission in document A/CN.9/L/CRP.3 on priority between competing security rights in an attachment to a movable asset, and that a suggestion was made in that note to include in the guide to enactment a reference to recommendation 89 of the Secured Transactions Guide, which was the only priority rule that the Guide contained with respect to attachments. If it was felt that the type of priority competition described by the representative of Canada was not adequately dealt with by the Secured Transactions Guide, further clarification should be provided in the guide to enactment.

20. **Ms. Gullifer** (United Kingdom) said that the matter raised was dealt with in paragraph 115 of chapter V of the Secured Transactions Guide, which referred to several types of priority conflict that might arise with respect to security rights in assets that later became attachments to movable assets. According to that paragraph, in the cases described, priority could be determined in accordance with the general priority principle, i.e., by the order of registration or third-party effectiveness. Since that approach was recommended in the Guide, although it was not a recommendation as such, it should not be departed from.

21. **Mr. Yang** Bingxun (China) expressed support for the proposal made by the representative of the United States of America, the comments made by the representative of France and the additional suggestions put forward by the representative of the Secretariat.

22. **Ms. Walsh** (Canada) said that, as the representative of the United Kingdom had noted, paragraph 115 of chapter V of the Secured Transactions Guide dealt with both a priority conflict between two or more security rights in an asset that later became an attachment and a priority conflict between a security right in an asset that became an attachment and a security right in the asset to which the attachment was attached. It was not quite correct to state that the general rules were sufficient to deal with the latter type of competition because those rules referred only to competing security rights in the same asset. It was for that reason that, in the context of immovable property, article 5 of the proposed model provisions set out a rule concerning the priority of an acquisition security right in an attachment to immovable property as against a right in the immovable property itself. Thus, although it might not be necessary to draft a rule on the determination of priority between a security right in an attachment and a security right in the asset to which the attachment was attached, if such a rule was to be included, the guide to enactment should at least paraphrase paragraph 115 of chapter V of the Secured Transactions Guide to explain that, in the context of that kind of competition, priority would depend on the order of registration.

23. **Mr. Whittaker** (Australia) said that if an asset was attached to another movable asset and the effect of the relevant law was that a security right that had previously been granted in that movable asset also became a security right in the attachment, there would be a priority competition between two security rights in the attachment. On that basis, the general rules should still apply; thus, priority would be determined typically by order of registration, as had already been stated, but could also be determined by possession.

24. **The Chair** asked whether that interpretation — namely that such a situation essentially concerned competing security rights in the same movable asset, thus the general rules of the Model Law would apply — was acceptable to the Commission.

25. **Mr. Weise** (American Bar Association) said he agreed that a movable asset attached to another movable asset would continue to be considered a movable asset, and that the general rules of the Model Law would therefore apply. Given the limited time available to the Commission, the best solution would be to provide guidance in the guide to enactment as to how to interpret and apply those rules in the situation described.

26. **Mr. Gabriel** (International Law Institute) said that while he agreed that such a situation fell within the scope of the Model Law, it was not clear what the exact content of the relevant paragraph of the guide to enactment would be. He therefore sought clarification as to whether the guide would discuss the issue in depth, reflecting the points raised during the current discussion, given that reference only to the recommendations of the Secured Transactions Guide was unlikely to suffice.

27. **Mr Bazinas** (Secretariat), summarizing the points on which consensus appeared to have been reached, said it was his understanding that the Commission wished to revise paragraph 31 to state that the general provisions of the Model Law applied to security rights in attachments to movable property, which should be understood as movable property within the scope of the Model Law. The paragraph would then explain that statement, first by setting out the information contained in article 1, paragraph 1, of the proposed model provisions in document A/CN.9/L/CRP.3 and clarified as suggested. It would also be explained that a security

right in a tangible asset remained effective against third parties even after the tangible asset became an attachment, essentially reflecting article 2 of the proposed model provisions. With respect to priority, the guide would draw on paragraph 115 of chapter V of the Secured Transactions Guide in order to explain the priority conflicts that had been discussed. The issue of liability for damage to a movable asset, as dealt with in the final sentence of article 7, paragraph 1, of the proposed supplementary provisions, would also be addressed, and a cross reference to the relevant recommendation of the Secured Transactions Guide would be included. Lastly, it would be stated that the Model Law did not address attachments to immovable property as that matter did not lend itself to harmonization and was left to the relevant legislation of the enacting State. A general reference to the recommendations of the Secured Transactions Guide dealing with immovable property would be included.

28. **Mr. Gabriel** (International Law Institute) said that it was unclear how the point concerning the liability of the enforcing secured creditor could be inferred from the text of the Model Law alone, without the need for reference to the relevant recommendation of the Secured Transactions Guide, given that that recommendation was not reflected in the Model Law. He asked whether the intention was to explain that the liability rule was inherent in the Model Law or to suggest that enacting States should consider adding that rule in their implementing legislation. If the former was the case, it should be explained what made the rule inherent. If that could not be explained, the guide would effectively be adding a new recommendation.

29. **The Chair** said it would be suggested that the enacting State should consider adopting a rule that imposed liability on the enforcing secured creditor for any damage caused to a movable asset.

30. **Mr. Dennis** (United States of America) said it had been his understanding that the last sentence of article 7, paragraph 1, of the proposed supplementary provisions was drawn from the Secured Transactions Guide and that the relevant recommendation would be referred to in the guide to enactment.

31. **The Chair** said she took it that the Commission wished the Secretariat to redraft paragraph 31 as proposed.

32. *It was so decided*.

A/CN.9/914/Add.2 (*continued*)

Chapter IV. The registry system (*continued*)

33. **The Chair** recalled that, at the Commission's previous meeting, the representative of the United States had proposed the inclusion, in paragraph 2 of the addendum, of a new sentence reflecting the first sentence of footnote 8 of the Model Law, to the effect that if a State enacted the Model Law and the Model Registry Provisions separately, its implementing texts should be enacted and take effect simultaneously. In that regard, she noted that the "take effect" element of the proposal might be covered by the provisions of the Model Law on transition. However, it could be left to the Secretariat to ensure that the point was adequately reflected in paragraph 2.

34. **Ms. Gross** (Israel), expressing support for the proposal of the representative of the United States of America, suggested that the proposed new sentence should also clarify that the registry system should be operational by the time the enacting law took effect.

35. **The Chair** said she took it that the Commission wished, on the basis of the proposals made, to modify paragraph 2 to explain that if the Model Registry Provisions and the Model Law were enacted as separate instruments, their enactment and entry into force should be coordinated so that the registry system functioned as intended.

36. *It was so decided*.

37. **Mr. Whittaker** (Australia) said that it was noted in paragraph 3 that the Secured Transactions Guide recommended that the registry should be electronic "if possible". Given developments in technology since that Guide had been written, that recommendation should be made stronger in the guide to enactment, as a fully electronic registry system was critical if the system was to be efficient and effective.

38. **Mr. Dennis** (United States of America), expressing support for that view, said it was his understanding that information in registered notices should always be stored in electronic form. The question was whether the input of information, such as the submission of notices, could be paper-based or must be done electronically. Paragraph 3 should be modified to reflect those points.

39. **The Chair** said that the words "if possible" should be preserved, as that wording was used in the Secured Transactions Guide and also quoted in the UNCITRAL Guide on the Implementation of a Security Rights Registry. The question raised by the representative of the United States with regard to the input of information was already addressed in paragraph 4 of document A/CN.9/914/Add.2, which indicated that access to registry services, including the submission of and searches for notices, should be electronic. However, she suggested that in the light of the comments made, the recommendation set out in paragraph 3 should be made stronger, including with regard to the storage of information.

40. *It was so agreed*.

41. **Mr. Dennis** (United States of America) proposed the deletion of paragraph 17, which was unnecessary as it made a general point relating to the authorization of the registration.

42. **The Chair** said that unless there was support for that proposal, paragraph 17 would remain as drafted.

A/CN.9/914/Add.3

43. **Mr. Whittaker** (Australia) said that the statement made in the final sentence of paragraph 22 would not be true in all cases. He therefore proposed that the words "such a claimant by definition could not have been prejudiced" should be amended to read "such a claimant generally may not have been prejudiced" in order to qualify that statement.

44. *It was so decided.*

45. **Mr. Dennis** (United States of America) noted that references were made throughout the guide to enactment to articles of the Model Law as being "based on" recommendations of, or the discussion set out in, the Secured Transactions Guide or the Registry Guide. However, in many instances, such references were misleading. For example, paragraphs 19 and 70 of document A/CN.9/914/Add.3 suggested that the options referred to were set out in the Registry Guide and the Secured Transactions Guide, respectively, which was not the case. All such instances should therefore be reviewed in order to ensure accuracy and clarity.

46. **The Chair** said she took it that the Commission wished the Secretariat to examine such instances throughout the draft guide to enactment and amend them as appropriate.

47. *It was so decided.*

48. **Mr. Dennis** (United States of America) proposed deleting the first two sentences of paragraph 34, as they described an approach that was rejected both in the Registry Guide and in the Model Law. Moreover, that approach was detailed in paragraph 273 of the Registry Guide, to which reference was made in the final sentence of paragraph 34 of document A/CN.9/914/Add.3.

49. **Ms. Gullifer** (United Kingdom) said that she supported that proposal, as it was not helpful to provide States with information on an approach that was not recommended in the Model Law.

50. **Ms. Walsh** (Canada) said that while she had no strong objections to the proposed deletion, the approach described was in fact followed in many States. It might therefore be worth retaining the reference to the fact that the Model Law did not take that approach. Indeed, paragraph 34 served as a useful reminder to users that the approach in the Model Law might not be the approach with which they were familiar.

51. **Mr. Dubovec** (National Law Center for Inter-American Free Trade) said that he agreed with the proposal that the first two sentences of paragraph 34 should be deleted, for the reasons already given. While the representative of Canada was correct, electronic registries — for which strong support had been expressed earlier in the meeting — were not configured in a manner that required the assignment of currency dates. Therefore, if the objective of the guide to enactment and the Model Law was to support purely electronic registries, the issue of currency dates was unlikely to arise and reference to that issue might confuse readers.

52. **Mr. Bazinas** (Secretariat) said that merely deleting the first two sentences of paragraph 34 would not resolve the problem, because the remaining sentences also referred to currency dates and the discussion of the matter in the Registry Guide. It might therefore be more appropriate to redraft that paragraph so that it started with what was currently the third sentence, which could be reformulated to read "Under the Model Law, a registration becomes effective only when the information in a notice submitted to the Registry has been entered into the registry record so as to be accessible to searchers, and not when the notice is registered". The paragraph could then go on to explain that currency dates were used in some States, providing a definition of a currency date, and the reference to the Registry Guide could be retained. That would provide the necessary context for the final two sentences of the paragraph. It was important to explain the approach taken in the Model Law.

53. **The Chair** said that it might not be necessary to refer to the use of currency dates or to retain the paragraph at all, since the approach taken in the Model Law was already explained elsewhere in the draft guide to enactment.

54. **Ms. Walsh** (Canada) said that paragraph 34 was still needed to the extent that it indicated that a registration became effective only when the information in a notice had been entered into the registry record so as to be accessible to searchers. It should be clarified that the registration did not become effective upon submission of the notice to the registry.

55. **The Chair** suggested that since that idea was already reflected in the section of the draft guide relating to article 13 of the Model Registry Provisions, paragraph 34 could be deleted.

56. *It was so agreed.*

57. **Mr. Whittaker** (Australia), supported by **Mr. Dennis** (United States of America), said that the scenario described in paragraph 42 in order to explain the purpose and effect of article 24, paragraph 6, of the Model Registry Provisions would seldom arise, as the period of effectiveness of a registration would apply regardless of whether or not the registrant had made an error in entering that information. That being the case, the "error" did not constitute an error per se. It was therefore difficult to envisage how a party could be misled by such an error.

58. **Mr. Bazinas** (Secretariat) said that the fact that such a situation was unlikely to arise was indicated by the words "even if the error would be seriously misleading from the perspective of a hypothetical reasonable searcher" in paragraph 42 of document A/CN.9/914/Add.3. The matter was therefore adequately addressed, unless it was felt that the more

conceptual issue of whether an error in entering the period of effectiveness could indeed be regarded as an error should be considered.

59. **Ms. Gullifer** (United Kingdom), expressing support for the comments made by the representative of Australia, pointed out that the provision concerned only errors made by registrants, as was clear both from the heading of article 24 of the Model Registry Provisions and from paragraph 38 of document A/CN.9/914/Add.3, in which case the "error" could not be misleading, whereas errors made by the registry itself, for example in translating a submitted notice, would be a different matter.

60. **Ms. Walsh** (Canada) said that she too agreed with the comments made by the representative of Australia. Paragraph 42 should be amended to acknowledge that, in practice, article 24 (6) of the Model Registry Provisions had no effect. That provision should not have been included in the Model Registry Provisions, as its effect had not been thought through. According to paragraph 42 of document A/CN.9/914/Add.3, if the period entered was shorter than intended, the registration would remain effective against third parties even after it had lapsed and the notice was no longer searchable — i.e., the information that the registrant had intended to enter could be relied upon — unless a third party could prove that it had searched the registry and failed to find the notice concerned, and had thus been seriously misled. Her delegation could not accept that interpretation of the intended operation of article 24 (6). The original intention of a registrant that inadvertently entered the period of effectiveness incorrectly was irrelevant to the applicability of that period. There could therefore be no error, except, possibly, in the case of a system malfunction.

61. **Mr. Weise** (American Bar Association) said he disagreed that the period of effectiveness of a registration would apply regardless of whether that information had been entered incorrectly. For example, if the grantor and the secured creditor agreed to a period of effectiveness of four years and the secured creditor inadvertently entered five years in the notice, the actual period of effectiveness would still be four years, because the extra year would not be authorized under the agreement between them. While it was unlikely that a third party would rely to its detriment on the information entered, it was undesirable for the guide to enactment to suggest that the period of effectiveness entered in the notice would always apply.

62. **Mr. Bazinas** (Secretariat) said that the question of how third-party reliance might arise with respect to an error in entering the period of effectiveness of a registration was sufficiently addressed in paragraph 215 of the Registry Guide, a reference to which was already set out in paragraph 42 of document A/CN.9/914/Add.3, while paragraph 216 of the Registry Guide explained why the test for whether that information could be considered seriously misleading was subjective. The guide to enactment should therefore be read in the light of that commentary, although the information in the Registry Guide could be repeated in the guide to enactment if that was felt to be necessary.

63. **Mr. Gabriel** (International Law Institute) said that while paragraphs 215 and 216 of the Registry Guide were informative, they did not entirely reflect the text of the recommendations in question or unambiguously explain article 24, paragraph 6, of the Model Registry Provisions. If the error consisted in entering a period of effectiveness that was too short, that provision would have no effect, since the registration would simply cease to be effective upon expiry of the period given unless it was interpreted as making the surprising statement that if a competing claimant did not search for the notice, that claimant would not rely on the shorter period and the registration would therefore continue to be effective against that party even though it had lapsed. That possible reading of article 24, paragraph 6, was clearly incorrect, as was indicated by the fact that it was reflected neither in paragraph 215 nor in paragraph 216 of the Registry Guide. However, it would be undesirable to state in the guide to enactment, at least with respect to situations in which the period of effectiveness entered in the notice was too short, that the provision had no effect, thus implying that the matter had not been considered properly during the drafting of the Model Law.

64. **Mr. Von Ziegler** (Switzerland), expressing agreement with the representative of the Secretariat that it was important to read paragraph 42 of document A/CN.9/914/Add.3 in conjunction with paragraphs 215 and 216 of the Registry Guide, pointed out that article 24 of the Model Registry Provisions was based on recommendation 29 (c) of the Registry Guide.

65. **Ms. Walsh** (Canada) suggested that a possible solution to the problem might be to clarify that article 24, paragraph 6, was not intended to address situations in which the error consisted in entering too short a period of effectiveness, as it would not apply in such cases; once that period lapsed, third parties would not be able to find the notice concerned and as a result would be unable to rely on the information that the notice contained. It might therefore be useful to clarify that the provision addressed only situations where the error consisted in entering too long a period of effectiveness, because it was only in such situations that a searcher could find the notice after the actual period of effectiveness had lapsed and might rely on the information that the notice contained.

66. **Ms. Gross** (Israel) said that another possible solution might be to clarify that, while an error in the period of effectiveness of a registration did not render the registration ineffective, the registration would simply lapse if that period was too short and would be effective only for the duration stated in the security agreement if it was too long. The paragraph could then go on to explain that in the unlikely event that such an

error misled a potential creditor, the entire registration would be rendered ineffective.

67. **Mr. Dennis** (United States of America), expressing support for the comments made by the representative of the International Law Institute, said that the problem posed by article 24, paragraph 6, of the Model Registry Provisions should be explained clearly. An alternative solution would be to amend the Model Law itself.

68. **The Chair** said that the Commission should avoid drawing the conclusion that an error had been made in the drafting of the Model Law, given that the drafting process had been extremely thorough. Instead, a way should be found to provide an appropriate explanation in the notes.

69. **Mr. Bazinas** (Secretariat) recalled that the issue had indeed been discussed during the drafting both of the Registry Guide and of the Model Law and was therefore not new. That discussion was reflected in the Registry Guide commentary, which made clear that whether an error in the period of effectiveness of a registration consisted in the registrant's entering too short a period of effectiveness or too long a period, third-party searchers would not be prejudiced. The decision by the Commission to retain the relevant provisions both in the Registry Guide and in the Model Law had been deliberate and taken after careful consideration, and the discussions that had led to that decision did not need to be revisited.

The meeting was suspended at 11.40 a.m. and resumed at 11.55 a.m.

