

# UNCITRAL Yearbook

Volume XXXIV B: 2003



UNITED NATIONS



UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW

# UNCITRAL Yearbook

Volume XXXIV B: 2003



UNITED NATIONS  
New York, 2006

## 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.

Volume XXXIV B contains chapters IV-X of part two and the part three annexes. The introduction, part one and chapters I-III of part two are in volume XXXIV A.

A/CN.9/SER.A/2003  
(Volume XXXIV B)

UNITED NATIONS PUBLICATION  
Sales No. E.06.V.14  
ISBN 92-1-133753-4  
ISSN 0251-4265

**CONTENTS**  
**VOLUME XXXIV A**

*Page*

INTRODUCTION .....

**Part One. Report of the Commission on its annual session  
and comments and action thereon**

THE THIRTY-SIXTH SESSION (2003) .....

- A. Report of the United Nations Commission on International Trade Law on the work of its thirty-sixth session (Vienna, 30 June – 11 July 2003) (A/58/17) .....
- B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (fiftieth session) (TD/B/50/14 (Vol. I ))
- C. General Assembly: report of the United Nations Commission on International Trade Law on the work of its thirty-sixth session: report of the Sixth Committee (A/58/513)
- D. General Assembly resolutions 58/75, and 58/76, of 9 December, 2003 .....

**Part Two. Studies and reports on specific subjects**

I. PRIVATELY FINANCED INFRASTRUCTURE PROJECTS .....

- A. Report of the Working Group on Privately Financed Infrastructure Projects on the work of its fifth session (Vienna, 9-13 September 2002) (A/CN.9/521) .....
- B. Working paper submitted to the Working Group on Privately Financed Infrastructure Projects at its fifth session: Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/WG.I/WP.29 and Add.1 and Add.2)
- C. Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (A/CN.9/522 and Add.1 and Add.2) .....
- D. Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects(A/CN.9/533 and Add.1-7) .....

II. INSOLVENCY LAW .....

- A. Report of the Working Group on Insolvency Law on the work of its twenty-seventh session (Vienna, 9-13 December 2002) (A/CN.9/529) .....
- B. Working paper submitted to the Working Group on Insolvency Law at its twenty-seventh session: Draft legislative guide on Insolvency Law (A/CN.9/WG.V/WP.63 and Add.3-15) .....
- C. Working paper submitted to the Working Group on Insolvency Law at its twenty-seventh session: Draft legislative guide on Insolvency Law (A/CN.9/WG.V/WP.64) .....
- D. Report of the Working Group on Insolvency Law on the work of its twenty-eighth session (New York, 24-28 February 2003) (A/CN.9/530) .....
- E. Working paper submitted to the Working Group on Insolvency Law at its twenty-eighth session: Draft legislative guide on insolvency law (A/CN.9/WG.V/WP.63/Add.1-2 and Add.16-17) .....
- F. Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the work of their first joint session (Vienna, 16-17 December 2002) (A/CN.9/535) .....
- G. Draft Legislative guide on insolvency law: List of contents (A/CN.9/534) .....

III. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION .....	
A. Report of the Working Group on Arbitration on the work of its thirty-seventh session (Vienna, 7-11 October 2002) (A/CN.9/523) .....	
B. Working paper submitted to the Working Group on Arbitration at its thirty-seventh session: Arbitration: interim measures of protection: Proposal by the United States (A/CN.9/WG.II/WP.121) .....	
C. Report of the Working Group on Arbitration on the work of its thirty-eighth session (New York, 12-16 May 2003) (A/CN.9/524) .....	
D. Working paper submitted to the Working Group on Arbitration at its thirty-eighth session: Settlement of Commercial Disputes: Interim measures of protection (A/CN.9/WG.II/WP.123) .....	

#### VOLUME XXXIV B

IV. TRANSPORT LAW .....	369
A. Report of the Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002) (A/CN.9/525) .....	369
B. Working paper submitted to the Working Group on Transport Law at its tenth session: Preliminary draft instrument on the carriage of goods [by sea]: Proposal by Canada (A/CN.9/WG.III/WP.23) .....	389
C. Report of the Working Group on Transport Law on the work of its eleventh session (New York, 24 March - 4 April 2003) (A/CN.9/526) .....	391
D. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: Proposal by Italy (A/CN.9/WG.III/WP.25) .....	431
E. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: Proposal by Sweden (A/CN.9/WG.III/WP.26) .....	433
F. Working paper submitted to the Working Group on Transport Law at its eleventh session: The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and the other transport Conventions: Comparative tables (A/CN.9/WG.III/WP.27) .....	435
G. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument (A/CN.9/WG.III/WP.28) .....	535
H. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: General remarks on the sphere of application of the draft instrument (A/CN.9/WG.III/WP.29) .....	557
I. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: Information document provided by the United Nations Conference on Trade and Development (UNCTAD) (A/CN.9/WG.III/WP.30) .....	579
V. ELECTRONIC COMMERCE .....	585
A. Report of the Working Group on Electronic Commerce on the work of its fortieth session (Vienna, 14-18 October 2002) (A/CN.9/527) .....	585

	<i>Page</i>
B. Working paper submitted to the Working Group on Electronic Commerce at its fortieth session: Legal barriers to the development of electronic commerce in international instruments relating to international trade: Compilation of comments by Governments and international organizations (A/CN.9/WG.IV/WP.98 and Add.1-4) ..	601
C. Report of the Working Group on Electronic Commerce on the work of its forty-first session (New York, 5-9 May 2003) (A/CN.9/528) .....	613
D. Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal barriers to the development of electronic commerce in international instruments relating to international trade: Compilation of comments by Governments and international organizations (A/CN.9/WG.IV/WP.98/Add.5-6) .....	632
E. Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal aspects of electronic commerce: Electronic contracting: provisions for a draft convention: (A/CN.9/WG.IV/WP.100) .....	639
F. Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal aspects of electronic commerce: Electronic contracting: provisions for a draft convention: Comments by the International Chamber of Commerce (A/CN.9/WG.IV/WP.101) .....	647
VI. SECURITY INTERESTS .....	653
A. Report of the Working Group on Security Interests on the work of its second session (Vienna, 17-20 December 2003) (A/CN.9/531) .....	653
B. Working paper submitted to the Working Group on Security Interests at its second session: Draft legislative guide on secured transactions (A/CN.9/WG.VI/WP.6 and Add.1-5) .....	663
C. Report of the Working Group on Security Interests on the work of its third session (New York, 3-7 March 2003) (A/CN.9/532) .....	692
D. Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the work of their first joint session (Vienna, 16-17 December 2002) (A/CN.9/535) .....	705
VII. POSSIBLE FUTURE WORK .....	707
A. Current activities of international organizations in the area of public procurement (A/CN.9/539 and Add.1) .....	707
B. Possible future work relating to commercial fraud (A/CN.9/540) .....	718
VIII. CASE LAW ON UNCITRAL TEXTS .....	727
IX. TRAINING AND ASSISTANCE .....	729
Training and technical assistance (A/CN.9/536) .....	729
X. STATUS OF UNCITRAL TEXTS .....	735
Status of Conventions and Model Laws (A/CN.9/537) .....	735

### **Part Three. Annexes**

I. UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS .....	739
II. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (A/CN.9/SR.758-774) ..	753

	<i>Page</i>
III. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL (A/CN.9/566) .....	809
IV. CHECK-LIST OF DOCUMENTS .....	821
V. LIST OF DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE <i>YEARBOOK</i> .....	829



## IV. TRANSPORT LAW

### A. Report of Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002)

(A/CN.9/525) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction .....	1-23
II. Deliberations and decisions .....	24-124
A. General discussion .....	25-28
B. Consideration of draft articles .....	29-124
1. Draft article 6 (Liability of the carrier) .....	29-105
(a) Subparagraph 6.1.1 .....	30-34
(b) Subparagraph 6.1.2 .....	35-37
(c) Subparagraph 6.1.3 .....	38-45
(d) Subparagraph 6.1.4 .....	46-56
(e) Paragraph 6.2 .....	57-62
(f) Paragraph 6.3 .....	63-64
(g) Paragraph 6.4 .....	65-70
(h) Paragraph 6.5 .....	71-75
(i) Paragraph 6.6 .....	76-80
(j) Paragraph 6.7 .....	81-85
(k) Paragraph 6.8 .....	86-92
(l) Paragraph 6.9 .....	93-100
(m) Paragraph 6.10 .....	101-105
2. Draft article 9 (Freight) .....	106-124
(a) Paragraph 9.4 .....	108-114
(b) Paragraph 9.5 .....	115-124

#### Annexes

I. Comments from the representative of the International Chamber of Shipping and the Baltic and International Maritime Council on the scope of the draft instrument

II. Comments from the representative of the International Group of Protection & Indemnity Clubs

#### I. INTRODUCTION

1. At its twenty-ninth session, in 1996,<sup>1</sup> the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.<sup>2</sup>

2. At that session, the Commission was informed that existing national laws and international conventions had left significant gaps regarding various issues. These gaps constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.<sup>3</sup>

<sup>1</sup>Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17).

<sup>2</sup>Ibid., para. 210.

<sup>3</sup>Ibid., para. 211.

3. At that session, the Commission also decided that the secretariat should gather information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems, so as to be able to present at a later stage a report to the Commission. It was agreed that such information-gathering should be broadly based and should include, in addition to Governments, the international organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors (IAPH).<sup>4</sup>

4. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.

5. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.<sup>5</sup>

6. At that session, it was also reported that the CMI working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.<sup>6</sup>

7. At its thirty-third session, in 2000, the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat. It also heard an oral report on behalf of CMI. In cooperation with the secretariat, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

8. In conjunction with the thirty-third session of the Commission in 2000, a transport law colloquium, organized jointly by the secretariat and CMI, was held in New

York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting possible solutions.

9. On the occasion of that colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a seaway bill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing. Some issues raised for consideration in any reform process included formulating more exact definitions of the roles, responsibilities, duties and rights of all parties involved and clearer definitions of when delivery was assumed to occur; rules for dealing with cases where it was not clear at which leg of the carriage cargo had been lost or damaged; identifying the terms or liability regime that should apply as well as the financial limits of liability; and the inclusion of provisions designed to prevent the fraudulent use of bills of lading.

10. At its thirty-fourth session, in 2001, the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to the request by the Commission.<sup>7</sup>

11. That report summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The details of possible legislative solutions were not presented because they were currently being worked on by the Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide how it wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

12. The report suggested that consultations conducted by the secretariat pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would

<sup>4</sup>Ibid., para. 215.

<sup>5</sup>Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 413.

<sup>6</sup>Ibid., para. 415.

<sup>7</sup>Ibid., *Fifty-fifth Session, Supplement No. 17* (A/56/17), paras. 319-345.

modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission. Considerations of possible legislative solutions by CMI were making good progress and it was expected that a preliminary text containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, would be prepared by December 2001.

13. After discussion, the Commission decided to establish a working group (to be named "Working Group on Transport Law") to consider the project. It was expected that the secretariat would prepare for the Working Group a preliminary working document containing drafts of possible solutions for a future legislative instrument, with alternatives and comments, which was under preparation by CMI.

14. As to the scope of the work, the Commission, after some discussion, decided that the working document to be presented to the Working Group should include issues of liability. The Commission also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) should also be carefully taken into account. It was also agreed that the work would be carried out in close cooperation with interested inter-governmental organizations involved in work on transport law (such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS)), as well as international non-governmental organizations.

15. At its thirty-fifth session, held in June 2002 in New York, the Commission had before it the report of the ninth session of the Working Group on Transport Law (15 to 26 April 2002), at which the consideration of the project commenced (A/CN.9/510). At that session, the Working Group undertook a preliminary review of the provisions of the draft instrument on transport law contained in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21). The Working Group had before it also the comments prepared by ECE and UNCTAD, which were reproduced in document A/CN.9/WG.III/WP.21/Add.1. Due to the absence of sufficient time, the Working Group did not complete its consideration of the draft instrument, which was left for finalization at its tenth session. The Commission noted that the secretariat had been requested to prepare revised provisions of the draft instrument based on the deliberations and decisions of the Working Group (A/CN.9/510, para. 21). The Commission expressed appreciation for the work that had already been accomplished by the Working Group.<sup>8</sup>

16. The Commission noted that the Working Group, conscious of the mandate it had received from the Commission<sup>9</sup> (and in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations), had adopted the view that it would be desirable to include within its discussions also door-to-door operations and to deal with those operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments (for considerations of the Working Group on the issue of the scope of the draft instrument, see A/CN.9/510, paras. 26-32). It was also noted that the Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations. Consequently, the Working Group had requested the Commission to approve that approach (A/CN.9/510, para. 32).

17. With respect to the scope of the draft instrument, strong support was expressed by a number of delegations in favour of the working assumption that the scope of the draft instrument should extend to door-to-door transport operations. It was pointed out that harmonizing the legal regime governing door-to-door transport was a practical necessity, in view of the large and growing number of practical situations where transport (in particular transport of containerized goods) was operated under door-to-door contracts. While no objection was raised against such an extended scope of the draft instrument, it was generally agreed that, for continuation of its deliberations, the Working Group should seek participation from international organizations such as the International Road Transport Union (IRU), the Intergovernmental Organization for International Carriage by Rail (OTIF), and other international organizations involved in land transportation. The Working Group was invited to consider the dangers of extending the rules governing maritime transport to land transportation and to take into account, in developing the draft instrument, the specific needs of land carriage. The Commission also invited member and observer States to include land transport experts in the delegations that participated in the deliberations of the Working Group. The Commission further invited Working Groups III (Transport Law) and IV (Electronic Commerce) to coordinate their work in respect of dematerialized transport documentation. While it was generally agreed that the draft instrument should provide appropriate mechanisms to avoid possible conflicts between the draft instrument and other multilateral instruments (in particular those instruments that contained mandatory rules applicable to land transport), the view was expressed that avoiding such conflicts would not be sufficient to guarantee the broad acceptability of the draft instrument unless the substantive provisions of the draft instrument established acceptable rules for both maritime and land transport. The Working Group was invited to explore the possibility of the draft instrument providing

<sup>8</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 222.

<sup>9</sup>Ibid., *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 345.

separate yet interoperable sets of rules (some of which might be optional in nature) for maritime and road transport. After discussion, the Commission approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.<sup>10</sup>

18. Working Group III (Transport Law), which was composed of all States members of the Commission, held its tenth session in Vienna from 16 to 20 September 2002. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Romania, the Russian Federation, Singapore, Spain, Sudan, Sweden, Thailand, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

19. The session was also attended by observers from the following States: Algeria, Australia, Denmark, Finland, Ghana, Greece, Kuwait, Lebanon, Libyan Arab Jamahiriya, the Netherlands, Norway, Peru, the Philippines, the Republic of Korea, Senegal, Slovakia, Switzerland, the Syrian Arab Republic, Tunisia, Turkey, Ukraine and Yemen.

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

(a) **United Nations system:** The International Maritime Organization (IMO) and the United Nations Conference on Trade and Development (UNCTAD).

(b) **Intergovernmental organizations:** The European Commission, the Intergovernmental Organization for International Carriage by Rail (OTIF) and the Organisation for Economic Co-operation and Development (OECD).

(c) **International non-governmental organizations invited by the Commission:** The Baltic and International Maritime Council (BIMCO), the *Comité international des transports ferroviaires* (CIT), the *Comité maritime international* (CMI), the European Law Student's Association (ELSA), the *Instituto Iberoamericano de Derecho Marítimo*, the International Chamber of Shipping (ICS), the International Federation of Freight Forwarders Associations (FIATA), the International Group of Protection and Indemnity (P & I) Clubs and the International Multimodal Transport Association (IMMTA).

21. The Working Group elected the following officers:

*Chairman:* Mr. Rafael Illescas (Spain)

*Rapporteur:* Mr. Walter De Sá Leitão (Brazil)

22. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.III/WP.22);

(b) Preliminary draft instrument on the carriage of goods by sea: Note by the secretariat (A/CN.9/WG.III/WP.21);

(c) Preliminary draft instrument on the carriage of goods by sea: Note by the secretariat (A/CN.9/WG.III/WP.21/Add.1).

(d) Proposal by Canada (A/CN.9/WG.III/WP.23)

23. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Preparation of a draft instrument on transport law.

4. Other business.

5. Adoption of the report.

## II. DELIBERATIONS AND DECISIONS

24. The Working Group continued to review the provisions of the draft instrument contained in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21). The deliberations and conclusions of the Working Group are reflected in section III below.

### A. General discussion

25. In preparation for the current session of the Working Group, a proposal was submitted by the Government of Canada (A/CN.9/WG.III/WP.23) concerning the scope and structure of the draft instrument. In light of the discussion held at the ninth session of the Working Group regarding the scope of application of the draft instrument on a door-to-door or on a port-to-port basis, the following three options were presented: (1) to continue working on the existing draft instrument, but to add a reservation that would enable contracting States to decide whether or not to implement article 4.2.1 and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea; (2) to continue working on the existing draft instrument, including article 4.2.1, but to insert "national law" after "international convention" in article 4.2.1 (b); or (3) to revise the existing draft instrument to include a separate chapter each on common provisions, on carriage of goods by sea (port-to-port), on carriage of goods by sea and by other modes before or after carriage by sea (door-to-door), and on final clauses and reservations, including a provision on express reservations for the port-to-port chapter and the door-to-door chapter.

26. The Working Group welcomed this contribution to the discussion on the scope of application of the draft instrument. It was, however, questioned if this was the appropriate time to discuss the options proposed for the structure of the draft instrument. Support was expressed for the view that an in-depth discussion on the scope of application would be premature, particularly since the secretariat had been requested to prepare a background paper on this topic for discussion at a future session of the Working Group. It was suggested that while an in-depth discussion

<sup>10</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 224.

of the issue or the choosing of option might be premature, the options presented in the Canadian proposal, in addition to possible other options, should form part of the background paper on scope of application to be presented at a future session of the Working Group.

27. The Working Group decided to proceed with a discussion of the liability issue in Chapter 6 of the draft instrument, to be followed by consideration of the period of responsibility issues in Chapter 4. The Working Group agreed to discuss in general terms the scope of application issues during its examination of the related issue of the period of responsibility covered in Chapter 4 (see below, para. 123).

28. In a preliminary exchange of views with representatives of international organizations involved in land transportation, the Working Group heard comments from the representative of the Intergovernmental Organization for International Carriage by Rail (OTIF) and the *Comité international des transports ferroviaires* (CIT), who expressed support for the establishment of global rules to govern multimodal transport, provided that unimodal transport situations, such as those involving transport by road, rail and inland waterways, were duly taken into account. In that context, interest was expressed for option (3) in the Canadian proposal (for continuation of that exchange of views, see below, para. 124 and annexes I and II).

## B. Consideration of draft articles

### 1. Draft article 6 (*Liability of the carrier*)

29. The text of draft article 6 as discussed by the Working Group was as follows:

#### “6.1 Basis of liability

“6.1.1 The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier’s responsibility as defined in article 4, unless the carrier proves that neither its fault nor that of any person referred to in article 6.3.2 (a) caused or contributed to the loss, damage or delay.

“6.1.2 [Notwithstanding the provisions of article 6.1.1 the carrier is not responsible for loss, damage or delay arising or resulting from

“(a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;

“(b) fire on the ship, unless caused by the fault or privity of the carrier.]

“6.1.3 Notwithstanding the provisions of article 6.1.1, if the carrier proves that loss of or damage to the goods or delay in delivery has been caused by one of the following events it is presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused or contributed to cause that loss, damage or delay.

- (i) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;
- (ii) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];
- (iii) act or omission of the shipper, the controlling party or the consignee;
- (iv) strikes, lock-outs, stoppages or restraints of labour;
- (v) saving or attempting to save life or property at sea;
- (vi) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;
- (vii) insufficiency or defective condition of packing or marking;
- (viii) latent defects not discoverable by due diligence.
- (ix) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;
- (x) acts of the carrier or a performing party in pursuance of the powers conferred by article 5.3 and 5.5 when the goods have become a danger to persons, property or the environment or have been sacrificed; [(xi) perils, dangers and accidents of the sea or other navigable waters;]

“6.1.4. [If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.]

“[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is

“(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and

“(b) not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.

If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]

#### “6.2 Calculation of compensation

“6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

“6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.

“6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in articles 6.2.1 and 6.2.2.

### “6.3 Liability of performing parties

“6.3.1 (a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier’s rights and immunities provided by this instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

“(b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 6.4.2, 6.6.4, and 6.7, a performing party is not bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.

“6.3.2 (a) Subject to article 6.3.3, the carrier is responsible for the acts and omissions of

- (i) any performing party, and
- (ii) any other person, including a performing party’s subcontractors and agents, who performs or undertakes to perform any of the carrier’s responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, as if such acts or omissions were its own. A carrier is responsible under this provision only when the performing party’s or other person’s act or omission is within the scope of its contract, employment, or agency.

“(b) Subject to article 6.3.3, a performing party is responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier’s responsibilities under the contract of carriage, including its subcontractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment.

“6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency.

“6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 6.4, 6.6 and 6.7.

“6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument.

### “6.4 Delay

“6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon [or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage].

“6.4.2 If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 6.2, the amount payable as compensation for such loss is limited to an amount equivalent to [... times the freight payable on the goods delayed]. The total amount payable under this provision and article 6.7.1 shall not exceed the limit that would be established under article 6.7.1 in respect of the total loss of the goods concerned.

### “6.5 Deviation

“(a) The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.

“(b) Where under national law a deviation of itself constitutes a breach of the carrier’s obligations, such breach only has effect consistently with the provisions of this instrument.

### “6.6 Deck cargo

“6.6.1 Goods may be carried on or above deck only if

- (i) such carriage is required by applicable laws or administrative rules or regulations, or
- (ii) they are carried in or on containers on decks that are specially fitted to carry such containers, or
- (iii) in cases not covered by paragraphs (i) or (ii) of this article, the carriage on deck is in accordance with the contract of carriage, or complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.

“6.6.2 If the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier is not liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pur-

suant to article 6.6.1 (ii), the carrier is liable for loss of or damage to such goods, or for delay in delivery, under the terms of this instrument without regard to whether they are carried on or above deck. If the goods are carried on deck in cases other than those permitted under article 6.6.1, the carrier is liable, irrespective of the provisions of article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

“6.6.3 If the goods have been shipped in accordance with article 6.6.1(iii), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier has the burden of proving that carriage on deck complies with article 6.6.1(iii) and, if a negotiable transport document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.

“6.6.4 If the carrier under this article 6.6 is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in articles 6.4 and 6.7; however, if the carrier and shipper expressly have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss of or damage to the goods that exclusively resulted from their carriage on deck.

#### “6.7 Limits of liability

“6.7.1 Subject to article 6.4.2 the carrier’s liability for loss of or damage to or in connection with the goods is limited to [...] units of account per package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, [or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.]

“6.7.2 When goods are carried in or on a container, the packages or shipping units enumerated in the contract particulars as packed in or on such container are deemed packages or shipping units. If not so enumerated, the goods in or on such container are deemed one shipping unit.

“6.7.3 The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing

Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

#### “6.8 Loss of the right to limit liability

“Neither the carrier nor any of the persons mentioned in article 6.3.2 is entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this instrument, [or as provided in the contract of carriage,] if the claimant proves that [the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.

#### “6.9 Notice of loss, damage, or delay

“6.9.1 The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to or in connection with the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within three working days after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

“6.9.2 No compensation is payable under article 6.4 unless notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

“6.9.3 When the notice referred to in this chapter is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to the performing party that delivered the goods.

“6.9.4 In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.

#### “6.10 Non-contractual claims

“The defences and limits of liability provided for in this instrument and the responsibilities imposed by this instrument apply in any action against the carrier or a performing party for loss of, for damage to, or in connection with the goods covered by a contract of carriage, whether the action is founded in contract, in tort, or otherwise.”

##### (a) *Subparagraph 6.1.1*

30. It was noted that draft article 6 constituted the core rule of liability for carriers and should be read with draft

articles 4 and 5 (which were also relevant in defining the carrier's obligations) and draft article 7 of the draft instrument (since draft article 6 mirrored the provisions regarding the shipper's obligations). It was also noted that paragraph 6.1 contained two types of exceptions to the liability of carrier as set out in subparagraphs 6.1.2 and 6.1.3. It was clarified that even if the carrier had acted in accordance with its obligations under draft article 5, for example by exercising due diligence as required under draft article 5.4, this would not necessarily mean that the carrier bore no fault under draft article 6.1. If, however, the carrier breached its obligations, for example under draft article 5.2.1 or 5.4, then this would constitute fault and the burden of proof would fall on the carrier to prove that there was no fault (if a *prima facie* case could be made).

31. Support was expressed for the content of subparagraph 6.1.1 and the requirement of fault-based liability on the carrier, namely that the carrier was liable unless it proved that the loss, damage or delay was not its fault nor that of any person referred to in subparagraph 6.3.2 (a). It was suggested that subparagraph 6.1.1 was closer in substance to the approach taken in article 4.2(q) of the Hague and Hague-Visby Rules than the approach taken in article 5.1 of the Hamburg Rules, which required that the carrier proved that it, its servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences. However, there was some criticism that the reference to the "period of the carrier's responsibility as defined in article 4" would allow the carrier to restrict its liability to a considerable extent. Some concern was expressed as to why it had been considered necessary to deviate from the language used in the Hamburg Rules. A suggestion was made that the basis of liability should be simplified by abolishing the standard of due diligence and replacing it with liability stemming from use of the vessel as such. It was suggested that the reason for the difference in wording from both the Hague Rules and the Hamburg Rules was to improve and provide greater certainty (e.g. as to the fact that the liability of the carrier was based on presumed fault, a matter that had required clarification by way of the common understanding adopted by the drafters of the Hamburg Rules). A contrary view was that combining different languages from both the Hague and Hamburg Rules might increase uncertainty as it was not clear how the provision would be interpreted.

32. It was stated that, whilst a higher standard of liability had been adopted in instruments dealing with other modes of transport (such as COTIF), a higher standard would not be acceptable in the maritime context. In this regard, support was expressed for features in addition to draft article 6.1, such as draft article 5, which set out the positive obligations of the carrier. It was noted that, if the draft instrument were to apply on a door-to-door basis, conflict with unimodal land transport conventions (such as COTIF and CMR) would be inevitable given that both imposed a higher standard of liability on the carrier. However it was suggested that these conflicts could be reduced by adopting suitable wording in draft article 6.4 as well as the language used in respect of the performing carrier. More generally, doubts were expressed as to whether default liability rules applicable in the context of

door-to-door transport should be based on the lower maritime standard instead of relying on the stricter standard governing land transport.

33. In response to a question regarding the relationship between draft articles 5.2, 5.4 and 6.1.1, it was noted that if the carrier proved that the event that caused or contributed to the loss, damage or delay did not constitute a breach of its obligations under draft articles 5.2 and 5.4, it would be assumed not to be at fault.

34. Strong support was expressed for the substance of subparagraph 6.1.1. After discussion, the Working Group requested the secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made, and also to the need for consistency between the various language versions.

(b) *Subparagraph 6.1.2*

35. It was recalled that subparagraphs (a) and (b) set forth the first two of the traditional exceptions to the carrier's liability, as provided in the Hague and Hague-Visby Rules. It was also recalled that there was considerable opposition to the retention of either. As regards subparagraph (a), it was pointed out that there was little support for the "management" element, which was simply productive of disputes as to the difference between management of the ship and the carrier's normal duties as to care and carriage of the goods. It was also pointed out that a similar exception to the carrier's liability based on the error in navigation existed in the original version of the Warsaw Convention and had been removed from the liability regime governing the air carriage of goods as early as 1955 as a reflection of technical progress in navigation techniques. It was widely felt that the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was emphasized that such a step might be essential in the context of establishing international rules for door-to-door transport.

36. A view was expressed by a number of delegations that the general exception based on error in navigation should be maintained since, should it be removed, there would be a considerable change to the existing position regarding the allocation of the risks of sea carriage between the carrier and the cargo interests, which would be likely to have an economic impact on insurance practice. A related view was that, although it was probably inevitable to do away with the general exception based on error in navigation, subparagraph (a) should be maintained in square brackets pending a final decision to be made at a later stage on what was referred to as "the liability package" (i.e. the various aspects of the liability regime applicable to the various parties involved). After discussion, however, the Working Group decided that subparagraph (a) should be deleted.

37. With respect to subparagraph (b), strong views were expressed for the deletion of the traditional exception based on fire on the ship. It was pointed out that, as currently drafted along the lines of the Hague and Hague-Visby Rules, the exception would impose an excessive burden of



proof on the shipper, since in most practical cases, it would be impossible for the shipper to prove that fire had been caused by the fault or privity of the carrier. As to the need to cover the situation where fire had been caused by the cargo itself, it was suggested that the issue might be sufficiently taken care of in the context of subparagraph 6.1.3.(vi) (“any other loss or damage arising from inherent quality, defect or vice of the goods”). However, the view was also expressed that further consultations with the industry were needed in order to assess the impact of the deletion of that exception on the general balance of liabilities in the draft instrument. Several delegations also supported the retention of subparagraph (b), as drafted. After discussion, the Working Group did not reach consensus on the deletion of subparagraph (b) and decided to maintain it within square brackets, subject to continuation of the discussion at a later stage.

(c) *Subparagraph 6.1.3*

38. The Working Group engaged in a general discussion of subparagraph 6.1.3, without entering into a review of each of the elements listed in subparagraphs (i) to (xi), which would be further considered after more discussion had taken place about the ways in which the draft instrument would address the issues of door-to-door transportation. It was recalled that subparagraph 6.1.3 was based on article 4.2 of the Hague and Hague-Visby Rules, which listed situations where the carrier was excused from liability for loss of or damage to the goods, generally for the reason that such loss or damage resulted from events beyond the control of the carrier. It was also recalled that subparagraph 6.1.3 presented not only a modified but also a somewhat extended version of the excepted perils of the Hague and Hague-Visby Rules, in particular through the inclusion of exceptions that arose from circumstances under the control of the carrier.

39. Doubts were expressed by a number of delegations regarding the need for including such a list in the draft instrument in view of the general principle embodied in subparagraph 6.1.1, under which the carrier’s liability was based on fault. It was stated that such a catalogue could not provide an exhaustive list of those incidents that could occur during transport and possibly diminish the liability of the carrier. It was pointed out that texts such as the UNCTAD/ICC Rules contained no such list and that it would be more satisfactory to refer to exonerations of the carrier’s liability in cases involving force majeure or other circumstances that were inevitable and unpredictable in nature, damage resulting from inherent vice of the goods or fault of the shipper or of the consignee. The prevailing view, however, was that, although it might be superfluous in certain legal systems, such a list should be retained in view of the useful role it would play in many legal systems in preserving the existing body of case law. It was pointed out that the complete deletion of the catalogue might be taken by judges inexperienced in maritime law as indicating an intention to change the law. It was said that even if the list was not needed in some countries, it was useful in others and did no harm in those countries that did not need it. It was also pointed out that the approach taken in a set of mandatory rules such as those contained in the draft instrument could not rely on party

autonomy as heavily as in contractual rules such as the UNCTAD/ICC Rules.

40. Regarding the structure of the list, a suggestion was made that it could be rationalized by grouping those situations where exoneration stemmed from events under the control of the carrier and those circumstances that were beyond the control of the carrier. In that context, serious doubts were expressed by a number of delegations as to whether circumstances under the control of the carrier should give rise to exonerations. Another suggestion was that subparagraph 6.1.3 should be phrased in the form of an illustrative list and not of a prescriptive provision.

41. Regarding the manner in which the carrier would avoid liability, it was pointed out that the excepted perils under subparagraph 6.1.3 appeared only as presumptions, and not as exonerations as in article 4.2 of the Hague and Hague-Visby Rules. The Working Group heard conflicting views as to whether the excepted perils should be retained as exonerations from liability or whether they should appear as presumptions only. In favour of adopting the presumption approach, it was stated that certain events were typical of situations where the carrier was not at fault; and that it was justifiable, where the carrier proved such an event, for the burden of proof to be reversed. However, in favour of maintaining the traditional exoneration approach, it was pointed out that not all of the perils listed in the subparagraph could be interpreted as applicable only where the carrier has not been negligent in incurring the excepted peril. For example, an “Act of God” and a peril of the sea could be defined as acts occurring without a carrier’s negligence in circumstances that could not reasonably have been guarded against. To define them for a “presumption” regime without reference to absence of fault was not easy. New definitions might have to be evolved, referring only to serious external events that could raise a (rebuttable) presumption of non-liability. Such a process might involve loss of existing case law in some jurisdictions. Those two excepted perils had been listed in square brackets since they would not fit well in a presumption-based regime and it seemed likely that situations that might attract either of them could fairly easily be dealt with under the basic rule of subparagraph 6.1.1. The Working Group deferred a final decision as to whether the circumstances listed under subparagraph 6.1.3 would be treated by way of presumptions or by way of exonerations until such time as it had reviewed the contents of the individual subparagraphs (i) to (xi) and the drafting of the entire provision had been considered in more detail. In the context of that discussion, it was pointed out that, since exonerations were subject to proof being given of the carrier’s fault, the difference between the presumption approach and the exoneration approach might be very limited in practice.

42. A concern was expressed that, as currently drafted, the chapeau of subparagraph 6.1.3 insufficiently addressed those cases where the carrier proved an event listed under subparagraph 6.3.1 but there was also an indication that the vessel might not have been seaworthy. The shipper would then actually have the burden of proving unseaworthiness. This was believed to be inconsistent with subparagraph 6.1.1 and it was suggested that it might be preferable to treat the events listed as exonerations if, at

the same time, the words “has been caused by one of the following events” could be replaced by “has been caused solely by one of the following events”. It was also suggested that the words “or contributed” should be deleted. Those suggestions were noted with interest.

43. Although no discussion took place regarding the individual subparagraphs (i) to (xi), the Working Group heard various suggestions and concerns in respect of those provisions. As a matter of drafting, it was suggested that the case of fire on the ship, should it be maintained under subparagraph 6.1.2, might need to be relocated under subparagraph 6.1.3. Regarding the substance of the provision, one suggestion was that the reference to quarantine restrictions should be deleted. Another suggestion was that, in view of the deletion of subparagraph 6.1.2 (a), a new element should be listed in subparagraph 6.1.3, based on “compulsory pilotage”. While some support was expressed for exonerating the carrier from liability where it had been placed under an obligation to use possibly incompetent pilotage, the prevailing view was that reliance on pilotage should not exonerate the carrier from its liability, since the pilot should be regarded as assisting the carrier. Although the carrier might indeed be faced with compulsory pilotage or other rule imposed by port authorities, for example with regard to mandatory loading or unloading of goods, it would be unfair to burden the shipper with the consequences of such obligations, since the carrier, unlike the shipper, was actually involved and maintained control of such situations. It was pointed out that exonerating the carrier and creating a recourse against the pilot or any other provider of services to the carrier (mention was made of ice-breaking services) would inappropriately depart from established practice and unduly interfere with the contractual arrangements between the carrier and its suppliers of services. After discussion, the Working Group decided not to create any additional exception under subparagraph 6.1.3 at the current stage, on the grounds that the general rule expressed in subparagraph 6.1.1 sufficiently addressed those situations that were not expressly addressed in subparagraph 6.1.3.

44. Consistent with the view that events under the control of the carrier should not give rise to exonerations, concerns were expressed regarding the appropriateness of including subparagraphs (ix) and (x). It was observed that the discussion of those issues could be reopened in the context of a detailed discussion of subparagraphs (i) to (xi).

45. The secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of the provision.

(d) *Subparagraph 6.1.4*

46. Subparagraph 6.1.4 presented the Working Group with two alternative texts with respect to concurrent causes of loss, damage or delay in delivery. The first alternative provided that, where the loss, damage or delay in delivery was caused by two events but the carrier was liable for only one of those events, the carrier was liable for the entire loss, except to the extent that it proved that the loss was caused by an event for which it was not liable. The second alternative stated that, where the loss, damage or delay in delivery was caused by two events, and the carrier was only

liable for one of them, the carrier and the party seeking recovery for the loss shared the burden of showing the cause of the loss. The second alternative also provided a fall-back provision to cover the rare situation where adequate proof was lacking, by providing that in these circumstances the two parties would share the loss in equal parts.

47. The Working Group discussed the text of the alternatives with respect to substance and form, focusing their interventions on general legislative policies.

48. While several views were expressed that either option was acceptable, and that the differences between the two options were largely irrelevant, strong support was expressed for the first alternative set out in subparagraph 6.1.4. It was noted that the first alternative was very clear and precise, and envisaged complete liability on behalf of the carrier, while leaving the carrier open to prove that it was not liable for the event causing the loss, damage or delay in delivery.

49. However, there was also strong opposition to the first alternative. A perceived problem with the first alternative was described as very serious. While this alternative was patterned after article 5.7 of the Hamburg Rules, it was suggested that it would not operate in the same fashion, due to the presumption of the absence of carrier fault in article 6.1.3 of the draft instrument, which could result in uncertainty regarding the interaction of draft articles 5 and 6.

50. It was pointed out that the second alternative better dealt with the situation where two concurrent causes resulted in the loss, yet the carrier was responsible for only one of the causes. For example, if the loss was due to both insufficient packing and improper handling of the goods, the first alternative would place the entire burden on the carrier to prove the allocation of loss between the two causes. In contrast, the second alternative would have both parties bear the burden of showing causation.

51. It was further argued that the second alternative was preferable given the Working Group’s decision to eliminate error in navigation from the carrier’s list of exemptions in subparagraph 6.1.2 (a). In most cases of loss, the argument would be made that error in navigation contributed to the loss, which would be difficult for the carrier to disprove. Under the second alternative, if error in navigation were alleged, the cargo owner would bear the burden of proving it as a cause and its extent, and where it was impossible to allocate the cause, the loss would be shared equally. Thus, the heart of the second alternative was a shared burden of proof.

52. However, it was suggested that the second alternative was simplistic in its treatment of the situation where no evidence on the overall apportionment could be established, and the carrier would be liable for one-half of the loss. Concern was expressed that the basic rule regarding burden of proof had already been set out in subparagraphs 6.1.1, 6.1.2 and 6.1.3, and that the second alternative in subparagraph 6.1.4 appeared to reverse this regime. The suggestion was made that the second alternative as a whole had no parallel in any existing international or national regime for the carriage of goods by sea, and that it would

substantially change the risk allocation between carrier and cargo interests. While it was conceded by proponents of the second alternative that this text did shift the burden of proof in favour of the carrier, it was argued that this was a policy choice which was especially appropriate in light of the abandonment of the error in navigation defence.

53. The issue of overriding obligations was raised in the Working Group in conjunction with the discussion of subparagraph 6.1.4. The example was given of the case where the combined causes of the loss were that of inherent vice in the goods, and of unseaworthiness of the vessel. It was suggested that until it was clear whether the obligation of seaworthiness in article 5.4 of the draft instrument was an overriding obligation, it was not possible to allocate the causes for the loss. Opposing views were expressed that subparagraph 6.1.4 should be maintained in order to avoid the doctrine of overriding obligations, and that the doctrine itself did not exist in many legal systems. A further view was that it was questionable whether subparagraph 6.1.4 eliminated the doctrine of overriding obligations. If this was not the case, subparagraph 6.1.4 should make that position clear, for instance by commencing with the words "Without prejudice to draft article 5.1.4".

54. While some delegations questioned whether it was necessary to envisage a special text on the issue of shared liability or contributing cause, it was widely felt that the apportionment of liability was an important issue that should be dealt with in the draft instrument. It was emphasized that most transport conventions contained such a clause governing the allocation of liability where loss was due to a combination of causes. It was also noted that the current rules dealing with concurrent causes resulted in an extremely heavy burden of proof on the carrier to prove that part of the loss was caused by an event for which the carrier was not liable. While intermediate solutions could be found to ease this heavy burden, this issue appeared to be ready for unification. However, it was suggested that both alternatives as drafted in subparagraph 6.1.4 were somewhat rigid in their treatment of this issue.

55. Other drafting difficulties were noted in both alternatives presented in subparagraph 6.1.4. Confusion was voiced over the ambiguous nature of the "event", and whether it was intended to be limited to "cause", and whether it would be limited to the list of presumptions in subparagraph 6.1.3. It was suggested that further study should be conducted on the issue of apportionment of liability due to a combination of causes of the loss.

56. The first alternative in subparagraph 6.1.4 received the strongest support in the Working Group, and the decision was made to maintain the first alternative in the draft instrument for continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage.

(e) *Paragraph 6.2*

57. It was recalled that paragraph 6.2 defined the scope and amount of compensation that was payable and that

delay was dealt with separately under paragraph 6.4. It was also recalled that the provision had been drafted with the intention of clarifying that damages were to be calculated on the "arrived value" being the value of the goods at the place of delivery. It was pointed out that this approach was a well-recognized method for calculating compensation and was used in the marine insurance context. In response, it was stated that, at least in one jurisdiction, compensation was calculated based on the value of the goods at the place where the carrier received the goods and that some jurisdictions also had mandatory regulations including the refunding of freight and costs incurred during the course of carriage as part of the compensation payable. It was suggested that these differences should be taken into account particularly if the draft instrument was to apply on a door-to-door basis. It was generally agreed that, if the draft instrument applied on a door-to-door basis, it would be necessary to determine whether or not customs and related costs should be included within the compensation that was payable. It was stated that, in some jurisdictions, customs-related costs were not generally included in the valuation of goods. The Working Group agreed, notwithstanding the different approaches to the time at which a valuation of goods should be made, that a provision standardizing the calculation of compensation was important to include in the draft instrument.

58. A question was raised whether paragraph 6.2 was intended to exclude all losses which could not be ascertained in the normal valuation of goods as set out in paragraph 6.2 such as, for example, consequential losses. It was suggested that whether or not consequential damages should be included in the compensation payable should depend on what was the intention of the parties. In response, it was explained that the intention of the CMI in preparing the draft was to replicate the Hague-Visby Rules.

59. A further concern raised was that, whilst paragraph 6.2 appeared to set an absolute limit on the amount of damages recoverable, it did not include the qualification set forth in the Hague-Visby Rules that allowed the shipper to declare the value of the goods in the bill of lading. There was support for the view that the calculation of compensation should take account of the intention of the parties as expressed in the contract of carriage.

60. It was observed that paragraph 6.2 was dealt with separately from the limits of liability as set out in draft paragraph 6.7, whereas article 4.5 of the Hague-Visby Rules dealt with both these issues together. It was stated that there was no specific reason for this separation and a future draft could consider combining paragraphs 6.2 with paragraph 6.7. In this respect a concern was raised as to the interaction between paragraphs 6.2 and 6.7, particularly given that the intention of the latter paragraph appeared to be to restrict compensation and exclude consequential damages.

61. A suggestion was made that paragraph 6.2 should contain a cross-reference to draft article 4 which dealt with the period of responsibility including the place of delivery. It was stated that the method for calculating compensation might need to be reviewed if the draft instrument applied on a door-to-door basis.

62. A suggestion was made that consideration should be given to revising paragraph 6.2 to cover loss or damage other than to the goods, a situation which could arise particularly if the instrument applied on a door-to-door basis. A suggestion was also made that, with a view to achieving drafting equilibrium, mirroring provisions for calculation of damages should be drafted with respect to shipper's liability. The Working Group agreed that paragraph 6.2 might be revised to take account of the specific concerns raised, particularly if the draft instrument applied on a door-to-door basis.

(f) *Paragraph 6.3*

63. It was pointed out that paragraph 6.3 recognized that a contracting carrier might not fully or even partly perform the contract of carriage itself. This provision therefore acknowledged and imposed liability on "performing parties", namely those parties that performed, wholly or partly, the contract of carriage. It was further stated that, whereas the contracting carrier was liable throughout the contract of carriage, a performing party had a more limited liability based on when it had custody of the goods or was actually participating in the performance of an activity contemplated by the contract of carriage. Although a view was expressed that consideration of this paragraph should be deferred until the scope of the draft instrument had been settled, it was agreed that preliminary discussion was useful even if the paragraph would need to be revised once the scope of the draft instrument had been settled. It was widely felt that the paragraph was useful as it recognized the reality of the existence of a performing party and thus protected the shipper and also protected the performing party whose liability was limited according to the criteria set out in subparagraph 6.3.1 (a).

64. A concern was expressed that the coverage of performing parties was a novel rule which created a direct right of action as against a party with whom the cargo interests did not have a contractual relationship. It was strongly argued that this innovation should be avoided as it had the potential for serious practical problems. Disagreement was expressed with respect to the statement in paragraph 94 of document A/CN.9/WG.III/WP.21 that a performing party was not liable in tort. In this respect, it was argued that liability of the performing party in tort was a matter of national law to which the present instrument did not extend. Also it was submitted that it was not clear under which conditions liability could be imposed upon the performing party. It was said that even though it appeared that the loss or damage had to be "localized" with the performing party (i.e. the loss or damage had to have occurred when the goods were in the performing party's custody), it was less than clear how the burden of proof on this point was to be dealt with. It was suggested that one interpretation could require that the performing party prove that the loss or damage occurred at a time when the goods were not in that party's custody. As well it was suggested that, whilst subparagraph 6.3.4. created joint and several liabilities, it did not indicate how the recourse action as between the parties was to be determined. This was particularly ambiguous given that there was not necessarily a contractual relationship between the parties concerned. For these reasons, it was suggested that paragraph

6.3 and the definition of "performing party" in draft article 1 should be deleted or, in the alternative, that the definition should be clarified so as to ensure that it was limited to "physically" performing parties. Support was expressed for limiting the scope of paragraph 6.3 to "physically" performing parties. In this respect it was suggested that the words "or undertakes to perform" should be deleted from subparagraph 6.3.2 (a) (ii). However, strong support was expressed for the retention of paragraph 6.3 on the basis that it was an indispensable provision. It was agreed that paragraph 6.3 should be retained, subject to a revision of the text taking account of the concerns expressed and to considering whether further changes were necessary if the draft instrument ultimately applied on a door-to-door basis.

(g) *Paragraph 6.4*

65. The Working Group heard the view that whilst a provision on delay was a novel one at least if compared with the text of the Hague and Hague-Visby Rules, it was however dealt with in the Hamburg Rules and in a number of transport law instruments of a contractual nature, such as the UNCTAD/ICC Rules and the FIATA bill of lading. It was suggested that it would be appropriate to deal with this matter in the draft instrument. Although it was recognized that time was not as crucial in maritime carriage as in other forms of carriage, it was recognized that, once time was agreed upon in the maritime context, any breach should be regulated in the interests of harmonisation rather than left to national law as was done under the Hague and Hague-Visby Rules. In support of the inclusion of a provision on delay it was said that time was becoming more important particularly in respect of short sea trade. A contrary view was that time was not as important as other factors in the maritime context, and that delay should not be a ground for breach of contract as envisaged in paragraph 6.4.

66. The prevailing view was that a provision on delay should be included in the draft instrument. Regarding the substance of the paragraph, it was observed that the provision included two limbs, the first recognising that delay was a matter left for the parties to agree upon, the second (in bracketed text), which provided a default rule in the absence of such an agreement. It was stated that the first limb of the provision provided clarity in that it allowed parties to raise limitation amounts, a choice that could also be reflected in the amount of freight. Support was expressed for the first limb of subparagraph 6.4.1 and for broad recognition that the matter of delay and duration of a transport was a commercial matter that could be the subject of agreements between the parties. Some support was expressed for the view that the question of how to deal with delay should be left exclusively to the parties. On that basis, it was suggested that the second limb of subparagraph 6.4.1 should be deleted.

67. Additional opposition was expressed to the second limb of subparagraph 6.4.1, which recognized the discretion of courts to find delay if delivery did not occur within the time that it would be reasonable to expect of a diligent carrier and allowed for evidence to be brought taking account of normal trade and communications expectations. It was stated that the second limb was too vague in its reference to reasonableness for determining whether there had

been delay and also that it did not serve a useful purpose in modern transport. It was also argued that, given that the error in navigation defence had been omitted from the draft instrument (see above, para. 36), a general provision on delay as set out in the second limb of paragraph 6.4 would impose too heavy a burden on the carrier. It was stated in response that, where the delay was caused by matters outside the control of the carrier, such as thick ice or storms, the carrier still had the protection offered by subparagraph 6.1.1. The prevailing view in the Working Group was that a provision along the lines of the second limb of subparagraph 6.4.1 should be retained, since the omission of such a provision would result in too rigid a formulation of the rule on delay. In that respect, it was pointed out that almost all international conventions concerning transport law included rules on liability for delay. A widely shared view was that the present wording was balanced because the reference to “reasonable” expectations of a diligent carrier provided shippers with an adequate level of protection. However, it was suggested that the term “reasonable” might require further explanations and that the second limb of the subparagraph should be re-examined once the scope of the draft instrument had been settled.

68. It was observed that one aspect not covered by paragraph 6.4, but dealt with in a number of other conventions, was the legal fiction that, after a certain period of time, delayed goods could be treated as lost goods. Some support was expressed for inclusion of a provision establishing such a fiction in the draft instrument. Strong opposition was expressed to the inclusion of such a clause, particularly in respect of developing countries where the choice of carriers was often non-existent. After discussion, during which strong concerns were raised about the inclusion of this provision, it was agreed that this was a topic worthy of further consideration taking account of industry needs and practices.

69. In relation to subparagraph 6.4.2 it was observed that this provision dealt with amounts payable for losses due to delay but not with compensation for loss or damage to the goods. It was stated that since the value of goods was only relevant for calculating compensation for damage or loss, the method for limiting liability in case of delay should be by reference to the amount of the freight. Differing views were expressed as to the limitation that should apply under this provision ranging from the amount of freight payable to an amount equivalent to four times the freight payable for the delayed goods. The view was expressed that the matter should be left to national law. Another view was expressed that whatever amount was agreed upon with regard to the limitation of liability should be mandatory to avoid a risk that standard clauses would be used to limit carrier liability below the amount specified in subparagraph 6.4.2. It was said that the Working Group should also consider how this provision would operate when combined with the overall limit of liability that could be found in paragraph 6.7. It was decided that the limits should be revisited once the provisions on liability and the scope of the draft instrument had been settled.

70. After discussion, the Working Group agreed that the text of paragraph 6.4. would remain as currently drafted for continuation of the discussion at a later stage.

(h) *Paragraph 6.5*

71. It was explained that paragraph 6.5 on deviation had been included in the draft instrument with a view to modernizing this area of maritime law. In traditional maritime law, deviation amounted to a breach of contract, further to which the carrier could lose all the benefits it would normally derive from the governing legal regime. Paragraph 6.5 was intended to reflect a policy under which deviations could be justified where they were made in order to attempt to save lives or property at sea, or where the deviation was otherwise reasonable. Paragraph 6.5 (b) was intended to harmonize the rules regarding deviation in those countries where national law held that deviation amounted to a breach of contract, and to subject those domestic provisions to a reading within the provisions of the draft instrument. It was recalled that, in addition, the draft instrument in paragraph 6.8 contained provisions regarding loss of the right to limit liability and fundamental breach of contract.

72. There was strong support for the inclusion of a provision on deviation in the draft instrument. It was pointed out that a deviation by the carrier in order to save property at sea differed from a deviation to save life, and that the carrier should thus be subject to liability for delay when deviating to salvage property, particularly where such a deviation to salvage property was agreed for a price. However, it was also noted that it was often difficult to distinguish between situations involving deviations to save life and those made to salvage property. It was suggested that the draft article could include language to the effect that, when goods are salvaged as a result of the deviation, compensation received as a result of the salvage could be used as compensation for loss caused by the resulting delay. As a matter of drafting, although paragraph 6.5 was being considered in general terms only, translation might need to be reviewed to ensure that “deviation” should be translated as “desvio” in Spanish, and as “déroutement” in French.

73. It was suggested that the phrase “authorized by the shipper or a deviation” should be inserted after the phrase “... in delivery caused by a deviation” in subparagraph 6.5 (a). In addition, concern was raised over the meaning of the phrase “or by any other reasonable deviation” at the end of subparagraph 6.5 (a). It was recommended that this phrase should be clarified or deleted, since there was no uniform interpretation of the term “reasonable deviation” in all countries. However, it was also stated that it could be difficult to foresee the precise circumstances of each deviation, and that precise language could unduly limit the provision. It was stated that there were often extensive clauses on changes in the route of the ship found in bills of lading, and the issue was raised whether it would be consequently possible for contracting parties to define in their contracts what they intended to be a “reasonable deviation”. Clarification was given that the concept of “reasonable deviation” was a concept in general law that had existed for some time, without giving rise to many problems of interpretation and that deviation was meant to be a departure from the contractual agreement, rather than an agreed term. The Working Group also heard that deviation to save life and property at sea was an international public

law principle with respect to assisting when another vessel was in peril, and was not intended to cover the situation where one's own vessel was in danger.

74. It was suggested that subparagraph 6.5 (b) was unnecessary as a result of the international law of treaties, and that it should be deleted. However, subparagraph 6.5 (b) received broad support, and was generally welcomed as confirmation of the primacy of international law in the face of national law on this topic.

75. The Working Group decided to retain paragraph 6.5 in its entirety, and the secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of this provision.

(i) *Paragraph 6.6*

76. The Working Group heard that paragraph 6.6 had been included in the draft instrument in order to cover the situation of cargo placed on deck, and thus being exposed to greater risks and hazards than it would have faced had it been placed below deck. It was also noted that in some jurisdictions, placing cargo on the deck without prior agreement could amount to a fundamental breach of contract or a quasi-deviation. Further, some types of cargo could only be reasonably transported on deck, and with respect to other types of cargo, transportation on deck had become the norm. In response to a question regarding the meaning of goods being carried "on" containers, it was explained that the provision was intended to reflect the possible use of a flat container, as defined paragraph 1.4 in the definitions chapter of the draft instrument.

77. It was noted that subparagraph 6.6.1 provided three situations when goods could be carried on deck: when it was required by public law, administrative law, or regulation; when the goods were carried in or on containers on decks that were specially fitted to carry such containers; or when it was in accordance with the contract of carriage or with the customs, usages and practices of the trade. It was explained that subparagraph 6.6.2 provided that where the goods were carried on deck in accordance with subparagraph 6.6.1, the carrier would not be held liable for any loss, damage or delay specifically related to the enhanced risk of carrying the good on deck. In addition, it was clarified that subparagraph 6.6.3 indicated that placing the cargo on deck might be not just in the interest of carriers, but also in the interest of parties to a sales contract, in which case it should be stated clearly in the documentation applying to the contract. It was also noted that subparagraph 6.6.4 set out the consequences for loss or damage incurred in deck cargo.

78. It was explained that approximately 65 per cent of the container-carrying capacity of a vessel was usually on or above its deck, such that for operational reasons it was important for container carriers to have the operational flexibility to decide where to carry the containers. However, in this respect it was stated that in the absence of instructions, the decision whether to carry cargo on or below deck was not a matter entirely in the discretion of the carrier, given other obligations such as the obligation to exercise proper care in respect of the cargo under subparagraph 5.2.1.