70. **Ms. Gullifer** (United Kingdom) said that despite the fact that the issue under discussion was dealt with extensively in the Registry Guide, it might nonetheless be useful to explain that there were two situations in which article 24, paragraph 6, of the Model Registry Provisions potentially applied, and to explain what would happen in each of those situations. While it might be necessary to reproduce some of the material set out in the Registry Guide, in view of the Commission's current discussion, it seemed appropriate to do so. Thus, paragraph 42 of document A/CN.9/914/Add.3 could be amended in two ways. The first would be to set out the situations in which article 24, paragraph 6, of the Model Registry Provisions would apply, thus leaving it to the enacting State to determine whether or not the paragraph was useful, and the second would be to add text to the guide to enactment to the effect that the provision would very rarely, if ever, have an effect, and to explain why that was the case.

71. **The Chair** suggested that, in the light of the comments made, the third and fourth sentences of paragraph 42 of document A/CN.9/914/Add.3 should be replaced with text that explained the two scenarios, drawing on the Registry Guide for that purpose and including a cross reference to the relevant paragraphs of that Guide.

72. **Mr. Dennis** (United States of America) asked whether the proposed amendment would reflect the fact that paragraph 6 of article 24 of the Model Registry Provisions would very rarely, if ever, apply.

73. **The Chair** said that it would be left to the reader to draw that conclusion.

74. **Mr. Dennis** (United States of America) said that it would nonetheless be preferable for the guide to offer that clarification, possibly with the addition of the words "in most States".

75. **The Chair** said that the qualification "in most States" might not be accurate and in any case was unnecessary. However, if there was no objection, she would take it that the Commission wished to add the proposed explanation that the provision would rarely have any effect.

76. *It was so agreed.*

A/CN.914/Add.4

Chapter V. Priority of a security right

77. **Mr. Dennis** (United States of America), drawing attention to paragraph 74 of document A/CN.914/Add.4, proposed that that paragraph should be deleted, as it provided an explanation of what the Model Law did not address, and was too complicated.

78. **Mr. Bazinas** (Secretariat) recalled that during the discussions of the Working Group, it had been decided that the explanation provided in that paragraph was necessary because in the absence of such an explanation it would seem that article 50 was incorrect or incomplete.

79. **Mr. Deschamps** (Canada), supported by **Ms. Gullifer** (United Kingdom), said that he agreed with the suggestion by the United States representative, particularly since the statement made in the first sentence of that paragraph was confusing. The paragraph would need to be significantly expanded upon in order to be made clear and, as it would take time to agree on any such additional language, it would be better to delete the paragraph for the sake of simplicity.

80. **The Chair** said it was important to ensure that the deletion of the paragraph would not result in the omission of necessary information explaining article 50 of the Model Law in the context of the work of UNCITRAL on secured transactions in relation to intellectual property matters.

81. **Mr. Bazinas** (Secretariat) suggested that paragraph 74 should be replaced with text along the lines of the first sentence of paragraph 204 of the UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property, to the effect that article 50 would be subject to article 1 (3) (b) of the Model Law, i.e. it would not apply to security rights in intellectual

property insofar as it was inconsistent with the law of the enacting State relating to intellectual property.

82. **Mr. Deschamps** (Canada), expressing his support for that suggestion, suggested that the proposed text should be added to the beginning of paragraph 73.

83. **The Chair** said she took it that the Commission wished to accept the proposed amendments. The language of paragraph 75 would also have to be adjusted to ensure that it followed on logically from the amended text.

84. *It was so decided*.

The meeting rose at 12.30 p.m.

Summary record of the 1064th meeting, held at the Vienna International Centre, Vienna, on Tuesday, 18 July 2017, at 2 p.m.

[A/CN.9/SR.1064]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 2 p.m.

Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (*continued*) (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6)

1. **The Chair** invited the Commission to resume its consideration of the part of the draft guide to enactment contained in document A/CN.9/914/Add.4.

2. **Mr. Deschamps** (Canada), drawing attention to paragraph 78, suggested that the reference to "the applicable law" in the second sentence should be replaced with a reference to "the law of the enacting State".

3. **The Chair** said she agreed that it was important to clarify that that sentence was not intended to address the possible application of the law of more than one State and thus a possible conflict-of-laws situation; rather, it should be understood as referring to other law within a given enacting State. Accordingly, she took it that the Commission wished to accept the proposal made.

4. *It was so decided.*

A/CN.9/914/Add.1 (continued)

Chapter II. Creation of a security right (continued)

5. **Ms. Gullifer** (United Kingdom), recalling the Commission's earlier discussion of paragraph 28 of document A/CN.9/914/Add.1, said that following informal consultations, it had been agreed that the first sentence of paragraph 28 should be left unchanged but the text should then go on to explain that "It does not apply to so-called 'financial receivables', for example loan receivables, for the following reasons: (1) the rule in paragraph 1 interferes with party autonomy, which is justified in relation to trade receivables because it has the effect of increasing the availability and reducing the cost of credit, and (2) in relation to financial receivables, there is a greater justification for the debtor, in other words the borrower, to be able to restrict the identity of its counterparty, which outweighs any possible benefit of overriding party autonomy in this regard". That suggested text could be expanded to include examples if that was felt to be appropriate.

6. **Mr. Deschamps** (Canada) said that one such example was a syndicated loan: a borrower might wish to ensure that a lender did not assign the loan without the borrower's consent or impose limitations on the eligible assignees; in the case of a long-term loan, there might be events during the life of the loan that would require the borrower to request a waiver of default or changes in the terms of the loan, in which case the borrower might wish to ensure that the original lender remained the same, in view of the good relationship that they had established, and that the loan was not assigned to a financial institution with which the borrower had no relationship, or to a vulture fund. Similarly, the lenders in a syndicated loan might have an interest in ensuring that one of the co-lenders was not free to assign the loan to a third party that was an affiliate of the borrower.

7. **Mr. Weise** (American Bar Association) said that if examples were to be provided of the type of receivables to which the rule in article 13 (1) of the Model Law did not apply, it should be made clear that those examples concerned receivables that were not covered by the term "trade receivables", notably financial receivables and loan receivables.

8. **Mr. Deschamps** (Canada) said that if examples of financial receivables were to be given, that should be done in the part of the guide relating to chapter I of the Model Law. Indeed, it might be preferable to avoid the term "financial receivables" in paragraph 28 altogether, because if that term was intended to refer to receivables arising from a financial contract, there was no need to discuss such receivables in relation to article 13, as they were excluded from the scope of the Model Law. Paragraph 3 of article 13 was not intended to limit the overriding effect of paragraph 1 to receivables other than receivables arising from financial contracts; rather, it was intended only to state that the invalidation of an anti-assignment clause applied only to a receivable arising from a contract for the supply or lease of goods or services.

9. **Mr. Bazinas** (Secretariat) suggested that, on the basis of the comments made, the second sentence of paragraph 28 should be modified along the lines suggested by the representative of the United Kingdom, beginning with the words "It does not apply to so-called 'financial receivables' arising from financial contracts" and going on to explain that those receivables were excluded from the Model Law and that, with respect to the receivables broadly defined under article 1 (3), the rule in paragraph 1 of article 13 interfered with party autonomy because that allowed the use of such receivables as collateral for credit and increased the availability of credit. However, with respect to other receivables, that was not the case. The example would

then be given of loan receivables, without reference to such receivables as financial receivables.

10. He pointed out that article 1, paragraph 3 (d), of the Model Law left out from the exclusion and therefore kept within the scope of the Model Law one type of financial receivable, namely payment rights arising upon the termination of all outstanding transactions, which was reflected in article 13, paragraph 3 (d). He suggested that the reason for the inclusion of such receivables should be explained, possibly along the lines of "The assignment of such a payment right upon termination of a netting arrangement is not excluded since, in the case of such an assignment, there is no risk of offsetting the mutuality of obligations." It might also be necessary to explain the rationale behind article 13 (3) (d), of the Model Law. While paragraph 26 of document A/CN.9/914, on article 1 (3) (d) of the Model Law, referred to the exclusion from the scope of the Model Law of payment rights under or from financial contracts governed by netting agreements, including foreign exchange transactions, on account of the complex issues that they raised, it did not refer to payment rights arising upon the termination of all outstanding obligations. The Commission might therefore wish the guide to state that such financial receivables were not excluded because they were essentially normal receivables. Concerning article 13 (3) (d), it could be stated that the anti-assignment rule applied to such receivables because there was no mutuality of obligations, and it could also be noted that there was a risk that the mutual positions of the counterparties might be offset if one type of receivable was excluded from their mutual obligations.

11. **Ms. Gullifer** (United Kingdom) said that she was in favour of removing the infelicitous reference to "financial receivables", which might easily be misunderstood. Article 13 (3) (a) referred to receivables "arising from a contract that is a contract for the supply or lease of goods or services other than financial services", which would include loan receivables. She had understood financial receivables to mean receivables arising from the kinds of contracts under which loan services and other financial services were provided, and that understanding had been the basis for her earlier comments. In the light of the observations made by the representative of the Secretariat, if a broader justification for the debtor to be able to control who its counterparty would be — illustrated by the examples given by the representative of Canada — was to be provided, it might also be useful to highlight that loan contracts were usually long-term, because as had been pointed out, by the time a netting agreement was reached there was no more mutuality, only the debt. That was not a feature of a loan agreement, as was confirmed by the examples provided by the representative of Canada.

12. **Mr. Deschamps** (Canada) suggested that no explanation should be provided for the exception to the exception, namely that article 13 applied to the net amount resulting from the termination of a netting agreement, because not all members of the Commission might agree on the reasons therefor. The explanation given by the Secretariat might then also apply to other receivables, in respect of which there would be no reason to override an anti-assignment clause, a situation which ought to be covered by the exception to the exception.

13. **Mr. Bazinas** (Secretariat) said that if no explanation was provided, it might be asked why payment rights arising upon the termination of all outstanding transactions were included in the scope of the Model Law under article 1 (3) (d) but subject to the anti-assignment rule under article 13 (3) (d). An explanation should not be omitted solely on the basis that it might not be understood. A possible way to provide an explanation that would give enacting States sufficient guidance without going into too much detail would be to explain that such payment rights were included in the scope of the Model Law not only because of the issue of mutuality, but also because, with respect to receivables arising from financial contracts, the assignment of a payment right would change the credit risk situation; consequently, any change in the risk exposure of a party was not only likely to make the whole transaction unravel, but would also adversely affect the availability and cost of credit, which would run counter to the overall objective of the Model Law. That would not happen in the case of close-out netting receivables.

14. He noted that the issue was dealt with in the explanatory note on the United Nations Convention on the Assignment of Receivables in International Trade (Assignment Convention).

15. **Mr. Deschamps** (Canada) said that the problem was that the explanation provided by the representative of the Secretariat would justify the inclusion of other financial receivables which were not listed in article 13 (3) of the Model Law.

16. **Ms. Gullifer** (United Kingdom) said that one possible solution might be to refer to the relevant provisions of the Assignment Convention by way of explanation.

17. **The Chair** said she took it that the Commission wished to accept that suggestion and to request the Secretariat to redraft paragraph 28 of document A/CN.9/914/Add.1 in the light of its discussion.

18. *It was so decided*.

A/CN.9/914/Add.5

Chapter VI. Rights and obligations of the parties and third-party obligors

19. **Mr. Dubovec** (National Law Center for Inter-American Free Trade), supported by **Mr. Dennis** (United States of America), said that the first sentence of paragraph 1 of document A/CN.9/914/Add.5 appeared to limit the scope of application of chapter VI

to pre-default situations, and that of chapter VII to post-default situations. He understood the rights and obligations of the parties covered by chapter VI to be applicable irrespective of the time of default. For instance, article 53 on the obligation of the party in possession to exercise reasonable care did not cease to apply if the grantor defaulted. He therefore requested clarification as to the scope of application of the two chapters, particularly chapter VI, as it was his understanding that the rights and obligations referred to also applied after default, subject to the provisions of chapter VII.

20. Mr. Deschamps (Canada) proposed that, as a solution to the issue raised, the word "pre-default" and the text in parentheses should be deleted from the first sentence of paragraph 1.

21. **Ms. Gullifer** (United Kingdom) said that if the proposed changes were made, the first sentence would effectively do no more than repeat the title of chapter VI.

22. **Ms. Gross** (Israel) said she agreed that the word "pre-default" should be deleted, but suggested that the text in parentheses should be retained and possibly adjusted to clarify the distinction between the topics dealt with in each chapter.

23. **Mr. Gabriel** (International Law Institute) said that since there appeared to be general agreement that chapter VI was not limited to pre-default situations and that chapter VII also came into play after default, it should be left to the Secretariat to redraft the sentence accordingly.

24. **Mr. Riffard** (France) proposed that, as a solution, the first sentence should read: "Chapter VI deals in general with the rights and obligations of the parties and third-party obligors, whereas chapter VII deals specifically with the post-default rights and obligations of the parties."

25. *It was so decided.*

26. **Mr. Deschamps** (Canada), drawing attention to paragraph 6, said that the question of whether or not it was the grantor that should bear any additional cost incurred by the secured creditor in returning an asset was not a matter of good faith, although the secured creditor should naturally seek to minimize such costs as far as possible. It should therefore be clarified that the costs of returning an asset should normally be borne by the grantor or the debtor of the receivable but the extent of those costs and the question of whether they were reasonable was subject to the standard of good faith.

27. **Ms. Gullifer** (United Kingdom), expressing support for that suggestion, said that the question of who should bear the costs was a matter of agreement between the parties and one that was usually governed by the security agreement. It was the agreement that would be subject to the standards of good faith and commercial reasonableness.

28. **Mr. Weise** (American Bar Association) suggested that the guide to enactment should note that article 54 was one of the articles that was not subject to party autonomy but that fact did not prevent the grantor and the secured creditor from reaching an agreement as to who should bear the cost of the return of the asset, as just pointed out by the representative of the United Kingdom.

29. **Mr. Bazinas** (Secretariat) said it was his understanding, on the basis of the comments made, that paragraph 6 of document A/CN.9/914/Add.5 should be revised to clarify that while article 54 was a mandatory provision, the cost of the return of an encumbered asset, which was usually borne by the grantor or the debtor of the receivable, was a matter that was subject to party autonomy and therefore would normally be governed by the security agreement. The guide would also clarify that the question of whether the cost was reasonable was subject to the good faith standard established in article 4 of the Model Law. If that was the understanding of the Commission, the Secretariat could redraft paragraph 6 accordingly.

30. **The Chair** said she took it that the Commission wished the Secretariat to redraft paragraph 6 in the light of that understanding.

31. *It was so decided.*

32. **Mr. Deschamps** (Canada) proposed that the text in parentheses in the second sentence of paragraph 11 should be removed, because the right to obtain information applied regardless of whether the security right had been registered.

33. *It was so decided.*

34. **Mr. Deschamps** (Canada), supported by **Mr. Whittaker** (Australia) and **Mr. Weise** (American Bar Association), said that the reference in the fourth and fifth sentences of paragraph 15 to "implicit" and "explicit" agreements was unnecessary, because the statement in the fifth sentence that the question of what constituted an implicit agreement was left to the applicable contract interpretation rules was a general principle which applied to any agreement that deviated from the Model Law, and thus was not specific to article 57. He therefore proposed that those two sentences should be deleted.

35. *It was so decided.*

36. **Ms. Gullifer** (United Kingdom), drawing attention to the scenario described in paragraph 28 to illustrate the operation of article 62, paragraph 4, of the Model Law, asked whether the paragraph also applied to security rights granted by the same grantor. That should be clarified.

37. **Mr. Bazinas** (Secretariat) said that article 62 (4) of the Model Law was based on article 16 (3) of the Assignment Convention, which stated that "Notification of a subsequent assignment constitutes notification of all prior assignments." When drafting the Model Law,

the Working Group had discussed the matter at length and had agreed that the language of that provision, but not the policy underlying it, should be revised. The example given in paragraph 28 of document A/CN.9/914/Add.5 illustrated what was meant by subsequent assignments.

38. **Ms. Gullifer** (United Kingdom) said that it was still unclear whether the paragraph applied to situations in which successive security rights were created by the same person, even if that person was a secured creditor — for example, where A created a security right in the receivable in favour of B, B created a security right in the receivable in favour of C and B also created a security right in the receivable in favour of D — or whether it applied only to the succession described.

39. **The Chair** said that the paragraph did not apply to situations in which successive security rights were granted by the same grantor.

40. **Mr. Deschamps** (Canada) said that he agreed with the explanation provided by the representative of the Secretariat. Noting that the first example in paragraph 28 concerned the creation of a security right in a receivable and the second concerned an outright assignment of a receivable, he suggested that since the draft guide to enactment already stated that the term "security right" included the right of the transferee under an outright transfer of a receivable by agreement, the second example should be removed, not because it was wrong but because it might give the impression that in the case of an outright assignment the result would not necessarily be the same.

41. **The Chair** recalled that the Working Group had decided to include the second example to reinforce the idea that the provision was applicable to the outright transfer of receivables.

42. **Mr. Gabriel** (International Law Institute) said that that was also his recollection, although he agreed with the representative of Canada that the text should not give the impression of restricting the meaning of the term "security right". He suggested that, to avoid confusion, the first example should be clarified as referring to a security right securing an obligation, using wording along the lines of "A, who is indebted to B, creates a security right to secure that indebtedness"; the second example would then show that the same rule applied to security rights arising from an outright transfer of a receivable.

43. **Mr. Brink** (Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry) said that in view of the importance of ensuring that the text was not misleading, he supported the proposal to clarify the first example.

44. **The Chair** said she took it that the Commission wished to clarify the first example along the lines proposed by the representative of the International Law Institute.

45. *It was so decided.*

46. **Ms. Gross** (Israel) said that although the articles set out in section II of chapter VI of the Model Law, namely articles 61 to 71, were not explicitly referred to in article 3 as exceptions to the rule of party autonomy, that rule obviously did not apply to those articles because the parties could not modify the rights of third parties. That point should be made clear, possibly in paragraph 1 of document A/CN.9/914/Add.5, which in its current form might cause confusion given that it stated that of the provisions of chapter VI, only articles 53 and 54 were mandatory, whereas the rules relating to third-party rights were clearly neither mandatory nor non-mandatory.

47. **Mr. Bazinas** (Secretariat) said that the reason why the provisions of section II of chapter VI were not among the mandatory provisions listed in article 3 was explained in paragraph 24 of document A/CN.9/914/Add.5, according to which paragraph 1 of article 61 of the Model Law set out the general principle that the creation of a security right in a receivable did not affect the rights or obligations of the debtor of the receivable, unless the debtor of the receivable consented. Derogation from those provisions was therefore possible, subject to the consent of the debtor of the receivable. Thus, paragraph 1 of document A/CN.9/914/Add.5 was in fact consistent with article 3 (1) of the Model Law. He pointed out that the provisions of section II of chapter VI concerned the rights and obligations of third-party obligors, not simply third parties, who in the Model Law were essentially competing claimants.

48. **Ms. Gross** (Israel) said that while she agreed with that explanation, it should nonetheless be clarified in paragraph 1 of document A/CN.9/914/Add.5 that while the provisions of section II of chapter VI of the Model Law were not mandatory in the sense of article 3 (1), the rights of third parties could not be modified by agreement between the parties to a security agreement, as was made clear in article 3 (2).

49. **The Chair** said that the matter was not so much one of party autonomy as one of ensuring that the rights of third parties were not affected.

50. **Ms. Walsh** (Canada), expressing support for the comments made by the representative of Israel, said that the statement in paragraph 1 of document A/CN.9/914/Add.5 that the provisions of chapter VI were non-mandatory and thus did not apply if the parties had agreed otherwise was indeed incomplete, particularly since the articles that were referred to as mandatory rules fell under section I on mutual rights and obligations of the parties to a security agreement, whereas section II dealt with the rights and obligations of third parties. Thus, the rules set out in section II were mandatory insofar as they affected third parties, in line with article 3 (2).

51. **The Chair** said that caution should be exercised when referring to mandatory and non-mandatory provisions.

52. **Mr. Sono** (Japan) said he agreed that it was not a question of whether the provisions of section II of chapter VI were mandatory or non-mandatory but, rather, a question of the scope of the agreement between the parties and who was affected by it. Provided that that was made clear, he had no objection to the proposed reference to article 3 (2).

53. **The Chair** said she took it that the Commission wished to amend paragraph 1 of document A/CN.9/914/Add.5 in the light of the comments made.

54. *It was so decided.*

55. **Mr. Riffard** (France) said that he wished to return to paragraph 28, which, while set out quite logically, might be confusing to legislators, particularly those unfamiliar with the discussion set out in the Assignment Convention. In particular, it might not be understood how such a chain as that described in the first example was possible. The example concerning successive outright transfers also required elaboration.

56. **Mr. Bazinas** (Secretariat) said that article 16 (3) of the Assignment Convention ("Notification of a subsequent assignment constitutes notification of all prior assignments"), which was the basis for article 62 (4) of the Model Law, was itself based on article 11 (2) of the International Institute for the Unification of Private Law (Unidroit) Convention on International Factoring, according to which notice to the debtor of the subsequent assignment also constituted notice of the assignment to the factor. That provision had validated normal practice at the time, particularly in international factoring transactions, in which notification of the second assignment was required, but not of the first, in a chain of assignments. Unless there was some validation of the first assignment, the second assignment might be rendered invalid. An explanation along those lines could be included in the guide to enactment.

57. **Mr. Weise** (American Bar Association) said that he concurred with the representative of France. The first example in paragraph 28 could indeed be misunderstood, and was not entirely accurate. It concerned a series of assignments intended to secure an obligation, whereas article 16 (3) of the Assignment Convention did not specifically apply to such assignments. The Model Law required that in order to grant a security right in an encumbered asset, the grantor must have rights in the asset. In the example in paragraph 28, B did not have rights in the receivable itself, but rather a security right in the receivable. In an assignment of a secured obligation, the assignee received the benefit of the security right that secured that obligation, but had no direct claim on the underlying encumbered asset. As currently worded, the first example in paragraph 28 misleadingly suggested that B, who held a security right to secure an obligation, could somehow grant a security right in the underlying encumbered asset. The second example, on the other hand, on successive sales of the underlying receivable, was accurate.

58. **Mr. Brink** (Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry) said that outright assignments were the key issue. It was important that the guide to enactment should provide an accurate explanation of the chain of assignments, which were a frequent occurrence in international factoring.

59. **Mr. Bazinas** (Secretariat) said that article 16 (3) of the Assignment Convention, and thus article 62 (4) of the Model Law, applied both to successive security rights in receivables and to outright transfers of receivables, which was why both scenarios were illustrated in paragraph 28 of document A/CN.9/914/Add.5.

60. **Mr. Deschamps** (Canada) said he shared the view that the first example should be elaborated on for the sake of readers who might be unfamiliar with the scenario presented. In that scenario, C and D could acquire their security right in the receivable only by operation of article 14 of the Model Law.

61. **Ms. Gullifer** (United Kingdom), concurring with the representative of Canada, said that the scenario concerning successive security rights was very complex and was therefore unlikely to be helpful. The second example, involving successive outright assignments, was much easier to understand, and should therefore be the main example given. A sentence could then be added at the end of paragraph 28 along the lines of "This will also apply, in certain circumstances, to successive security rights," accompanied, possibly, by a reference to article 14.

62. **Mr. Schoefisch** (Germany) said that he agreed with the representative of France that a distinction should be made between the transfer of ownership of a receivable and the creation of successive security rights in the same receivable.

63. **Mr. Whittaker** (Australia) said he agreed that the first example was complex. Subsequent grantors could only give their own security right in the receivable as security, not the receivable itself. He concurred with the view that it might be better to remove the first example.

64. **Mr. Gabriel** (International Law Institute) said he agreed with the view that the first example did not sufficiently or precisely describe the operation of successive security rights securing performance of an obligation. However, deletion of the example would mean that the paragraph no longer illustrated the protection given by article 62 (4) to the debtor of a receivable that had been the subject of a series of transactions of the kind described. That was important guidance, because in a situation where there was a series of loans secured by each party's rights with respect to the receivable, if in the first example it was D that, as a result of default by other parties in the chain, called on the debtor of the receivable to fulfil its payment obligation, it was necessary to know who should notify the debtor of the receivable, and whether D's notifying the debtor of the receivable was sufficient. He therefore

suggested that the first example should be explained more fully, in line with the Commission's discussion, rather than providing guidance only on the second scenario described.

65. **The Chair** suggested that both examples should be retained but a way of making the first example clearer and more accurate should be found.

The meeting was suspended at 4.10 p.m. and resumed at 4.30 p.m.

66. **The Chair** said that there appeared to be two options: (1) to retain only the second example in paragraph 28, adding a general comment to the effect that successive security rights in the same encumbered asset were also possible, or (2) to retain the first example, but to make it clearer and more accurate.

67. **Mr. Whittaker** (Australia) said that during the informal consultations, there had been concern that it was difficult to make the first example fully accurate, because it referred only to the granting of security rights in the receivable, rather than the granting of security rights in security rights in the receivable. Consequently, some delegations had concluded that only the second example should be retained. In any case, the first example was not intended to be a comprehensive description of all the ways in which article 62 (4) might apply.

68. **Ms. Gullifer** (United Kingdom), expressing support for those comments, repeated her earlier suggestion that a sentence should be added after the second example, to the effect that article 62 (4) also applied to successive security rights. During informal consultations, the example had been given of a two-stage process in which the first stage involved an outright assignment of a receivable by A to B while the second stage involved the creation by B of a security right in the receivable in favour of C. It might therefore be worth noting also that the rule in article 62 (4) applied even where the links in the chain involved different transactions. The question was how to find wording to make that clear.

69. **The Chair** asked whether, on the basis of the comments made, the first example should be deleted and the second should be followed by the explanation that the rule also applied in the case of successive transfers of a security right, possibly accompanied by a reference to article 14 of the Model Law.

70. **Mr. Sono** (Japan) pointed out that article 62 (4) of the Model Law concerned only situations involving a security right in a receivable, not a security right in a security right in the receivable. The proposed additional text might make the example excessively complicated.

71. **Ms. Gross** (Israel) said that she was in favour of retaining only the second example, without any additional text. She wondered whether there was a need to refer to article 14, the relevance of which was not entirely clear.

72. **Mr. Brink** (Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry), referring to the second example, said that it was common for factors to borrow money in order to purchase receivables and subsequently create security rights in those receivables. Thus, the chain in such cases involved one outright purchase and one transfer of security rights. The guide to enactment should include a reference to that possibility in order to avoid the impression that only outright transfers would give rise to the application of article 14.

73. **Mr. Bazinas** (Secretariat) said he shared the understanding of the representative of Japan that article 62 (4) did not apply to a security right in a security right in a receivable but, rather, would apply only to successive security interests in the same receivable. However, if it was the Commission's understanding that in the first example in paragraph 28 of document A/CN.9/914/Add.5, B could only create a security right in A's security right, not directly in the encumbered asset, the guide should explain how article 62 (4) applied in such cases.

74. Responding to the comments made by the representative of Factors Chain International and EU Federation for the Factoring and Commercial Finance Industry, he wondered whether it was necessary for the guide to enactment to indicate that the rule in article 62 (4) applied in the situation described by that representative, or to any similar chain, such as where the factor created a security interest in a receivable that it had purchased using a loan, in order to borrow more money. He was unsure of how the rule would apply in such scenarios.

75. **Ms. Gullifer** (United Kingdom) said that she wished to withdraw her earlier proposal to add text at the end of paragraph 28 to the effect that article 62 (4) applied also to successive security rights, as that fact was already stated in the first sentence of the paragraph.

76. **Mr. Whittaker** (Australia) said that the scenario described with regard to factoring was fully within the scope of the Model Law because the first operation was an outright transfer, such that when the factor then granted a security right in favour of its bank, that security right was a security right in the receivable itself, not in a security right in that receivable. However, it was difficult to see how article 62 (4) would apply in the case of a series of security rights granted in favour of successive secured creditors rather than a series of transfers, whether outright transfers or transfers by way of security.

77. **The Chair** said she took it that the Commission wished, in the light of the comments made, to delete the first example in paragraph 28 of document A/CN.9/914/Add.5 and to retain and clarify the second example.

78. *It was so decided*.

79. **Mr. Deschamps** (Canada), drawing attention to the last sentence of paragraph 33 of document

A/CN.9/914/Add.5, said it was not clear that paragraph 8 of article 63 addressed the matter described. Paragraph 9 was also relevant, and perhaps more so than paragraph 8. He therefore suggested that the last sentence of paragraph 33 should be replaced with wording along the lines of "Paragraphs 8 and 9 provide ways for the debtor of the receivable to ensure that it does not make payment to the wrong person in such circumstances."

80. **Mr. Riffard** (France) said that while he had no objection to that proposal, he noted that the example set out in paragraph 33 was essentially the same as the one in paragraph 28 that had given rise to the Commission's earlier protracted and difficult discussion.

81. **The Chair** said she took it that the Commission wished to accept the proposal by the representative of Canada concerning the last sentence of paragraph 33, and suggested that, as had been agreed with respect to paragraph 28, the example given should be modified to refer to successive outright transfers of receivables rather than successive security rights.

82. *It was so decided*.

83. **Mr. Dennis** (United States of America) said that it was not clear why the first sentence of paragraph 41 of document A/CN.9/914/Add.5 referred to the United Nations Convention on International Bills of Exchange and International Promissory Notes (Bills and Notes Convention). The reference should instead be to the relevant article of the Assignment Convention. The final sentence of paragraph 41 was also unclear.

84. **Ms. Gullifer** (United Kingdom) said she agreed that the last sentence of paragraph 41 should be clarified, and that the first sentence should refer to the Assignment Convention. The relevant article of that Convention was article 19, which was referred to in paragraph 39.

85. **The Chair** said that the reason for the reference to the Bills and Notes Convention was that article 30 of that Convention was the basis for article 19 of the Assignment Convention.

86. **Mr. Dennis** (United States of America) said that it would be more relevant, and more helpful, to refer to the Assignment Convention than to the Bills and Notes Convention.

87. **Mr. Weise** (American Bar Association) suggested that reference should be made to both conventions, possibly by including the reference to article 30 of the Bills and Notes Convention on first mention of article 19 of the Assignment Convention in paragraph 39, and that the latter provision should be indicated as the most recent comparable rule.

The meeting rose at 5 p.m.

Summary record of the 1065th meeting, held at the Vienna International Centre, Vienna, on Wednesday, 19 July 2017, at 9.30 a.m.

[A/CN.9/SR.1065]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 9.40 a.m.

Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (*continued*) (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6)

1. **The Chair** invited the Commission to resume its consideration of the part of the draft guide to enactment contained in document A/CN.9/914/Add.5.

*Chapter VI. Rights and obligations of the parties and third-party obligors (*continued*)*

2. **The Chair** recalled that at the previous meeting, it had been proposed that the reference to the United Nations Convention on International Bills of Exchange and International Promissory Notes in paragraph 41 of document A/CN.9/914/Add.5 should be deleted and that the final sentence of that paragraph should be clarified. She took it that the Commission wished to accept those proposals.

3. *It was so decided.*

4. **Mr. Deschamps** (Canada) suggested the deletion of the words "to protect the general operations of deposit-taking institutions and" from the final sentence of paragraph 49, because if it were the case that the rights of set-off were preserved in order to protect the general operations of deposit-taking institutions, security rights in bank deposits would not be permitted. Without an explanation of how the general operations of deposit-taking institutions were protected, such a statement should be avoided.

5. **Mr. Bazinas** (Secretariat) said that that wording had been used because the Working Group had decided that the policy rationale set out in chapter VII, paragraph 34, of the UNCITRAL Legislative Guide on Secured Transactions should be reflected in the guide to enactment. If the Commission wished to confirm that decision, the phrase "to protect the general operations of deposit-taking institutions and" could be retained on the understanding that it was explained in the Secured Transactions Guide, or it could be further elaborated. If it were deleted, paragraph 49 of document A/CN.9/914/Add.5 would not be consistent with the Secured Transactions Guide.

6. **Ms. Gullifer** (United Kingdom) expressed concern that if the final sentence of paragraph 49 was redrafted in the manner suggested by the representative of Canada, the second, third and fourth sentences of the paragraph would all make the same point. The problem was that the phrase "to protect the general operations of deposit-taking institutions" was a much more simplified rationale than the one set out in chapter VII, paragraph 34, of the Secured Transactions Guide. She therefore suggested that the last sentence should be replaced with a reference to the much fuller discussion of the policy rationale contained in paragraph 34 of the Secured Transactions Guide.

7. **Mr. Gabriel** (International Law Institute) said that paragraph 49 of document A/CN.9/914/Add.5 as drafted might give the impression that the right of set-off was protected only in relation to banks, and that the policy rationale applied only to them, whereas in fact article 64, paragraph 1(b), of the Model Law protected the right of set-off of debtors of the receivable generally. It might therefore be helpful to refer to that provision, and to refer to article 69 as providing additional protection of the right of set-off.

8. **Mr. Deschamps** (Canada), expressing support for the suggestions of the representatives of the United Kingdom and the International Law Institute, said it was important to state that the right of set-off of the deposit-taking institution was preserved in the same way as that of any other debtor.

9. **Mr. Bazinas** (Secretariat) said that the right of set-off of any other debtor of the receivable was preserved only if that right was available to the debtor at the time it received notification of the security right. He suggested that the final sentence of paragraph 49 should be modified as suggested by the representative of the United Kingdom and that reference should also be made to the discussion of the rights of set-off of the debtor of the receivable in paragraph 37 of document A/CN.9/914/Add.5.

10. *It was so decided.*

Chapter VII. Enforcement of a security right

11. **Ms. Gross** (Israel), drawing attention to paragraph 58, suggested that the word "not" in the phrase "judicial or similar proceedings may not be efficient" should be deleted, as it was incorrect.

12. *It was so agreed.*

13. **Mr. Dennis** (United States of America) proposed that paragraph 59 should include a cross reference to article 3, paragraph 3, of the Model Law, since it concerned alternative dispute resolution.

14. *It was so decided.*

15. **Mr. Deschamps** (Canada), drawing attention to paragraph 67, said that it was unclear what was meant by the phrase "once the relevant enforcement process has reached a point when the asset is no longer available to be the subject of enforcement" in the first sentence of that paragraph. He therefore proposed that the phrase should be amended to read "once the relevant enforcement process is completed or a third party has acquired rights in the asset".

16. *It was so decided.*

17. **Ms. Gross** (Israel), supported by **Mr. Deschamps** (Canada) and **Mr. Gabriel** (International Law Institute), said that although the last sentence of paragraph 69 mirrored paragraphs 65 to 67, which described a similar situation in relation to article 75 of the Model Law, the explanation that it gave should be that the enforcement process had advanced so far that the higher-ranking secured creditor could not take over the enforcement process, because under article 76 the asset could still be subject to enforcement by the higher-ranking secured creditor at a later stage, but that secured creditor would have to start a new enforcement process.

18. *It was so agreed.*

19. **Mr. Whittaker** (Australia) suggested that the second sentence of paragraph 73 should be deleted, because in the situation described, the debtor or grantor would already be in breach of the credit or security agreement — that breach having led to the enforcement process — and therefore would be unlikely to be concerned about further violating the agreement by raising unfounded objections to the recovery of enforcement costs. It was therefore unnecessary to attempt to determine how likely it was that the debtor or grantor would raise such objections.

20. **Ms. Walsh** (Canada) said that if the second sentence were deleted, the whole paragraph would have to be redrafted, since the sentences were related. She suggested as an alternative solution that, while the precise drafting should be left to the Secretariat, the second and third sentences should be merged along the following lines: "It follows that, as a practical matter, the person in possession, whether it is the grantor or a third person, is unlikely to raise unfounded objections since this may expose that person to liability to pay the additional costs incurred by the secured creditor in having to seek judicial assistance."

21. **The Chair** said she took it that the Commission wished the Secretariat to redraft the paragraph to reflect the suggestion by the representative of Canada.