79. Paragraph 6.6 received strong support for its structure and content. This provision was welcomed as an appropriate apportionment of liability in conformity with the freedom of contract regime, with the caveat that certain terms needed clarification, and that, as currently drafted, the draft article was too lengthy and complex. A question was raised whether in the case of vessels specially fitted for containers outlined in subparagraph 6.6.1(ii), there could not in some situations be an agreement between the shipper and the carrier regarding whether carriage was to be on or below deck. It was explained that the existence of specially-fitted vessels was not novel, and that the principle enshrined in subparagraph 6.6.1(ii) was intended to allow for carrier flexibility in choosing whether to carry cargo above or below deck. Concerns were raised with respect to alterations to the burden of proof regime that could be caused by subparagraph 6.6.2, since the carrier would have to prove either exoneration under subparagraph 6.6.1, or that the damage was not exclusively the consequence of their carriage on deck. In response, it was explained that pursuant to subparagraph 6.6.2, if the cargo was unjustifiably carried on deck, the carrier was responsible for any loss attributable to deck carriage, regardless of whether or not the carrier was at fault for the actual damage—in other words, strict liability was imposed. A suggestion was made that reference to "failing this" in the second sentence of subparagraph 6.6.3 required that the shipper had to prove that the goods had been shipped in accordance with subparagraph 6.6.1(iii). Further clarity was sought on where the burden of proof lay in the operation of subparagraph 6.6.3. In response, it was noted that the burden of proof in subparagraph 6.6.3 was not with respect to the damage, but rather with respect to compliance with the contract for deck carriage. In addition, it was suggested that the phrase "exclusively the consequence of their carriage on deck" in the final sentence of subparagraph 6.6.2 was imprecise, because damage or loss rarely has only one cause. A possible remedy for this could be use of the word "solely", taken from article 9.3 in the Hamburg Rules, or alternatively, to place the word "exclusively" in square brackets. The question was raised whether reference should also be made to containers in subparagraph 6.6.4. It was suggested that the limits of liability in the draft instrument should be mandatory and subject to no exception, however, the point was made that subparagraph 6.6.4 allowed for the limit on liability to be broken only when there was an intentional breach of contract regarding where to carry the cargo.

80. The Working Group decided to retain the structure and content of paragraph 6.6 for continuation of the discussion at a later stage.

(j) *Paragraph 6.7*

81. By way of introduction, it was recalled that paragraph 6.7 was derived from articles 6 and 26 of the Hamburg Rules and article 4.5 of the Hague and Hague-Visby Rules. General support was expressed for the principles on which paragraph 6.7 was based. It was generally agreed that it would not be appropriate to insert any amount for limits of liability in the draft instrument at this stage. It was pointed out that more discussion would be needed on that point, particularly if the draft instrument was to

govern door-to-door transport, in view of the difference in the amounts of the limits applicable to different modes of transport, which ranged, for example, from 2 special drawing rights per kilogram in maritime transport to 17 special drawing rights per kilogram in air transport (for weight-based limitations).

82. A suggestion was made that it would be appropriate to include in the draft instrument an article providing for an accelerated amendment procedure to adjust the amounts of limitation, for example along the lines of article 8 of the 1996 Protocol to the Convention on Limitation of Liability for Maritime Claims. The suggestion was noted with interest. However, it was stated that the level of the limits ultimately agreed to be inserted in subparagraph 6.7.1 would have a bearing on support for an accelerated amendment procedure.

83. Another suggestion was that, in line with a proposal made at the workshop on cargo liability regimes organized by the Maritime Transport Committee of OECD in January 2001, "before considering new monetary limits, it would be advisable for the sponsoring agency, as part of preparatory work for a diplomatic conference, to commission an independent study on the changes in the value of money since the limits were fixed in the Hague-Visby Rules". Some support was expressed for that suggestion. In that context, however, the view was expressed that, in view of the increase in the level of containerization, the average value of cargo in containerized transport had remained relatively stable over the years. Attention was drawn to the possibility of introducing a limitation amount per container as an alternative to the package limitation.

84. It was recalled that the last part of subparagraph 6.7.1 was between square brackets because it had yet to be decided whether any mandatory provision with respect to limits of liability should be "one-sided or two-sided mandatory", i.e. whether or not it should be permissible for either party to increase its respective liabilities. A widely-shared view was that the text between square brackets should be retained.

85. After discussion, the Working Group decided to retain the entire text of paragraph 6.7 in the draft instrument for continuation of the discussion at a later stage.

(k) *Paragraph 6.8*

86. By way of introduction, it was recalled that paragraph 6.8 was closely modelled on both article 8(1) of the Hamburg Rules and article 4.5(e) of the Hague-Visby Rules. The provision for breaking the overall limitation was of a type that required a personal fault by the carrier but did not contemplate the consequences of wilful misconduct or reckless behaviour by an agent or servant of the carrier. The need to demonstrate personal fault would require the demonstration of some form of management failure in a corporate carrier. The view was expressed that the absence of a provision on wilful misconduct or reckless behaviour by an agent or servant of the carrier was not acceptable. It was also observed that, as currently drafted, the draft instrument might encourage the consignee to sue directly the master of the ship or another

agent of the carrier, where that agent had acted recklessly, since the liability of the agent was not subject to limitation. In addition, it was stated that the system currently contemplated in paragraph 6.8 might raise serious difficulties in the context of door-to-door transport since it was typically inspired by maritime law but did not reflect the approach that prevailed in the law applicable to other modes of transport.

87. A question was raised about the interplay between subparagraph 6.6.4 and paragraph 6.8 and the possible redundancy of those two provisions. It was explained in response that paragraph 6.8 established the general test governing loss of the right to limit liability (i.e. the reckless or intentional behaviour of the carrier), while subparagraph 6.6.4 established as a specific rule that, in case of breach of an agreement that the cargo would be carried under deck, the carrier would be deemed to have acted recklessly. Subparagraph 6.6.4 was thus intended to avoid the shipper being under an obligation to prove the recklessness of the carrier in certain specific circumstances. It was widely agreed that the two provisions served different purposes and were not redundant.

88. With respect to the general policy on which loss of the right to limit liability should be based in the draft instrument, the view was expressed that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules. While examples were given of international instruments where such a policy had been implemented, it was pointed out that such instruments relied on a relatively high-amount limitation. It was also pointed out that in certain countries, unbreakable limits of liability would be regarded as unconstitutional, while in other countries they could be ignored by judges under a general doctrine of fundamental breach.

89. The Working Group was generally of the view that the substance of paragraph 6.8 was acceptable but it was felt by a large number of those delegations that took part in the discussion that further consideration should be given to the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. A note of caution was struck about relying on the concept of reckless behaviour, which might be interpreted differently in different jurisdictions and might thus encourage forum shopping. It was thus suggested that further consideration should be given to the possibility of using the notion of "intentional" rather than "reckless" behaviour. A further point raised was that the relation as between the breakability of the limits of liability and the joint and several liability created in subparagraph 6.3.4 should be further examined.

90. It was suggested that the words "personal act or omission" should be replaced by the words "act or omission", for reasons of consistency with the Athens Convention relating to the Carriage of Passenger and their Luggage by Sea. It was also suggested that this was a matter of drafting.

91. With respect to the words between square brackets, it was observed that the Working Group would need to

consider at a later stage whether the limit of liability should be breakable in cases of delay.

92. After discussion, the Working Group took note of the comments and suggestions made and decided to maintain the text of paragraph 6.8 in the draft instrument for continuation of the discussion at a later stage.

(1) *Paragraph 6.9*

93. The Working Group observed that this provision was of practical importance, recognizing that a claim for damages in a liability case necessarily started with proof that damage had occurred whilst the goods were in the custody of the carrier. Evidence showing that the cargo had been delivered in a damaged condition would thus be required otherwise the carrier enjoyed a presumption of proper delivery. The article provided that this evidence could be given by the consignee providing a notice of such loss or damage, or by joint inspection of the goods by the consignee and the carrier or performing party against whom the claim was made. Without this notice or joint inspection, there was a presumption that the carrier delivered the goods according to their description in the contract. A point was made that under the present formulation, the presumption would not operate if there was proof to the contrary, even if no notice had been given. It was further observed that the three-day period within which notice was to be provided was intended to assist all parties providing them with early notice of damage. It was also observed that a short notice period retained the greatest evidentiary value for the claimant, while exceeding the notice period would not time-bar the claim but would make its proof more difficult. In response, it was suggested that the view that a relatively short notice period added to the evidentiary strength was a matter of fact to be decided by a court or tribunal. A concern was also expressed that the words "unless notice of loss or damage" did not sufficiently make it clear that the failure to give notice would not constitute a time bar as it did in the pre-Hague Rules era. It was pointed out that the operation of the presumption depended on clear requirements as to the form and content of the notice of loss, damage or delay. It was stated that some refinement of the form and content of that notice should thus be considered. It was pointed out that the presumption was not a precondition to proof of damage during carriage, however it did provide an incentive to the consignee to give notice in a timely fashion.

94. A question was raised whether or not the notice should be in writing. Support was expressed for this, although it was noted that this could introduce an overly formalistic requirement and that a prudent cargo owner would send a written notice, otherwise it would be up to the cargo owner to prove that it had given notice or that there was constructive notice. It was suggested that, in principle and as a matter of good faith, unless given at the time of delivery, notice should be in writing. It was suggested that account should be taken of electronic communications in reworking this provision. In this respect, it was noted that draft article 2.3 provided that notices might be made using electronic communications. It was agreed that the secretariat should take account of the broad support for written notice when preparing the revised draft of this text.

95. As well, given the different time periods that applied in different modes of transport, it was considered appropriate that compliance with the time period applicable to the last leg of the transport should suffice in determining whether timely notice had been given. It was noted that the time within which notice should be given differed in various instruments ranging from three, six, and seven to as much as fifteen days. Deep concern was expressed regarding a possible three-day time limit on the basis that in some countries geographical realities would make the period impossible to meet. In response to that concern, it was noted that the consignee would negotiate the place of delivery in the contract and could take into account concerns such as geographical distance and notice periods. This point was also made in response to the suggestion that the length of the time period should depend upon whether or not the goods were containerized. It was noted in response that it was impossible for the parties to choose door-to-door transport with respect to certain cargo or certain destinations. It was also suggested that the use of the term "working days" could result in uncertainty due to differing national holidays and that it would be helpful to specify "working days at the place of delivery" or "consecutive days". Strong support was expressed for the view that a three-day period was too short. However, there was no consensus as to the time period that should apply and a suggestion was made that a reference to a "reasonable time" could be appropriate. It was decided that the reference to "three working" should be placed in square brackets, together with other possible alternatives, in the revised text.

96. It was suggested that the reference to "joint inspection" in subparagraph 6.9.1 was too imprecise and did not cover the situation where a carrier refused to participate in such an inspection. In addition, it was suggested that the phrase "concurrent inspection" or "*inspection contradictoire*" might be more appropriate in a civil law context. Whilst it was agreed that this point was essentially a drafting matter, it was agreed that the matter should be considered in a future draft.

97. In subparagraph 6.9.1 it was suggested that the phrase "or in connection" was redundant and that it should be made clear that it was the consignee that was required to give the notice under this provision. Another drafting suggestion was that consideration should be given to expanding the scope of subparagraph 6.9.1 to allow for notice to be given to the employee or agent of the carrier or performing party. The Working Group observed that the draft instrument had been drafted to avoid encroaching on agency law. It was suggested that it should be clarified whether the term "delivery" referred to actual delivery or should be given the meaning set out in draft article 4.1.3. It was said that the term "delivery" in draft article 6.9.1 was the contractual point of the delivery but it was questioned why the draft instrument departed from the approach taken in the Hague and Hague-Visby Rules which referred to removal of goods. In response, it was stated that the approach taken in the draft instrument was of paramount importance in order to avoid the situation where the consignee would dictate the date of removal, putting the matter beyond the control of the carrier. A question was raised as to how to cover the situation where goods were required



under law to be left with an authority upon whom the consignee could not rely to provide the required notice.

98. In respect of subparagraph 6.9.2, the issue was raised whether notice of damages for delay could be given prior to delivery to the consignee. In addition, the issue was raised whether exceeding the twenty-one day notice period would result in a loss of a right to claim damages for delay and how that provision interacted with provision on time for suit in draft article 14. In this regard it was noted that only notice had to be given within twenty-one days and that the consignee had a year from the date of delivery within which to institute judicial or arbitral proceedings under draft article 14. However, it was suggested that the twenty-one day period for giving notice to the person against whom liability was being asserted would be a difficult burden for the consignee.

99. It was clarified that the performing party under subparagraph 6.9.3 could only refer to the person who actually delivered the goods and could not include the warehouse unless it delivered the goods.

100. Support was expressed for subparagraph 6.9.4 on the basis that it contained notions of good faith and cooperation between the parties. It was however suggested that the reference to providing access to “all reasonable facilities for inspecting and tallying the goods” should also include reference to providing access to records and documents relevant to the carriage of the goods. This was said to be particularly important with respect to the transport of temperature-sensitive goods where temperature records might be only in electronic form, accessible only by the carrier, and could be quickly overwritten. There was strong support for this proposal.

(m) *Paragraph 6.10*

101. The Working Group heard that paragraph 6.10 addressed a well-recognized principle that needed to be considered in the context of the draft instrument as a whole. It was recognized that the provision was very important to avoid the possibility that merely taking a non-contractual claim could circumvent the entire draft instrument. It was further agreed that the implications of the provision would depend on the ultimate scope of the draft instrument and thus no definitive decision should be taken on the provision at this stage.

102. A suggestion to include a reference to delay in delivery in the provision was widely supported.

103. A concern was raised that paragraph 6.10 did not appear to cover non-contractual claims brought against persons other than the carrier, such as handlers or stevedores. This question was felt to require further clarification. A question was raised as to whether other persons mentioned in subparagraph 6.3.3 were also intended to be covered by paragraph 6.10 and thus enjoy the same benefits, defences and limits. In response, it was noted that the purpose of paragraph 6.10 was to channel all claims that could be brought under the draft instrument into the current provision and that, as these other parties were not subject to suit under the draft instrument, there would be no point to

include such parties within the scope of the provision. These other persons were protected by draft article 6.3.3. It was further pointed out that “any person other than the carrier” were those parties that did not fall within the definition of the performing party under draft article 1.17, and therefore had no responsibility under the draft instrument, but according to draft article 6.3.3, such parties could benefit from the defences and limitations in liability available to the carrier.

104. As a matter of drafting, it was pointed out that the title of the provision needed to be standardized in all language versions.

105. A question was also raised as to whether paragraph 6.10 would be better placed in draft article 13 on rights of suit. In response it was noted that whilst draft article 13 defined the individual persons who were able to bring a suit, by way of an allocation of the right to sue, draft article 6 on liability of the carrier provided the substantive basis of that suit. For that reason it was suggested that while the structure of these provisions might change in the future, the current placement of paragraph 6.10 within draft article 6 was appropriate.

**2. Draft article 9 (Freight)**

106. The Working Group resumed its deliberations regarding draft article 9. Due to the absence of sufficient time, the Working Group had only discussed paragraphs 9.1 to 9.3 at its ninth session (A/CN.9/510, para. 190). The text of draft article 9 as considered by the Working Group was reproduced in the report of the Working Group on the work of its ninth session (A/CN.9/510, para. 171).

107. The general view was expressed that it was necessary to include provisions relating to freight in the draft instrument. It was pointed out that practices in that respect varied widely between different trades and that the payment of freight was a commercial matter that should be left to the parties.

(a) *Paragraph 9.4*

108. The Working Group heard that paragraph 9.4 consisted of declaratory provisions intended to provide clarity and to put the consignee and others, particularly those outside of the contract of carriage, on notice in advising what the notations “freight prepaid” or “freight collect” meant when found on the bill of lading. Subparagraph 9.4 (a) advised that if “freight prepaid” was mentioned on the transport document, neither the holder nor the consignee was liable for payment of the freight. Further, pursuant to subparagraph 9.4 (b), if “freight collect” appeared on the transport document, the consignee might be held liable for payment of the freight. General support was expressed for the aim of paragraph 9.4 to ensure that frequently-used contractual wording was understood. It was also considered that paragraph 9.4 could settle uncertainty in international maritime law in a manner consistent with actual practice.

109. However, it was suggested that paragraph 9.4 was so vague as to be of little assistance in the unification of maritime law, and that there were certain reservations with

respect to whether a provision in the draft instrument on freight was necessary.

110. The suggestion was made that the declaration in subparagraph 9.4 (a) was too radical in freeing the holder and consignee of any responsibility for the payment of freight, and instead that it would be better to create a presumption of the absence of a debt for freight. However, the alternative view was expressed that subparagraph 9.4 (a) should not create a presumption that the freight had been paid.

111. It was pointed out that subparagraph 9.4 (b) was particularly problematic, and given the vagueness of the words "may be liable", it was of little utility. It was also said that draft articles 12.2.2 and 12.2.4 were intimately linked with subparagraph 9.4 (b), and that consideration of these provisions should be undertaken at the same time. It was suggested that if the consignee took any responsibility for the delivery of the goods, it should also be responsible for the freight. At the same time, it was noted that subparagraph 9.4 (b) could serve to provide information or a warning that freight was still payable. However, it was suggested that the payment of freight should be a condition for the consignee to obtain delivery of the goods, rather than an obligation. It was further noted that subparagraph 9.4 (b) should focus on the payment of freight in fact, rather than on who should bear the obligation for the unpaid freight.

112. One proposal that was made to remedy the perceived problem in subparagraph 9.4 (b) was to replace the words "such a statement puts the consignee on notice that it may be liable for the payment of the freight" with the words, "the payment of freight is a condition for the exercise by the consignee of the right to obtain delivery of the goods."

113. An alternative suggestion for subparagraph 9.4 (b) was as follows: "If the contract particulars in a transport document or an electronic record contain the statement 'freight collect', or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight."

114. The Working Group agreed that the text in paragraph 9.4 should be retained, noting that subparagraph (b) should be revisited in light of the comments above, and the texts proposed could be presented as alternatives in future drafts of the instrument. It was further noted that the content of the text would need to be further discussed together with draft article 12.2.2 and 12.2.4.

#### (b) Paragraph 9.5

115. Paragraph 9.5 was described as one of the essential provisions of the draft instrument. It was explained that the provision was intended to elaborate on the traditional principles applicable in maritime transport that goods should pay for the freight and that the carrier should be protected against the insolvency of its debtors up to the value of the transported goods. The view was also expressed, however, that attempting to legislate by way of uniform law in the field of the right of retention of the carrier might constitute an overly ambitious task. In the context of its prelim-

inary discussion of the issue, the Working Group was invited to consider the following elements: (a) whether a provision regarding the right of retention was needed; (b) the conditions to be met by the carrier to exercise such a right of retention; (c) the nature of the debts of the consignee that could justify retention of the goods; (d) whether paragraph 9.5 should be formulated as a mandatory provision or be made subject to contrary agreement; and (e) the legal regime governing the right of the carrier to dispose of the goods.

116. Regarding the need for a provision along the lines of paragraph 9.5, doubts were expressed. It was pointed out that, in certain regions, the only right of retention that was known in maritime transport was the right of retention of the ship that could be exercised by naval works to ensure that a shipowner would pay for the costs associated with maintenance or repair of the vessel. It was also observed that no provision along the lines of paragraph 9.5 was found in existing transport conventions. The view was expressed that the provision should be restricted to payments for which the consignee was liable. If the provision would include also payments for which the shipper was liable, that could contradict certain Incoterm practices under which the freight was included in the price for the goods. The prevailing view was that efforts should be pursued toward establishing a uniform regime for the right of retention. It was generally agreed that considerable changes would need to be introduced in paragraph 9.5.

117. A widely shared view was that, to the extent a provision along the lines of paragraph 9.5 should be retained, it should not be made conditional upon the consignee being liable for payment under applicable national law. In that connection, it was pointed out that the recognition of a right of retention might be appropriate in certain cases where the consignee was not liable for the freight, e.g. where the statement "freight collect" was contained in the transport document. It was also pointed out that establishing a right of retention might be appropriate not only where the consignee was the debtor but also in certain cases where another person, for example the shipper or the holder of the bill of lading, was indebted to the carrier. Furthermore, it was explained that the purpose for which a right of retention was established might be defeated if, prior to exercising that right, the carrier had to prove that the consignee was liable under domestic law. A question was raised as to whether paragraph 9.5 should create a right of retention or whether it should merely establish a security to complement a right of retention that might exist outside the draft instrument. In the latter case, the need would arise to determine the national law on the basis of which the existence of the right of retention should be assessed. It was emphasized that reference to applicable national law might raise difficult question of private international law. It was pointed out that various approaches might be taken by existing laws. For example, some laws were based on the rule that the carrier should be protected against insolvency of the consignee. Other laws might be based on a distinction whether a negotiable transport document had been issued, in which case the interest of the third party holder of the negotiable document should prevail over the interest of the carrier. It was generally felt that more discussion would be needed on that issue.

118. The view was expressed that establishing a right of retention might be regarded as affecting the balance of international transport law in favour of the carrier and that balance would need to be closely examined. Concern was expressed about establishing in the draft instrument a unilateral right of the carrier to retain goods on the basis of an alleged claim in the absence of any judicial intervention. In response, it was pointed out that the essential purpose of paragraph 9.5 was to establish at least the right of the carrier to obtain adequate security until payment of the freight had been made. In that connection, it was suggested that the words “adequate security” might need to be replaced by the words “adequate security acceptable to the carrier”. It was suggested that future consideration should be given to the possibility of ensuring that the interests of the carrier would receive adequate protection without affecting the position of any consignee acting in good faith.

119. In the context of that discussion, the view was expressed that paragraph 9.5 should make it clear that the right of retention would not necessarily imply that the goods would be retained on board the ship. Another view was that the right of retention of the goods should be expressly limited to those goods for which freight had not been paid, unless the goods retained could not be identified or separated from other goods.

120. With respect to the individual costs listed in subparagraphs 9.5 (a) (i) to (iii) as grounds for exercise by the carrier of a right of retention of the goods, the view was expressed that the list was too extensive. Doubts were expressed about the exact meaning and limit of “other reimbursable costs” under subparagraph 9.5 (a) (i). The view was expressed that it might be essential to include a reference, not only to freight but also to associated costs, for example to deal with cases where damage had been caused by the transported goods. While it was acknowledged that those claims were not liquidated at the time when a right of retention would be exercised, it was pointed out that at least a security should be put up for those claims. However, strong support was expressed in favour of limiting the list of costs to freight, demurrage, and possibly damages for detention of the goods. A suggestion was made that subparagraph 9.5 (a) (ii) should be deleted since it was insufficiently linked with the issue of freight. As to the reference to general average in subparagraph 9.5 (a) (iii), it was stated that the obligation of payment could only be justified if a corresponding clause had been inserted in the contract of carriage or the transport document. It was also suggested that the issue of general average should not be linked with the issue of freight due by the consignee since the owner of the goods at the time of the general average might be different from the consignee. More generally, it was stated that, while payment of

the freight might justify retention of the goods, the reimbursement of other costs should be left for commercial negotiation between the parties or for discussion in the context of judicial or arbitral proceedings in case of conflict between the carrier and the consignee or the shipper.

121. Regarding the question whether paragraph 9.5 should be formulated as a mandatory rule or not, a widely shared view was that the rule should be made subject to party autonomy. It was widely felt that mandatory rules would be unnecessarily rigid in respect of the right of retention of the goods, for which the carrier should be free to negotiate with its debtors.

122. With respect to the entitlement of the carrier to sell the goods under subparagraph 9.5 (b), various views were expressed. One view was that the matter should not be dealt with through the establishment of a broad entitlement but should somehow involve judicial or other dispute settlement mechanisms to ensure that the right of retention was exercised in good faith and that retention of the goods had legal grounds. Another view was that, as a matter of drafting, the words “the consignee” at the end of subparagraph 9.5 (b) should be replaced by the words “the person entitled to the goods” to ensure consistency with the final sentence of draft article 10.4.1 (c). Yet another view, was that a cross-reference should be made in subparagraph 9.5 (b) to article 10.4. With respect to the law applicable to the sale of the goods under subparagraph 9.5 (b), the view was expressed that the draft instrument should contain an indication that it should be the *lex fori*, i.e., the law of applicable at the location where the goods were retained. Regarding the right of the carrier to “satisfy the amounts payable to it”, it was pointed out that such a rule went beyond traditional rules governing the right of retention in a number of countries, where the holder of such a right would merely be given priority over other creditors.

123. After discussion, the Working Group decided that paragraph 9.5 should be retained in the draft instrument for continuation of the discussion at a later stage. Due to the absence of sufficient time, the Working Group deferred its consideration of draft article 4 (see above, para. 27) and the remaining provisions of the draft instrument until its next session.

124. At the close of the session, the Working Group resumed its consultations with representatives from the transport industry, and with observers from various organizations involved in different modes of transport (for earlier discussion, see above, para. 28). Comments from a number of industry representatives are reproduced for information purposes as annexes I and II to this report, in the form in which they were received by the secretariat.

## ANNEX I

### Comments from the representative of the International Chamber of Shipping and the Baltic and International Maritime Council on the scope of the draft instrument

The International Chamber of Shipping and BIMCO represent all sectors of the shipping industry. ICS and BIMCO represent shipowners that are trading tackle-to-tackle, port-to-port and door-to-door as well as every possible combination of

those periods, e.g. from the port at one end to the door at the other. As such, ICS and BIMCO support the development of an international convention based on the draft prepared by CMI. The instrument as drafted by CMI is a maritime

instrument which has the flexibility to apply to all of the above scenarios.

When CMI drafted the instrument it set out to strengthen the unimodal maritime rules—not just the liability regime—but also other aspects which are not currently regulated. However, it was soon recognized that the realities of containerized transport of goods could not be ignored. There would be little added value in developing another unimodal regime. It would be remiss to ignore door-to-door transport. Provided that carriage by sea is contemplated at some stage, the provisions of the instrument should apply to the full scope of the carriage.

The shipping industry does not want to impinge on the regimes applicable to other modes of transport. The instrument is drafted on the basis of a network system that aims at respect-

ing other unimodal regimes and preserving them and we would fully support strengthening the instrument in this direction by appropriate additions to overcome possible conflicts of laws.

The instrument should not really affect the other sectors of the industry, i.e. road, rail, air. They have their own regimes that will continue to be applicable to them. Of course the possibility of conflicts needs to be avoided but that should not be too difficult. The instrument should govern the relationship between the shipper and the maritime carrier or MTO. It should not govern the relationship between the shipper and, e.g. the CMR carrier.

In sum, ICS and BIMCO support the development of an international “maritime plus” convention based on the draft prepared by CMI.

## ANNEX II

### Comments from the representative of the International Group of Protection & Indemnity Clubs

Thank you for the opportunity to indicate our views on the scope of the draft instrument. As some of you may know, the thirteen P&I Clubs members of the International Group are mutual organizations which insure the third-party liabilities of approximately 92 per cent of the world’s ocean-going tonnage.

The International Group has taken an active role in the CMI’s deliberations, which have led to the draft instrument that delegates are now considering. The Group has submitted two papers to the CMI, which are available to delegates. We believe that the instrument, if it is to meet its intended purpose of promoting uniformity and if it is to attract widespread international support, must provide a regime suitable for both developing modes of transport such as door-to-door carriage that is increasingly common in the context of the container trade and traditional tackle-to-tackle carriage, that remains prevalent in the bulk and break-bulk trades and which continues to predominate in tonnage terms. In other words if the instrument is to be of use to the industry, it must be flexible and cater for all modes of carriage involving a sea-leg.

We recognize that there will inevitably be a degree of conflict between existing unimodal regimes that have been shaped to meet the particular risks and potential liabilities associated with carriage by road, rail and air, just as the sea-carriage regimes have been formulated to meet the particular risks associated with carriage by sea. However, we believe that these potential problems are capable of resolution albeit that it may require an innovative approach and we believe that the CMI draft goes a long way towards achieving this. It does so by adopting a network system approach in the context of door-to-door carriage, an approach that respects the unimodal regimes and with which we agree.

The prime objective of this UNCITRAL initiative is, as we have said, to bring uniformity to an area of the law that is presently subject to a multiplicity of regimes in different jurisdictions. However, it should not be forgotten that international conventions are intended to ensure an acceptable and fair balance of rights and liabilities between competing interests, particularly if there is perceived inequality in their bargaining positions. In the present case the competing interests are of course carrier and cargo. In our view their respective bargaining positions have changed considerably over the

last 80 years in favour of cargo interests. As I recall, the distinguished delegate from France commented in New York that in a number of instances the balance of power now lay with shippers.