22. *It was so decided.*

23. **Mr. Deschamps** (Canada) said that while the explanation given in paragraph 75 as to why a lower-ranking secured creditor was not entitled to obtain possession of an encumbered asset that was in the possession of a higher-ranking secured creditor was correct, a sentence or separate paragraph should be added to explain the additional rationale that if the higher-ranking secured creditor had obtained possession of the encumbered asset through enforcement, the lower-ranking secured creditor should not be entitled to obtain possession from the higher-ranking secured creditor because the higher-ranking secured creditor would have priority, i.e., the lower-ranking secured creditor should not be allowed to terminate the enforcement process initiated by the higher-ranking secured creditor.

24. **Mr. Bazinas** (Secretariat) suggested that since the point made by the representative of Canada was largely covered by the first sentence of paragraph 75, the additional element regarding enforcement as the means by which the higher-ranking secured creditor might obtain possession of the asset should be reflected in the same sentence.

25. **Mr. Deschamps** (Canada) said that the point he had raised would need to be stated separately, as it also concerned the second sentence of the paragraph. That sentence explained the purpose of article 77 (4) as being to preserve the third-party effectiveness achieved by possession by the higher-ranking secured creditor; however, it should be added that if enforcement was initiated by a higher-ranking secured creditor that had obtained possession of the asset, the lower-ranking secured creditor would not be entitled to obtain possession from that higher-ranking secured creditor.

26. **Mr. Weise** (American Bar Association) said that the fifth sentence of paragraph 75 appeared to be inconsistent with article 81, paragraph 1, of the Model Law, the effect of which, as he understood it, was that it was for the enacting State to determine whether or not the rights of the higher-ranking secured creditor were extinguished. He suggested that paragraph 75 should be adjusted accordingly.

27. **Mr. Bazinas** (Secretariat) suggested that the problem identified by the representative of the American Bar Association might be resolved by replacing the reference to article 81 in the fourth sentence of paragraph 75 with a reference to the part of the draft guide to enactment that dealt with article 81 (1), namely paragraph 90 of document A/CN.9/914/Add.5, the final sentence of which recommended the manner in which the enacting State could implement that provision.

28. With regard to the matter raised by the representative of Canada, the Secretariat could draft additional text, to be inserted in paragraph 75, to the effect that the additional rationale for the rule in article 77 (4) was that if a higher-ranking secured creditor had already initiated enforcement, the relinquishment of possession to the lower-ranking secured creditor would interfere with the exercise of the enforcement rights of the higher-ranking secured creditor.

29. **Ms. Walsh** (Canada) said she agreed that the cross reference in the fourth sentence of paragraph 75 should be to paragraph 90 rather than to article 81 of the Model Law.

30. **Mr. Gabriel** (International Law Institute) said that the rationale described by the representative of Canada in relation to article 77 (4) was much stronger than the one set out in paragraph 75 as currently drafted, which would apply much less frequently and was therefore less relevant. Accordingly, the stronger rationale should be set out first in the second sentence of paragraph 75.

31. **Mr. Weise** (American Bar Association), referring to the suggestion made by the representative of the Secretariat with respect to article 81 of the Model Law, said that while he agreed that the statement made in the fifth sentence of paragraph 75 would be correct if the recommendation made in paragraph 90 was followed by a State, enacting States were not required to follow that recommendation. However, the sentence in question appeared to be based on the assumption that that recommendation would be followed. An appropriate solution would be to explain that the statement made in the fifth sentence of paragraph 75 would apply only in States that enacted article 81 (1) as recommended in paragraph 90.

32. **Mr. Dennis** (United States of America) and **Ms. Gullifer** (United Kingdom) expressed support for the solution proposed by the representative of the American Bar Association.

33. **The Chair** said she took it that the Commission wished to accept that solution, together with the replacement of the reference to article 81 with a reference to paragraph 90 of document A/CN.9/914/Add.5, and to accept the further changes to paragraph 75 suggested by the representative of the Secretariat in response to the proposal made by the representative of Canada.

34. *It was so decided.*

35. **Ms. Gross** (Israel), supported by **Mr. Maradiaga** (Honduras), said that in the part of the draft guide relating to article 78, it would be useful to clarify the relationship between the right of a secured creditor to obtain possession of a tangible asset and the right of a secured creditor to dispose of an encumbered asset, particularly in view of the language of article 78, paragraph 4(d). The fact that a secured creditor could dispose of an encumbered asset without taking possession of that asset was significant, and necessitated further explanation of how the provision would operate in practice.

36. **The Chair** asked whether, given that the Commission had decided to prepare a practice guide, the point raised by the representative of Israel might be better developed in that guide rather than in the guide to enactment.

37. **Mr. Bazinas** (Secretariat) said that while paragraph 75 already dealt with the right to take possession and dispose of an encumbered asset, a statement could be added to the commentary on article 78 to reinforce the point that while the secured creditor would normally take possession, it could dispose of an encumbered asset without taking possession.

38. **Mr. Gabriel** (International Law Institute) said it was important to clarify that article 78 applied not only to tangible assets, to which the concept of "possession" was relevant, but also to intangible assets, to which that concept did not apply.

39. **The Chair** suggested that, in view of the support expressed for the suggestion of the representative of Israel and the comments made by the representative of the Secretariat as to how that suggestion might be accommodated, the Secretariat could be asked to incorporate the suggestion into the redrafted commentary on article 78. The point raised by the representative of the International Law Institute could also be reflected.

40. *It was so decided.*

41. **Mr. Gabriel** (International Law Institute), referring to paragraph 79, suggested that the information in parentheses should be amended to reflect the fact that parties other than the grantor might be the recipients of the notice. In addition, it was not a "proposal" but, rather, notice of the intention to dispose of the encumbered asset that must be communicated; the word "proposal" should therefore be replaced with the word "notice".

42. *It was so agreed.*

43. **Mr. Dubovec** (National Law Center for Inter-American Free Trade), supported by **Mr. Dennis** (United States of America), said that the example of a "recognized market" provided in the final two sentences of paragraph 80, namely a stock exchange, was not applicable in the context of the Model Law, because intermediated securities were not included in its scope. He suggested that the paragraph should instead give an example of an organized market relating to a type of asset that did fall within the scope of the Model Law, such as a commodity exchange.

44. *It was so agreed*.

45. **Ms. Gullifer** (United Kingdom) said that the final sentence of paragraph 81 implied that it logically followed from article 79 (1) that the enacting State should specify in article 81 (1) that the transferee took free of all security rights in the encumbered asset. While she understood that that sentence was intended as a strong recommendation, it gave the impression that the enacting State would have no reason to do otherwise, or had no other choice. However, under article 81 (1), the enacting State did have a choice as to whether or not a buyer or other transferee acquired its rights free of any

rights. That choice should be made clear in the final sentence of paragraph 81. A reference to article 81 (2), which involved a similar choice to be made by the enacting State, should also be included.

46. **Ms. Walsh** (Canada) said that in the case of a judicial sale, paragraph 1 of article 79 indicated that the proceeds should be distributed in accordance with the provisions of the Model Law on priority. The logical implication of that provision was that the sale must therefore extinguish the rights of all secured creditors, including prior-ranking secured creditors, which was correct. If a different rule of distribution were to be established, it might not be consistent with the requirement to distribute the proceeds of the sale in accordance with the provisions of the Model Law on priority.

47. **Mr. Bazinas** (Secretariat) said that the approach of giving options in a text such as the Model Law and making recommendations in the accompanying commentary, which was designed to provide guidance to States, was not exceptional, and the reasons for the Working Group's decision to adopt that approach with respect to paragraph 81 of document A/CN.9/914/Add.5 were given in that paragraph, and had also been explained by the representative of Canada. The matter had been discussed at length by the Working Group, the understanding of which had been that, in most States, in a judicial sale the transferee would usually take free of all security rights in the encumbered asset. Both the judicial sale process itself and the distribution of the proceeds according to the priority rules ensured that the other parties were provided with adequate safeguards.

48. **Mr. Weise** (American Bar Association), expressing agreement with the comments made by the representative of the United Kingdom, said that while the policy decision recalled by the representative of the Secretariat was not in question, paragraph 81 should not indicate that there was only one possibility for the enacting State. The choice of the enacting State was clearly indicated by the words "whether … or not" in article 81 (1). While he agreed with the intended recommendation, it should be clarified that the final sentence of paragraph 81 was indeed only a recommendation.

49. **Mr. Whittaker** (Australia), expressing support for the comments made by the representative of Canada, said it appeared that the strength of the recommendation in the final sentence of paragraph 81 was designed to ensure that articles 79 and 81 of the Model Law operated together effectively and did not produce inconsistent outcomes.

50. **Mr. Bazinas** (Secretariat), referring to the proposal of the United Kingdom representative to include a reference to article 81 (2) in the final sentence of paragraph 81, said that it was not possible to incorporate such a reference in paragraph 81 because of the different language used with respect to lessees or licensees under that provision. It would therefore be more appropriate to include at the end of paragraph 82 a recommendation parallel to that set out in paragraph 81, i.e. to recommend that the enacting State should specify that a lessee or licensee was entitled to the benefit of the lease or licence unaffected by any security rights.

51. **The Chair** said she took it that the Commission wished to accept that suggestion.

52. *It was so decided.*

53. **Mr. Deschamps** (Canada) proposed the deletion in paragraphs 87 and 88 of the phrase beginning with the word "although" within the parentheses, as in both paragraphs that phrase would apply only to the grantor and the debtor, whereas the addressees of the secured creditor's proposal might also be other secured creditors or other persons with rights in the asset, who would not be discharged. Even if the secured obligation was satisfied, those persons might nonetheless have an interest in objecting to the proposal.

54. **Mr. Gabriel** (International Law Institute) said that while he agreed with the proposal by the representative of Canada, the explanation provided should not refer only to parties other than the grantor or debtor, as the grantor might wish to object to the proposal; for example, if the encumbered asset was worth more than the secured obligation, the grantor would be entitled to the surplus remaining after disposition and would therefore wish to claim that surplus, which would not be possible if the secured creditor acquired the asset in satisfaction of the secured obligation.

55. **The Chair** said she took it that the Commission wished, on the basis of the comments made, to modify paragraphs 87 and 88 accordingly.

56. *It was so decided.*

The meeting was suspended at 11.10 a.m. and resumed at 11.30 a.m.

A/CN.9/914/Add.6

Chapter VIII. Conflict of laws

57. **Mr. Dennis** (United States of America), drawing attention to the definition of "tangible asset" set out in paragraph 7 of document A/CN.9/914/Add.6, asked whether that term was intended to cover electronic negotiable documents, in which case the applicable law would be the law of the location of the asset, or whether electronic negotiable documents were to be treated as intangible assets, in which case they would be governed by the law of the location of the grantor, which would be more logical. Guidance on that point should be included in the guide to enactment.

58. **Mr. Bazinas** (Secretariat) said that the definition provided applied to paper-based negotiable documents, as both the Model Law and the Secured Transactions Guide had been prepared against the background of negotiable instruments and negotiable documents in paper form, as was stated in footnote 25 of part B of the

introduction to the Secured Transactions Guide. If the Commission agreed, a statement could be included in paragraph 14 or 15 of document A/CN.9/914/Add.6 to the effect that negotiable documents in electronic form should be treated as intangible assets.

59. **Ms. Gullifer** (United Kingdom) said that she supported the suggestion of the United States representative, as the inclusion of such guidance would provide useful clarification. She proposed incorporating that guidance in paragraph 7 with a cross reference to paragraphs 14 and 15 in order to ensure that the point was reflected both in the part of the guide on article 85 and in the part on article 86, thus avoiding any possible confusion.

60. **Ms. Walsh** (Canada) said that the addition of information regarding electronic negotiable instruments would be confusing for legislators, as the term "negotiable instruments" was understood to refer to negotiable instruments in paper form only. Electronic negotiable instruments were not among the types of encumbered asset dealt with in the Model Law. The only other types of asset to be considered in relation to articles 85 and 86 were non-intermediated securities, which posed no difficulties as it was clear that certificated non-intermediated securities were represented by a physical certificate and thus fell under the definition of "tangible asset", while uncertificated non-intermediated securities were represented by an electronic record and therefore fell within the definition of "intangible asset".

61. **Mr. Bazinas** (Secretariat) said that a definition of tangible assets was provided in paragraph 65 of document A/CN.9/914 and the way in which electronic equivalents were addressed in the Model Law was explained in paragraph 66 of that document, which reflected the decision taken by Working Group VI not to include a detailed discussion of electronic documents in the Secured Transactions Guide or in the Model Law. If the Commission wished to alter that decision, it would be necessary to ensure that every provision applied correctly to electronic equivalents of paper documents.

62. **Mr. Dennis** (United States of America), responding to the comments made by the representative of Canada, pointed out that there was no definition of "negotiable document" in the Model Law. The point that he had raised essentially concerned the definition of "tangible asset", and it was clear from paragraph 65 of document A/CN.9/914 that that term did not include every kind of negotiable document. While the guide to enactment could simply state that the term "tangible asset" was not intended to include electronic negotiable documents, such a statement would not be accurate, as it did cover electronic documents in the sense that it covered non-intermediated securities in electronic form. The Secured Transactions Guide had been prepared against the background of negotiable instruments and negotiable documents in paper form because it had been prepared in 2006, whereas it was now common for States to use negotiable documents and negotiable instruments in electronic form, including warehouse receipts. It was therefore necessary to explain clearly how the matter was dealt with, although the matter could perhaps be addressed as part of the future work of the Working Group.

63. **Mr. Bazinas** (Secretariat) pointed out that the Model Law defined intangible assets as "any movable asset other than a tangible asset". If the term "intangible asset" was understood to exclude paper documents, it followed that electronic documents must be intangible assets. According to paragraph 46 of A/CN.9/914, the term "intangible asset" included receivables, rights to the performance of obligations other than receivables, rights to payment of funds credited to a bank account and uncertificated non-intermediated securities, as well as any other movable asset that was not a tangible asset. That definition appeared to resolve the matter, although additional language could be added for clarification. However, if that was not the understanding of the Commission, the rules of the Model Law would need to be reviewed to check whether they applied to any other types of asset.

64. **Mr. Soh** (Singapore) noted that for States enacting the newly adopted Model Law on Electronic Transferable Records, certain electronic documents would be the equivalent of paper-based documents and would therefore be treated in the same manner.

65. **The Chair** said that the Model Law on Electronic Transferable Records was not intended to affect any substantive provisions of the Model Law on Secured Transactions, such as the definitions of "tangible asset" and "intangible asset".

66. **Ms. Walsh** (Canada) said that it would be helpful for the guide to enactment to indicate that negotiable documents and negotiable instruments should be understood as being represented by a physical document and thus fell under the definition of "tangible asset", as physical possession was needed in order for many of the rules of the Model Law to apply. In particular, special priority rights depended on physical possession as a means of achieving third-party effectiveness. The concept of virtual possession, for example, of electronic bills of lading or electronic warehouse receipts, did not exist, and a sophisticated set of rules would be needed to determine what constituted the equivalent of physical possession of a negotiable instrument.

67. **The Chair** suggested that, since there appeared to be support for the proposal to provide guidance on the matter, that guidance should be provided in paragraph 65 of A/CN.9/914, where the term "tangible asset" was explained, as it was relevant not only to the conflict-of-laws provisions but also to many other provisions of the Model Law.

68. **Mr. Dennis** (United States of America) said that it should also be explained, under the definition of "intangible asset" in paragraph 46 of document

A/CN.9/914, that that definition would include electronic negotiable documents and electronic negotiable instruments. Since negotiable documents and negotiable instruments were increasingly in electronic form, such additional guidance would be helpful for enacting States.

69. **Ms. Gullifer** (United Kingdom) said that she supported the suggestions made, as they would ensure clarity and would be consistent with the inclusion of certificated non-intermediated securities as examples of tangible assets and of uncertificated non-intermediated securities as intangible assets.

70. **Mr. Gabriel** (International Law Institute), referring to the comment made by the representative of Singapore, said that if States enacted both the Model Law on Secured Transactions and the Model Law on Electronic Transferable Records, the issue under discussion would be resolved by application of article 11 of the latter text, which dealt with control of an electronic transferable record as the functional equivalent of possession of a transferable document or instrument.

71. **The Chair** said that the Model Law on Electronic Transferable Records, which was not intended to have any impact on substantive law, would not affect the provisions of the Model Law on Secured Transactions. The proposed additional explanations concerning tangible and intangible assets would further clarify that point.

72. **Ms. Walsh** (Canada) expressed concern that reference to electronic negotiable instruments and electronic negotiable documents might be problematic, as it was unclear whether or how such an instrument or document could be negotiable. The rules relating to the possession of paper documents were intended to reflect the fact that negotiability was achieved through the transfer of physical possession. However, there was no established international practice with regard to the negotiation of documents such as bills of lading and warehouse receipts in electronic form or the achievement of functional equivalence of possession in respect of such documents, nor, to her knowledge, was the negotiability of electronic documents commonly dealt with under national legislation. As it was the word "negotiable" that was problematic, it would be better simply to refer to documents and instruments that were traditionally represented in paper form and to state that documents or instruments in electronic form fell under the category of "intangible assets", thus avoiding the assumption that paper-based and electronic documents or instruments were equally negotiable.

73. As the term "possession" would apply only to paper-based negotiable instruments or documents, she suggested the addition of wording to the effect that the rules of the Model Law that dealt with possession applied only where a document or instrument was in a tangible form, particularly since, as had been pointed out, the definitions set out in the guide to enactment would have a bearing not only on the conflict-of-laws provisions of the Model Law but also on the rules relating to third-party effectiveness and priority.

74. **Mr. Bazinas** (Secretariat) said that the question of whether negotiable documents or instruments were paper or electronic, and the question of whether a document or instrument was negotiable, would be determined not by a secured transactions law but by other law of the enacting State. The definitions of tangible and intangible assets set out in the Model Law were established solely for the purposes of a secured transactions law. It might therefore suffice, in the guide to enactment, to include negotiable documents and instruments represented in paper form as examples of a tangible asset and those in electronic form as examples of an intangible asset. It was unnecessary to refer to possession, which was clearly defined in the Model Law as "actual possession of a tangible asset".

75. **Mr. Whittaker** (Australia), expressing support for the comments made by the representative of Canada and the explanation provided by the representative of the Secretariat, said that it would be helpful to formulate the reference to electronic negotiable documents or instruments as examples of intangible assets in such a way as to avoid the implication that the concept of such documents or instruments was well established.

76. **Mr. Dennis** (United States of America) said he agreed that the question of negotiability of an electronic document or instrument was a matter for the law of the enacting State, and that the concept of an electronic negotiable document or an electronic negotiable instrument might not necessarily be widely established. In United States legislation, for example, electronic negotiable documents were referred to as "electronic documents of title". Both points should be clarified. He suggested that it should be left to the Secretariat to formulate appropriate wording.

77. **The Chair** suggested that the fact that the negotiability of a document, whether paper or electronic, would be determined under other legislation of the enacting State should be clarified both in paragraph 46 of document A/CN.9/914 with respect to intangible assets and in paragraph 65 of the same document with respect to tangible assets.

78. **Ms. Walsh** (Canada) said that the way in which negotiability was achieved in general law in the context of electronic documents or instruments was not relevant with respect to the Model Law, as in the Model Law there was no such concept as, and consequently no special rules applicable to, negotiable intangible assets. The Model Law did, however, recognize physical possession as the means of negotiating documents and instruments by according special priority to a party in possession of a negotiable document or instrument. It was important to ensure that the definition of "possession" was restricted to tangible assets, on which basis it would be understood that no special priority applied under the Model Law to an electronic document

or instrument. Since negotiability would depend on other law, it would suffice to state simply that negotiable electronic documents and negotiable electronic instruments constituted intangible assets.

79. **Mr. Dennis** (United States of America), referring to the comments made by the representative of Singapore, said that it would be helpful to clarify the impact of the Model Law on Electronic Transferable Records on the Model Law on Secured Transactions, for example, with respect to article 49 of the latter text, which referred to possession of a negotiable document.

The meeting rose at 12.30 p.m.

Summary record of the 1066th meeting, held at the Vienna International Centre, Vienna, on Wednesday, 19 July 2017, at 2 p.m.

[A/CN.9/SR.1066]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 2.05 p.m.

Progress report of Working Group VI (Security interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (*continued*) (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6; A/CN.9/L/CRP.1/Add.14 and A/CN.9/L/CRP.4)

1. **The Chair** invited the Commission to resume its consideration of the part of the draft guide to enactment contained in document A/CN.9/914/Add.6.

2. Recalling the Commission's earlier discussion of the relationship between the UNCITRAL Model Law on Electronic Transferable Records and the Model Law on Secured Transactions, she noted that the purpose of the Model Law on Electronic Transferable Records was to establish the functional equivalence of transferable documents or instruments in electronic form to those in paper form. It was intended not to modify the substantive provisions of other laws but, rather, to apply where that functional equivalence was relevant or useful. However, in the context of the Model Law on Secured Transactions, and specifically with respect to the distinction between tangible and intangible assets, the Model Law on Electronic Transferable Records should not apply, particularly article 11, which established that where possession of a transferable document or instrument was required, that requirement was met with respect to an electronic transferable record if control of that record by a person could be reliably established; under the Model Law on Secured Transactions, possession was defined as applying only to tangible assets. The guide to enactment should therefore explain that a State enacting both model laws should ensure that the Model Law on Electronic Transferable Records did not affect the integrity of the regime established by the Model Law on Secured Transactions.

3. **Mr. Whittaker** (Australia), expressing support for that suggestion, said that it was important for the guide to enactment to clarify that relationship in order to prevent any possible inconsistency between the two model laws.

4. **Mr. Weise** (American Bar Association), expressing agreement with the Chair, said that the guide to enactment should explain that the relationship between the secured transactions law and other law of the enacting State, such as legislation governing electronic documents or the negotiability of such documents, should be such that neither affected the scope or effect of the other.

5. **Ms. Walsh** (Canada) noted that "negotiable documents" and "negotiable instruments" under the Model Law on Secured Transactions were essentially "transferable documents or instruments" under the Model Law on Electronic Transferable Records, in which the definition of "transferable document or instrument" was separate from and more precise than that of "electronic transferable record", being defined as a document or instrument issued on paper that entitled the holder to claim the performance of the obligation indicated in the document or instrument. That definition would cover warehouse receipts and bills of lading, and was compatible with the understanding, in the context of the Model Law on Secured Transactions, of negotiable documents or negotiable instruments as being in paper form. Article 11 of the Model Law on Electronic Transferable Records established the concept of exclusive control of an electronic transferable record as equivalent to possession of a transferable document or instrument — i.e., physical possession of a paper document — and, in paragraph 2, the transfer of control over an electronic transferable record as equivalent to the transfer of possession of a transferable document or instrument. Thus, to avoid conflict between that article and the Model Law on Secured Transactions, she suggested that in the definition of "possession" in the guide to enactment, it should be expressly stated that in the context of negotiable documents and instruments, possession meant physical possession of the paper document or instrument, as was reflected in the definition of "tangible asset". It should also be explained that States that had enacted the Model Law on Electronic Transferable Records might wish to include in their definition of "possession" the concept of control along the lines of article 11 of the Model Law. That would enable States enacting the Model Law on Secured Transactions to apply the special rules applicable to possession of negotiable documents. Otherwise, article 11 of the Model Law on Electronic Transferable Records would conflict with the Model Law on Secured Transactions, which did not provide for control as the equivalent of possession.

6. **Mr. Liu** Hong (China) said that while he was in favour of the proposed inclusion in the guide of electronic negotiable documents and electronic negotiable instruments as examples of intangible assets, which would be helpful to users of the guide, it should be left to enacting States to consider the relationship

between the two model laws. While the issue at hand was important, it was not urgent, as there was no existing practice or legislation with respect to negotiable documents or instruments in electronic form.

7. **Mr. Bazinas** (Secretariat) pointed out that neither the Model Law on Secured Transactions nor the Model Law on Electronic Transferable Records defined "negotiable document" or "negotiable instrument", nor did they deal with the issue of negotiability. The question of whether a document or instrument, whether paper or electronic, was negotiable would be determined by other law of the enacting State.

8. If the explanation proposed by the representative of Canada with respect to article 11 of the Model Law on Electronic Transferable Records was accepted, the possible impact would be that the rules of the Model Law on Secured Transactions that were meant to apply to negotiable instruments and negotiable documents in paper form would also apply to electronic negotiable instruments and documents, which would be a change of policy.

9. **The Chair** said that since the Commission had not had the opportunity to consider the possible implications of the proposed additional text inviting enacting States to consider expanding the definition of "possession" in their secured transaction law to reflect article 11 of the Model Law on Electronic Transferable Records, it might be unwise to include such text.

10. **Mr. Soh** (Singapore) said that the Model Law on Electronic Transferable Records was not intended to influence the way in which the terms "negotiable document" and "negotiable instrument" were defined in other legislation. A State wishing to enact both model laws would need to consider how they would interact and whether a negotiable document or instrument in electronic form under its legislation on electronic transferable records would be treated as a negotiable document or instrument for the purposes of its secured transactions law. The Commission therefore did not need to make a recommendation in that regard.

11. **Ms. Walsh** (Canada) said that since neither model law defined "negotiable document" or "negotiable instrument", the focus should not be on such documents or instruments and their electronic equivalents, nor should it be on the concepts of "tangible asset" and "intangible asset"; rather, the key issue was possession. In that regard, she recalled that the Commission had decided when adopting the Model Law on Electronic Transferable Records and the explanatory note thereto that, with respect to security rights in transferable documents or instruments, control would be the functional equivalent of possession, as was reflected in the relevant part of the draft report, namely paragraph 14 of document A/CN.9/L/CRP.1/Add.14. While that paragraph referred only to the creation of a security right in a transferable document or instrument, it would be logical to assume that the same functional equivalence applied not only to creation but also to third-party effectiveness and priority. However, in the absence of certainty in that regard, and in the light of the comments made by the previous speakers, it would be sufficient simply to draw the attention of States that enacted both model laws to the need to consider the relationship between the definition of "possession" in the Model Law on Secured Transactions and the concept of control as the functional equivalent of possession in article 11 of the Model Law on Electronic Transferable Records.

12. **The Chair** suggested that the discussion in the draft guide to enactment of the terms "intangible asset", "possession" and "tangible asset", set out in paragraphs 46, 53 and 65, respectively, of document A/CN.9/914, should be expanded on the basis of the comments made, and that paragraph 53 of that document should be revised to indicate that States enacting both model laws should consider the relationship between the two.

13. **Mr. Bazinas** (Secretariat) said it was his understanding that the Commission wished to clarify in paragraph 65 of document A/CN.9/914 that the definition of "tangible asset" covered only negotiable documents and negotiable instruments in paper form, and that the matter of negotiability was left to other law of the enacting State; and to expand the definition of "intangible asset" in paragraph 46 of that document to include negotiable documents and negotiable instruments in electronic form and to make a statement similar to that in paragraph 65 with regard to negotiability. However, given that "possession" was defined in the Model Law as "the actual possession of a tangible asset", if the term "tangible asset" did not include non-paper documents and instruments, the definition of "possession" would not apply at all to such documents or instruments. He therefore sought clarification as to whether that was the policy decision of the Commission, or whether the Commission wished to leave that matter to the enacting State.

14. **The Chair** said it was her understanding, on the basis of the comments made, that the Commission had confirmed that the policy under the Model Law on Secured Transactions was that the concept of possession was limited to tangible assets; however, since enacting States could depart from the provisions of the Model Law, the guide to enactment should simply indicate that if a State enacted both model laws, it should consider the relationship between them with respect to that concept.

15. **Mr. Dennis** (United States of America) said that the implication of such a conclusion was that the Model Law on Electronic Transferable Records would not apply if possession was limited to tangible assets.

16. **The Chair** said that throughout the development of the Model Law on Secured Transactions, the understanding had been that possession was limited to tangible assets. It would therefore be a dramatic shift in policy if the Commission were to decide otherwise; moreover, the Commission was not in a position to

adequately assess the implications of such a shift at the current stage of its deliberations.

17. **Mr. Dennis** (United States of America) said that his delegation had reached a different conclusion, namely that tangible assets included negotiable documents and instruments in both paper and electronic form and that the term "possession" would therefore apply to electronic negotiable documents and electronic negotiable instruments. It had also understood that control would be the functional equivalent of possession for the purposes of the Model Law, so that, for example, article 46 of the Model Law would apply to electronic negotiable instruments. The definition of "tangible asset" in the Model Law was unclear, and the proposed amended definition in the guide to enactment raised the question as to what the policy should be with regard to possession. As the representative of Canada had pointed out, paragraph 14 of document A/CN.9/L/CRP.1/Add.14 suggested that control as the functional equivalent of possession would apply to third-party effectiveness and priority — in that regard, he noted that the reference to creation of a security right by possession was incorrect, as a security right was created by a security agreement — but that was not his understanding of the effect of the Model Law on Electronic Transferable Records on the Model Law on Secured Transactions.

18. **The Chair** pointed out that the definition of "possession", in the Model Law on Secured Transactions, as the actual possession of a tangible asset was based on the definition of the term in the UNCITRAL Legislative Guide on Secured Transactions, and it appeared to be the prevailing view of the Commission that possession was indeed limited to tangible assets.

19. **Mr. Dennis** (United States of America) recalled his earlier comment that the Secured Transactions Guide had been prepared against the background of negotiable instruments and negotiable documents in paper form because it had been prepared in 2006. At that time, the Commission would not have been able to adopt a position with respect to the concept of possession in the context of electronic documents. Consequently, it could not be determined solely on the basis of that Guide that electronic documents were intangible assets and that the term "possession" therefore did not apply to them. The proposed approach to the matter was inconsistent with the conclusion that the Commission had reached with respect to the Model Law on Electronic Transferable Records.

20. **The Chair** said that the solution might be simply to invite States to consider the relationship between the two model laws. She suggested that the Commission should defer further consideration of the matter until it had completed its review of the remainder of the draft guide to enactment, in order to give delegations time to consult.

21. *It was so agreed.*

22. **Mr. Deschamps** (Canada) proposed that paragraph 4 of document A/CN.9/914/Add.6 should be modified to clarify that the parties were permitted to select the law applicable to their rights and obligations not because article 84 was non-mandatory but because it permitted that choice of law.

23. He further proposed that in paragraph 10, it should be clarified that a motor vehicle would always be treated as a mobile asset, regardless of whether it was used to cross national borders. The paragraph as currently drafted gave the impression that an asset would be mobile depending on its actual use, thus contradicting the second sentence, which stated that the exception referred to the ordinary use of assets of that type and not to their actual use.

24. Lastly, drawing attention to the example given in paragraph 22 of a foundation as a legal person without any commercial activities, he said it should be made clear that the term "business" was used in a broad sense in the Model Law and was not limited to commercial activities.

25. **The Chair** said that the Secretariat would take the suggestion made with regard to paragraph 22, together with any other such drafting suggestions submitted to it directly, into consideration during the final drafting of the guide. She took it that the Commission wished to accept the proposals made with respect to paragraphs 4 and 10.

26. *It was so decided.*

27. **Ms. Gross** (Israel) proposed that paragraph 24 should explain the relationship between article 91 and article 23, which provided for a period of time during which a security right would remain effective against third parties if the location of the asset or grantor changed, and would thus apply to the scenario described in article 91.

28. **Ms. Walsh** (Canada) said that such an explanation would helpfully remind the reader that although under article 91 the law applicable to third-party effectiveness and priority would change as a result of a change in the relevant connecting factor, that did not mean that the secured creditor could not preserve the third-party effectiveness of its security right. Under article 23, if the location was changed to the enacting State, the secured creditor would be allowed to preserve the third-party effectiveness of its security right for the period of time specified in that article, during which the priority of its security right would be determined by the time at which third-party effectiveness was achieved under the law of the other State.

29. **The Chair** said she took it that the Commission wished the Secretariat to modify paragraph 24 to include the proposed explanation on the basis of the comments made.

30. *It was so decided.*

31. **Mr. Deschamps** (Canada), drawing attention to the fourth sentence of paragraph 41, said it was not always the case that the location of the relevant branch of the deposit-taking institution could easily be determined. For example, a statement of account might be issued by an administrative office of a bank without any indication of the address of the branch; also, some cheques no longer indicated a bank address. The sentence should therefore be revised accordingly.

32. **The Chair** suggested that, in the light of those comments, the statement made in the fourth sentence should be qualified by the words "in most cases".

33. *It was so decided.*

34. **Mr. Deschamps** (Canada) said that paragraphs 41 and 42 gave the impression that the expectations of the parties would be the same under option A and option B of article 97 of the Model Law — the parties being the same in each case — whereas it should be made clear that that was not the case.

35. **Mr. Bazinas** (Secretariat) said it was his understanding also that the expectations of the parties referred to in paragraph 41 were different from those referred to in paragraph 42. In paragraph 41, the expectation of the parties was that the applicable law would be that of the State where the branch of the deposit-taking institution was located, whereas in paragraph 42 the expectation of the parties was that the law they designated in their account agreement would be the applicable law.

36. **Mr. Gabriel** (International Law Institute) said that he shared that understanding, as it did not seem possible that the different options could meet the same expectations of the parties. The law of the State where the branch of the deposit-taking institution was located might well be different from the law designated in the account agreement. He suggested that, since the explanations of the two options were otherwise satisfactory, the sentences referring to the expectations of the parties should simply be deleted.

37. **Mr. Deschamps** (Canada) suggested that each of the sentences in question should be reformulated to refer to the different expectations of the parties.

38. *It was so decided.*

39. **Mr. Deschamps** (Canada) proposed that, in paragraph 46, the words "the licensor's right to royalties or" should be deleted from the parentheses in the last sentence, because royalties were receivables, not intellectual property.

40. He further proposed that the last sentence of paragraph 48 should be deleted because, in certain circumstances, a security right in intellectual property could be enforced against persons other than the grantor. Furthermore, the statement made in that sentence was not specific to security rights in intellectual property, as it applied to the enforcement of any kind of security right.

41. **Mr. Sono** (Japan) proposed that the final sentence of paragraph 46 should be deleted in its entirety, as it was unclear how that sentence related to conflict of laws.

42. **The Chair** said she took it that the Commission wished to delete the final sentence of paragraph 46 and the final sentence of paragraph 48 as proposed.

43. *It was so decided.*

Chapter IX. Transition

44. **Ms. Walsh** (Canada) proposed that since paragraph 69 of document A/CN.9/914/Add.6 related to paragraph 1 of article 103 rather than paragraph 2 of the article, the references in paragraph 69 to paragraph 2 of the article should be corrected accordingly and the paragraph should be placed after paragraph 67, which also concerned article 103, paragraph 1.

45. *It was so decided.*

46. **Mr. Dennis** (United States of America) proposed that the last two sentences of paragraph 74, if not the whole paragraph, should be deleted because the matters discussed in that paragraph were already covered in the following paragraphs, specifically the discussion of paragraph 4 of article 105.

47. **Ms. Walsh** (Canada) proposed that paragraph 74 should be deleted in its entirety. The point made in the first sentence was covered by paragraph 75, while the point made in the last two sentences was covered by paragraph 77.

48. **The Chair** said she took it that the Commission wished to delete paragraph 74 as proposed.

49. *It was so decided.*

50. **Mr. Gabriel** (International Law Institute) proposed that it should be made clear in the last sentence of paragraph 78 that the registration venue might be in another State, as the prior law could be the law of another State. The sentence as currently drafted was confusing.

51. **Ms. Walsh** (Canada), expressing agreement with those comments, proposed that the last sentence of the paragraph should simply be deleted, as the preceding sentence contained all the necessary information.

52. **The Chair** said she took it that the Commission wished to accept the proposal by the representative of Canada.