We have already pointed out that if the obligation to exercise due diligence is extended to the period throughout the voyage and the navigational fault defence is excluded, it will substantially affect the allocation of risk between carrier and cargo interests and this is likely to have a very real effect on the economics of both door-to-door and tackle-to-tackle carriage, imposing a greater financial burden on the carrier. It was for this reason that we supported the distinguished delegate from the United Kingdom’s suggestion that at the very least loss or damage due to pilot error be retained in the catalogue of exceptions.

This alteration in the allocation of risk and the associated costs of the transport adventure to the carrier, is likely to be all the greater if as has been suggested by a number of delegations, although not yet of course decided:

(1) Firstly, the onus is placed on the carrier to prove the extent of loss or damage for which he is not liable, when the loss results in part from a cause for which he is liable and in part from a cause for which he is not liable. That is alternative 1 of draft Article 6.1.4.

(2) Secondly, the carrier is made liable for delay generally, rather than any such liability being restricted to instances of express agreement between carrier and cargo.

(3) Thirdly, the loss of the right to limit is not restricted to the personal act or omission of the carrier but expanded to embrace the acts and omissions for those for whom he may be vicariously liable.

It is for these reasons that we suggested that those articles dealing with matters affecting the carrier and shipper’s respective rights and liabilities be considered as a whole, rather than as at present in isolation. Only then we believe will it be possible to make a fair assessment of whether or not a fair balance has been struck between them.

**B. Working paper submitted to the Working Group on Transport Law  
at its tenth session: Preliminary draft instrument on the carriage  
of goods [by sea]: Proposal by Canada**

**(A/CN.9/WG.III/WP.23) [Original: English]**

**NOTE BY THE SECRETARIAT**

In preparation for the tenth session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the Government of Canada, on 20 August 2002, submitted the text of a proposal concerning the scope and structure of the draft instrument for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the secretariat.

**ANNEX**

**Proposal by Canada**

1. Canada welcomes this new initiative by UNCITRAL to promote the cause of harmonization of international law in a field that can be best described as a legal medley. Our gratitude also goes to the Comité Maritime International (CMI) for its immense contribution to this cause, not only in connection with the present subject, but also in the many other areas of international maritime law.

2. We also welcome the results of the 9th session of the Working Group on Transport Law that met in April 2002 in New York. As a first meeting on the subject, the debate was preliminary, focusing largely on conceptual issues, in particular, the scope of application of the draft instrument. As noted in the report of the Working Group on this meeting (A/CN.9/510), there was a general consensus that the purpose of its work was to end the multiplicity of the regimes of liability applying to the carriage of goods by sea and also to adjust maritime transport law to better meet the needs and realities of international maritime transport practices. The Working Group placed considerable emphasis on the "maritime aspects" of this project and Canada wholeheartedly agrees with that approach.

3. At the same time, the Working Group recognized that there is considerable interest and need to examine multimodal issues and that it was therefore appropriate to study both a strictly maritime regime, on a port-to-port principle, and a regime extended also to land transport, a "multimodal regime", on a door-to-door principle, without taking a decision at this stage on the scope of the future instrument.

4. Both approaches received support as well as objections. Canada indicated its support for the development of a port-to-port instrument not because we do not recognize the reality of the widespread practice of door-to-door transport, but because we strongly believe that:

*a)* the initial objective of CMI to focus first on restoring uniformity of international law in the marine mode was the right one, and that the introduction of harmonized rules in areas which have not yet been regulated internationally (e.g. electronic documents) was of great importance;

*b)* that this objective should not be delayed or jeopardized by extending the scope of the work of the Working Group to other modes of transport; and

*c)* that a new instrument developed strictly for the marine mode would have better prospects of being widely adopted, than if it was an instrument designed to regulate also other modes,

hitherto subject to national law in most countries, save for those mainly European countries where international conventions for other modes are currently in effect.

5. It was evident that those who supported the extension of work to include rules for other modes, on a door-to-door principle, were equally convinced that that is the right approach for the Working Group to pursue. They argued that the transport concepts of today and tomorrow especially in the field of container transport require a fresh approach, which could give added value to the future instrument, although it would be maritime in its genesis.

6. Thus, it seems to us that no useful purpose would be served at this juncture by restricting the scope of work in the Working Group to only one approach, to the exclusion of the other. If this premise is accepted, then the Working Group must look for ways of bridging the gap between the port-to-port and door-to-door approaches. Clearly, this is a policy dilemma that should be given sufficient time for discussion at the September meeting, perhaps early on in the session before the Working Group resumes consideration of the draft articles, with the view of reaching a consensus on the future direction of work in the Working Group.

7. The following three (3) options could, in our view, be examined as the basis of a possible consensus:

*Option 1*

8. Continue to work on the existing draft instrument, including Article 4.2.1, but add a *reservation* that would enable contracting States to decide whether or not to implement this Article and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea.

*Commentary*

*a)* This option would advance the objective of restoring uniformity of law in the marine mode, and would establish it in other modes, for those States that wish to pursue that goal. At the same time, States that do not share that goal would still be part of the new marine regime, and possibly in the future could revoke their reservation and apply the instrument fully.

*b)* By declaring their reservation at the time of ratification, there could be no confusion as to which contracting States apply all provisions of the instrument and which States reserved on the application of the instrument to inland carriage under Article 4.2.1.

### Option 2

9. Continue to work on the existing draft instrument, including Article 4.2.1 but insert “national law” after “international convention” (in paragraph 4.2.1.b).

#### Commentary

a) Again, this option would provide an important signal to those States that are interested in the development of a new regime for the marine mode, leaving the rules for other modes to national law. It is recognized that under this option it would be more difficult to establish, at any point in time, what law applies in any contracting State—a mandatory international convention for inland carriage or national law—since there would be no record of any declaration to that effect.

b) In both Option 1 and 2, Article 4.2.1. could also be subject to further elaboration regarding the liability for non-localized damages.

### Option 3

10. Revise the existing draft instrument in a manner that would establish:

*Chapter 1* – definitions and all provisions common to Chapters 2, 3 and 4;

*Chapter 2* – provisions governing carriage of goods by sea (i.e. port to-port);

*Chapter 3* – provisions governing carriage of goods by sea and by other modes before or after carriage by sea (i.e. door-to-door);

There seem to be two basic models for this purpose:

a) uniform system—a single regime that applies equally to all modes of transport involved in the carriage of goods from door-to-door;

b) network system—same as in (a) above, but with the proviso that the uniform system is displaced where an international convention is applicable to the inland leg of a contract for carriage of goods by sea, and it is clear that the loss or damage occurred solely in the course of the inland carriage.

*Chapter 4* – final clauses and reservations, including a provision for express reservations for:

- *Chapter 2* for those contracting States that wish to implement the new instrument for multimodal carriage of goods (door-to-door regime); or
- *Chapter 3* for those States that wish to implement the new instrument only for the carriage of goods by sea (port-to-port regime).

### Commentary

*This is a more robust option designed to:*

a) make a major step in harmonization of international law for carriage of goods by accommodating both the port-to-port and door-to-door approaches in Chapter 2 and Chapter 3, respectively. Effectively, there would be two separate conventions in a single instrument, sharing those provisions that would be common to both Chapters. Under this option, it would be abundantly clear which contracting States adhere to the marine regime in Chapter 2 and which adhere to the multimodal regime in Chapter 3.

b) improve the prospects of long-term uniformity since States adhering only to Chapter 2 could join Chapter 3 by simply revoking their reservation on the latter. This may be a key difference between Option 3 and Option 1 where revoking that reservation may be complicated by different policy considerations, possibly requiring a decision whether or not to adopt an international convention for inland carriage to support Article 4.2.1. Moreover, although these conventions are rather regional in nature, and limited in number, there is no way of predicting if other regional conventions will be adopted in the future. They are not likely to be uniform and thus importing them into this instrument by virtue of Article 4.2.1 may not advance the cause of international uniformity for carriage of goods.

11. If it were decided to adopt a “network system” in Chapter 3, then presumably the marine regime in that Chapter could be identical to Chapter 2, thus achieving the widest possible uniformity of law in the marine mode. Under that scenario, it would be possible to simplify *Option 3* as follows:

*Chapter 1* – definitions and all provisions common to Chapters 2, 3 and 4;

*Chapter 2* – provisions governing carriage of goods by sea (i.e. port to-port);

*Chapter 3* – provisions governing carriage of goods by other modes before or after carriage by sea (i.e. door-to-door);

*Chapter 4* – final clauses and reservations, including a provision for express reservation for Chapter 3 for those contracting states that wish to implement the new instrument only for the carriage of goods by sea (i.e. only for port-to-port).

### Summary

12. This paper raises issues that go beyond the scope of a conceptual paper, which is the sole purpose of this submission to the Working Group. Nevertheless, we hope that it will assist in the consideration of the various policy options that the Working Group is facing and that it will facilitate the debate, at this or the next session in the spring of 2003, leading to a consensus along a path that has the widest possible support and that can truly achieve the overriding objective of this initiative—to end the multiplicity of the regimes of liability applying to the carriage of goods by sea.

**C. Report of Working Group on Transport Law on the work of its  
eleventh session (New York, 24 March-4 April 2003)**

**(A/CN.9/526) [Original: English]**

**CONTENTS**

	<i>Paragraphs</i>
I. Introduction	1-22
II. Deliberations and decisions	23
A. Consideration of draft articles	24-218
1. Draft article 8 (Transport documents and electronic records)	24-61
(a) Paragraph 8.1.	25-26
(b) Paragraph 8.2.	27-34
(i) Subparagraph 8.2.1	27-29
(ii) Subparagraph 8.2.2	30-31
(iii) Subparagraph 8.2.3	32
(iv) Subparagraph 8.2.4	33-34
(c) Paragraph 8.3.	35-52
(i) Subparagraph 8.3.1	35-41
(ii) Subparagraph 8.3.2	42-43
(iii) Subparagraph 8.3.3	44-48
(iv) Subparagraph 8.3.4	49-52
(d) Paragraph 8.4.	53-61
(i) Subparagraph 8.4.1	53-55
(ii) Subparagraph 8.4.2	56-60
(iii) Subparagraph 8.4.3	61
2. Draft article 10 (Delivery to the consignee)	62-99
(a) General remarks.	63-64
(b) Paragraph 10.1.	65-72
(c) Paragraph 10.2.	73
(d) Paragraph 10.3.	74-90
(i) Subparagraph 10.3.1	74-77
(ii) Subparagraph 10.3.2	78-90
(e) Paragraph 10.4.	91-99
3. Draft article 11 (Right of control)	100-126
(a) General remarks.	101
(b) Paragraph 11.1.	102-104
(c) Paragraph 11.2.	105-113
(i) Subparagraph 11.2 (a)	105-108
(ii) Subparagraph 11.2 (b)	109-111
(iii) Subparagraph 11.2 (c)	112
(iv) Subparagraph 11.2 (d)	113
(d) Paragraph 11.3.	114-119
(i) Subparagraph 11.3 (a)	114-117
(ii) Subparagraph 11.3 (b)	118
(iii) Subparagraph 11.3 (c)	119
(e) Paragraph 11.4.	120
(f) Paragraph 11.5.	121-123
(g) Paragraph 11.6.	124-126
4. Draft article 12 (Transfer of rights)	127-148
(a) General remarks.	128-129
(b) Paragraph 12.1.	130-136
(i) Subparagraph 12.1.1	130-133
(ii) Subparagraph 12.1.2	134
(c) Paragraph 12.2.	135-141
(i) Subparagraph 12.2.1	135-136
(ii) Subparagraph 12.2.2	137-140
(iii) Subparagraph 12.2.3	141
(d) Paragraph 12.3.	142-145
(e) Paragraph 12.4.	146-148

	<i>Paragraphs</i>
5. Draft article 13 (Rights of suit) . . . . .	149-162
(a) Paragraph 13.1 . . . . .	150-159
(b) Paragraph 13.2 . . . . .	160-161
(c) Paragraph 13.3 . . . . .	162
6. Draft article 14 (Time for suit) . . . . .	163-182
(a) General remarks . . . . .	164
(b) Paragraph 14.1 . . . . .	165-169
(c) Paragraph 14.2 . . . . .	170-174
(d) Paragraph 14.3 . . . . .	175
(e) Paragraph 14.4 . . . . .	176-178
(f) Paragraph 14.5 . . . . .	179-182
7. Draft article 15 (General average) . . . . .	183-190
(a) General remarks . . . . .	184-185
(b) Paragraph 15.1 . . . . .	186
(c) Paragraph 15.2 . . . . .	187-190
8. Draft article 16 (Other conventions) . . . . .	191-202
(a) General remarks . . . . .	192-195
(b) Paragraph 16.1 . . . . .	196-197
(c) Paragraph 16.2 . . . . .	198-199
(d) Paragraph 16.3 . . . . .	200-202
9. Draft article 17 (Limits of contractual freedom) . . . . .	203-218
(a) Title . . . . .	204
(b) Paragraph 17.1 . . . . .	205-215
(i) Subparagraph 17.1 (a) . . . . .	205-213
(ii) Subparagraph 17.1 (b) . . . . .	214
(iii) Subparagraph 17.1 (c) . . . . .	215
(c) Paragraph 17.2 . . . . .	216-218
(i) Subparagraph 17.2 (a) . . . . .	216-217
(ii) Subparagraph 17.2 (b) . . . . .	218
B. Scope of application of the draft instrument . . . . .	219-267
1. General discussion . . . . .	219-239
2. Consideration of specific issues related to the scope of the draft instrument . . . . .	240-267
(a) Type of carriage covered by the draft instrument . . . . .	241-244
(b) Relationship of the draft instrument with other transport conventions and with domestic legislation . . . . .	245-250
(c) Treatment of performing parties . . . . .	251-256
(d) Limits of liability . . . . .	257-263
(e) Treatment of non-localized damages . . . . .	264-267

## I. INTRODUCTION

1. At its twenty-ninth session, in 1996,<sup>1</sup> the Commission considered a proposal to include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules where no such rules existed and with a view to achieving greater uniformity of laws.<sup>2</sup>

2. At that session, the Commission had been informed that existing national laws and international conventions had left significant gaps regarding various issues. These

gaps constituted an obstacle to the free flow of goods and increased the cost of transactions. The growing use of electronic means of communication in the carriage of goods further aggravated the consequences of those fragmentary and disparate laws and also created the need for uniform provisions addressing the issues particular to the use of new technologies.<sup>3</sup>

3. At that session, the Commission also decided that the secretariat should gather information, ideas and opinions as to the problems that arose in practice and possible solutions to those problems, so as to be able to present at a later stage a report to the Commission. It was agreed that such information-gathering should be broadly based and should include, in addition to Governments, the interna-

<sup>1</sup>*Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, paras. 210-215.

<sup>2</sup>*Ibid.*, para. 210.

<sup>3</sup>*Ibid.*, para. 211.



tional organizations representing the commercial sectors involved in the carriage of goods by sea, such as the International Maritime Committee (CMI), the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and the International Association of Ports and Harbors.<sup>4</sup>

4. At its thirty-first session, in 1998, the Commission heard a statement on behalf of CMI to the effect that it welcomed the invitation to cooperate with the secretariat in soliciting views of the sectors involved in the international carriage of goods and in preparing an analysis of that information.<sup>5</sup>

5. At the thirty-second session of the Commission, in 1999, it was reported on behalf of CMI that a CMI working group had been instructed to prepare a study on a broad range of issues in international transport law with the aim of identifying the areas where unification or harmonization was needed by the industries involved.<sup>6</sup>

6. At that session, it was also reported that the CMI working group had sent a questionnaire to all CMI member organizations covering a large number of legal systems. The intention of CMI was, once the replies to the questionnaire had been received, to create an international subcommittee to analyse the data and find a basis for further work towards harmonizing the law in the area of international transport of goods. The Commission had been assured that CMI would provide it with assistance in preparing a universally acceptable harmonizing instrument.<sup>7</sup>

7. At its thirty-third session, in 2000,<sup>8</sup> the Commission had before it a report of the Secretary-General on possible future work in transport law (A/CN.9/476), which described the progress of the work carried out by CMI in cooperation with the secretariat. It also heard an oral report on behalf of CMI. In cooperation with the secretariat, the CMI working group had launched an investigation based on a questionnaire covering different legal systems addressed to the CMI member organizations. It was also noted that, at the same time, a number of round-table meetings had been held in order to discuss features of the future work with international organizations representing various industries. Those meetings showed the continued support for and interest of the industry in the project.

8. In conjunction with the thirty-third session of the Commission in 2000, a transport law colloquium, organized jointly by the secretariat and CMI, was held in New York on 6 July 2000. The purpose of the colloquium was to gather ideas and expert opinions on problems that arose in the international carriage of goods, in particular the carriage of goods by sea, identifying issues in transport law on which the Commission might wish to consider undertaking future work and, to the extent possible, suggesting

possible solutions. On the occasion of that colloquium, a majority of speakers acknowledged that existing national laws and international conventions left significant gaps regarding issues such as the functioning of a bill of lading and a sea waybill, the relationship of those transport documents to the rights and obligations between the seller and the buyer of the goods and the legal position of the entities that provide financing to a party to a contract of carriage. There was general consensus that, with the changes wrought by the development of multimodalism and the use of electronic commerce, the transport law regime was in need of reform to regulate all transport contracts, whether applying to one or more modes of transport and whether the contract was made electronically or in writing.

9. At its thirty-fourth session, in 2001,<sup>9</sup> the Commission had before it a report of the Secretary-General (A/CN.9/497) that had been prepared pursuant to the request by the Commission. That report summarized the considerations and suggestions that had resulted so far from the discussions in the CMI International Subcommittee. The purpose of the report was to enable the Commission to assess the thrust and scope of possible solutions and decide how it wished to proceed. The issues described in the report that would have to be dealt with in the future instrument included the following: the scope of application of the instrument, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, the obligations of the shipper, transport documents, freight, delivery to the consignee, right of control of parties interested in the cargo during carriage, transfer of rights in goods, the party that had the right to bring an action against the carrier and time bar for actions against the carrier.

10. The report suggested that consultations conducted by the secretariat pursuant to the mandate it received from the Commission in 1996 indicated that work could usefully commence towards an international instrument, possibly having the nature of an international treaty, that would modernize the law of carriage, take into account the latest developments in technology, including electronic commerce, and eliminate legal difficulties in the international transport of goods by sea that were identified by the Commission.

11. At its thirty-fourth session, the Commission decided to entrust the project to the Working Group on Transport Law.<sup>10</sup>

12. As to the scope of the work, the Commission, after some discussion, decided that the working document to be presented to the Working Group should include issues of liability. The Commission also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate. It was stated that solutions embraced in the United Nations Convention on the Liability of Transport Terminals in International Trade (Vienna, 1991) should also be carefully

<sup>4</sup>Ibid., para. 215.

<sup>5</sup>Ibid., *Fifty-third Session, Supplement No. 17 (A/53/17)*, para. 264.

<sup>6</sup>Ibid., *Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 413.

<sup>7</sup>Ibid., paras. 414-415.

<sup>8</sup>Ibid., *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 416-427.

<sup>9</sup>Ibid., *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 319-345.

<sup>10</sup>Ibid., para. 345.

taken into account. It was also agreed that the work would be carried out in close cooperation with interested inter-governmental organizations involved in work on transport law, such as the United Nations Conference on Trade and Development (UNCTAD), the Economic Commission for Europe (ECE) and other regional commissions of the United Nations, and the Organization of American States (OAS), as well as international non-governmental organizations.<sup>11</sup>

13. At its thirty-fifth session, in 2002,<sup>12</sup> the Commission had before it the report of the ninth session of the Working Group on Transport Law held in New York from 15 to 26 April 2002 at which the consideration of this project commenced (A/CN.9/510). At that session, the Working Group undertook a preliminary review of the provisions of the draft instrument on transport law contained in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21). The Working Group also had before it the comments prepared by ECE and UNCTAD, which were reproduced in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21/Add.1). Due to the absence of sufficient time, the Working Group did not complete its consideration of the draft instrument, which was left for finalization at its tenth session. The secretariat was requested to prepare revised provisions of the draft instrument based on the deliberations and decisions of the Working Group (A/CN.9/510, para. 21). The Commission expressed appreciation for the work that had already been accomplished by the Working Group.

14. The Commission noted that the Working Group, conscious of the mandate given to it by the Commission (A/56/17, para. 345) (and in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations), had adopted the view that it would be desirable to include within its discussions also door-to-door operations and to deal with these operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments (for considerations of the Working Group on the issue of the scope of the draft instrument, see A/CN.9/510, paras. 26-32). It was also noted that the Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations. Consequently, the Working Group had requested the Commission to approve that approach (A/CN.9/510, para. 32).

15. With respect to the scope of the draft instrument, strong support was expressed by a number of delegations in favour of the working assumption that the scope of the draft instrument should extend to door-to-door transport operations. It was pointed out that harmonizing the legal regime governing door-to-door transport was a practical necessity, in view of the large and growing number of prac-

tical situations where transport (in particular transport of containerized goods) was operated under door-to-door contracts. While no objection was raised against such an extended scope of the draft instrument, it was generally agreed that, for continuation of its deliberations, the Working Group should seek participation from international organizations such as the International Road Transport Union (IRU), the Intergovernmental Organisation for International Carriage by Rail (OTIF), and other international organizations involved in land transportation. The Working Group was invited to consider the dangers of extending the rules governing maritime transport to land transportation, and to take into account, in developing the draft instrument, the specific needs of land carriage. The Commission also invited member and observer States to include land transport experts in the delegations that participated in the deliberations of the Working Group. The Commission further invited Working Groups III (Transport Law) and IV (Electronic Commerce) to coordinate their work in respect of dematerialized transport documentation. While it was generally agreed that the draft instrument should provide appropriate mechanisms to avoid possible conflicts between the draft instrument and other multilateral instruments (in particular those instruments that contained mandatory rules applicable to land transport), the view was expressed that avoiding such conflicts would not be sufficient to guarantee the broad acceptability of the draft instrument unless the substantive provisions of the draft instrument established acceptable rules for both maritime and land transport. The Working Group was invited to explore the possibility of the draft instrument providing separate yet interoperable sets of rules (some of which might be optional in nature) for maritime and road transport. After discussion, the Commission approved the working assumption that the draft instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.<sup>13</sup>

16. At its tenth session (Vienna, 16-20 September 2002), the Working Group continued to review the provisions of the draft instrument contained in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21). The report of that session is contained in document A/CN.9/525. The Working Group considered draft articles 6, 9.4 and 9.5 of the draft instrument. Due to the absence of sufficient time, the Working Group deferred its consideration of draft article 4 and the remaining provisions of the draft instrument until its next session (A/CN.9/525, para. 123).

17. Working Group III on Transport Law, which was composed of all States members of the Commission, held its eleventh session in New York from 24 March to 4 April 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Burkina Faso, Cameroon, Canada, China, Colombia, Fiji, France, Germany, India, Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Russian Federation, Sierra Leone, Spain, Sweden, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

<sup>11</sup>Ibid.

<sup>12</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 210-224.

<sup>13</sup>Ibid., para. 224.

18. The session was also attended by observers from the following States: Australia, Belarus, Denmark, Finland, Gabon, Lebanon, Marshall Islands, Netherlands, New Zealand, Niger, Norway, Philippines, Republic of Korea, Switzerland, Turkey, Venezuela and Viet Nam.

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

(a) *United Nations system*: the United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Intergovernmental Organization for International Carriage by Rail (OTIF);

(c) *International non-governmental organizations invited by the Commission*: Association of American Railroads (AAR), Center for International Legal Studies, Comité Maritime International (CMI), Institute of International Container Lessors (IICL), Instituto Iberoamericano de Derecho Marítimo, International Chamber of Shipping (ICS), International Federation of Freight Forwarders Associations (FIATA), International Group of Protection and Indemnity Clubs, International Multimodal Transport Association (IMTA), International Union of Marine Insurance (IUMI), The Baltic and International Maritime Council (BIMCO) and Transportation Intermediaries Association (TIA).

20. The Working Group elected the following officers:

*Chairman*: Mr. Rafael Illescas (Spain)

*Rapporteur*: Mr. Walter De Sá Leitão (Brazil)

21. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.III/WP.24);

(b) Preliminary draft instrument on the carriage of goods by sea: Note by the secretariat (A/CN.9/WG.III/WP.21);

(c) Preliminary draft instrument on the carriage of goods by sea: Note by the secretariat (A/CN.9/WG.III/WP.21/Add.1);

(d) Proposals by the Governments of Canada (A/CN.9/WG.III/WP.23), Italy (A/CN.9/WG.III/WP.25) and Sweden (A/CN.9/WG.III/WP.26) regarding the scope of the draft instrument;

(e) Comparative table of the provisions of the draft instrument and corresponding provisions in existing transport conventions (A/CN.9/WG.III/WP.27);

(f) Compilation of comments received by the secretariat in relation to the preparation of the draft instrument (A/CN.9/WG.III/WP.28);

(g) Note by the secretariat on the scope of the draft instrument (A/CN.9/WG.III/WP.29);

(h) Information document provided by the United Nations Conference on Trade and Development (A/CN.9/WG.III/WP.30).

22. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Preparation of a draft instrument on the carriage of goods by sea.

4. Other business.

5. Adoption of the report.

## II. DELIBERATIONS AND DECISIONS

23. The Working Group completed its first reading of the draft instrument contained in the annex to the note by the secretariat (A/CN.9/WG.III/WP.21), with the exception of those provisions of the draft instrument dealing with the use of electronic commerce techniques in transport documentation, which were left for consideration at a later stage. The deliberations and conclusions of the Working Group are reflected below. The secretariat was requested to prepare a revised version of the draft instrument to reflect the decisions made by the Working Group. Where no such decision had been made, the secretariat was requested to conduct its work bearing in mind the various views and concerns expressed in the course of the deliberations of the Working Group. The Working Group encouraged the secretariat to exercise broad discretion in restructuring the draft instrument and redrafting its individual provisions to facilitate continuation of the discussion at a future session on the basis of options reflecting the spectrum of opinions that had been expressed at the ninth, tenth and eleventh sessions of the Working Group.

### A. Consideration of draft articles

#### 1. Draft article 8 (*Transport documents and electronic records*)

24. The text of draft article 8 as considered by the Working Group was as follows:

“8.1 Issuance of the transport document or the electronic record

Upon delivery of the goods to a carrier or performing party

(i) The consignor is entitled to obtain a transport document or, if the carrier so agrees, an electronic record evidencing the carrier's or performing party's receipt of the goods;

(ii) The shipper or, if the shipper so indicates to the carrier, the person referred to in article 7.7, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If pursuant to article 2.1 the carrier and the shipper have agreed to the use of an electronic record, the shipper is entitled to obtain from the carrier a negotiable electronic record unless they have agreed not to use a negotiable electronic record or it is the custom, usage or practice in the trade not to use one.

## “8.2 Contract particulars

“8.2.1 The contract particulars in the document or electronic record referred to in article 8.1 must include

- (a) A description of the goods;
- (b) The leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;
- (c)
  - (i) The number of packages, the number of pieces, or the quantity, and
  - (ii) The weight as furnished by the shipper before the carrier or a performing party receives the goods;
- (d) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;
- (e) The name and address of the carrier; and
- (f) The date:
  - (i) On which the carrier or a performing party received the goods, or
  - (ii) On which the goods were loaded on board the vessel, or
  - (iii) On which the transport document or electronic record was issued.

“8.2.2 The phrase ‘apparent order and condition of the goods’ in article 8.2.1 refers to the order and condition of the goods based on:

- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and
- (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record.

## “8.2.3 Signature

(a) A transport document shall be signed by the carrier or a person having authority from the carrier;

(b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier’s authorization of the electronic record.