53. *It was so decided.*

54. **Ms. Walsh** (Canada), drawing attention to paragraph 83, proposed that the words "(b) enable the establishment of the Registry (or adaptation of an existing registry to the registry system required by the new law) and ensure that it is fully operational;" should

be deleted and that the second part of the second sentence should be amended to read "the new law should come into force as soon as is practical after the text of the new law is final and the registry system required to support the new law is established and operational", as the need to establish the registry was not one of the reasons why lead time was necessary; rather, the registry must be both established and operational before the law entered into force. Moreover, the establishment of the registry might well take longer than the 6 to 12 months suggested as an example at the end of the paragraph.

55. **Ms. Gross** (Israel), expressing support for the comments made by the representative of Canada, said that if the paragraph was amended as proposed, the last sentence would also need to be revised, as it would still suggest that the period indicated was the time needed to establish the registry. While that appeared to have been the intention of the Working Group when drafting the guide, it would be more logical for the period of 6 to 12 months to be indicated as the suggested time needed to educate the persons affected once the registry had become operational. The sentence should be revised in such a way as to preserve the useful guidance that it provided on the mechanism for determining the time when the new law should enter into force.

56. **Mr. Whittaker** (Australia) said that he too agreed with the comments made by the representative of Canada, although with respect to the proposed wording "after the text of the new law is final", it went without saying that the "lead time" would begin only when the new law had been finalized. He also agreed that the lead time should refer to the time needed for education and training once the register was operational, and suggested that the final sentence of paragraph 83 should be redrafted accordingly.

57. **Mr. Dennis** (United States of America) said that paragraph 83 should reflect the fact that the time at which the new law would enter into force would also depend on whether the enacting State was reforming its secured transactions system and would therefore be implementing the Model Law only partially, or whether it was enacting the Model Law and its registry provisions in their entirety.

58. **Mr. Bazinas** (Secretariat) suggested that paragraph 83 should include a cross reference to paragraph 72, which suggested a transitional period of one to two years and referred the reader to paragraph 83 for the relevant considerations to be taken into account in determining the time required for the new law to enter into force. He recalled that, on the basis of a transitional period of one to two years and a period of 6 to 12 months for entry into force, it had been the understanding of the Working Group that the total time needed for the law to come into effect would be two to three years.

59. **Ms. Walsh** (Canada) said it was her understanding that paragraph 72 addressed a different matter, describing a scenario in which the law had already come into force and secured creditors had a given time period within which to make their security rights effective against third parties, whereas paragraph 83 dealt with the conditions that must be created before the law could enter into force, including the need for an operational registry system, whether that system was new or adapted according to the new law. For that reason, it was necessary to explain that the lead time did not refer to the time needed to establish the registry, but to the time needed for training and familiarization with the new system, i.e. the 6 to 12 months indicated as an example, once the text of the law had been finalized and possibly even enacted but not yet enforced. Expressing agreement with the representative of Israel that the final sentence of paragraph 83 would have to be amended if her original proposal was accepted, she suggested that that sentence should be deleted and a similar statement, to the effect that the new law could enter into force on a specific date or on the date to be specified by a decree once the registry became operational, should be added to paragraph 82.

60. **Mr. Bazinas** (Secretariat) said it was his understanding that the intention of paragraph 83 was to set out the factors that enacting States should consider when determining the time of the law's entry into force, rather than suggesting when the law should enter into force. Similarly, the last sentence of the paragraph was intended not to suggest that the law should enter into force within 6 to 12 months but, rather, to provide enacting States with a mechanism for determining the time when the law should enter into force.

61. **Mr. Dennis** (United States of America) said that he shared that understanding, and agreed with previous speakers that the law should not come into effect until the registry was established. He pointed out that training could be undertaken while the registry was being established, and that States were likely to want to bring their new law into effect as soon as possible after the registry became operational; indeed, secured transactions reform should be carried out as quickly as possible in order for States to benefit from that reform. A period of 6 to 12 months therefore seemed rather long and unrealistic.

62. **The Chair** said that, as she understood it, there was agreement that the registry should be operational before the law came into force and that States should consider the criteria set out in (a), (c) and (d) of paragraph 83 in determining when the new law would enter into force. The paragraph could be adjusted on that basis, and the final sentence could be deleted in the light of the comments made with respect to the time when the law should enter into force.

63. **Mr. Whittaker** (Australia) said that the period of time needed after the registry had become operational might depend on the complexity of the economy of the enacting State. His country, for example, had needed a significant period of time once its registry had become operational to enable banks and other financial institutions to adjust their systems in order to be able to

interface with the registry, and that had been a critical component of its implementation process. That point should be reflected in the guide to enactment.

64. **Ms. Gross** (Israel), expressing support for the Chair's suggestion, said that it might be simplest to remove the reference to the time period in parentheses in the final sentence of the paragraph, given that that time period could vary greatly among States and would depend on whether the conditions necessary for the law's implementation had been created.

65. **Mr. Dennis** (United States of America) said that he agreed with the Chair's suggestion to delete the final sentence of paragraph 83.

66. **Ms. Walsh** (Canada) expressed agreement that the deletion of that sentence was appropriate. Paragraph 82 already indicated that the Model Law did not recommend a particular date or mechanism, leaving the matter to the enacting State. That statement could be followed by the guidance contained in the final sentence of paragraph 83, i.e. a statement to the effect that the new law might enter into force on a specific date or on the date to be specified by decree. However, that guidance was linked to the important point that the law should not be brought into effect until the registry was operational, which should be reflected in paragraph 83, whereas paragraph 82 dealt with the mechanism for determining the time of entry into force.

67. **Ms. Gross** (Israel) expressed support for the suggestion to move the guidance set out in the final sentence of paragraph 83, with the exception of the reference to the time period, to paragraph 82.

68. **The Chair** said she took it that the Commission wished to accept that change, and to modify paragraph 83 to emphasize that the registry should be operational before the new law entered into force; that enacting States should consider the lead time needed for the steps described in (a), (c) and (d); and that the lead time would depend on the complexity of the economy of the enacting State.

69. *It was so decided*.

Draft decision on the adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (A/CN.9/L/CRP.4)

70. **Mr. Bazinas** (Secretariat) drew attention to the note to the Commission set out in document A/CN.9/L/CRP.4, relating to the publication of the guide to enactment.

71. **The Chair** recalled that the Commission had yet to resume its consideration of how and to what extent the guide to enactment should address the relationship between the Model Law on Secured Transactions and the Model Law on Electronic Transferable Records. However, the draft decision on the adoption of the guide could be considered independently of that discussion.

72. **Mr. Dennis** (United States of America), supported by **Ms. Gullifer** (United Kingdom), proposed that the draft decision should refer to the importance of secured transaction reform in facilitating cross-border trade and highlight the fact that the Model Law and the guide to enactment established a comprehensive regime governing secured transactions. If there was support for that proposal, his delegation could draft suggested provisions and circulate them for the Commission's consideration.

73. **The Chair** said that while she appreciated the desire to include such positive language, the benefits of the Model Law were already set out in the Commission's decision adopting the Model Law and in the relevant General Assembly resolution, namely resolution 71/136. It might therefore be best to avoid attributing the benefits of the Model Law to the guide to enactment; instead, an appropriate balance should be sought. She suggested that the Commission should defer its consideration of the draft decision until the Commission's next meeting, pending circulation of the proposed changes for discussion.

74. She suggested that the Commission should also defer until the next meeting its consideration of how the guide to enactment should address the relationship between the Model Law on Secured Transactions and the Model Law on Electronic Transferable Records, in order to give delegations time to consider the matter further.

75. *It was so agreed.*

The meeting rose at 4.55 p.m.

Summary record of the 1067th meeting, held at the Vienna International Centre, Vienna, on Thursday, 20 July 2017, at 9.30 a.m.

[A/CN.9/SR.1067]

Chair: Ms. Sabo (Vice-Chair) (Canada)

The meeting was called to order at 9.45 a.m.

Progress report of Working Group VI (Security Interests): finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (*continued*) (A/CN.9/899, A/CN.9/904, A/CN.9/914, A/CN.9/914/Add.1, A/CN.9/914/Add.2, A/CN.9/914/Add.3, A/CN.9/914/Add.4, A/CN.9/914/Add.5 and A/CN.9/914/Add.6; A/CN.9/L/CRP.4)

Draft decision on the adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions (A/CN.9/L/CRP.4) (continued)

1. **Mr. Dennis** (United States of America), supported by **Ms. Gullifer** (United Kingdom), proposed that an additional paragraph should be inserted after the third preambular paragraph of the draft decision, to read "*Being convinced* that the overarching benefits of the Model Law include an increase in access to affordable credit, the facilitation of the development of international trade and greater legal certainty in the exercise of international commercial activities."

2. *It was so decided.*

3. *The draft decision, as orally amended, was adopted.*

4. **The Chair** recalled that the Commission, at its previous meeting, had discussed the possibility of including in the Guide to Enactment an explanation of the relationship between the UNCITRAL Model Law on Secured Transactions and the UNCITRAL Model Law on Electronic Transferable Records.

5. **Mr. Dennis** (United State of America) suggested that it might suffice for the Guide to Enactment to state simply that States wishing to enact both model laws should consider the relationship between them.

6. **The Chair** said it was indeed her understanding that the Commission wished to take a cautious approach rather than attempting to provide detailed guidance regarding the relationship between the two model laws. On that basis, she took it that the Commission wished to accept the suggestion made by the United States representative.

7. *It was so decided.*

Possible future work in the area of security interests and related topics (*continued*) (A/CN.9/913, A/CN.9/924 and A/CN.9/926)

8. **Mr. Dennis** (United States of America) recalled that, during the Commission's earlier discussion of future work in the area of security interests, his delegation had suggested that the Secretariat should conduct a study with respect to warehouse receipts. The outcome of informal consultations with regard to that suggestion was that his delegation and others intended to submit a paper regarding work on that topic, setting out the possible elements of such work, after the completion of the practice guide on secured transactions. He requested the inclusion of wording to that effect in the relevant part of the report of the session.

9. **The Chair** asked whether that paper would be made available for consideration at a later session of the Commission, when future work, priorities and the mandates of its working groups were discussed.

10. **Mr. Dennis** (United States of America) said that the intention was to submit the paper to Working Group VI to allow States to consider it first.

11. **Mr. Sorieul** (Secretary of the Commission) said that while delegations were entitled to put forward proposals on any subject at any time, the Commission had already concluded its discussion regarding the future work of Working Group VI, having decided to mandate the Working Group to prepare a practice guide on secured transactions. There would be an opportunity to return to the issue of warehouse receipts at a later session. However, the topic should not be referred to in the report of the session as having been added to the Working Group's agenda, as that would be inconsistent with the Commission's decision with regard to work in the area of security interests.

12. **Mr. Dennis** (United States of America) said that his proposal was simply to note the intention of a number of delegations to submit a paper on the topic. There seemed to be support for that proposal among delegations.

13. **The Chair** said it was her recollection that there had not been support for work on warehouse receipts as a priority. The most appropriate course of action would be to submit the proposed paper to the Commission for consideration, as it was for the Commission to decide on the projects to be assigned to the working groups. The topic of warehouse receipts should be considered by the Commission at its fifty-first or fifty-second session, as its discussion at the current time would be premature.

14. **Mr. Yuen** (Germany) expressed support for the proposal made by the United States representative that the intention to submit the paper in question should be noted in the report of the session.

15. **Mr. Dennis** (United States of America) said it was his understanding that any Working Group could consider its future work at any time and did not require approval from the Commission to do so.

16. **The Chair** suggested that, in the interests of reaching a wide audience and garnering support for work on the topic, it would be better for the paper to be submitted to the Commission at a future session.

17. *It was so agreed.*

Adoption of the report of the Commission
(*continued*) (A/CN.9/L/CRP.1/Add.1, A/CN.9/L/CRP.1/Add.2, A/CN.9/L/CRP.1/Add.3, A/CN.9/L/CRP.1/Add.4, A/CN.9/L/CRP.1/Add.5, A/CN.9/L/CRP.1/Add.6, A/CN.9/L/CRP.1/Add.7, A/CN.9/L/CRP.1/Add.8, A/CN.9/L/CRP.1/Add.9, A/CN.9/L/CRP.1/Add.10, A/CN.9/L/CRP.1/Add.11, A/CN.9/L/CRP.1/Add.13, A/CN.9/L/CRP.1/Add.14, A/CN.9/L/CRP.1/Add.15, A/CN.9/L/CRP.1/Add.16, A/CN.9/L/CRP.1/Add.18, A/CN.9/L/CRP.1/Add.19, A/CN.9/L/CRP.1/Add.23 and A/CN.9/L/CRP.1/Add.24)

18. **Mr. Sorieul** (Secretary of the Commission), recalling that document A/CN.9/L/CRP.1/Add.12 had already been adopted at the Commission's 1060th meeting, suggested that the Commission first consider the two available parts of the draft report on agenda item 24, contained in documents A/CN.9/L/CRP.1/Add.23 and A/CN.9/L/CRP.1/Add.24.

19. **The Chair** reminded delegations that they were encouraged not to reopen substantive issues but simply to ensure that the report was correct. If they wished to propose substantive changes, it was important that they should suggest specific language, as there would be no time for drafting. If delegations had linguistic or grammatical points to raise, they were invited to submit suggested changes to the Secretariat.

A/CN.9/L/CRP.1/Add.23

20. *Document A/CN.9/L/CRP.1/Add.23 was adopted.*

A/CN.9/L/CRP.1/Add.24

21. **Ms. Gullifer** (United Kingdom), drawing attention to paragraph 1, proposed that the words "to movable property" should be inserted after the words "an attachment" in items (e), (f) and (g), to clarify that those items did not refer to an attachment to immovable property.

22. **Mr. Sono** (Japan) said that while he supported that proposal, he suggested that the words "a movable asset" should be used in place of the words "movable property" in items (d), (e), (f) and (g).

23. **Mr. Dennis** (United States of America) expressed support for the proposal made by the representative of the United Kingdom. With regard to the suggestion to use the word "asset", he noted that items (a) and (b) referred to both movable and immovable property. It would be confusing to use both "property" and "asset"; either one or the other should be used.

24. **Ms. Gullifer** (United Kingdom) further proposed that the words "the attachment itself" in paragraph 1 (g) should be amended to read "the asset itself" or "the property itself".

25. **Ms. Walsh** (Canada) expressed support for that proposal, but pointed out that the word "movable" should be included. While the word "asset" was usually used in relation to movable property and the word "property" in relation to immovable property, she did not object to the use of the wording "movable property".

26. **Mr. Dennis** (United States of America) pointed out that the words "movable property" were used in item (b); however, it was his understanding that reference was made to chapter V, paragraph 115, of the UNCITRAL Legislative Guide on Secured Transactions, in which "attachment to a movable asset" was used. It was important for terminology to be used consistently throughout the paragraph.

27. **The Chair** suggested that the words " to movable property" should be inserted following the words "an attachment" in paragraph 1 (e), (f) and (g), and that the words "the attachment itself" at the end of item (g) should be replaced with the words "that movable property".

28. *It was so decided.*

29. **Ms. Gross** (Israel) said that paragraph 14 (b) should refer to paragraph 1 of article 3 rather than to paragraph 2. She also proposed the deletion of the words ", except to the extent provided in the provisions of section II of chapter VI (e.g. art. 63)" at the end of the paragraph.

30. **Mr. Bazinas** (Secretariat) pointed out that that wording was based on article 61, paragraph 1, of the Model Law and was intended to draw attention to the fact that a number of the provisions of chapter VI, section II, of the Model Law established obligations that the debtor of the receivable must fulfil regardless of whether it had given its consent.

31. **Mr. Sono** (Japan) said that the reference to paragraph 2 in paragraph 14 (b) was correct. However, he suggested that the words "while, under article 3, paragraph 2, the provisions of section II of chapter VI were not mandatory" should be reformulated to read "while the provisions of section II of chapter VI were not mandatory, under article 3, paragraph 2", for the sake of clarity as to what the paragraph in question referred to. Alternatively, reference could be made simply to article 3.

32. **The Chair** suggested that the reference to paragraph 2 should be deleted and the remainder of paragraph 14 (b) should be left unchanged.

33. *It was so decided.*

34. *Document A/CN.9/L/CRP.1/Add.24, as orally amended, was adopted.*

A/CN.9/L/CRP.1/Add.18

35. **Mr. Bazinas** (Secretariat) said that a number of structural changes would be made to the part of the draft report contained in the addendum: the chapter number would be IV rather than XV and the title of the chapter would be amended to "Consideration of issues in the area of security interests", in line with the titles of documents A/CN.9/L/CRP.1/Add.23 and A/CN.9/L/CRP.1/Add.24. Furthermore, since section A of that chapter would be entitled "Finalization and adoption of a guide to enactment of the UNCITRAL Model Law on Secured Transactions", the title "Possible future work in the area of security interests" would become the heading of section B. In addition, the square brackets would be removed from paragraph 1.

36. **Ms. Gullifer** (United Kingdom), supported by **Mr. Tosato** (Italy) and **Mr. Dennis** (United States of America), said that the content of the final sentence of paragraph 5 did not fully capture the discussions that had taken place. Therefore, the words "inventory and receivables as security for credit was permitted" in that sentence should be replaced with wording along the lines of "movable assets as security were treated as eligible collateral for regulatory purposes".

37. *It was so agreed.*

38. **Ms. Gross** (Israel) suggested the insertion of the words ", including microfinance regulation" after the words "should form the basis of that work" in paragraph 10, to emphasize that issue.

39. **Mr. Bazinas** (Secretariat) pointed out that the financing of micro-businesses was already mentioned in paragraph 4 and addressed in both of the documents to which that paragraph referred, namely documents A/CN.9/913 and A/CN.9/926. It would therefore be undesirable to place particular emphasis on financing of micro-businesses in paragraph 10. However, as a compromise, a reference to paragraph 4 could be added to paragraph 10.

40. **The Chair** said that since the issue of financing of micro-businesses was already highlighted in paragraph 1, emphasis on only one element of the Commission's decision in paragraph 10 would mean that that decision was not accurately reflected.

41. **Mr. Dennis** (United States of America) said he agreed that the reference to financing of micro-businesses in paragraph 4 was sufficient.