## “8.2.4 Omission of required contents from the contract particulars

The absence of one or more of the contract particulars referred to in article 8.2.1, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic record.

## “8.3 Qualifying the description of the goods in the contract particulars

“8.3.1 Under the following circumstances, the carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 8.2.1 (b) or 8.2.1 (c) with an appropriate clause therein to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

- (a) For non-containerized goods
  - (i) If the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may include an appropriate qualifying clause in the contract particulars, or
  - (ii) If the carrier reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information;

(b) For goods delivered to the carrier in a closed container, the carrier may include an appropriate qualifying clause in the contract particulars with respect to

- (i) The leading marks on the goods inside the container, or
- (ii) The number of packages, the number of pieces, or the quantity of the goods inside the container,

unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container;

(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if

- (i) The carrier can show that neither the carrier nor a performing party weighed the container, and
- (ii) The shipper and the carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars.

## “8.3.2 Reasonable means of checking

For purposes of article 8.3.1:

(a) A “reasonable means of checking” must be not only physically practicable but also commercially reasonable;

(b) A carrier acts in “good faith” when issuing a transport document or an electronic record if

- (i) The carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and

- (ii) The carrier has not intentionally failed to determine whether a material statement in the transport document or electronic record is materially false or misleading because it believes that the statement is likely to be false or misleading;

(c) The burden of proving whether a carrier acted in good faith when issuing a transport document or an electronic record is on the party claiming that the carrier did not act in good faith.

#### “8.3.3 Prima facie and conclusive evidence

Except as otherwise provided in article 8.3.4, a transport document or an electronic record that evidences receipt of the goods is

(a) Prima facie evidence of the carrier’s receipt of the goods as described in the contract particulars; and

(b) Conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars

- [(i) If a negotiable transport document or a negotiable electronic record has been transferred to a third party acting in good faith [or
- (ii) If a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars].

#### “8.3.4 Effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 8.3.1, then the transport document will not constitute prima facie or conclusive evidence under article 8.3.3 to the extent that the description of the goods is qualified by the clause.

#### “8.4 Deficiencies in the contract particulars

##### “8.4.1 Date

If the contract particulars include the date but fail to indicate the significance thereof, then the date is considered to be:

(a) If the contract particulars indicate that the goods have been loaded on board a vessel, the date on which all of the goods indicated in the transport document or electronic record were loaded on board the vessel; or

(b) If the contract particulars do not indicate that the goods have been loaded on board a vessel, the date on which the carrier or a performing party received the goods.

##### “[8.4.2 Failure to identify the carrier

If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage which transfers contractual responsibility for the car-

riage of the goods to an identified bareboat charterer. [If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]]

#### “8.4.3 Apparent order and condition

If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document or electronic record is either prima facie or conclusive evidence under article 8.3.3, as the case may be, that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party”.

##### (a) Paragraph 8.1

25. The substance of paragraph 8.1 was found to be generally acceptable. It was pointed out that a purpose of paragraph 8.1 was to recall the traditional distinction between the evidentiary function served by a transport document as a receipt for the goods and the commercial function served by a negotiable transport document as representing the goods. Those two functions were reflected in subparagraphs (i) and (ii) respectively. With respect to subparagraph (i), a suggestion was made that the words “transport document” should be replaced by the word “receipt”. While the term “transport document” was generally preferred for reasons of consistency in terminology, it was acknowledged that, since not all transport documents as defined under paragraph 1.20 served the function of evidencing receipt of the goods by the carrier, it was important to make it abundantly clear that, under subparagraph 8.1 (i), the transport document should serve the receipt function. Subparagraph (ii) was found particularly useful as a reflection of the practice under which the parties might agree to use non-negotiable transport documents. It was recalled that a third function of a transport document was traditionally to record the rights and obligations of the parties to the contract of carriage. It was not suggested that this contractual function should be reflected in the text of draft article 8.

26. A question was raised as to whether paragraph 8.1 might interfere with various existing practices regarding the use of specific types of transport documents such as “received for shipment” and “shipped on board” bills of lading. Concern was expressed that the draft instrument should not affect such practices, in particular in the context of documentary credit. It was stated in response that paragraph 8.1 had been drafted broadly to encompass any type of transport document that might be used in practice, including any specific type of bill of lading or even certain types of non-negotiable waybills. Thus the draft instrument remained neutral, in particular with respect to documentary credit practices.

##### (b) Paragraph 8.2

###### (i) Subparagraph 8.2.1

27. As a matter of drafting, it was suggested that the words “as furnished by the shipper before the carrier or a

performing party receives the goods” contained in subparagraph 8.2.1 (c) (ii) should also apply to subparagraph 8.2.1 (c) (i). That suggestion was generally accepted by the Working Group.

28. In that connection, a concern was expressed that the words “as furnished by the shipper before the carrier or a performing party receives the goods” might be read as placing a heavy liability on the shipper, particularly if article 8 was to be read in combination with paragraph 7.4. It was pointed out in response that subparagraph 8.2.1 was not to be read as creating any liability for the shipper under draft article 7. However, before issuing the transport document, the carrier should have an opportunity to verify the information provided by the shipper, a reason why that information should be provided before the goods were loaded on a vessel.

29. Another concern was expressed that, in certain practical cases, the combination of subparagraphs 8.2.1 (c) (i) and (ii) as cumulative elements to be included in the transport document might be excessively burdensome for the carrier. The example was given of a shipment of bricks, where it might be superfluous to indicate both the weight under subparagraph 8.2.1 (c) (ii) and the quantity under subparagraph 8.2.1 (c) (i). It was pointed out in response that, while the list of contract particulars contained in subparagraph 8.2.1 was more extensive than corresponding provisions in existing international instruments such as the Hague Rules, such contract particulars were to appear in the transport document only if the shipper so requested. Thus, subparagraph 8.2.1 was not to be regarded as establishing a general obligation on either the shipper or the carrier but rather as creating a way for the carrier to meet the commercial needs of the shipper.

*(ii) Subparagraph 8.2.2*

30. It was recalled that subparagraph 8.2.2 provided both an objective and a subjective component to the phrase “apparent order and condition of the goods”. Under subparagraph 8.2.2 (a), the carrier had no duty to inspect the goods beyond what would be revealed by a reasonable external inspection of the goods as packaged at the time the consignor delivered them to the carrier or a performing party. Under subparagraph 8.2.2 (b), however, if the carrier or a performing party actually carried out a more thorough inspection (e.g. inspecting the contents of packages or opening a closed container), then the carrier was responsible for whatever such an inspection should have revealed (see A/CN.9/WG.III/WP.21, paras. 135-136).

31. The Working Group found the substance of subparagraph 8.2.2 to be generally acceptable.

*(iii) Subparagraph 8.2.3*

32. It was recalled that subparagraph 8.2.3 (a) was intended to reflect the provisions of the Uniform Customs and Practices for Documentary Credits (UCP 500) published by the International Chamber of Commerce, under which a transport document should be signed, and an electronic record should be comparably authenticated. Subparagraph 8.2.3 (b) was intended provide a definition

of electronic signature based on the UNCITRAL Model Law on Electronic Signatures 2001, as specifically adjusted to bring its intended meaning within the scope of this provision. In that context, the Working Group agreed that the draft provision might need to be further discussed at a later stage with a view to verify its consistency with the Model Law. Subject to that agreement, the substance of subparagraph 8.2.3 was found to be generally acceptable.

*(iv) Subparagraph 8.2.4*

33. It was recalled that subparagraph 8.2.4 gave effect to the view that the validity of the transport document or electronic record did not depend on the inclusion of the particulars that should be included. For example, an undated bill of lading would still be valid, even though a bill of lading should be dated. Subparagraph 8.2.4 also extends the rationale behind that view to hold that the validity of the transport document or electronic record did not depend on the accuracy of the contract particulars that should be included. Under this extension, for example, a misdated bill of lading would still be valid, even though a bill of lading should be accurately dated (see A/CN.9/WG.III/WP.21, para. 138).

34. The Working Group found the substance of subparagraph 8.2.4 to be generally acceptable.

*(c) Paragraph 8.3*

*(i) Subparagraph 8.3.1*

35. It was recalled that subparagraph 8.3.1 generally corresponded to existing law and practice in most countries (A/CN.9/WG.III/WP.21, para. 140). It was pointed out that, article III.3 of the Hague and Hague-Visby Rules contained language excusing the carrier from including otherwise required information in the transport document if the carrier had no reasonable means of verifying that the information furnished by the shipper accurately represented the goods. However, for commercial or other reasons, a carrier would typically prefer to issue a transport document containing a description of the goods, and protect itself by qualifying the description of the goods. Subparagraph 8.3.1 was intended to address that issue through a variety of rules to reflect the fact that commercial shipments could occur in different forms.

36. Various suggestions were made regarding possible improvements of subparagraph 8.3.1. One suggestion, aimed at broadening the freedom of the carrier to qualify the information contained in the transport document, was that the opening words of the paragraph, which referred to the information mentioned in subparagraphs 8.2.1 (b) and 8.2.1 (c) should also mention the information mentioned in subparagraph 8.2.1 (a). Another suggestion to the same effect was that language along the lines of subparagraph 8.3.1 (a) (ii) should be included also in subparagraph 8.3.1 (b) to address the situation where the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. With respect to subparagraph 8.3.1 (c), it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container.

37. Additional suggestions were made to complement the current provisions contained in subparagraph 8.3.1. One suggestion was that the carrier who decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification. The effect of such an obligation would be to avoid the use of general clauses along the lines of “said to be” or “said to contain”. Another suggestion was that the draft instrument should deal with the situation where the carrier accepted not to qualify the description of the goods, for example not to interfere with a documentary credit, but obtained a guarantee from the shipper. It was stated that it should be made clear that such a guarantee should not affect the position of third parties. Yet another suggestion was that, where the carrier acting in bad faith had voluntarily avoided to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

38. Questions were raised as to the standard of proof to be applied in the context of subparagraph 8.3.1 (c) (i). It was pointed out that, depending on that standard of proof, it might be difficult for the carrier to demonstrate that a performing party had not weighed the container. It was explained in response that the provision was not intended to create a very high standard of proof and that there generally existed records of the use of weighing facilities in ports.

39. A more general question was raised regarding the possible interplay between the draft instrument and any domestic law that would prohibit the use of certain qualifications such as “said to contain” clauses. It was stated in response that the draft instrument was not intended to interfere with such domestic law.

40. Another general question was raised regarding the manner in which the transport document would reflect a possible conflict between the information provided by the shipper and the assessment by the carrier of what constituted accurate information. It was stated in response that the shipper should always be entitled to a document reflecting the information it had provided. Should the carrier disagree with that information, it should also reflect its own assessment in the contract particulars.

41. After discussion, the Working Group came to the provisional conclusion that the above comments and suggestions should be borne in mind when preparing a revised draft of subparagraph 8.3.1 for continuation of the discussion at a future session.

*(ii) Subparagraph 8.3.2*

42. It was noted that this provision was intended to clarify the meaning of the terms used in subparagraph 8.3.1. It was pointed out that subparagraph 8.3.2 (a) clarified that “reasonable means of checking” in subparagraph 8.3.1 must be both physically practicable and commercially reasonable, and that subparagraph 8.3.2 (b) set out that the carrier acted in “good faith” when issuing a transport document or an electronic record if the carrier had no actual knowledge that any statement was materially false or misleading and that the carrier had not intentionally failed to

make such a determination because it believed the statement was likely to be false or misleading. It was also noted that subparagraph 8.3.2 (c) assumed that the carrier was acting in good faith unless otherwise proven. In response to a question regarding the situation where a letter of indemnity was issued by the shipper, who requested a clean bill of lading even where the goods were damaged in order to fulfil the requirements of a bank, it was noted that subparagraph 8.3.2 did not address the issue of the enforceability of a letter of indemnity.

43. The Working Group found the substance of subparagraph 8.3.2 to be generally acceptable.

*(iii) Subparagraph 8.3.3*

44. It was explained to the Working Group that the concept of a transport document or an electronic record that evidences receipt of the goods constitutes prima facie and conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars was a concept included in the Hague-Visby and Hamburg Rules. It was noted that subparagraph 8.3.3 (a) set out this principle with respect to prima facie evidence, whilst subparagraph 8.3.3 (b) set it out with respect to conclusive evidence. It was suggested that subparagraph 8.3.3 (b) (i) was not controversial because it dealt with the case of a negotiable transport document or a negotiable electronic record that had been transferred to a third party in good faith. It was further suggested that subparagraph 8.3.3 (b) (ii) was more controversial, and its inclusion in the draft instrument would have to be considered carefully, since it could include the situation where there was good faith reliance on the description of goods in a non-negotiable transport document.

45. Opposition was expressed to the inclusion of subparagraph 8.3.3 (b) (ii) because it introduced a novel use for non-negotiable documents that was unknown in European law. It was suggested that this approach amounted to creating a new category of document that was somewhere between a negotiable and a non-negotiable document, and that this was an unnecessary complication for the draft instrument. Further concerns were expressed with respect to the lack of clarity of this draft article.

46. Some support was expressed for the retention of subparagraph 8.3.3 (b) (ii) and the removal of the square brackets surrounding it in the draft instrument, since it was suggested that the draft article reflected current trade practice, where an estimated 50 per cent of letters of credit were being paid on cargo receipts. It was urged that the law should keep pace with these changes.

47. It was suggested that a conclusive evidence rule with respect to non-negotiable documents already existed with respect to sea waybills in article 5 of the CMI Uniform Rules for Sea Waybills, and that since the concept was not novel, subparagraph 8.3.3 (b) (ii) should be retained. However, it was also noted that the requirements for this draft provision that a person acting in good faith must have paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars was an unusual concept in civil law countries.

48. It was suggested that in spite of the problems that were noted with respect to the possible creation of a new category of document, the advantages of including a provision such as subparagraph 8.3.3 (b) (ii) could outweigh its disadvantages. The prevailing view in the Working Group was to retain subparagraph 8.3.3 (b) (ii) in square brackets in the draft instrument, and to request the secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made.

*(iv) Subparagraph 8.3.4*

49. The Working Group heard that subparagraph 8.3.4 was a clarification of subparagraph 8.3.3, that stated that if there was a qualifying clause in the transport document that complied with the requirements of subparagraph 8.3.1, then the transport document, whether it was negotiable or non-negotiable, was not prima facie or conclusive evidence pursuant to subparagraph 8.3.3.

50. It was suggested that subparagraph 8.3.4 was too much in favour of the carrier, in allowing the carrier to rely upon the qualifying clause regardless of the condition in which it delivered the goods. It was noted that while it was appropriate to allow the carrier to rely upon the qualifying clause with respect to the situation where there was delivery of an unopened container, in the situation where the carrier delivered a damaged or opened container, and could not establish the chain of custody, the carrier should not be entitled to benefit from the qualifying clause. It was suggested that subparagraph 8.3.4 should be redrafted in accordance with paragraphs 153 and 154 of the commentary on the draft instrument (A/CN.9/WG.III/WP.21).

51. Another view was that the validity of the qualifying clause should not depend upon the delivery of an undamaged container by the carrier, and that the issue of the liability of the carrier should not be confused with the issue of the description of the goods and the weight and contents of the container. It was emphasized that there was no connection between the qualifying clause and the condition of the container upon delivery, and that the carrier was not automatically relieved of responsibility by the existence of a qualifying clause in the transport document.

52. While some support was expressed for redrafting subparagraph 8.3.4, the prevailing view was that it should be retained in substance for continuation of the discussion at a future session.

*(d) Paragraph 8.4*

*(i) Subparagraph 8.4.1*

53. The Working Group heard that subparagraph 8.4.1 regarding the date operated only if the date was inserted into the contract particulars without any statement of its significance. It was explained that this provision was inserted into the draft instrument in order to deal with problems that have arisen with respect to incorrectly dated bills of lading.

54. It was noted by way of general comment that the terms "transport document or electronic record" are

repeated throughout the provisions of chapter 8 of the draft instrument, and that the repetition of this phrase emphasized the distinction between transport documents and electronic records, rather than focusing on the content of the document, as intended in the mandate of the Working Group. It was suggested that care should be taken to avoid this problem when reviewing the provisions in chapter 8 in light of existing instruments on electronic commerce.

55. The Working Group found the substance of subparagraph 8.4.1 to be generally acceptable, taking into account the issue raised with respect to electronic records.

*(ii) Subparagraph 8.4.2*

56. The Working Group heard that whilst paragraph 8.2 provided that the contract particulars should contain the name and address of the carrier, identity of carrier clauses have caused problems in some jurisdictions. It was explained that subparagraph 8.4.2 was intended to remedy this situation by providing that where the contract particulars fail to identify the carrier, but name a vessel, then the registered owner of the vessel is presumed to be the carrier, unless the owner proves that the ship was under a bareboat charter at the time of the carriage. It was noted that inclusion of such an article amounted to a policy decision that was controversial in some quarters. It was further noted that if the Working Group agreed to include a provision such as subparagraph 8.4.2, a further decision would have to be made with respect to the last sentence of the draft article, which was in additional square brackets, and which sets out the additional presumption that where the registered owner rebuts the presumption that it is the carrier, the bareboat charterer is presumed to be the carrier.

57. Opposition was expressed to the approach taken in this draft article, based upon the view that the registered owner of the vessel should not play a role in the draft instrument, but instead should have responsibility in conventions on liability where third parties were involved. It was also suggested that a party who was unrelated to the contract should not, in some situations, become liable as a result of it, and that a bareboat charterer should not be implicated as a result of a contract of carriage.

58. The view was expressed that a provision such as subparagraph 8.4.2 was both important and justified, particularly since, in practice, the issue of identifying the carrier is key when establishing liability. Support for the draft article was expressed based on its clarity, and the fact that it simply raised a presumption, rather than dictated a rigid rule. It was noted that there could be additional problems with the draft article, such as where there was a consortium of carriers, but that overall, the principle embodied in the draft article filled a gap, and deserved the support and further examination of the Working Group. It was also noted that the inclusion of non-contracting parties was not a novel idea, since many jurisdictions already create a liability for registered owners on the basis of maritime liens for cargo claims. Another suggestion was made to create an irrebuttable presumption by retaining the first sentence and by deleting the final two sentences.



59. Further, concerns were expressed that a provision such as subparagraph 5.4.2 could create further uncertainty because its relationship with various case laws as to the identity of the carrier in some jurisdictions is not clear. Reference was made to case law that put emphasis on the heading of the transport document when it did not include the carrier's name on its face or which imposed liability on more than one carrier for one bill of lading, or on an apparent carrier when the document failed to identify clearly the carrier. A further reservation was expressed with respect to the second sentence of subparagraph 8.4.2, pursuant to which it was unclear whether this was the only way through which the registered owner could rebut the presumption set out therein. It was suggested that the registered owner should be free to introduce any evidence that defeats the presumption that it was the carrier. A note of caution was also voiced with respect to the possibility that since there is no requirement that the carrier provide its proper name and address, the carrier may have an incentive to intentionally fail to include that information, thus leaving the registered owner of the vessel in the position of the carrier, and potentially subject to liability. Other concerns were expressed regarding which document should be used to establish the identity of the carrier. It was also noted that the working assumption with respect to the draft instrument was that it was to cover door-to-door carriage, and that the presumption contained in the draft article could be quite inappropriate in the case where, for example, the carrier that failed to identify itself was a non-vessel operating carrier.

60. It was also suggested that parties to a contract should be more vigilant regarding the identity of their counterparties. It was noted that the principle embodied by the draft article was important to retain on behalf of cargo owners. The prevailing view in the Working Group was that subparagraph 8.4.2 identified a serious problem that must be treated in the draft instrument, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep subparagraph 8.4.2 in square brackets in the draft instrument, and to discuss it in greater detail at a future date.

*(iii) Subparagraph 8.4.3*

61. The Working Group found the substance of subparagraph 8.4.3 to be generally acceptable.

## **2. Draft article 10 (Delivery to the consignee)**

62. The text of draft article 10 as considered by the Working Group was as follows:

“10.1 When the goods have arrived at their destination, the consignee that exercises any of its rights under the contract of carriage shall accept delivery of the goods at the time and location mentioned in article 4.1.3. If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the carrier or performing party will act in respect

of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.

“10.2 On request of the carrier or the performing party that delivers the goods, the consignee shall confirm delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.

“10.3.1 If no negotiable transport document or no negotiable electronic record has been issued:

- (i) The controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee;
- (ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee's production of proper identification.

“10.3.2 If a negotiable transport document or a negotiable electronic record has been issued, the following provisions apply:

*(a)*

- (i) Without prejudice to the provisions of article 10.1 the holder of a negotiable transport document 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 mentioned in article 4.1.3 to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;
- (ii) Without prejudice to the provisions of article 10.1 the holder of a negotiable electronic 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 mentioned in article 4.1.3 to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 2.4 that it is the holder of the electronic record. Upon such delivery, the electronic record ceases to have any effect or validity;

*(b)* If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise accordingly the con-

trolling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 7.7 is deemed to be the shipper for purposes of this paragraph;

(c) Notwithstanding the provision of paragraph (d) of this article, a carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in article 2.4, that it is the holder;

(d) If the delivery of the goods by the carrier at the place of destination takes place without the negotiable transport document being surrendered to the carrier or without the demonstration referred to in paragraph (a) (ii) above, a holder who becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage will only acquire rights under the contract of carriage if the passing of the negotiable transport document or negotiable electronic record was effected in pursuance of contractual or other arrangements made before such delivery of the goods, unless such holder at the time it became holder did not have or could not reasonably have had knowledge of such delivery;

(e) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled, without prejudice to any other remedies that a carrier may have against such controlling party or shipper, to exercise its rights under article 10.4.

“10.4.1 (a) If the goods have arrived at the place of destination and

- (i) The goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage; or
- (ii) The carrier is not allowed under applicable law or regulations to deliver the goods to the consignee,

then the carrier is entitled to exercise the rights and remedies mentioned in paragraph (b);

(b) Under the circumstances specified in paragraph (a), the carrier is entitled, at the risk and account of the person entitled to the goods, to exercise some or all of the following rights and remedies:

- (i) To store the goods at any suitable place;
- (ii) To unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or
- (iii) To cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time;

(c) If the goods are sold under paragraph (b) (iii), the carrier may deduct from the proceeds of the sale the amount necessary to:

- (i) Pay or reimburse any costs incurred in respect of the goods; and
- (ii) Pay or reimburse the carrier any other amounts that are referred to in article 9.5 (a) and that are due to the carrier.

Subject to these deductions, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods.

“10.4.2 The carrier is only allowed to exercise the right referred to in article 10.4.1 after it has given notice to the person stated in the contract particulars as the person to be notified of the arrival of the goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper that the goods have arrived at the place of destination.

“10.4.3 When exercising its rights referred to in article 10.4.1, the carrier or performing party acts as an agent of the person entitled to the goods, but without any liability for loss or damage to these goods, unless the loss or damage results from [a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]”.

(a) *General remarks*

63. The Working Group heard that draft article 10 consisted mainly of innovative material intended to set out what constituted delivery, and to deal with two problems that were pressing and frequent in daily practice. The first problem that was encountered frequently was that goods were not claimed by the consignee, and the second was that the consignee could demand delivery, but the negotiable transport document was not available to be surrendered to the carrier. It was noted that paragraph 10.1 stated that when the goods had arrived at their destination, the consignee had to accept delivery if the consignee had exercised any of its rights under the contract of carriage. It was stated that paragraph 10.2 was uncontroversial. Subparagraph 10.3.1 dealt with the situation where, if no negotiable document was available, the carrier had to deliver the goods to the consignee upon production of proper identification. It was explained that subparagraph 10.3.2 was potentially the most controversial aspect of this provision, since it dealt with the case of the negotiable transport doc-

ument. Subparagraph 10.3.2 (a) (i) sets out the traditional practice where the holder of a negotiable instrument was entitled to claim delivery of the goods, at which point the carrier had to deliver the goods to the holder upon surrender of the negotiable instrument. It was noted that subparagraphs 10.3.2 (c) and (d) were intended to deal with the non-production of the transport document or bill of lading at the destination. The Working Group heard that these draft provisions were an attempt to remedy a long-standing problem to which there was no simple solution, and that the draft provisions attempted to strike a fair balance between the rights of all of the parties involved.

64. It was suggested that paragraph 10.1 could be approved in principle, since it contained provisions that were comparable to other texts, such as those that impose a liability regime on a warehouse manager or a bailee for taking charge of the goods. A widely held view was that, while the various provisions in draft article 10 might need to be restructured and reordered in future versions of the draft instrument, the substance of the draft article was generally acceptable.

(b) *Paragraph 10.1*

65. Support was expressed for the principle that there be a provision in the draft instrument pursuant to which the consignee was obliged to take delivery at the time and place of delivery agreed in the contract of carriage, or in accordance with trade practice, customs or usages. The draft provision was praised for attempting to strike a balance between the interests of the shipper and of the carrier, and for providing a flexible solution to some of the problems associated with delivery. It was suggested that paragraph 10.1 could look to additional sanctions on the consignee in situations where the consignee was in breach of its obligation to accept delivery, such as the termination of the contract.

66. However, a note of caution was raised with respect to the balance struck between cargo interests and the carrier. It was suggested that paragraph 10.1 granted too broad a set of rights to the carrier, in that the carrier bore no responsibility for loss or damage to the goods unless it was caused by the carrier's intentional or reckless act or omission. In response, it was stated that paragraph 10.1 was intended to set out the basis for the carrier's liability for loss or damage to the cargo in the situation where the carrier was forced to act as a floating warehouse. Thus, it imposed a warehouseman's level of care. By contrast, paragraph 10.4 was drafted using permissive language, and was intended to provide the carrier with the entitlement to exercise certain rights, but those rights were circumscribed by certain conditions included in the article to protect the consignee.

67. A preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional. Further, concern was raised with respect to the interaction between paragraphs 10.1 and 10.4, and it was recommended that the relationship between the draft provisions be clarified. A suggestion was made that paragraphs 10.1 and 10.4 could be merged. In order to reduce

the confusion caused by the interplay of paragraphs 10.1 and 10.4, it was also suggested that the second sentence of paragraph 10.1 be deleted, and that paragraph 10.4 be left to stand on its own.

68. While general support was voiced for the principle embodied in paragraph 10.1, concerns were raised with respect to the concept of "agent". In some national legal regimes, the rights, obligations and responsibilities of agents have been clearly set out, and it was suggested that the potential confusion generated in this regard could be avoided by deletion of the concept of agent in this draft provision. However, the view was also expressed that the characterization of the carrier or performing party as agent of the consignee was important in order for the carrier to exercise power over the goods, and to avoid liability, provided that no damage was caused and with an established limit on inexcusable fault.

69. It was also suggested that paragraph 10.1 should be considered in light of the law of the sale of goods, which did not contain an unconditional obligation to take delivery of the goods. The view was expressed, however, that the rule in this draft article was in accordance with the right of rejection pursuant to article 86 of the United Nations Convention on Contracts for the International Sale of Goods. It was cautioned that not all States were parties to that convention, and that the provisions of the convention were non-mandatory. It was suggested that this latter point was important since the obligation to accept delivery under paragraph 10.1 was a mandatory provision.

70. Concern was expressed that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of paragraph 10.1. It was suggested that this could be clarified with the addition of the phrase "or of the performing party" after the phrase "personal act or omission of the carrier".

71. A risk of confusion was mentioned with respect to the relationship between draft article 10 and draft article 11 on right of control. It was suggested that this could be remedied by providing that the controlling party could replace the consignee only until the consignee exercised its rights under the contract, after which the right of control ceased to exist.

72. After discussion, the Working Group requested the secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made, and also to the need for consistency between the various language versions.