42. Drawing attention to paragraph 8, he suggested the addition of the words "for immediate referral to a working group" at the end of the final sentence of that paragraph, because the suggestions referred to remained on the future work agenda.

43. *It was so agreed.*

44. **Mr. Tosato** (Italy) suggested the insertion, at the end of paragraph 9, of an additional sentence reading "Coordination and cooperation was also recommended with regard to international banking regulators", or worded similarly, to reflect more accurately the discussions that had taken place.

45. **The Chair** said that wording along the lines of "Coordination and cooperation with international banking regulators was also supported" might be more appropriate.

46. **Mr. Bazinas** (Secretariat), supported by **Mr. Dennis** (United States of America), suggested the wording "That mandate also included coordination and cooperation with international regulatory banking authorities", which would be consistent with the structure of the current final sentence.

47. *It was so decided.*

48. *Document A/CN.9/L/CRP.1/Add.18, as orally amended, was adopted.*

A/CN.9/L/CRP.1/Add.1, A/CN.9/L/CRP.1/Add.2, A/CN.9/L/CRP.1/Add.3, A/CN.9/L/CRP.1/Add.4 and A/CN.9/L/CRP.1/Add.19

49. *Documents A/CN.9/L/CRP.1/Add.1, A/CN.9/L/CRP.1/Add.2, A/CN.9/L/CRP.1/Add.3, A/CN.9/L/CRP.1/Add.4 and A/CN.9/L/CRP.1/Add.19 were adopted.*

A/CN.9/L/CRP.1/Add.5

50. **Mr. Sorieul** (Secretary of the Commission) informed the Commission that additional proposals had been made for the establishment of two new regional centres. Further information concerning those proposals could be found in documents A/CN.9/L/CRP.1/Add.20 and A/CN.9/L/CRP.1/Add.25, which would be considered by the Commission at a later stage.

51. **Mr. Dennis** (United States of America) said that the wording "further encouraging the Secretariat to continue the establishment of such partnerships, and noting with appreciation" in subparagraph (c) of paragraph 3 did not appear to follow on logically from the paragraph's introductory clause "Strong support was expressed for the various activities undertaken by the Secretariat and its Regional Centre, which were aimed at:". A standalone paragraph containing that information might be more appropriate, although the specific drafting could be left to the Secretariat.

52. *It was so agreed.*

53. *Subject to the agreed redrafting, document A/CN.9/L/CRP.1/Add.5, was adopted.*

A/CN.9/L/CRP.1/Add.6, A/CN.9/L/CRP.1/Add.7, A/CN.9/L/CRP.1/Add.8, A/CN.9/L/CRP.1/Add.9, A/CN.9/L/CRP.1/Add.10, A/CN.9/L/CRP.1/Add.11 and A/CN.9/L/CRP.1/Add.13

54. *Documents A/CN.9/L/CRP.1/Add.6, A/CN.9/L/CRP.1/Add.7, A/CN.9/L/CRP.1/Add.8, A/CN.9/L/CRP.1/Add.9, A/CN.9/L/CRP.1/Add.10, A/CN.9/L/CRP.1/Add.11 and A/CN.9/L/CRP.1/Add.13 were adopted.*

A/CN.9/L/CRP.1/Add.14

55. **Mr. Dennis** (United States of America), drawing attention to paragraph 12 of the document, suggested that a new sentence reading "The Commission agreed to retain that text unchanged" should be added at the end of that paragraph in order to state explicitly what the Commission had decided on, as had been done in other paragraphs of the document.

56. *It was* so *decided.*

57. **The Chair** suggested, in the light of consultations with delegations, that paragraph 14 should be modified to refer to the effectiveness of security rights against third parties rather than the creation of security rights, thus reflecting the Commission's discussions more accurately. Accordingly, in the first sentence of the paragraph, the word "created" would be replaced with the words "made effective against third parties", and the phrase "registering a security right" would be replaced with the phrase "registering notice of the security right". In the second sentence of the explanation given in quotation marks, the words "and made effective against third parties" would be inserted after the word "created", and in the third sentence of that quoted explanation, the words "created by the registration of the rights in a public registry" would be replaced with the words "made effective against third parties by registration in a public registry."

58. *It was* so *decided.*

59. **Ms. Walsh** (Canada) said that in the second sentence of paragraph 14, it was unclear to what wording "the same wording" referred. In order to clarify what was meant, she suggested that the second sentence be reformulated to read "It was noted that the same wording, 'or permits', was used in paragraph 2 of the draft article."

60. *It was so decided*.

61. **Mr. Castellani** (Secretariat), drawing attention to paragraph 131 of the explanatory notes to the Model Law on Electronic Transferable Records as quoted in paragraph 34 of document A/CN.9/L/CRP.1/Add.14, said that he had been requested to present a proposal by the delegation of the Comité Maritime International, which was unable to attend the meeting, to replace the word "enables" with the word "allows" and to insert the words "in accordance with article 10" after the words "electronic transferable records" in the second sentence of that quoted paragraph, in order to reflect more accurately the discussion summarized in paragraph 32 of the addendum.

62. **Mr.** Dennis (United States of America) said that since the text in question had been agreed on by the Commission, and formed part of the explanatory notes rather than part of the text of the draft report, it should not be modified for the sole purpose of alignment with paragraph 32.

63. **The Chair** recalled that there had been some discussion of whether to use the word "enables" or the word "allows" with respect to the practice of issuing multiple originals, and that the Commission had discussed the importance of article 10 in that context. However, the text quoted in paragraph 34 of the addendum had been presented to the Commission only as suggested language rather than as final text. The proposals made by the delegation of the Comité Maritime International did not affect the substance of the quoted paragraph, and reflected the Commission's deliberations. The reference to article 10, moreover, made the paragraph more precise.

64. **Mr. Soh** (Singapore) said that he shared the Chair's recollection of the Commission's discussion of paragraph 131 of the draft explanatory notes. Article 10 had been expressly mentioned as a basis for allowing the continuation of the practice of issuing multiple originals of a transferable document or instrument.

65. **Mr. Dennis** (United States of America) requested time to consult on the matter with his delegation.

66. **The Chair** suggested that, if there were no further comments on document A/CN.9/L/CRP.1/Add.14, the Commission should defer its consideration of paragraph 34 of the document until its next meeting.

67. *It was so agreed.*

The meeting was suspended at 11.30 a.m. and resumed at 11.45 a.m.

A/CN.9/L/CRP.1/Add.15

68. **Mr. Soh** (Singapore) said that under the heading "Article 5. Information requirements (*continued*)", the reference to "18 bis" should be corrected to read "20 bis".

69. *It was so agreed.*

70. *Document A/CN.9/L/CRP.1/Add.15, as orally amended, was adopted*.

A/CN.9/L/CRP.1/Add.16

71. *Document A/CN.9/L/CRP.1/Add.16 was adopted*.

The meeting rose at 11.55 a.m.

Summary record of the 1068th meeting, held at the Vienna International Centre, Vienna, on Friday, 21 July 2017, at 2 p.m.

[A/CN.9/SR.1068]

Chair: Mr. Martonyi (Hungary)

The meeting was called to order at 2.05 p.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/L/CRP.1, A/CN.9/L/CRP.1/Add.14, A/CN.9/L/CRP.1/Add.17, A/CN.9/L/CRP.1/Add.20, A/CN.9/L/CRP.1/Add.21, A/CN.9/L/CRP.1/Add.22, A/CN.9/L/CRP.1/Add.25 and A/CN.9/L/CRP.1/Add.26)

A/CN.9/L/CRP.1/Add.14 (continued)

1. **Mr. Sorieul** (Secretary of the Commission) recalled that, at the Commission's previous meeting, the Secretariat had presented a proposal by the Comité Maritime International to revise the second sentence of paragraph 131 of the explanatory notes to the Model Law on Electronic Transferable Records, as quoted in paragraph 34 of document A/CN.9/L/CRP.1/Add.14, to read "The Model Law allows the continuation of that practice with respect to the use of electronic transferable records in accordance with article 10 when that practice is permitted under applicable law".

2. **Mr. Dennis** (United States of America) said that his delegation was willing to accept that proposal. However, the word "allow" should be replaced with the words "does not affect", which would more accurately reflect the Commission's discussions.

3. **The Chair** said he took it that the Commission wished to accept the proposed wording as modified by the representative of the United States.

4. *It was so decided.*

5. *Document A/CN.9/L/CRP.1/Add.14, as orally amended, was adopted.*

A/CN.9/L/CRP.1 and A/CN.9/L/CRP.1/Add.17

6. *Documents A/CN.9/L/CRP.1 and A/CN.9/L/CRP.1/Add.17 were adopted.*

A/CN.9/L/CRP.1/Add.20

7. **Mr. Sorieul** (Secretary of the Commission) read out a message received by the Secretariat from the Prime Minister of the Russian Federation congratulating UNCITRAL on its fiftieth anniversary. He suggested that a reference to that message should be added to paragraph 34 of document A/CN.9/L/CRP.1/Add.20.

8. The language of paragraphs 30 and 33, which related to the proposals made by the Governments of Cameroon and Bahrain to establish regional centres, had been redrafted and the new text of those paragraphs could be found at the end of document A/CN.9/L/CRP.1/Add.25.

9. **The Chair** said he took it that the Commission wished the Secretariat to update paragraphs 30, 33 and 34 of document A/CN.9/L/CRP.1/Add.20 accordingly.

10. *It was so decided.*

11. *Subject to the agreed changes, document A/CN.9/L/CRP.1/Add.20 was adopted.*

A/CN.9/L/CRP.1/Add.21

12. **Ms. Sabo** (Canada), referring to paragraph 5, said that she did not recall any mention having been made, during earlier discussions, of the use of the two remaining days of reserved conference services for a colloquium on public-private partnerships.

13. **Mr. Sorieul** (Secretary of the Commission) said that the wording "colloquium on public-private partnerships" might be misleading, as it did not reflect a specific decision made during the Commission's current session but, rather, a decision made by the Commission at its forty-ninth session that the Secretariat would be entitled to use the time freed up by the absence of a project for Working Group III. Those two days were to be dedicated to work by an expert group on the ongoing revision of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000).

14. **Ms. Sabo** (Canada) suggested that in view of that explanation, it might be more appropriate to use the word "meeting" rather than "colloquium".

15. *It was so decided.*

16. *Document A/CN.9/L/CRP.1/Add.21, as orally amended, was adopted.*

A/CN.9/L/CRP.1/Add.22

17. **Mr. Sorieul** (Secretary of the Commission), drawing the Commission's attention to paragraph 10, suggested deleting the words "to States", which appeared to be a drafting error.

18. *It was so agreed.*

19. *Document A/CN.9/L/CRP.1/Add.22, as orally amended, was adopted.*

A/CN.9/L/CRP.1/Add.25

20. **Ms. Gullifer** (United Kingdom), supported by **Mr. Whittaker** (Australia), said that an additional paragraph should be inserted before paragraph 4 to record the Commission's decision to delete the word "not" from the phrase "judicial or similar proceedings may not be

efficient" in paragraph 58 of document A/CN.9/914/Add.5.

21. *It was so agreed.*

22. **Mr. Whittaker** (Australia) said that paragraph 12 reflected an interim position in the Commission's lengthy discussions rather than the final conclusion that the Commission had reached. Accordingly, the paragraph should be amended to read "With respect to paragraph 81, it was agreed that the last sentence should be expanded to include a reference to article 81, paragraph 2".

23. *It was so agreed.*

24. **Ms. Walsh** (Canada) proposed deleting the words "(or dematerialized)" from paragraph 23 to avoid confusion, as the term was typically used in relation to securities rather than to the instruments and documents referred to in that paragraph.

25. *It was so decided.*

26. **Mr. Weise** (American Bar Association) said that paragraph 25 (a) was overly broad in indicating that the provisions of the Model Law that applied to tangible assets did not apply to electronic negotiable instruments or documents. He suggested that that should be resolved by inserting the word "specifically" after the word "applied".

27. *It was so agreed.*

28. **Mr. Dennis** (United States of America) suggested deleting the word "possible" from paragraph 25 (b), as the language "should consider their relationship" was sufficient. He also suggested inserting a cross reference to paragraph 14 of document A/CN.9/L/CRP.1/Add.14, where the relationship between the model laws in question was discussed.

29. *It was so agreed.*

30. **Ms. Walsh** (Canada), supported by **Ms. Gullifer** (United Kingdom), suggested that paragraph 26 should be amended to read along the lines of "With respect to paragraph 69, it was agreed that it should be revised to clarify that the reference to paragraph 2 of article 103 should be changed to a reference to paragraph 1 of article 103, and that the substance of paragraph 69 should be placed after or incorporated in paragraph 67, which deals with article 103, paragraph 1".

31. *It was so decided.*

32. **Ms. Walsh** (Canada) proposed that the words "electronic transferable records" in the second sentence of paragraph 24 should be replaced with the words "transferable documents or instruments in electronic form" so that the paragraph was consistent with the language used in article 11 of the Model Law on Secured Transactions. She also proposed that the words "of exclusive possession" should be added at the end of that sentence.

33. **Mr. Dennis** (United States of America) said that he did not support the inclusion of the word "exclusive" in the sentence as he was not familiar with the term "exclusive possession".

34. **Mr. Sorieul** (Secretary of the Commission) said he agreed that the term "exclusive possession" was unclear, but that the proposed reference to "possession" should be retained.

35. **The Chair** said he took it that the Commission wished to reformulate the sentence in question to read "It was widely felt that the Model Law on ETR was not intended to revise the substantive provisions of other law but rather to facilitate the use of transferable documents or instruments in electronic form by providing rules on achieving the functional equivalence of possession".

36. *It was so decided.*

37. **Mr. Dennis** (United States of America) proposed that the last sentence of paragraph 24 should be deleted, as it was inconsistent with the statement, made in paragraph 14 of document A/CN.9/L/CRP.1/Add.14 as amended, that control under article 11 of the Model Law on Electronic Transferable Records provided the functional equivalent in those cases where the security rights would be created and made effective against third parties by possession of a paper document or instrument. That inconsistency made the sentence unclear with respect to the intention of the Model Law.

38. **Ms. Walsh** (Canada) said that while she agreed with that view, if the sentence was deleted, paragraph 24 would no longer fully reflect the Commission's discussion on the Model Law on Secured Transactions, as it had been accepted that the intention of that Model Law was to restrict the concept of possession to tangible assets such as negotiable documents and negotiable instruments in paper form.

39. **Mr. Dennis** (United States of America), recalling that the relationship between the model laws had not been discussed in detail, said that the suggestion in paragraph 25 that States wishing to enact both model laws should consider their relationship was sufficient. It would be problematic to state that one view had been that "control" was the functional equivalent of "possession" but that the opposite view had also been stated. It would therefore be preferable to delete the final sentence of paragraph 24.

40. **Mr. Whittaker** (Australia) said that he did not support the deletion of the sentence, as it represented a view that had been expressed clearly and discussed at length, namely that, at least in the context of the Model Law on Secured Transactions, it did not automatically follow that the more general principles espoused by the Model Law on Electronic Transferable Records would automatically apply under the Model Law on Secured Transactions. That would have to be considered in more detail by enacting States if they chose to implement both

model laws. As a possible solution, he suggested amending the wording "the concept of 'possession' under the Model Law that applied only to tangible assets" in the sentence in question to read "the concept of 'possession' under the Model Law, which is intended to apply only to tangible assets".

41. **Mr. Dennis** (United States of America) said that he supported that suggestion but would prefer the words "it was stated" to "it was generally felt", to reflect the fact that different views had been expressed.

42. **Ms. Sabo** (Canada), expressing support for the suggestion by the representative of Australia, said that the wording "it was stated" would not accurately reflect the discussion, as the view referred to had indeed been the general view.

43. **Mr. Dennis** (United States of America) suggested that, alternatively, a sentence could be added to the paragraph to explain that another view had been that it was the plain meaning of both texts taken together that the concept of possession would be affected.

44. **Ms. Sabo** (Canada), speaking as Vice-Chair, said that on the basis of her recollection as the Chair of the meeting in question, the wording suggested by the representative of Australia best reflected the views that had been expressed. The words "it was stated" would represent a change of meaning, as the majority of delegations had expressed the same view.

45. **The Chair** suggested the wording "It was widely felt that" as a compromise solution.

46. **Mr. Tosato** (Italy) said that he was in favour of the proposal by the representative of Australia, which accurately reflected the discussion that had taken place.

47. **Mr. Whittaker** (Australia) suggested replacing the words "it was generally felt" with "it was the majority but not universal view that".

48. **Ms. Sabo** (Canada) suggested that the sentence should be amended as proposed by the representative of Australia and a new sentence should be added at the end of the paragraph along the lines of "Another view was that article 11 of the Model Law on Electronic Transferable Records would have the effect of changing the concept of 'possession' under the Model Law".

49. **Mr. Sorieul** (Secretary of the Commission) said that the Commission had not discussed the issue in such detail but, rather, had simply concluded that article 11 of the Model Law on Electronic Transferable Records was not intended to change the concept of possession as applied under the Model Law on Secured Transactions. Adding language to the effect that the article might change that concept, or that one of the views expressed had been that it did change the concept, would raise questions as to how and to what extent the concept of possession was changed, which had not been discussed. Therefore, the report should not suggest that the matter had been discussed at length. Instead, paragraph 24 should reflect no more than what had been agreed on, namely that the Model Law was not intended to change the concept of possession.

The meeting was suspended at 3.15 p.m. and resumed at 3.40 p.m.

50. **Mr. Dennis** (United States of America) said that the solution reached during informal consultations was that a new sentence should be added at the end of paragraph 24 stating that "Another view was that the plain meaning of article 11 of the Model Law on Electronic Transferable Records made 'control' the functional equivalent of possession for the purposes of the Model Law on Secured Transactions".

51. **The Chair** took it that the Commission wished to accept that proposal.

52. *It was so decided.*

53. *Document A/CN.9/L/CRP.1/Add.25, as orally amended, was adopted.*

A/CN.9/L/CRP.1/Add.26

54. **Mr. Bazinas** (Secretariat) suggested moving the information in paragraph 3 to the end of paragraph 8 of document A/CN.9/L/CRP.1/Add.18, which had already been adopted at the Commission's previous meeting, as that document addressed future work on security interests, to which paragraph 3 of document A/CN.9/L/CRP.1/Add.26 related.

55. **Mr. Sorieul** (Secretary of the Commission) said that a clear decision had been made not to add the topic of warehouse receipts to the work programme of Working Group VI. Therefore, care should be taken to ensure that the report of the session did not suggest the opposite, irrespective of any studies that might be prepared by the Secretariat or a Member State. Working Group VI currently had only one item for future work, namely the preparation of a practice guide on secured transactions, and the Commission had clearly indicated its unwillingness to add any other topic to that Working Group's future work programme.

56. **Ms. Sabo** (Canada) said that paragraph 3 of document A/CN.9/L/CRP.1/Add.26 seemed to indicate sufficiently clearly that the Commission did not wish to take up the topic of warehouse receipts at the current time. However, it was somewhat unusual to refer to the intentions of specific delegations in relation to the Commission's work. In order to avoid misunderstanding, she suggested that paragraph 3 be moved as proposed and redrafted to refer to a proposal having been made by a delegation to conduct additional research on the topic of warehouse receipts with a view to submitting a proposal for future work on that topic to the Commission at its next session.

57. **Mr. Dennis** (United States of America), expressing support for that suggestion, pointed out that paragraph 12 of document

A/CN.9/L/CRP.1/Add.18 indicated that the topic of warehouse receipts would be retained on the Commission's future work agenda for further discussion at a future session, since it had been discussed in document A/CN.9/913. It could be left to the Secretariat to further refine the paragraph concerning warehouse receipts accordingly and in such a manner as to address the concern expressed by the Secretary.

58. **Ms. Sabo** (Canada) suggested that only the wording "The Commission was also informed that a delegation intended to prepare and submit a study on warehouse receipts for future consideration by the Commission" should be moved to paragraph 8 of document A/CN.9/L/CRP.1/Add.18, as there was no need to refer to the practice guide on secured transactions.

59. *It was so decided.*

60. *Document A/CN.9/L/CRP.1/Add.26, as orally amended, was adopted.*

61. *The draft report as a whole, as amended, was adopted.*

Closure of the session

62. After the customary exchange of courtesies, **the Chair** declared the fiftieth session of the Commission closed.

The meeting rose at 4 p.m.

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XIII. Online dispute resolution

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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 fiftieth session	
	1. General series	
A/CN.9/894	Provisional agenda, annotations thereto and scheduling of meetings of the fiftieth session	Not reproduced
A/CN.9/895	Report of Working Group I (MSMEs) on the work of its twenty-seventh session (Vienna, 3-7 October 2016)	Part two, chap. I, A
A/CN.9/896	Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session (Vienna, 12-23 September 2016)	Part two, chap. II, A
A/CN.9/897	Report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session (Vienna, 31 October-4 November 2016)	Part two, chap. III, A
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A/CN.9/899	Report of Working Group VI (Security Interests) on the work of its thirtieth session (Vienna, 5-9 December 2016)	Part two, chap. V, A
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A/CN.9/901	Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (New York, 6-10 February 2017)	Part two, chap. II, C
A/CN.9/902	Report of Working Group IV (Electronic Commerce) on the work of its fifty-fifth session (New York, 24-18 April 2017)	Part two, chap. III, C
A/CN.9/903	Report of Working Group V (Insolvency Law) on the work of is fifty-first session (New York, 10-19 May 2017)	Part two, chap. IV, D
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A/CN.9/L/CRP.1 and Add.1-26	Draft report of the United Nations Commission on International Trade Law on the work of its fiftieth session	Not reproduced
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A/CN.9/L/CRP.3	Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions	Not reproduced
A/CN.9/L/CRP.4	Finalization and adoption of a Guide to Enactment of the UNCITRAL Model Law on Secured Transactions: draft decision on the adoption of a Guide to Enactment of the UNCITRAL Model Law on Secured Transactions	Not reproduced
A/CN.9/L/CRP.5	Finalization and adoption of a Model Law on Electronic Transferable Records and Explanatory Notes: draft decision	Not reproduced

3. Information series

A/CN.9/L/INF/1	List of participants	Not reproduced

B. List of documents before the Working Group on MSMEs at its twenty-seventh session

1. Working papers

A/CN.9/WG.I/WP.97	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.98	Contribution by the United Nations Conference on Trade and Development (UNCTAD): lessons learned on business registration	Part two, chap. I, B

A/CN.9/WG.I/WP.99 and Add.1	Draft Legislative Guide on an UNCITRAL Limited Liability Organization	Part two, chap. I, C

2. Restricted series

A/CN.9/WG.I/XXVII/CRP.1 and Add.1-4	Draft report of Working Group I (MSMEs) on the work of its twenty-seventh session	Not reproduced

3. Information series

A/CN.9/WG.I/XXVII/INF/1	List of participants	Not reproduced

C. List of documents before the Working Group on MSMEs at its twenty-eighth session

1. Working papers

A/CN.9/WG.I/WP.100	Annotated provisional agenda	Not reproduced
A/CN.9/WG.I/WP.101	Draft legislative guide on key principles of a business registry	Part two, chap. I, E
A/CN.9/WG.I/WP.102	Proposal by the Government of Italy: contractual networks	Part two, chap. I, F
A/CN.9/WG.I/WP.103	Compilation of draft recommendations on key principles of a business registry	Part two, chap. I, G
A/CN.9/WG.I/WP.104	Observations and model provisions from the Government of Colombia: dissolution and liquidation of MSMEs	Part two, chap. I, H

2. Restricted series

A/CN.9/WG.I/XXVIII/ CRP.1 and Add.1-7	Draft report of Working Group I (MSMEs) on the work of its twenty-eighth session	Not reproduced

3. Information series

A/CN.9/WG.I/XXVIII/ INF/1	List of participants	Not reproduced

D. List of documents before the Working Group on Arbitration and Conciliation at its sixty-fifth session

1. Working papers

A/CN.9/WG.II/WP.197	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.198	Settlement of commercial disputes: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation	Part two, chap. II, B

2. Restricted series

A/CN.9/WG.II/LXV/CRP.1 and Add.1-8	Draft report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session	Not reproduced
A/CN.9/WG.II/LXV/ CRP.2	Draft report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session	Not reproduced

3. Information series

A/CN.9/WG.II/LXV/ INF/1	List of participants	Not reproduced

E. List of documents before the Working Group on Arbitration and Conciliation at its sixty-fourth session

1. Working papers

A/CN.9/WG.II/WP.199	Annotated provisional agenda	Not reproduced
A/CN.9/WG.II/WP.200 and Add.1	Settlement of commercial disputes: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation	Part two, chap. II, D

2. Restricted series

A/CN.9/WG.II/LXVI/ CRP.1 and Add. 1-3	Draft report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session	Not reproduced
A/CN.9/WG.II/LXVI/ CRP.2	Draft report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session	Not reproduced

3. Information series

A/CN.9/WG.II/LXVI/INF/ 1	List of participants	Not reproduced

F. List of documents before the Working Group on Electronic Commerce at its fifty-fourth session

1. Working papers

A/CN.9/WG.IV/WP.138	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.139 and Add.1-2	Draft Model Law on Electronic Transferable Records	Part two, chap. III, B

2. Restricted series

A/CN.9/WG.IV/LIV/ CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session	Not reproduced
A/CN.9/WG.IV/LIV/ CRP.2	Draft Model Law on Electronic Transferable Records: relationship between the draft Model Law on Electronic Transferable Records and pre-existing UNCITRAL texts	Not reproduced
A/CN.9/WG.IV/LIV/ CRP.3	Legal issues related to identity management and trust services: notes on possible scope of future work	Not reproduced

3. Information series

A/CN.9/WG.IV/LIV/INF.1	List of participants	Not reproduced

G. List of documents before the Working Group on Electronic Commerce at its fifty-fifth session

1. Working papers

A/CN.9/WG.IV/WP.140 and Add.1	Annotated provisional agenda	Not reproduced
A/CN.9/WG.IV/WP.141	Legal issues related to identity management and trust services	Part two, chap. III, D
A/CN.9/WG.IV/WP.142	Contractual aspects of cloud computing	Part two, chap. III, E
A/CN.9/WG.IV/WP.143	Legal issues related to identity management and trust services: terms and concepts relevant to identity management and trust services	Part two, chap. III, F

A/CN.9/WG.IV/WP.144	Legal issues related to identity management and trust services: proposal by Austria, Belgium, France, Italy, the United Kingdom and the European Union	Part two, chap. III, G
A/CN.9/WG.IV/WP.145	Legal issues related to identity management and trust services: proposal by the United States of America	Part two, chap. III, H
A/CN.9/WG.IV/WP.146	Legal issues related to identity management and trust services: proposal by the United Kingdom of Great Britain and Northern Ireland	Part two, chap. III, I

2. Restricted series

A/CN.9/WG.IV/LV/CRP.1 and Add.1-4	Draft report of Working Group IV (Electronic Commerce) on the work of its fifty-fifth session	Not reproduced

3. Information series

A/CN.9/WG.IV/LV/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.V/WP.141	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.142 and Add.1	Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions/commentary and notes on the draft legislative provisions	Part two, chap. IV, B
A/CN.9/WG.V/WP.143 and Add.1	Recognition and enforcement of insolvency-related judgments: draft model law/commentary and notes on the draft model law	Part two, chap. IV, C

2. Restricted series

A/CN.9/WG.V/L/CRP.1 and Add.1-4	Draft report of Working Group V (Insolvency Law) on the work of its fiftieth session	Not reproduced

3. Information series

A/CN.9/WG.V/L/INF/1	List of participants	Not reproduced

I. List of documents before the Working Group on Insolvency Law at its fifty-first session

1. Working papers

A/CN.9/WG.V/WP.144	Annotated provisional agenda	Not reproduced
A/CN.9/WG.V/WP.145	Recognition and enforcement of insolvency-related judgments: draft model law	Part two, chap. IV, E
A/CN.9/WG.V/WP.146	Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions	Part two, chap. IV, F
A/CN.9/WG.V/WP.147	Insolvency of micro, small and medium-sized enterprises	Part two, chap. IV, G
A/CN.9/WG.V/WP.148	Comments submitted by Canada on draft model law on recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.143)	Part two, chap. IV, H

2. Restricted series

A/CN.9/WG.V/LI/CRP.1 and Add.1-7	Draft report of Working Group V (Insolvency Law) on the work of its fifty-first session	Not reproduced
A/CN.9/WG.V/LI/CRP.2	Facilitating the cross-border insolvency of multinational enterprise groups: proposal by Canada	Not reproduced
A/CN.9/WG.V/LI/CRP.3	Recognition and enforcement of insolvency-related judgments: comments submitted by the European Union on the draft model law on recognition and enforcement of insolvency-related judgments (A/CN.9/WG.V/WP.145)	Not reproduced
A/CN.9/WG.V/LI/CRP.4	Draft model law on cross-border recognition and enforcement of insolvency-related judgments: revised text	Not reproduced
A/CN.9/WG.V/LI/CRP.5	Draft model law on cross-border recognition and enforcement of insolvency-related judgments: revised text (*continued*)	Not reproduced

3. Information series

A/CN.9/WG.V/LI/INF/1	List of participants	Not reproduced

J. List of documents before the Working Group on on Security Interests at its thirtieth session

1. Working papers

A/CN.9/WG.VI/WP.70	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.71 and Add.1-6	Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions	Part two, chap. V, B

2. Restricted series

A/CN.9/WG.VI/XXX/ CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its thirtieth session	Not reproduced

3. Information series

A/CN.9/WG.VI/XXX/ INF/1	List of participants	Not reproduced

K. List of documents before the Working Group on Security Interests at its thirty-first session

1. Working papers

A/CN.9/WG.VI/WP.72	Annotated provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.73	Draft Guide to Enactment of the UNCITRAL Model Law on Secured Transactions	Part two, chap. V, D

2. Restricted series

A/CN.9/WG.VI/XXXI/ CRP.1 and Add.1-4	Draft report of Working Group VI (Security Interests) on the work of its thirty-first session	Not reproduced

3. Information Series

A/CN.9/WG.VI/XXXI/ 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 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (2004 to 2012); MSME's (as of 2014)

   (b) Working Group II:

   International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); Arbitration and Conciliation / Dispute Settlement (as of 2000)

   (c) Working Group III:

   International Legislation on Shipping (1970 to 1975); Transport Law (2002 to 2008); Online Dispute Resolution (2010 to 2016); Investor-State Dispute Settlement Reform (as of 2017)

   (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 (forty-first session)	Volume XXXIX:2008	Part one, A
A/64/17 (forty-second session)	Volume XL:2009	Part one, A
A/65/17 (forty-third session)	Volume XLI:2010	Part one, A
A/66/17 (forty-fourth session)	Volume XLII:2011	Part one, A
A/67/17 (forty-fifth session)	Volume XLIII:2012	Part one, A
A/68/17 (forty-sixth session)	Volume XLIV:2013	Part one, A
A/69/17 (forty-seventh session)	Volume XLV: 2014	Part one, A
A/70/17 (forty-eighth session)	Volume XLVI: 2015	Part one, A
A/71/17 (forty-ninth session)	Volume XLVII: 2016	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

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3104 (XXVIII)	Volume V: 1974	Part one, I, C
3108 (XXVIII)	Volume V: 1974	Part one, I, C
3316 (XXIX)	Volume VI: 1975	Part one, I, C
3317 (XXIX)	Volume VI: 1975	Part three, I, B
3494 (XXX)	Volume VII: 1976	Part one, I, C
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31/99	Volume VIII: 1977	Part one, I, C
31/100	Volume XIII: 1977	Part one, I, C
32/145	Volume IX: 1978	Part one, I, C
32/438	Volume IX: 1978	Part one, I, C
33/92	Volume X: 1979	Part one, I, B
33/93	Volume X: 1979	Part one, I, C
34/143	Volume XI: 1980	Part one, I, C
34/150	Volume XI: 1980	Part three, III
35/166	Volume XI: 1980	Part three, III
35/51	Volume XI: 1980	Part one, II, D
35/52	Volume XI: 1980	Part one, II, D
36/32	Volume XII: 1981	Part one, D
36/107	Volume XII: 1981	Part three, I
36/111	Volume XII: 1981	Part three, II
37/103	Volume XIII: 1982	Part three, III
37/106	Volume XIII: 1982	Part one, D
37/107	Volume XIII: 1982	Part one, D
38/128	Volume XIV: 1983	Part three, III
38/134	Volume XIV: 1983	Part one, D
38/135	Volume XIV: 1983	Part one, D
39/82	Volume XV: 1984	Part one, D
40/71	Volume XVI: 1985	Part one, D
40/72	Volume XVI: 1985	Part one, D
41/77	Volume XVII: 1986	Part one, D
42/152	Volume XVIII: 1987	Part one, D
42/153	Volume XVIII: 1987	Part one, E
43/165 and annex	Volume XIX: 1988	Part one, D
43/166	Volume XIX: 1988	Part one, E
44/33	Volume XX: 1989	Part one, E
45/42	Volume XXI: 1990	Part one, D
46/56	Volume XXII: 1991	Part one, D
47/34	Volume XXIII: 1992	Part one, D
48/32	Volume XXIV: 1993	Part one, D
48/33	Volume XXIV: 1993	Part one, D
48/34	Volume XXIV: 1993	Part one, D
49/54	Volume XXV: 1994	Part one, D
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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
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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
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68/116	Volume XLIV: 2013	Part one, D
69/115	Volume XLV: 2014	Part one, D
69/116	Volume XLV: 2014	Part one, D
69/123	Volume XLV: 2014	Part one, D
69/313	Volume XLV: 2014	Part one, D
70/115	Volume XLVI: 2015	Part one, D
70/118	Volume XLVI: 2015	Part one, D
71/135	Volume XLVII: 2016	Part one, D
71/136	Volume XLVII: 2016	Part one, D
71/137	Volume XLVII: 2016	Part one, D
71/138	Volume XLVII: 2016	Part one, D
71/148	Volume XLVII: 2016	Part one, D
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A/5728	Volume I: 1968-1970	Part one, I, A
A/6396	Volume I: 1968-1970	Part one, II, B
A/6594	Volume I: 1968-1970	Part one, II, D
A/7408	Volume I: 1968-1970	Part two, I, B, 2
A/7747	Volume I: 1968-1970	Part two, II, B, 2
A/8146	Volume II: 1971	Part one, I, B
A/8506	Volume III: 1972	Part one, I, B
A/8896	Volume IV: 1973	Part one, I, B
A/9408	Volume V: 1974	Part one, I, B
A/9920	Volume VI: 1975	Part one, I, B
A/9711	Volume VI: 1975	Part three, I, A
A/10420	Volume VII: 1976	Part one, I, B
A/31/390	Volume VIII: 1977	Part one, I, B
A/32/402	Volume IX: 1978	Part one, I, B
A/33/349	Volume X: 1979	Part one, I, B
A/34/780	Volume XI: 1980	Part one, I, B

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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
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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
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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
A/70/507	Volume XLVI: 2015	Part one, C
A/71/507	Volume XLVII: 2016	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
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A/8415/Rev.1	Volume III: 1972	Part one, I, A
A/8715/Rev.1	Volume IV: 1973	Part one, I, A
A/9015/Rev.1	Volume V: 1974	Part one, I, A
A/9615/Rev.1	Volume VI: 1975	Part one, I, A
A/10015/Rev.1	Volume VII: 1976	Part one, I, A
TD/B/617	Volume VIII: 1977	Part one, I, A
TD/B/664	Volume IX: 1978	Part one, I, A
A/33/15/Vol.II	Volume X: 1979	Part one, I, A
A/34/15/Vol.II	Volume XI: 1980	Part one, I, A
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B
A/36/15/Vol.II	Volume XII: 1981	Part one, B
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5. Documents submitted to the Commission, including reports of meetings of working groups

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