(c) *Paragraph 10.2*

73. The Working Group found the substance of paragraph 10.2 to be generally acceptable.

(d) *Paragraph 10.3*

(i) *Subparagraph 10.3.1*

74. The Working Group was reminded that subparagraph 10.3.1 was intended to govern the situation where no nego-

tiable transport document or electronic record had been issued. It was suggested that provisions were drafted in an even-handed fashion, where subparagraph 10.3.1 (i) stated that the controlling party had to put the carrier in a position to be able to make delivery by providing it with the consignee's name, and subparagraph 10.3.1 (ii) provided the corollary that the carrier had to deliver the goods according to the agreement in the contract of carriage upon the production of proper identification by the consignee.

75. It was suggested that this draft provision was confusing, since it could be read to imply that the carrier did not know the identity of the consignee until the end of the carriage. However, except where the controlling party would change the consignee during the course of the carriage, it was more likely that the carrier would know the identity of the consignee from the outset. It was explained that subparagraph 10.3.1 was intended to set out the general obligation of the controlling party to put the carrier in a position where delivery could be effected. The suggestion was made that the Working Group should consider redrafting subparagraph 8.2.1 to include the name and address of the consignee in the contract particulars that must be put into the transport document.

76. A question was raised regarding what consequences would flow from the situation where the carrier did not follow the rule set out in subparagraph 10.3.1 (ii). It was suggested that this matter should be left to national law, and that subparagraph 10.3.1 (ii) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier.

77. The Working Group found the principles embodied in subparagraph 10.3.1 to be generally acceptable. The Working Group requested the secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

*(ii) Subparagraph 10.3.2*

78. The Working Group was reminded that subparagraph 10.3.2 considered delivery in the case of issued negotiable transport documents, and that subparagraph 10.3.2 (a) (i) corresponded to the current practice, wherein the holder of the negotiable document had the right to claim delivery of the goods upon their arrival at the place of destination, and upon surrender of the negotiable document, the carrier had the obligation to deliver the goods. It was emphasized that subparagraph 10.3.2 (a) (ii), which referred to negotiable electronic records, mirrored subparagraph 10.3.2 (a) (i) regarding negotiable documentary records, but that the holder of a negotiable electronic record had to demonstrate in accordance with paragraph 2.4 that it was the holder. It was noted that paragraph 2.4 was fundamental to the operation of the electronic system set out in the draft instrument. It was reiterated to the Working Group that in the event the holder of the negotiable instrument did not claim delivery, subparagraph 10.3.2 (b) provided a mechanism for the carrier to put the controlling party, and failing it, the shipper, in a position to give the carrier instructions with respect to the delivery of the goods. The Working Group was reminded that subparagraph 10.3.2 (c) dis-

charged the carrier from the obligation to deliver the goods under the contract of carriage only, and not from its other obligations. It was noted that subparagraph 10.3.2 (d) reduced the holder's rights in certain circumstances, but that the risk remained with the carrier if the transfer of the negotiable instrument took place before the delivery. It was pointed out that subparagraph 10.3.2 was intended to preserve some of the risk on the part of the carrier, and to provide an even-handed solution to the problems associated with the failure of the holder of a negotiable transport document to claim delivery.

79. General support was expressed for the principle embodied in subparagraph 10.3.2 as a whole. Approval was expressed for the draft provision's goal of solving an important and practical problem with respect to the delivery of cargo that has greatly troubled the shipping world for many years, both on the carrier and cargo sides of the issue. The Working Group welcomed a convention-based solution to the problem. It was noted that insurance cover for the carrier was excluded by international group clubs when the carrier delivered cargo without surrender of the transport document, but it was acknowledged that it was often difficult for the consignee to obtain the negotiable transport document prior to delivery of the goods. Support was expressed for providing protection to a carrier in such circumstances when the carrier had acted properly and prudently. It was generally agreed that this draft provision provided a good basis from which to further refine the text.

80. However, a note of caution was raised that the Working Group would have to carefully examine the balance of the different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution.

81. The Working Group found the substance of subparagraphs 10.3.2 (a) (i) and (ii) to be generally acceptable.

82. The suggestion was made with respect to subparagraph 10.3.2 (b), that the carrier should have the obligation of accepting the negotiable transport document, and that if the holder of the document did not claim delivery of the goods, then the carrier should have the obligation of notifying the controlling party. Support was expressed for the suggestion that the principle expressed in subparagraph 10.3.2 (b) should also apply in cases where no negotiable instrument had been issued. Further, it was suggested that this subparagraph of the draft article should set out the consequences for the carrier when it failed to notify the controlling party, or the shipper, or the deemed shipper pursuant to paragraph 7.7. However, it was noted that if the carrier was not able to locate the consignee for delivery, then subparagraph 10.3.2 (e) became operational, and the carrier became entitled to exercise its rights under paragraph 10.4.

83. It was suggested that it was unclear how subparagraphs 10.3.2 (c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. It was requested that the drafting in this regard be clarified.

84. Concerns were expressed with respect to subparagraph 10.3.2 (*d*). It was suggested that this subparagraph should be revised to provide greater protection for the third party who became a holder of the negotiable transport document after delivery was made. However, it was explained that the draft article was based on two pillars: the contract of carriage between the carrier and the shipper pursuant to which the carrier agreed to deliver goods to a certain person, and the general principle that the carrier had to refer to its contractual counterpart for instructions, and that the shipper had to enable the carrier to perform its part of the contract. In response to a question regarding why subparagraph 10.3.2 was limited to negotiable transport documents, unlike conventions such as the CMR that considered this issue with respect to non-negotiable documents, it was noted that the real problem arose where there was a negotiable transport document, since in principle, the arrival of the goods at their destination exhausted the bill of lading.

85. Further concerns were expressed with respect to the effect that this provision might have on the principle found in some national legal regimes that the burden of proof in cases of a good faith holder did not lie with the party claiming good faith, but rather with the party attempting to prove otherwise. It was stated in response to this concern that subparagraph 10.3.2 was not intended to govern the burden of proof, which would be dependent upon the circumstances, and that the draft article was intended only to grant certain protections to an innocent third party holder when there was no knowledge of delivery. Additional concerns suggested that the rule in this subparagraph could weaken the bill of lading as a document of title, and the suggestion was made that a way to solve this problem might be to develop a system for electronic bills of lading that were more easily and more quickly transferred.

86. It was explained that the regime that subparagraph 10.3.2 was attempting to establish was an effort to reform the whole system of negotiable transport documents, since, it was suggested, it was an area that was in urgent need of repair. It was further suggested that the whole system was being undermined by the current trade practice whereby bills of lading were often not available upon delivery, and industry had filled the gap with its own documentary solutions, such as with letters of indemnity. It was suggested that these practices had weakened the bill of lading, and that this provision was attempting to restore the integrity and strength of the bill of lading system. It was also stated that the problem of bills of lading being unavailable upon delivery was not a result of the speed with which a bill of lading travelled, but rather it was a function of the fact that voyages are often much shorter than time period required for the holding of bills of lading by the financial institutions.

87. The Working Group heard that the “contractual or other arrangements” referred to in subparagraph 10.3.2 (*d*) referred not to letters of indemnity, but principally to contracts of sale, and particularly to those situations in which there was a series of buyers and sellers and the bill of lading could not travel quickly enough through the entire series in order to be there at the time of delivery. The goal of this draft article was to protect the buyer in the series who received the bill of lading after the goods had been

delivered, so that the buyer could acquire certain contractual rights under the bill of lading, even though delivery could not be obtained. It was noted that this provision was inspired by a similar provision in the 1992 Carriage of Goods by Sea Act in the United Kingdom. The second situation that subparagraph 10.3.2 (*d*) was intended to cover was the situation where there is a bona fide acquirer of a bill of lading.

88. Other concerns expressed with respect to subparagraph 10.3.2 (*d*) were that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. Further, concern was expressed with respect to the lack of certainty of the phrase “could not reasonably have had knowledge of such delivery”.

89. The view was expressed that subparagraph 10.3.2 (*e*) should be aligned with subparagraph 10.3.2 (*b*), by adding to it, after the opening phrase, “If the controlling party or shipper does not give the carrier adequate instructions as to the delivery of the goods”, the phrase, “or in cases when the controlling party or the shipper cannot be found”. Support was expressed for this suggestion, and it was agreed that it would appear in square brackets in the next version of the draft instrument prepared by the secretariat.

90. The prevailing view in the Working Group was that subparagraph 10.3.2 represented an important and welcome advancement in establishing the balance of interests among parties in the situation where the holder of a negotiable transport document failed to claim delivery of the goods. It was decided that the Working Group would resume a detailed discussion of this draft article in the future, and the secretariat was requested to prepare a redraft of the provision, taking into account the concerns expressed.

(e) *Paragraph 10.4*

91. The Working Group heard that subparagraph 10.4.1 stated the general principle setting out the entitlement of the carrier to exercise certain rights and remedies in situations of failure of delivery involving negotiable and non-negotiable transport documents, and concerning consignees who had or had not exercised any rights pursuant to the contract of carriage. It was noted that subparagraph 10.4.1 (*b*) entitled the carrier to store, unpack or sell the goods at the risk and account of the person entitled to them, and subparagraph 10.4.1 (*c*) entitled the carrier to deduct the costs incurred with respect to the goods, or payable to the carrier under subparagraph 9.5 (*a*). It was explained that subparagraph 10.4.2 provided a safeguard to the consignee in requiring the carrier to give notice to the consignee, controlling party or shipper prior to exercising its rights, and that subparagraph 10.4.3 made the carrier liable for loss of or damage to the goods sustained intentionally or recklessly by the carrier.

92. While there was general support for subparagraph 10.4.1, concern was expressed with respect to the phrase “no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage”. It was suggested that this phrase was confusing, since it could be

seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand.

93. General approval was also expressed for the policy reflected in subparagraph 10.4.2, with the proviso that it was unclear why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights.

94. Concern with respect to the use of the term “agent” in subparagraph 10.4.3 was again echoed, and it was noted that the third line of this draft article should read “loss of or damage to these goods”. An additional note of caution was again raised with respect to the wording of the draft article that could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. Support was expressed for the suggestion that this latter point could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”. Support was also expressed for the suggestion that the word “personal” should be deleted from this draft provision in order to broaden its scope.

95. In response to a question regarding the placement of the square brackets in subparagraph 10.4.3, it was explained that the square brackets were in the correct position, since the contents of the brackets were intended to define the carrier’s liability, but the Working Group had to decide at what level to determine that liability before the brackets could be removed. Some support was received for the suggestion that the square brackets should be removed from this draft provision.

96. It was noted that subparagraphs 10.4.3 and 10.4.1 had similarities in their content, and it was suggested that their language should be adjusted to reflect those similarities. There was some support for this suggestion.

97. It was suggested that when the carrier exercised its rights under subparagraph 10.4.1, it could result in costs in addition to those arising from loss or damage, such as, for example, expenses arising from warehousing or sale. In addition, it was noted that the value of the goods might not in some cases cover the costs incurred. The suggestion was made that subparagraph 10.4.3 should include the idea that when exercising its rights in subparagraph 10.4.1, “the carrier or performing party may cause costs and risks, and that these shall be borne by the person entitled to the goods”.

98. The suggestion was made that the reference in subparagraph 10.4.1 (c) (ii) to the deduction by the carrier from the proceeds of the sale, the amount necessary to reimburse the carrier pursuant to subparagraph 9.5 (a) should be placed in square brackets in light of the fact that subparagraph 9.5 (a) had not yet been agreed upon by the Working Group. It was noted that in the conclusions reached with respect to subparagraph 9.5 (a), the Working Group had not decided to place that provision in square brackets (A/CN.9/525, para.123), and that it would be inappropriate to do so in subparagraph 10.4.1 (c) (ii).

99. The Working Group expressed its general approval with paragraph 10.4, and requested the secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

### 3. Draft article 11 (Right of control)

100. The text of draft article 11 as considered by the Working Group was as follows:

“11.1 The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1.1. Such right to give the carrier instructions comprises rights to:

- (i) Give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
- (ii) Demand delivery of the goods before their arrival at the place of destination;
- (iii) Replace the consignee by any other person including the controlling party;
- (iv) Agree with the carrier to a variation of the contract of carriage.

“11.2 (a) When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:

- (i) The shipper is the controlling party unless the shipper and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party;
- (ii) The controlling party is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor or the transferee shall notify the carrier of such transfer;
- (iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification;

(b) When a negotiable transport document is issued, the following rules apply:

- (i) The holder or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party;
- (ii) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 12.1, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control;

- (iii) In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to the carrier. If more than one original of the document was issued, all originals shall be produced;
- (iv) Any instructions as referred to in article 11.1 (ii), (iii) and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated on the negotiable transport document;

(c) When a negotiable electronic record is issued:

- (i) The holder is the sole controlling party and is entitled to transfer the right of control to another person by passing the negotiable electronic record in accordance with the rules of procedure referred to in article 2.4, upon which transfer the transferor loses its right of control;
- (ii) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the rules of procedure referred to in article 2.4, that it is the holder;
- (iii) Any instructions as referred to in article 11.1 (ii), (iii) and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated in the electronic record;

(d) Notwithstanding the provisions of article 12.4, a person, not being the shipper or the person referred to in article 7.7, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this instrument.

“11.3 (a) Subject to the provisions of paragraphs (b) and (c) of this article, if any instruction mentioned in article 11.1 (i), (ii) or (iii):

- (i) Can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;
- (ii) Will not interfere with the normal operations of the carrier or a performing party; and
- (iii) Would not cause any additional expense, loss, or damage to the carrier, the performing party, or any person interested in other goods carried on the same voyage,

then the carrier shall execute the instruction. If it is reasonably expected that one or more of the conditions mentioned in subparagraphs (i), (ii) and (iii) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction;

(b) In any event, the controlling party shall indemnify the carrier, performing parties, and any persons interested in other goods carried on the same voyage against any additional expense, loss, or damage that may occur as a result of executing any instruction under this article;

(c) If a carrier

- (i) Reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and
- (ii) Is nevertheless willing to execute the instruction,

then the carrier is entitled to obtain security from the controlling party for the amount of the reasonably expected additional expense, loss, or damage.

“11.4 Goods that are delivered pursuant to an instruction in accordance with article 11.1 (ii) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.

“11.5 If during the period that the carrier holds the goods in its custody, the carrier reasonably requires information, instructions, or documents in addition to those referred to in article 7.3 (a), it shall seek such information, instructions, or documents from the controlling party. If the carrier, after reasonable effort, is unable to identify and find the controlling party, or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the obligation to do so shall be on the shipper or the person referred to in article 7.7.

“11.6 The provisions of articles 11.1 (ii) and (iii) and 11.3 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 11.2 (a) (ii). If a transport document or an electronic record is issued, any agreement referred to in this paragraph must be stated in the contract particulars.”

#### (a) *General remarks*

101. While it was generally felt that a provision regarding the right of control would constitute a welcome addition to traditional maritime transport instruments, the views and concerns expressed in respect of draft article 11 at the ninth session of the Working Group were reiterated (see A/CN.9/510, paras. 55-56). It was pointed out that, when revising draft article 11, particular attention should be given to avoiding inconsistencies among the various language versions.

#### (b) *Paragraph 11.1*

102. As a matter of drafting, a concern was expressed that subparagraph (i) was unclear as to the exact meaning of the words “give or modify instructions ... that do not constitute a variation of the contract”. It was pointed out that those words might be read as contradicting themselves. While it was acknowledged that clearer drafting might be needed, it was stated in response that a clear distinction should be made in substance between what was referred to as a minor or “normal” modification of instructions given in respect of the goods, for example, regarding the temperature at which those goods should be stored, and a more substantive variation of the contract of carriage.

103. With respect to subparagraph (iv), it was suggested that the provision should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was stated that, while subparagraph (iv) was not directly related to the exercise of the right of control, it served a particularly useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. It was stated that, although a variation of the contract of carriage would normally be negotiated between the parties to that contract, the contractual shipper might not always be the best person for the carrier to contact where an urgent decision had to be made in respect of the goods. In such a case where urgent dialogue should take place between the carrier and the person most interested in the goods, with the possible consequence that certain terms of the contract of carriage would need to be modified, it was suggested that the controlling party would be the best person for the carrier to contact.

104. After discussion, the Working Group found the substance of paragraph 11.1 to be generally acceptable. The secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(c) *Paragraph 11.2*

(i) *Subparagraph 11.2 (a)*

105. With respect to subparagraph 11.2 (a) (i), a question was raised as to the reasons why the consent of the consignee was required to designate a controlling party other than the shipper. It was observed that the consignee was not a party to the contract of carriage. It was also observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) conferred to him the power to unilaterally transfer his right of control to another person. In response, a view was expressed that the designation of the controlling party took place at a very early stage in the carriage process or even before the conclusion of the contract of carriage. At that stage, designating the controlling party might be an important point for the purposes of the underlying sale transaction that took place between the shipper and the consignee. For that reason, it was considered appropriate under that view to involve the consignee in the designation of the controlling party.

106. With respect to the duration of the right of control, it was observed that, under paragraph 11.2, the controlling party remained in control of the goods until their final delivery (see A/CN.9/WG.III/WP.21, para. 188). A question was raised as to the reasons why the draft instrument departed from the CMI Uniform Rules for Sea Waybills in that, under the draft instrument, there was no automatic transfer of the right of control from the shipper to the consignee as soon as the goods had arrived at their place of delivery. It was suggested in that context that the draft instrument might create a difficult situation for the carrier if the right of control could be transferred or otherwise exercised after the

goods had arrived at their place of delivery. It was thus proposed that the draft instrument should be made fully consistent with the CMI Uniform Rules for Sea Waybills. The Working Group took note of that proposal. It was explained in response that, if there were such automatic transfer, the most common shipper's instruction to the carrier, namely not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected, could be frustrated. For that reason, the duration of the right of control under the draft instrument had been extended until the goods had been actually delivered. More generally, it was pointed out that subparagraph 11.2 (a) dealt with the situation where no negotiable document had been issued, a situation where flexibility in the transfer of the right of control was essential.

107. With respect to subparagraph 11.2 (a) (ii), concern was expressed that, under existing law in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier. It was suggested that only notification from the transferor should be acceptable as a means of informing the carrier of such a transfer. In that connection, a more general question was raised regarding the relationship between paragraph 11.2 and paragraph 12.3. It was suggested that the issue of the transfer of the right of control should be made subject to applicable domestic law. While the Working Group took note of that suggestion, it was generally felt that no reference to domestic law should be made in draft article 11. It was agreed that various options might need to be discussed further as to which parties should notify the carrier of a transfer of the right of control.

108. After discussion, the Working Group found the substance of subparagraph 11.2 (a) to be generally acceptable. The secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(ii) *Subparagraph 11.2 (b)*

109. A concern was raised that the reference to the "holder" of the bill of lading might be unduly restrictive and the person to whom the bill of lading was endorsed should also be listed under subparagraph 11.2 (b). In response, it was explained that the definition of "holder" under paragraph 1.12 sufficiently took care of that issue.

110. With respect to subparagraph 11.2 (b) (iii), the view was expressed that the draft provision did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier. It was suggested that the draft instrument should provide that, in such a case, the carrier should be free to refuse to follow the instructions given by the controlling party. It was also suggested that a similar indication should be given under subparagraph 11.2 (c) (ii). The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised. It was further suggested that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the



hands of the carrier. The Working Group generally agreed with that suggestion.

111. After discussion, subject to the above-mentioned views and suggestions, the Working Group found the substance of subparagraph 11.2 (b) to be generally acceptable. The secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(iii) *Subparagraph 11.2 (c)*

112. The Working Group deferred consideration of subparagraph 11.2 (c) until it had come to a more precise understanding of the manner in which the issues of electronic commerce would be addressed in the draft instrument.

(iv) *Subparagraph 11.2 (d)*

113. The Working Group found the substance of subparagraph 11.2 (d) to be generally acceptable.

(d) *Paragraph 11.3*

(i) *Subparagraph 11.3 (a)*

114. A question was raised regarding the relationship between subparagraph 11.3 (a) (iii) and subparagraph 11.1 (ii). It was stated that, under subparagraph 11.1 (ii), the exercise of the right of control would inevitably involve "additional expenses". However, such expenses resulting from delivery of the goods before their arrival at the place of destination might range from acceptable minor expenses to less acceptable expenses from the perspective of the carrier, for example, if the instructions received from the controlling party resulted in a change in the port of destination of the vessel. To avoid a contradiction between those two provisions, it was suggested that either the carrier should be under no obligation to execute the instruction received under subparagraph 11.1 (ii) or that subparagraph 11.3 (a) (iii) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses.

115. A contrary view was expressed that the issue of "additional expenses" should not be dealt with under subparagraph 11.3 (a). It was pointed out that the matter was sufficiently covered by subparagraph 11.3 (c). Broad support was expressed for the deletion of subparagraph 11.3 (a) (iii).

116. A more general question was raised regarding the nature of the obligation incurred by the carrier under paragraph 11.3. As to whether the carrier should be under an obligation to perform ("*obligation de résultat*") or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party ("*obligation de moyens*"), the view was expressed that the former, more stringent obligation, should be preferred. However, it was stated by the proponents of that view that the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the con-

sequences of the failure to perform, it was suggested that the draft instrument should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract.

117. After discussion, the Working Group generally agreed that subparagraph 11.3 (a) should be recast to reflect the above views and suggestions. It was agreed that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session.

(ii) *Subparagraph 11.3 (b)*

118. A question was raised regarding the meaning of the words "the controlling party shall indemnify the carrier". As already pointed out at the ninth session of the Working Group (see A/CN.9/510, para. 56), it was recalled that the notion of indemnity inappropriately suggested that the controlling party might be exposed to liability. It was suggested that the notion of "indemnity" should be replaced by that of "remuneration", which was more in line with the rightful exercise of its right of control by the controlling party. Subject to that suggestion, the Working Group found the substance of subparagraph 11.3 (b) to be generally acceptable.

(iii) *Subparagraph 11.3 (c)*

119. The Working Group found the substance of subparagraph 11.3 (c) to be generally acceptable.

(e) *Paragraph 11.4*

120. The Working Group found the substance of paragraph 11.4 to be generally acceptable.

(f) *Paragraph 11.5*

121. The view was expressed that, since subparagraph 7.3 (a) dealt with the obligation of the shipper to provide information to the carrier, that obligation should be reflected in paragraph 11.5. It was suggested that the end of the first sentence of paragraph 11.5 should be amended to provide the carrier with the choice to seek instructions from "the shipper or the controlling party" and not exclusively from "the controlling party". It was generally felt, however, that the obligation for the shipper to provide information in cases where the controlling party could not be identified was already contained in the second sentence of paragraph 11.5. It was thus unnecessary to refer to the shipper in the first sentence. Furthermore, providing the carrier with a choice to seek instructions from either the shipper or the controlling party would run counter to the policy that, during the carriage, the counterpart of the carrier should be the controlling party. Consistent with that policy, the shipper would only intervene as a substitute for the controlling party if that party could not be located or was unable to provide the requested information.

122. Another view was that, in addition to the carrier, performing parties such as warehouses or stevedores who held the goods in their custody might need to seek instructions from the shipper or the controlling party. It was thus suggested that the first sentence of paragraph 11.5 should be amended to refer to “the carrier or the performing party”. That suggestion was generally supported.

123. As a matter of drafting, it was suggested that it might be misleading to combine in the same provision a first sentence dealing with an obligation of the carrier and a second sentence dealing with an obligation of the shipper. It was generally felt that the formulation of the paragraph should be made clearer. Subject to the above suggestions, the Working Group found the substance of paragraph 11.5 to be generally acceptable.

(g) *Paragraph 11.6*

124. Broad support was expressed for the principle expressed in paragraph 11.6 under which the provisions regarding the right of control should be non-mandatory. A question was raised regarding the interplay of paragraphs 11.6 and 11.1 if paragraph 11.1 was to be interpreted as defining the right of control by way of an open-ended list. It was stated in response that the word “comprises” in paragraph 11.1 had been used as opposed to the word “includes” precisely to make it clear that the list in that paragraph was exhaustive.

125. Doubts were expressed regarding the extent to which party autonomy should be allowed to deviate from article 11. It was stated that it might be inappropriate to allow carriers, for example, to exclude totally the right of the controlling party to change the initial instructions regarding delivery of the goods, even where the carrier knew that the initial instructions had become unreasonable or should otherwise be changed.

126. Regarding the third sentence of the paragraph, the view was expressed that the words “any agreement ... must be listed in the contract particulars” might overly restrict the effect of paragraph 11.6 by allowing only agreements fully expressed in a bill of lading. Other types of agreement could be used for the purposes of paragraph 11.6, for example, through incorporation by reference to a contractual document outside the bill of lading. Such incorporation by reference would also be particularly important where electronic documentation was used. It was suggested that a revised draft of paragraph 11.6 should avoid suggesting any restriction to the freedom of the parties to derogate from article 11. That suggestion was broadly supported. Subject to that suggestion, the Working Group found the substance of paragraph 11.6 to be generally acceptable.

**4. Draft article 12 (Transfer of rights)**

127. The text of draft article 12 as considered by the Working Group was as follows:

“12.1.1 If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person,

- (i) If an order document, duly endorsed either to such other person or in blank, or,
- (ii) If a bearer document or a blank endorsed document, without endorsement, or,
- (iii) If a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement.

“12.1.2 If a negotiable electronic record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by passing the electronic record in accordance with the rules of procedure referred to in article 2.4.

“12.2.1 Without prejudice to the provisions of article 11.5, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.

“12.2.2 Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.

“12.2.3 Any holder that is not the shipper and that:

- (i) Under article 2.2 agrees with the carrier to replace a negotiable transport document by a negotiable electronic record or to replace a negotiable electronic record by a negotiable transport document, or
- (ii) Under article 12.1 transfers its rights,

does not exercise any right under the contract of carriage for the purpose of the articles 12.2.1 and 12.2.2.

“12.3 The transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record is issued shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights. Such transfer of rights may be effected by means of electronic communication. A transfer of the right of control cannot be completed without a notification of such transfer to the carrier by the transferor or the transferee.

“12.4 If the transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record has been issued includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.”

(a) *General remarks*

128. The Working Group heard that article 12 of the draft instrument constituted a novel approach, at least with

regard to maritime conventions. It was noted that there were two principal reasons for the inclusion of a chapter on transfer of rights: first, to ensure that the provisions of the draft instrument were coherent throughout in terms of the issue of liability of the parties, and second, in order to set out the necessary rules to accommodate the electronic communication component of the draft instrument. It was explained that subparagraph 12.1.1 and paragraph 12.2 related to a negotiable transport document, whilst paragraphs 12.3 and 12.4 concerned non-negotiable transport documents and instances where no transport document at all was issued. It was stated that subparagraph 12.1.1 should be read in conjunction with the definition of “holder” in paragraph 1.12, and that subparagraph 12.1.2 concerned negotiable electronic records. It was explained that subparagraph 12.2.1 contained a declaration of the non-liability of a holder who did not exercise any right under the contract of carriage, whilst subparagraph 12.2.2 made it clear that a holder who exercised a right under the contract of carriage also assumed any liabilities pursuant to that contract, to the extent that they were ascertainable pursuant to that contract. Subparagraph 12.2.3 and paragraph 12.3 were said to be self-explanatory and administrative in nature. It was further stated that paragraph 12.4 should be read with subparagraph 11.2 (d), since that provision constituted a qualification of paragraph 12.4.

129. The suggestion was made that article 12 be deleted from the draft instrument in its entirety, or that the entire chapter be placed in square brackets. In response to these suggestions, it was recalled that article 12 was inserted into the draft instrument as a response to problems that had been encountered in the preparation of the UNCITRAL Model Law on Electronic Commerce, which were specific to bills of lading, and the notion of “functional equivalency” between electronic records and paper documents. It was concluded at that time that the law of bills of lading was insufficiently codified in an international instrument to be able to accommodate an electronic record functionally equivalent to a paper-based bill of lading. It was recalled that the prevailing view at that time was that the development of rules regarding paper transport documents would facilitate the development and use of electronic records. The Working Group was cautioned that if it decided that the task of codifying rules on bills of lading was too difficult, then it would fail to accomplish its objective regarding electronic records. It was pointed out that the preliminary exchange of views in the Working Group made it clear that the entire chapter warranted further discussion.

(b) *Paragraph 12.1*

(i) *Subparagraph 12.1.1*

130. In considering the text of subparagraph 12.1.1, there was general support for the principle embodied in the provision that a holder of a negotiable transport document was entitled to transfer the rights incorporated in the document by transferring the document itself. It was stated, however, that there might be exceptions to this principle as, for example, in the case of paragraph 13.3, which provided that the shippers or consignees who were not holders could still sue for loss or damages. It was suggested that this matter could be dealt with through the addition of a phrase into sub-

paragraph 12.1.1 such as, “except for the provisions in article 13.3, the transfer of a negotiable transport document means the transfer of all rights incorporated in it”.

131. A concern was raised with respect to the interaction of subparagraph 12.1.1 and article 71 of the United Nations Convention on Contracts for the International Sale of Goods, which provided that a seller could in certain circumstances suspend the delivery of the goods to the buyer, even after they had already been shipped. It was explained that article 71 of the Sale of Goods Convention represented an exception to the principal rule, which is embodied in the draft instrument, that only the party with right of control can stop the carriage of the goods. It was suggested that reading article 71 of the Sale of Goods Convention as an exception to the main rule removed the apparent inconsistency between that convention and the draft instrument.

132. In the course of discussions in the Working Group, there was some support for the concern raised with respect to the types of negotiable transport documents included within the terms of subparagraph 12.1.1. It was noted that some national law regimes included bills of lading to a named person as negotiable documents, yet these nominative documents were not included in the list of negotiable transport documents in subparagraph 12.1.1, nor were they included by virtue of the definition of “negotiable transport document” in paragraph 1.14. It was suggested that a bill of lading to a named person should be included in subparagraph 12.1.1, either through direct inclusion, or by including it in paragraph 1.14. Through the course of discussions, it was noted that in most national legal regimes, a nominative bill of lading was non-negotiable, and that it was transferred by assignment rather than by endorsement. By way of explanation, it was noted that subparagraph 12.1.1 was drafted in order to circumvent the difficulties of dealing with the nominative aspect of electronic documents. It was further noted that the drafting decision was made to limit these problems and promote harmonization by using terms such as “to order” and “to bearer” to describe negotiable documents, and it was suggested that reintroducing the nominative document as a negotiable document could negatively affect the ability of the electronic system to differentiate documents.

133. There was strong support in the Working Group to maintain the text of subparagraph 12.1.1 as drafted in order to promote the harmonization and to accommodate negotiable electronic records. The concern regarding nominative negotiable documents under certain national laws was noted.

(ii) *Subparagraph 12.1.2*

134. The Working Group took note that subparagraph 12.1.2 would be discussed at a later date in conjunction with the other provisions in the draft instrument regarding electronic records.

(c) *Paragraph 12.2*

(i) *Subparagraph 12.2.1*

135. It was suggested that subparagraph 12.1.2 could be clarified by providing examples of the types of liabilities

that could be assumed by a holder who was not the shipper and who had not exercised any right under the contract of carriage. By way of explanation, it was pointed out that this provision was intended to provide comfort to intermediate holders such as banks that, as long as they did not exercise any right under the contract of carriage, they would not assume any liability under that contract. The question was raised whether this was an appropriate rule for the draft instrument, since the draft article might be misread as suggesting that any time a holder became active or exercised a right, the holder would automatically assume responsibilities or liabilities under the contract of carriage. In response, it was suggested that subparagraphs 12.2.1 and 12.2.2 should be read together, since the latter provision clarified what liabilities a holder would assume in the situation where the holder exercised any right under the contract of carriage.

136. There was some support for the view that the concept in subparagraph 12.2.1 was superfluous. After discussion, the Working Group requested the secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

*(ii) Subparagraph 12.2.2*

137. The concerns raised with respect to subparagraph 12.2.1 were echoed with respect to subparagraph 12.2.2, and a request was made that the text in the draft article stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract. It was suggested that it would be difficult to itemize which obligations in the contract of carriage could be assumed by the holder, and that, in any event, the text of the provision was sufficiently clear in stating that the liabilities were those that "are incorporated in or ascertainable from the negotiable transport document". Further reservations were noted with respect to the breadth of the subparagraph, and the possibility was suggested that carriers could expand the liability of holders significantly pursuant to this provision by including standard clauses in the contract of carriage that extended the liabilities of the shipper.

138. By way of explanation, it was pointed out that subparagraph 12.2.2 was intended not to detail which obligations would be imposed on the holder, but rather to state that if there were obligations on a holder, then the later holder would assume those liabilities once that holder exercised any rights under the contract. It was further stated that the existence of any such liabilities was to be decided by the parties who negotiated the contract, and that any liabilities were limited to those that were incorporated in or ascertainable from the contract. It was suggested that any further specification of potential liabilities for the holder would be impossible in an international instrument, and should be left to national law to ascertain those potential liabilities from the contract. In response to this suggestion, it was urged that the issue should be dealt with in the draft instrument rather than be left to the applicable law.

139. Additional concern was raised with respect to the possibility that specific liabilities that might be considered unfair could be incorporated into the contract and thus be assumed by the holder. An example was given of the pos-

sibility that a demurrage claim could be incorporated into the contract of carriage, and the receiver of cargo as the holder could become responsible for its payment.

140. The Working Group requested the secretariat to prepare a revised draft of subparagraph 12.2.2 with due consideration being given to the views expressed.

*(iii) Subparagraph 12.2.3*

141. The Working Group found the substance of subparagraph 12.2.3 to be generally acceptable.

*(d) Paragraph 12.3*

142. Concern was raised with respect to a conflict that could arise between paragraph 12.3 and national law in countries where notice of transfer of rights must be given by the transferor, and may not be given by the transferor or the transferee as stated in the last sentence of the provision. It was suggested that this potential conflict could be avoided through the inclusion of the following phrase after the words "or the transferee" at the end of the final sentence of the provision: "in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights". In the alternative, it was suggested that the potential conflict could be avoided through the deletion of the phrase "by the transferor or the transferee" in the final sentence of paragraph 12.3.

143. Whilst support was expressed for the principle behind the opening sentence of paragraph 12.3, concern was expressed with respect to the requirement in the provision that the transfer of rights under a contract of carriage pursuant to which no negotiable transport document was issued "shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights". In particular, it was noted that this provision raised very complex conflict of law issues for certain European countries, given its conflict with the approach taken to the issue of assignment in the Rome Convention on the Law Applicable to Contractual Obligations. It was suggested that a simpler approach might be found, but some uncertainty was expressed regarding whether it would be possible to solve the issue using a single applicable law approach. The suggestion was also made that, with a view to avoiding conflict with any regional convention, paragraph 12.3 could simply refer to "applicable law" in its first sentence, rather than stating how to apply the law.

144. A view was expressed that the secretariat could promote the harmonization of international approaches to the issue of transfer of rights by examining how the Convention on the Assignment of Receivables in International Trade dealt with the transfer of rights. The Working Group was reminded, however, that the draft instrument was intended to focus on the carriage of goods, and not on the transfer of rights.

145. The Working Group requested the secretariat to prepare and place in square brackets a revised draft of paragraph 12.3, with due consideration being given to the suggestions made in the course of the discussion.

*(e) Paragraph 12.4*

146. It was suggested that the text of paragraph 12.4 was unnecessarily complicated and difficult to understand. Criticism was heard that this provision derogated from the law of assignment, and that it did not appear consistent with the approach taken in paragraph 12.3, wherein the transfer of rights was to take place according to applicable law. Further, the specific substantive law set out in paragraph 12.4 appeared to strongly favour the carrier, and might be seen as undermining the balance of rights in the draft instrument as a whole. It was suggested that the matters dealt with in this provision might better be left to the agreement of the parties, than to be decided by any specific rule on joint and several liability.

147. In response to the specific criticisms of paragraph 12.4, support was expressed for the view that paragraph 12.4 was a welcome attempt to state the general principle that a debtor cannot escape liability by transferring its rights to another party. It was also suggested that a provision that ensured that a debtor remained liable until the carrier agreed to the transfer of rights was a positive approach, although it was questioned why a carrier would need joint and several liability on the part of the holder if the carrier had agreed to the transfer. Further, in response to the statement that draft paragraphs 12.3 and 12.4 could apply when no document at all was issued, it was explained that the transfer of rights could take place pursuant to an exchange of electronic data.

148. In light of the discussion with respect to draft article 12 and to paragraph 12.4 in particular, the Working Group requested the secretariat to prepare and place in square brackets a revised draft of paragraph 12.4, with due consideration being given to the views expressed.

*5. Draft article 13 (Rights of suit)*

149. The text of draft article 13 as considered by the Working Group was as follows:

“13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

- (i) The shipper;
- (ii) The consignee;
- (iii) Any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage;
- (iv) Any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer. In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.

“13.2 In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. If such holder did not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffered such loss or damage.

“13.3 In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.”

*(a) Paragraph 13.1*

150. By way of introduction, it was recalled that paragraph 13.1 was intended to apply to any contract of carriage, whether or not a document or electronic record had been issued and, if it had been issued, irrespective of its nature. That provision set out a general rule as to which parties had a right of suit under the draft instrument. As a possible deficiency of the current draft, it was mentioned that two parties listed in paragraph 13.1 might suffer loss, for example, where goods were damaged and delayed, an insurer paid the insured portion of the loss, and the consignee had to bear the uninsured portion, such as loss due to delay. It was thus suggested that a revised draft of paragraph 13.1 should make it clear that both parties were entitled to claim to recover their respective portions of the loss. As a matter of drafting, it was also suggested that the readability of the provision might be improved if the words “Without prejudice to articles 13.2 and 13.3” were deleted.

151. Some support was expressed about the principle expressed in paragraph 13.1, under which a contracting shipper or a consignee could only assert those contractual rights that belonged to it and if it had a sufficient interest to claim. This meant that in the case of loss of or damage to the goods the claimant should have suffered the loss or damage itself. If another person, e.g. the owner of the goods or an insurer, was the interested party, such other person should either acquire the right of suit from the contracting shipper or from the consignee, or, if possible, assert a claim against the carrier outside the contract of carriage.

152. Fundamental concerns and questions were raised with respect to paragraph 13.1. It was pointed out that, under most legal systems, the provision could be regarded as superfluous since it established a right of suit where such a right would normally be recognized by existing law to any person who had sufficient interest to claim. At the same time, the provision might be regarded as unduly restrictive in respect of the persons whose right of suit was recognized. It was emphasized that recognizing a right of suit to a limited number of persons by way of closed list was a dangerous technique in that it might inadvertently exclude certain persons whose legitimate right of suit should be recognized. Among such persons possibly omitted unduly from the list contained in paragraph 13.1, it was suggested that

the controlling party, in cases where the carrier had refused to follow its instructions, and the person identified in paragraph 7.7 might need to be considered. In the course of that discussion, a note of caution was struck regarding the appropriateness of limiting in any way the exercise of rights of suit, a policy that might run counter to fundamental rights, possibly human rights, that should be recognized to any person who had sufficient interest to claim.

153. The view was expressed that the provision could also be regarded as unduly restrictive regarding the nature of the action that could be exercised. In that respect, a question was raised as to the reasons why paragraph 13.1 dealt only with actions for damages and not with actions for performance.

154. The provision was further criticized on the grounds that it dealt in general terms with claims asserted against the carrier or any performing party. The view was expressed that dealing with claims against the carrier was too restrictive and resulted in an insufficiently balanced provision. Under that view, a provision on the rights of suit should also envisage claims asserted against the shipper or the consignee, for example, claims for payment of freight. As regards claims asserted against the performing party, the view was expressed that the scope of the provision was too broad. It was suggested that, with a view to avoiding conflict with existing mandatory regimes applicable to land carriers, the scope of the provision should be restricted to claims asserted against sea carriers.

155. The overall structure of the provision was criticized as reflective of an approach based on the recognition of an action, as opposed to the recognition of a right, which would be the preferred approach under many legal systems. It was observed that the recognition of an action to a limited number of persons offered the advantage of predictability. However, widespread preference was expressed for a general provision recognizing the right of any person to claim compensation where that person suffered loss or damage as a consequence of the breach of the contract of carriage.

156. Some support was expressed for the retention of the last sentence of paragraph 13.1, which was said to provide a useful rule applicable both to suits based on breach of contract and to suit based on tort. It was generally felt that that sentence appropriately expressed the general principle that when transferring rights, the transferee could not acquire more rights than the transferor had. The view was expressed, however, that the matter of assignment or subrogation should be left to applicable law. A contrary view was that the matter should not be dealt with through private international law but that the draft instrument should provide a uniform rule governing the situation where claims were made by third parties. In that situation, it was suggested that, where the carrier was sued by a third party on the basis of an extra-contractual claim, the protection afforded by the draft instrument, in particular the limits of liability, should be available to the carrier. The Working Group took note of that suggestion.

157. While strong support was expressed for the deletion of paragraph 13.1, the Working Group decided to defer any

decision regarding paragraph 13.1 until it had completed its review of the draft articles and further discussed the scope of application of the draft instrument. The secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage.

158. In the context of the discussion of paragraph 13.1, the view was expressed that the draft instrument should contain provisions regarding the issues of applicable law and dispute settlement through arbitration. While the view was expressed that no such provisions were needed and that those issues should be entirely left to the discretion of the parties, the widely prevailing view was that such provisions should be introduced in the draft instrument. Strong support was expressed in favour of modelling such provisions on articles 21 and 22 of the Hamburg Rules, although those provisions were criticized by some delegations. Other possible models, including articles 31 and 33 of the CMR, Regulation 44-2001 of the European Union, and the Montreal Convention, were suggested. It was pointed out that a decision would need to be made as to whether the jurisdiction should be exclusive, as in the European Regulation, or not, as in the CMR Convention. A decision would also need to be made as to whether a jurisdiction clause would be binding only on parties to the contract of carriage or also on third parties. A further suggestion was made that the draft instrument should also encourage parties to conciliate before resorting to more adversarial dispute settlement mechanisms.

159. After discussion, the Working Group requested the secretariat to prepare draft provisions on issues of jurisdiction and arbitration, with possible variants reflecting the various views and suggestions expressed in the course of the above discussion.

#### (b) *Paragraph 13.2*

160. It was stated that, under existing law in certain countries, the holder of a bill of lading would only be given a right of suit if the holder could produce a bill of lading and prove that loss or damage had occurred. From that perspective, the combination of paragraphs 13.2 and 13.3 would lead to the questionable result that the holder of a bill of lading would be entitled to exercise a right of suit without having to prove that it suffered loss or damage. It was generally felt, however, that the first sentence of paragraph 13.2 was in line with existing law in most countries and served a useful purpose, in particular by establishing that the holder did not have an exclusive right of suit. From that perspective, it was however suggested that the same principle should apply in the case of paragraph 13.1, where no negotiable instrument had been issued.

161. Doubts were expressed regarding the meaning of the words "on behalf" in the second sentence of paragraph 13.2. While it was felt that the second sentence was needed in order to avoid the possibility that a carrier might have to pay twice, it was generally agreed that further clarification should be introduced in the provision regarding the subrogation relationship to be established

between the holder of a bill of lading and the party that suffered loss or damage.

(c) *Paragraph 13.3*

162. It was recalled that the person exercising a right of suit under the contract of carriage should not be dependent on the cooperation of the holder of a negotiable document if that person, and not the holder, had suffered the damage. Doubts were expressed regarding the operation of the provision under which the claimant should prove that the holder did not suffer the damage. The Working Group agreed that the issue might need to be further discussed at a later stage.

**6. Draft article 14 (Time for suit)**

163. The text of draft article 14 as considered by the Working Group was as follows:

“14.1 The carrier is discharged from all liability in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper is discharged from all liability under chapter 7 of this instrument if judicial or arbitral proceedings have not been instituted within a period of one year.

“14.2 The period mentioned in article 14.1 commences on the day on which the carrier has completed delivery of the goods concerned pursuant to article 4.1.3 or 4.1.4 or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.

“14.3 The person against whom a claim is made at any time during the running of the period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

“14.4 An action for indemnity by a person held liable under this instrument may be instituted even after the expiration of the period mentioned in article 14.1 if the indemnity action is instituted within the later of:

- (a) The time allowed by the law of the State where proceedings are instituted; or
- (b) 90 days commencing from the day when the person instituting the action for indemnity has either:
  - (i) Settled the claim; or
  - (ii) Been served with process in the action against itself.

“[14.5 If the registered owner of a vessel defeats the presumption that it is the carrier under article 8.4.2, an action against the bareboat charterer may be instituted even after the expiration of the period mentioned in article 14.1 if the action is instituted within the later of:

- (a) The time allowed by the law of the State where proceedings are instituted; or
- (b) 90 days commencing from the day when the registered owner both;

- (i) Proves that the ship was under a bareboat charter at the time of the carriage; and
- (ii) Adequately identifies the bareboat charterer.]”

(a) *General remarks*

164. It was recalled that draft article 14 on time for suit was discussed in general terms by the Working Group at its ninth session (A/CN.9/510, para. 60). It was noted that, in keeping with the time for suit in the Hague and Hague-Visby Rules, paragraph 14.1 provided a period of one year as the basic time limit for suits against the carrier and the shipper, while the question of adopting a different time period, such as the two-year period specified in the Hamburg Rules, remained open as a policy question for the consideration of the Working Group. It was noted that paragraph 14.2 was intended to clarify the basis on which the time for suit commenced to run in order to overcome problems that had arisen in practice with respect to previous conventions. Paragraph 14.3 was described as an important provision, which followed the Hague-Visby and Hamburg Rules, and which was intended to clarify that a valid extension to the time for suit could be given. It was explained that paragraph 14.4 was also based on the Hague-Visby and Hamburg Rules, and that paragraph 14.5 was placed in square brackets in order to reflect its reliance on the rule in subparagraph 8.4.2, also in square brackets, in accommodating a claimant's potential inability to identify the carrier in a timely fashion.

(b) *Paragraph 14.1*

165. There was general support for the principle of limiting the time for suit, as set out in paragraph 14.1. It was questioned why the paragraph discharged the carrier from all liability in respect of the goods once the time for suit had expired, yet it was silent on the discharge of liability of performing parties. Support was expressed for the inclusion of performing parties in this provision.

166. It was recognized that the inclusion of a time-for-suit provision for the shipper in the second sentence of paragraph 14.1 was a new approach. Some general doubt was expressed with respect to this innovation, but support was also expressed for that provision which was said to provide for a balanced approach in limiting the time for suit against both carriers and shippers. A question was raised why the time for suit for shippers referred only to shipper liability pursuant to article 7 of the draft instrument, and why it did not also refer to shipper liability pursuant to other articles, such as article 9. It was suggested that all persons subject to liability under the contract of carriage should be included in this provision, and that they should be subject to the same period of limitation. A further suggestion was made that paragraph 14.1 not make specific reference to carriers or shippers, but that it simply state that any suit pursuant to the draft instrument would be barred after a period of time to be agreed by the Working Group. Another question raised with respect to the second sentence of the paragraph was why it mentioned only shippers and not other persons who were subject to the same responsibilities and liabilities as shippers under article 7.

A further question was raised with respect to a possible error in paragraph 7.7, which made reference to Chapter 13 rather than to Chapter 14 in its reference to provisions concerning shipper's rights and immunities.

167. An important question of terminology was raised with respect to paragraph 14.1. It was noted that the commentary to this provision (A/CN.9/WG.III/WP.21, paragraph 208) stated that the expiration of the time for suit resulted in the extinguishment of the rights of the potential claimant, and as such, suggested that paragraph 14.1 concerned a prescription period rather than a limitation period. It was noted that this distinction was very important, particularly in civil law systems, where the law establishing a time period for the extinction of a right would typically not allow a suspension of the time period. As to whether the *lex fori* or the *lex contractus* would govern the issue of the limitation period, it was pointed out that certain existing international instruments such as the Rome Convention on the Law Applicable to Contractual Obligations would lead to the application of the *lex contractus* as matters of time for suit for claims arising from the contract of carriage would be governed by the proper law of the contract. However, in some jurisdictions, the matter would be regarded as one of civil procedure to be governed by the *lex fori*. It was suggested that any ambiguity with respect to prescription periods versus limitation periods should be carefully avoided, in order to ensure predictability of the time for suit provisions.

168. During the course of the discussion, significant support was expressed for retaining the time period of one year, as set out in the paragraph and in accordance with the Hague and Hague-Visby Rules. It was further suggested that a one-year period would avoid the situation where an extra year was not seen to have significant advantages for the parties, but rather had major disadvantages in terms of increased uncertainty, both terms of the practical aspects of the case such as preservation of evidence, but also with respect to unresolved potential liability for claims. On the other hand, there was also support for the suggestion that one year was not long enough to find the correct party to sue, given the complexity of modern cases and the number of parties involved, and that a two-year period such as that appearing in the Hamburg Rules would be more appropriate. Another suggestion was to extend the one-year period in cases of wilful misconduct to a three-year period. It was noted that the length of the limitation period should be fair and balanced, and should offset other changes that might be effected by the draft instrument as a whole in the allocation of risk amongst the parties. Caution was raised that rules on time for suit had caused difficulties of interpretation in other transport conventions, and the Working Group was urged to agree upon a simple and effective rule.

169. The suggestion was made to insert the one-year time period in square brackets, or alternatively, to simply insert empty square brackets and not state any specific period of time. The Working Group requested the secretariat to place "one" in square brackets, and to prepare a revised draft of paragraph 14.1, with due consideration being given to the views expressed.

(c) *Paragraph 14.2*

170. Whilst there was strong support for the principle that it was necessary to have a very clear and easily ascertainable date for the commencement of the time for suit, doubt was expressed with respect to the choice in paragraph 14.2 of the date of delivery of the goods pursuant to the contract of carriage as set out in subparagraphs 4.1.3 or 4.1.4 as that date. It was suggested that the date of delivery in the contract of carriage might be much earlier than the date of actual delivery and might therefore be detrimental to the consignee. It was further suggested that a better date for the commencement of the time period would be the actual date of delivery. The Working Group was reminded that delivery was not defined in the draft instrument since it was thought to be impossible to provide an appropriate definition of delivery that would satisfy most jurisdictions, thus it was left to national law. It was noted that the choice of the date of delivery in the contract of carriage was intended to avoid the uncertainty surrounding whether delivery meant actual delivery, or whether it meant the date that the carrier offered the goods for delivery, or some other time involved in delivery. It was also noted that actual delivery could be unilaterally delayed by the consignee, and that it could also be highly dependent on local customs authorities and regulations, thus causing great uncertainty concerning the date of delivery and the commencement of the running of the time for suit. It was suggested that in order to avoid uncertainty, it was necessary to choose as the date of commencement of the time period a date that was easily fixed by all parties.

171. Concern was also raised with respect to the choice of the last day on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It was stated that if the parties had not agreed, then subparagraph 6.4.1 on delay stated that delivery should be within the time it would be reasonable to expect of a diligent carrier, and that this was not an easily fixed date either.

172. Another issue raised with respect to paragraph 14.2 was the possibility that a plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It was suggested that a possible solution to this problem could be to include counterclaims in the terms provided for additional time under subparagraph 14.4 (b) (ii) of the draft instrument (see para. 177 below).

173. The suggestion was also made that there be a different commencement day regarding the claim against the shipper than for a claim against the carrier.

174. The Working Group requested the secretariat to retain the text of paragraph 14.2, with consideration being given to possible alternatives to reflect the views expressed.

(d) *Paragraph 14.3*

175. The Working Group found the substance of paragraph 14.3 to be generally acceptable.



(e) *Paragraph 14.4*

176. Concerns were raised with respect to subparagraph 14.4 (b) (ii), which set out that an action for indemnity by a person held liable under the draft instrument could be instituted after the expiration of the paragraph 14.1 time for suit in certain circumstances. It was noted that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgement in the case had been rendered, and it was suggested that the 90-day period in subparagraph 14.4 (b) (ii) be adjusted to commence from the date the legal judgement is effective. Support was expressed for this position, and alternative language was offered that the 90-day period should run from the day the judgement against the recourse claimant became final and unreviewable.

177. It was suggested that the concern raised with respect to the possibility of counterclaims being barred by the late commencement of claims pursuant to paragraph 14.1 (see above, para. 172) could be met by allowing counterclaims to be made after the expiration of the time for suit, provided that they are instituted within 90 days of the service of process in the main action, pursuant to subparagraph 14.4 (b) (ii) as currently drafted. A further suggestion was made that counterclaims could be dealt with in a separate draft article, but that they should nonetheless be treated in similar fashion to subparagraph 14.4 (b) (ii).

178. The Working Group requested the secretariat to prepare a revised draft of paragraph 14.4, with due consideration being given to the views expressed.

(f) *Paragraph 14.5*

179. It was recalled that paragraph 14.5 appeared in square brackets due to its link to subparagraph 8.4.2, which was also bracketed, and that if the decision was made to delete subparagraph 8.4.2, then the entire text of paragraph 14.5 would also be deleted as unnecessary. It was reiterated that this provision was intended to accommodate the claimant who could be at risk of running out of time to file suit through no fault of its own if the registered owner waited too long before producing the bareboat charterer pursuant to subparagraph 8.4.2.

180. Mindful of the fact that the fate of this provision depended upon that of subparagraph 8.4.2, the Working Group expressed support for the principle embodied in paragraph 14.5, and for the 90-day time period. However, a doubt was raised whether this provision would be of any assistance to cargo claimants that experienced difficulties in identifying the carrier, since if the registered owner of the vessel successfully rebutted the presumption, the claimant would need to introduce a new claim against the bareboat charterer.

181. It was suggested that subparagraphs (i) and (ii) of subparagraph 14.5 (b) be combined into one, since subparagraph (ii) could be considered a sufficiently rigorous condition to subsume subparagraph (i). Whilst it was recognized that the sheer size of a typical bareboat charter, in addition to the likelihood that it would contain confiden-

tial information, would make it impractical to produce in a proceeding, it was thought that proof of the facts by the registered owner of the vessel could be expressed in one single condition.

182. The Working Group requested the secretariat to prepare a revised draft of paragraph 14.4, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the secretariat to retain subparagraph 8.4.2 in square brackets, and that it therefore requested the secretariat to retain paragraph 14.5 in square brackets, bearing in mind that the fate of the latter article was linked to that of the former.

**7. Draft article 15 (General average)**

183. The text of draft article 15 as considered by the Working Group was as follows:

“15.1 Nothing in this instrument prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.

“15.2 With the exception of the provision on time for suit, the provisions of this instrument relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.”

(a) *General remarks*

184. The Working Group was reminded that it had discussed draft article 15 on general average in broad terms in relation to paragraph 5.5 during its ninth session (see A/CN.9/510, paras. 137-143). It was recalled that draft article 15 was closely based upon article 24 of the Hamburg Rules, and that article 15 of the draft instrument was intended to permit the incorporation into the contract of carriage the operation of the York-Antwerp Rules (1994) on general average. It was pointed out that the drafting in chapter 15 was intended to reflect the principle that the general average award adjustment must first be made, and the general average award established, and that pursuant to paragraph 15.2, liability matters would thereafter be determined on the same basis as liability for a claim brought by the cargo owner for loss of or damage to the goods. It was submitted it was reasonable to determine the two claims using the same liability rules, given that they amounted to two sides of the same set of facts. It was further stated that the principles of general average have a long history in maritime law, and that they form part of the national laws of most maritime countries.

185. There was broad support for the continued operation of the rules on general average as a set of rules independent from the operation of those in the draft instrument. Whilst there was some discussion as to whether it was necessary to specifically include provisions such as those in article 15 in order to accomplish this goal, there was general support for the existing chapter as drafted. It was stated, however, that article 24 of

the Hamburg Rules had been included due to the specific liability rules in that convention, and that the Hague and Hague-Visby Rules had no specific provision on general average, although they did contain in article V a statement that "Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision on general average". It was recalled that this statement in the Hague and Hague-Visby rules allowed for the operation of the York-Antwerp Rules on general average, but it was pointed out that the issue was unclear and generated jurisprudence. It was suggested that since the liability provisions in the draft instrument more closely resembled the Hague and Hague-Visby Rules, it would be appropriate to delete article 15 on general average as unnecessary, without fear that it would impede the operation of the general average rules. It was stated in response, however, that the insertion of an article such as draft article 15 was of great assistance in clarifying the relationship between the draft instrument and the general average rules, such that it could significantly reduce the potential jurisprudence on this point.

(b) *Paragraph 15.1*

186. There was broad support for the continued incorporation of the York-Antwerp Rules on general average into the contract of carriage, and, with the Working Group found the substance of paragraph 15.1 to be generally acceptable.

(c) *Paragraph 15.2*

187. Whilst it was generally conceded that paragraph 15.1 served to clarify and ensure the incorporation of the rules on general average, the question was raised whether paragraph 15.2 was necessary in the draft instrument. It was suggested that the rules on liability pursuant to the contract of carriage would apply regardless of the inclusion of paragraph 15.2, and that the statement to this effect in paragraph 15.2 only served to confuse the issue.

188. There was also support expressed for the retention of paragraph 15.2, but there were suggestions for modification to the drafting. It was stated that the opening phrase of paragraph 15.2 with respect to time for suit was intended to indicate that the time for suit provisions did not apply to general average awards, but it was suggested that clearer language could be found to express that meaning. In this connection, it was also suggested that the Working Group might wish to establish a separate provision on time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. Some support was expressed for this approach.

189. In addition, it was questioned whether paragraph 15.2 should also include liability for loss due to delay and demurrage in those liabilities under the draft instrument which should be applied to the determination of refusals for contribution to general average.

190. The Working Group requested the secretariat to prepare a revised draft of paragraph 15.2, with due consideration being given to the views expressed.

8. *Draft article 16 (Other conventions)*

191. The text of draft article 16 as considered by the Working Group was as follows:

"16.1 This instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [seagoing] ships.

"16.2 No liability arises under the provisions of this instrument for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage by sea.

"16.3 No liability arises under the provisions of this instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960, on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963, on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions."

(a) *General remarks*

192. The Working Group heard that article 16 on other conventions was based upon article 25 of the Hamburg Rules, although the order of the subparagraphs had been adjusted somewhat in the draft instrument. Further, it was noted that the draft instrument did not contain an article in keeping with article 25.2 of the Hamburg Rules with respect to other conventions on jurisdiction and arbitration, since the draft instrument did not yet contain chapters on these matters. It was suggested that the Working Group might wish to include a similar provision in the draft instrument if it decided to include provisions therein regarding jurisdiction and arbitration. The additional comment was made that if such a provision were included in the draft instrument, the Working Group might wish to consider specifying the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968) and any subsequent regulation, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

193. It was also explained that article 25.5 of the Hamburg Rules had been omitted in the draft instrument in light of the scope of application issue. It was noted that the Working Group might wish to revisit the possibility of adding a provision similar to article 25.2 of the Hamburg Rules once it had made a decision regarding the scope of application of the draft instrument.

194. General support was expressed for draft article 16 as a useful and appropriate addition to the draft instrument.

195. It was noted that article 16 was intended to specify the relationship between the draft instrument and other international conventions, but that the list of other international conventions that could be affected by the draft instrument was much longer than that set out in article 16, and could include, for example, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996). It was suggested that rather than risk omitting a convention in a specific list of instruments, a general clause be used instead that this instrument would not affect other international conventions concerning the limitation of liability. Some support was expressed for this approach, however, caution was urged that too general a statement, such as, for example, to state that all other conventions with limitation on liability should prevail, might not accurately reflect the intention of the Working Group. It was also suggested that the Working Group should carefully examine the list of other conventions, keeping in mind the fact that the draft instrument, unlike the Hamburg Rules upon which draft article 16 is based, dealt not only with the carrier's liability, but also with the shipper's liability, on a mandatory basis.

(b) *Paragraph 16.1*

196. The suggestion was made that it would be helpful to some States attempting to avoid conflicts with other transport conventions if paragraph 16.1 were amended to add language stating that the draft instrument would prevail over other transport conventions except in relation to States that are not members of the instrument. It was stated that this addition would be particularly helpful if the Working Group decided upon a door-to-door scope of application of the draft instrument, but that it would be equally welcome if the Working Group were to decide upon a port-to-port scope of application.

197. It was noted that the word "seagoing" in paragraph 16.1 appeared in square brackets, and it was suggested that this word be deleted, since in light of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (2000), use of the term might cause confusion regarding which convention was applicable.

(c) *Paragraph 16.2*

198. Support was expressed for paragraph 16.2, however, it was suggested that the phrase "by sea" be deleted from the final line of paragraph 16.2, since a number of conventions govern the carriage of passengers and luggage by means other than sea, such as by road, railroad and air, and it would be helpful to clarify that the draft instrument was not intended to affect these conventions.

199. The Working Group found the substance of paragraph 16.2 to be generally acceptable, and in keeping with the drafting approach in paragraph 16.1, the Working Group decided to place square brackets around the phrase "by sea".

(d) *Paragraph 16.3*

200. It was explained that the list of conventions in paragraph 16.3 was not yet complete, since the instruments listed had been supplemented by further protocols and

amendments, one of which was the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1998). It was noted that care would have to be taken to examine the list and to prepare an accurate and updated version thereof.

201. The suggestion was made that other conventions touching on liability could be added to those listed in paragraph 16.3, such as those with respect to pollution and accidents. However, some hesitation was voiced at extending the list of conventions in this fashion, and caution was urged to include on the list only those conventions with which the draft instrument could have a conflict. It was suggested that the list of conventions that appeared in paragraph 16.3 and in article 25.3 of the Hamburg Convention might be as a result of the requirements of the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (1971).

202. The Working Group requested the secretariat to update the list of conventions and instruments in paragraph 16.3, and to prepare a revised draft of paragraph 16.3, with due consideration being given to the views expressed.

**9. Draft article 17 (Limits of contractual freedom)**

203. The text of draft article 17 as considered by the Working Group was as follows:

"17.1 (a) Unless otherwise specified in this instrument, any contractual stipulation that derogates from the provisions of this instrument is null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under the provisions of this instrument.

(b) [Notwithstanding paragraph (a), the carrier or a performing party may increase its responsibilities and its obligations under this instrument.]

(c) Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.

"17.2 Notwithstanding the provisions of chapters 5 and 6 of this instrument, both the carrier and any performing party may by the terms of the contract of carriage exclude or limit their liability for loss of or damage to the goods if

(a) The goods are live animals, or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic record is or is to be issued for the carriage of the goods."

(a) *Title*

204. As a matter of drafting, it was suggested that the title of the draft article should be revised to reflect more accu-

rately the contents of the provision, which did not deal with “limits of contractual freedom” in general, but dealt with clauses limiting or increasing the level of liability incurred by the various parties involved in the contract of carriage.

(b) *Paragraph 17.1*

(i) *Subparagraph 17.1 (a)*

205. The discussion focused on the words “or increase” in square brackets in paragraph 17.1. With a view to ensuring a balanced and even treatment of the shipper and the carrier under the draft instrument, the view was expressed that the traditional solution allowing the carrier to increase its liability should be extended to the shipper. In response, a widely shared view was expressed that, while the possibility for the carrier to increase its liability should be recognized, as it was under the Hague Rules, the shipper should be protected against clauses that might increase its liability, particularly in contracts agreed on standard terms. It was generally felt that, in examining the balance of rights and obligations between the shipper and the carrier, it should be borne in mind that, with the notable exception of certain very large shippers, a shipper would typically have less bargaining power and should thus be protected. Another view was expressed that paragraph 17.1 should not at all address the shipper, the controlling party, or the consignee. In response to a question regarding the possibility for the carrier to increase its liability under CMR, it was explained that such an increase was not necessary, in view of the higher limit of liability under CMR.

206. With respect to the liability incurred by the controlling party, the view was expressed that further discussion would be needed regarding clauses limiting or extending such liability. It was suggested that the liability of agents or employees of the contractual parties might also need to be envisaged.

207. A proposal was made that special treatment should be given under draft article 17 to competitively negotiated contracts between shippers and carriers. It was stated that parties to such contracts (which were described as “sophisticated parties”) should have freedom to negotiate terms of their own choosing. Should these parties be allowed to negotiate clauses to increase or decrease their liability among themselves, such clauses should not affect third parties.

208. In response to that proposal on the exclusion of certain “competitively negotiated contracts between sophisticated parties”, several major concerns were expressed. One concern was based on what was described as the “near impossibility” of a clear definition. While the Hague and Hague-Visby Rules made it relatively easy to distinguish between matters included in and excluded from the conventions because the distinguishing element was the traditional bill of lading, such distinguishing element was lost in the draft instrument, which was intended to apply to “contracts for the carriage of goods [by sea]”. Consequently, clear definitions should be provided in the draft instrument in order to circumscribe the exact scope of any exclusion. It was pointed out that a “volume” contract, also referred to as an “ocean transportation contract” or “OTC”, had few distinctive characteristics when com-

pared to a carriage contract. Expressions such as “contract of affreightment”, “volume contract”, “tonnage contract” and “quantity contract”, were also used and, depending on the legal system, appeared to be treated as synonymous. The characteristics of such contracts were: that the carrier undertook to perform a “generic” obligation (i.e. a generally defined duty which later needs to be further specified) to carry a specified quantity of goods; that no ships were as yet nominated in the contract; that the cargo consisted of a large quantity which was to be carried in several ships over a certain period of time; that the freight was calculated on the basis of an agreed unit or as a lump sum; and that the risk of delay was borne by the carrier. The volume contract consequently had many of the characteristics of a voyage charter-party. However, the individual shipments pursuant to such a contract would be mandatorily governed by the Hague or Hague-Visby Rules. This was said to contradict the allegations by the supporters of the exclusion of such contracts from the scope of the draft instrument, that under current practice, no small shipper was ever forced into a so-called “service contract” (which would then be an adhesion contract), and that this practice would not change under the draft instrument if service contracts were excluded from its scope of application. The fundamental difference was that in the present situation, such contracts could not be imposed on small shippers because of the compulsory application of the Hague Rules to the individual shipments. Were the scope of the draft instrument to be reduced in the proposed manner, that protection would be lost and the parties would be faced with the situation that prevailed in the 19th century.

209. A second concern was that the exclusion of individual shipments performed pursuant to a volume contract from the scope of the draft instrument would constitute a legal revolution, and would undermine the ambit of the draft instrument to such an extent as to make it virtually non-existent in certain trades. The proposed exclusion was described as a first step towards the effective abolition of the Hague Rules regime, which was put in place to protect cargo interests. In that context, it was recalled that, for example, it had been said that 80 to 85 per cent of United States container trade was presently performed under volume contracts.

210. A third concern was expressed with regard to the application of national legislation. It was stated that the exclusion of service contracts from the scope of the draft instrument might create a competitive advantage for ocean carriers as opposed to non-vessel operating carriers (NVO) where national legislation, for example, would allow an “individual ocean common carrier” to enter into a “service contract” or “ocean transportation contract”, but would not allow an NVO (a freight forwarder acting as principal) to do so. Thus, the draft instrument would significantly change the legal situation with regard to competition in certain large domestic markets. It was stated that this should not be the purpose of an international convention, and that this secondary effect of the proposed exclusion would be highly detrimental to freight-forwarding interests.

211. A fourth concern was expressed with respect to the creation of a possibility of opting out of the draft instru-

ment. It was stated that the proposal envisaged the draft instrument to apply by default, i.e. if the sophisticated parties did not decide otherwise. This amounted to creating an opting-out possibility. It was stated that any opting-out or opting-in provision would constitute a fundamental change in the philosophy on which most international conventions on maritime carriage of goods were based.

212. In response to those concerns, it was indicated that a proposal for a draft provision excluding “competitively negotiated contracts between sophisticated parties” would be made available to the secretariat before the next session of the Working Group. The above-mentioned concerns would be borne in mind when drafting that proposal. It was pointed out that the proposal, while innovative, was not as revolutionary as might be feared, since it was based on analogy between service contracts and charter-parties, and it would simply amplify the current exclusion of charter-parties from the scope of the Hague and Hague-Visby Rules. Interest in the proposal for the exclusion of competitively negotiated contracts was expressed.

213. After discussion, the Working Group decided to maintain the text of subparagraph 17.1 (a) in the draft instrument, including the words “or increase” in square brackets, for continuation of the discussion at a future session, possibly on the basis of one or more new proposals.

(ii) *Subparagraph 17.1 (b)*

214. The Working Group found the substance of subparagraph 17.1 (b) to be generally acceptable. It was decided that the square brackets around that provision should be removed.

(iii) *Subparagraph 17.1 (c)*

215. The Working Group found the substance of subparagraph 17.1 (c) to be generally acceptable.

(c) *Paragraph 17.2*

(i) *Subparagraph 17.2 (a)*

216. It was recalled that, at the ninth session of the Working Group, subparagraph 17.2 (a), which allowed the carrier and the performing party to exclude or limit liability for loss or damage to goods where the goods were live animals, was widely supported. It was also recalled that the provision was a traditional exception, with both the Hague and Hague-Visby Rules excluding live animals from the definition of goods. It was noted that trade in live animals represented only a very small trade. However, a concern was raised against allowing the carrier to exclude or limit the liability for loss or damage to live animals. It was suggested that a better approach would be to simply exclude carriage of live animals altogether from the draft instrument rather than allowing exclusion of liability (see A/CN.9/510, para. 64). Support was expressed for adopting the text of subparagraph 17.2 (a) unchanged. Strong support was also expressed for the view that, while the traditional exception with respect to live animals should be maintained, the draft instrument should not simply recognize any clause that would “exclude or limit” the liability

of the carrier and any performing party where live animals were transported. The carrier or the performing party should not be allowed to exempt itself from any liability, for example, in case of serious or intentional fault or misconduct in the treatment of live animals, or where the carrier or performing party failed to follow the instructions given by the shipper. Yet another view was that the draft instrument should specify the circumstances under which the liability of the carrier or the performing party could be excluded in the case of transport of live animals. It was suggested that a reference to the “inherent vice of the goods” might be helpful in that respect, for example, to establish that a carrier carrying live cattle in poor health condition might be allowed to exclude its liability. It was generally felt, however, that the inherent vice of the goods, which was already covered under subparagraph 17.2 (b), was difficult to characterize with respect to live animals.

217. After discussion, the Working Group decided that the substance of subparagraph 17.2 (a) should be maintained in the draft instrument for continuation of the discussion at a future session. The secretariat was requested to prepare alternative wording to limit the ability of the carrier and the performing party carrying live animals to exonerate themselves from liability in case of serious fault of misconduct.

(ii) *Subparagraph 17.2 (b)*

218. The Working Group found the substance of subparagraph 17.2 (b) to be generally acceptable.

## B. Scope of application of the draft instrument

### 1. General discussion

219. The Working Group agreed to proceed in its examination of the scope of application of the draft instrument by first hearing presentations from those delegations that had made written proposals to the Working Group. It was agreed that the second step would be to discuss the positions of other delegations with respect to the proposals on the table, taking into account that the existing proposals were not necessarily intended to be mutually exclusive, but that the decision of the Working Group on how to proceed in its work on scope of application could combine elements from the various proposals, or generate new proposals. It was further agreed that once the Working Group had heard general statements on the scope of application of the draft instrument, it would revert its attention to the specific provisions of article 3 of the draft instrument on scope of application, and article 4 on period of responsibility.

220. By way of presentation of the proposal by Italy (A/CN.9/WG.III/WP.25), it was stated that, whilst the best system applicable to a door-to-door contract of carriage performed partly by sea and partly by other modes of transport would clearly be a uniform system, a network system had been adopted in all multimodal transport instruments because it was impossible to derogate by contract from the mandatory rules applicable to the different modes of transport, whether they were uniform rules or national rules. It

was pointed out that provisions of the draft instrument applied to the non-contractual liability of the servants or agents of the contracting carrier, as did the 1980 Convention on International Multimodal Transport of Goods, but that the network system in the draft instrument had been extended to the carrier's liability and time for suit in an attempt to avoid a conflict between conventions in lieu of a specific provision on conflict of conventions. It was also suggested that adopting a limited network system would not be an adequate means for avoiding a potential conflict with other conventions because the allocation of the burden of proof in paragraph 5.1 of the draft instrument differed from that adopted in other transport conventions, and because matters other than liability, limits on liability and time for suit were regulated in other transport conventions. Further, it was suggested that if a contract of carriage entered into between a door-to-door carrier and a performing carrier came under the scope of application of another international convention, that convention and the draft instrument would apply simultaneously. It was further noted that the contracting carrier who undertook to perform a carriage by a mode other than by sea could be unaware of the fact that the contract being entered into was subject to the draft instrument, rather than to the international convention or national law applicable to the transport that contracting carrier had undertaken to perform. It was suggested that this would create the situation where a recourse action of the door-to-door carrier against the performing carrier would be subject to the international convention or national law applicable to the contract entered into by those two parties, while a direct action of the shipper or consignee against the performing carrier would be subject to the draft instrument. It was further suggested that the liability of the performing carrier would thus be governed by different rules depending on whether the action was brought against the performing carrier by the door-to-door carrier or by the shipper/consignee. It was stated that the Italian proposal intended to overcome the anomalies of this situation, by having the draft instrument apply to the performing carrier only when the performing carrier was a carrier by sea. To this end, three basic principles were submitted by the Italian delegation for consideration by the Working Group. First, any person who had a right of suit under the contract of carriage against the carrier would also have a right of suit against any performing carrier or performing party. Second, if the performing carrier against whom suit was brought was a carrier by sea, the provisions of the draft instrument would apply to the contract to which that performing carrier was a party. Finally, if the performing carrier against whom suit was brought was not a carrier by sea, the convention or national law applicable to the contract to which such performing carrier was a party, as well as the terms and conditions of that contract, would apply.

221. By way of additional explanation of the proposal by Canada (A/CN.9/WG.III/WP.23; see also A/CN.9/525, para. 25), the Working Group heard that whilst the Canadian delegation preferred the first option set out in paragraph 8 of its proposal with respect to a port-to-port scope of application, that delegation was of the view that the Working Group was unlikely to reach consensus on a port-to-port scope of application in the draft instrument. It was stated that option 2 in paragraph 9 of the Canadian

proposal, under which the draft instrument should be modified to include national law in subparagraph 4.2.1 in order to deal with land-based carriage, was not the preferred option, since inserting a reference to national law into the draft instrument would not enhance the uniformity of the law in this area. It was submitted to the Working Group that the preferred option should be option 3 in paragraphs 10 and 11 of the proposal by Canada, since, if the draft instrument was to be a door-to-door regime, it should be recognized that some States were not yet ready to adopt such a regime. However, the option 3 approach would enhance the uniformity of the instrument, since a contracting State's adoption of a door-to-door regime would be as simple as removing the reservation placed earlier on that chapter of the draft instrument.

222. The Working Group next heard a presentation by the Swedish delegation of its proposal (A/CN.9/WG.III/WP.26). It was submitted that, while the structure of the draft instrument remained open for discussion, the intention of the proposal was to ensure that, if the draft instrument were to be a door-to-door regime, it would address certain issues. It was stated that one of these issues was the potential conflict with other mandatory transport conventions, and another was the potential conflict between the draft instrument and mandatory national laws dealing with inland carriage. It was further suggested that the draft instrument should deal in the manner suggested in the Swedish proposal with other possible issues that could place it in conflict with other transport conventions, such as the issue of calculation of compensation and the issue of non-localized damages (see below, paras. 258 and 264 to 267, respectively).

223. UNCTAD presented to the Working Group its findings in the responses it received to its questionnaire on Multimodal Transport Regulation (A/CN.9/WG.III/WP.30; the complete text was published by UNCTAD as "Multimodal transport: the feasibility of an international instrument" (UNCTAD/SDTE/TLB/2003/1)). It was stated that the questionnaire was sent to 191 States and industry organizations, both governmental and non-governmental, and that 109 responses had been received, 60 from the Governments of developed and developing countries, and 49 from industry representatives and others. In response to the question of how the status quo was perceived, it was submitted that over 80 per cent of respondents found the present legal framework unsatisfactory and that 70 per cent considered that it was not cost-effective. It was suggested that there was interest in a multimodal instrument, but that some respondents wondered whether it was practical. With respect to the suitability of different approaches, it was suggested that around two thirds of the respondents appeared to prefer a new international instrument to govern multimodal transport or a revision of the 1980 Convention on International Multimodal Transport of Goods. It was further stated that some respondents expressed support for a new instrument based on the UNCTAD/ICC Rules, while a minority of respondents, mainly from maritime transport interests, favoured the extension of an international sea carriage regime to all contracts for multimodal transport involving a sea leg, and still others felt that the new instrument should reflect a completely new approach. It was suggested that with the exception of the maritime transport

industry, there appeared to be limited support for the regime adopted in the draft instrument. With respect to the issue of the content and features of a multimodal system, it was suggested that approximately equal numbers of respondents expressed support for a fault-based liability system and for a strict liability system. It was further stated that around 75 per cent of respondents felt that any international instrument should adopt the same approach as existing statutory or multimodal liability regimes by providing for continuing responsibility of the contracting carrier through the entire transport. It was noted that whilst governments and providers of services saw the need for changes to the legal framework, views were divided on how best to proceed, and some respondents supported the development of a binding international instrument, while others supported the development of a non-mandatory regime. The view was expressed that there was interest amongst respondents in a new instrument and that there was a willingness to debate controversial issues. It was suggested that these issues could be debated in an informal forum to assess how best to proceed with future work.

224. The Working Group next heard a summary of the position of the Netherlands on the issue of scope as contained in a position paper on the multimodality of the draft instrument (to be published in A/CN.9/WG.III/WP.28/Add.1). It was suggested that the position of the Netherlands in the discussion with respect to the scope of application of the draft instrument should be considered in the context of its view in the long term. It was recalled that, in the current discussion in the Working Group, the solution envisaged for multimodal carriage focused on either a network liability system or a uniform liability system. It was stated that, while the network system had well-known disadvantages, a uniform system, such as that contained in the 1980 Multimodal Convention deviated too much from the practices of commercial parties in order for it to be broadly accepted. It was suggested that worldwide application of a liability regime on a uniform basis applicable to all modes of transport was not attainable. It was submitted that what might be envisaged realistically in the long term was a multimodal convention for intercontinental maritime transport (“maritime plus”); a multimodal convention for intercontinental air carriage (“air carriage plus”); and regional multimodal conventions that included all modes of transport. It was explained that the term “intercontinental maritime transport” was used simply as a means to differentiate it geographically from “regional maritime transport”, and it was not meant as a term of art to suggest a scope of application for the draft instrument different from international maritime transport. It was suggested that the current draft instrument fit into this long-term perspective in light of its maritime plus approach. It was noted that in order to achieve regional multimodal conventions, the current trend was to extend the scope of unimodal conventions to carriage by other modes of carriage that preceded or were subsequent to its own mode of carriage, using, for example, the model of the 1999 Convention for the Unification of Certain Rules for the International Carriage by Air (the Montreal Convention) for air carriage and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix B to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the

CIM-COTIF) for European rail carriage. It was suggested that if such an extension to other preceding and subsequent modes of carriage was made generally for each mode and for each unimodal convention on a cross-border basis, such an approach could fit neatly into commercial practice. In this manner, it was suggested that the various modes of transport would grow toward each other and the result eventually could be a merged multimodal convention on a regional basis. It was noted that this approach would require an appropriate conflict of conventions provision that would have to be identical for each unimodal convention so extended. It was suggested that a further advantage of such a general “unimodal plus” approach would be that it could act as a breakthrough for the current stalemate between the network system and uniform system approaches. It was also emphasized that the proposal of the Netherlands was intended to serve as background information for the discussion on scope of application, and it was not intended to preclude any of the current proposals put forward by Canada, Sweden and Italy.

225. The Working Group was reminded by the CMI that the draft instrument adopted a contractual approach, which was intended to adjust maritime transport to modern reality by adopting a door-to-door regime. It was stated that the idea of a draft instrument was originally intended to harmonize maritime cargo regimes, but that it became apparent that it would be necessary to go beyond the port-to-port approach and take into account the facts of modern carriage of goods. It was suggested that the limited network scheme in subparagraph 4.2.1 was a workable system, but that there was further room for flexibility to explore other approaches toward a workable and simple system in defining the scope of application of the draft instrument. It was stated that, when subparagraph 4.2.1 was formulated, the decision was made not to defer to national law in order to achieve the greatest possible uniformity of law, and that the important and difficult issue of performing parties was also discussed at length. It was also stated that the Working Group would have to consider how best to create a fair allocation of risk amongst parties in the overall context of a door-to-door regime.

226. It was stated in a submission by the United States delegation that it did not yet have a final position on the issue of the scope of coverage of the draft instrument. It was suggested that this uncertainty stemmed from its view that certain key issues under discussion by the Working Group were interrelated, in effect, those of the scope of application and treatment of performing parties, choice of forum and jurisdiction, liability limits and freedom of contract, and that any position on a single issue would depend on a particular outcome being reached on other issues. Support was expressed for the view that a fully uniform system was most likely impossible to achieve, but it was submitted that the goal of the Working Group should be to attain as much uniformity as was politically attainable. With respect to the contracting parties, the United States suggested that subparagraph 4.2.1 could be adopted, so that the instrument’s liability limits would apply on a uniform basis, subject only to the limited network exception when CMR or some other mandatory international convention was applicable. It was also stated that the treatment of performing parties was an important aspect of the issue of

scope of application, and that a distinction could be drawn between maritime performing parties and inland performing parties. Support was expressed for the mandatory application of the draft instrument to maritime performing parties. With respect to inland performing parties, different concerns arose. The instrument could neither create nor prohibit suits against them. They would instead be subject to whatever legal regime would otherwise apply in the absence of the instrument, and could take advantage of any applicable Himalaya clause to the extent permitted by national law. The United States stated that, under its suggestion, there would be no need to add "national law" to subparagraph 4.2.1's exclusion for mandatory international conventions in order to protect the interests of either inland performing parties or cargo owners. Inland performing parties would be outside the scope of the instrument. As an example, the United States noted that where there was no mandatory international convention applicable to the inland carrier's activities (such as the United States or Canada), a cargo owner could sue the contracting carrier under the instrument's terms or sue the inland performing party under the otherwise applicable law, for example, under United States tort law or Canadian legislation.

227. Certain differences between the United States suggestion and the Italian proposal were stressed. First, under the Italian proposal, the contracting carrier's liability to the shipper would be on a fully uniform basis (using the liability limits established by the instrument), rather than under subparagraph 4.2.1's limited network system. Second, under the Italian proposal, the instrument would create a cause of action by the cargo owner against the performing party on the terms of the contract between the performing party and the carrier. Thus, under the Italian proposal, the cargo interests would in effect step into the shoes of the contracting carrier vis-à-vis the performing party. In contrast, under the United States suggestion, the cargo interests could sue the performing party under whatever law would otherwise be applicable to the suit in the absence of the instrument, for example, under domestic tort law.

228. The Working Group heard the International Federation of Freight Forwarders Associations (FIATA) (see also pp. 3-5, A/CN.9/WG.III/WP.28) reiterate its position that the draft instrument was originally conceived as a maritime law draft, as was evident throughout its provisions, and that its scope should thus be confined to port-to-port coverage. It was also suggested that confining the scope of application to port-to-port was an opportunity to reunite maritime carriage of goods law, and that the instrument already sought to address issues that had not before been addressed in a maritime convention, as well as pressing daily issues, such as delivery of goods without the production of a bill of lading, on-deck carriage in the container trade, and the use of electronic documents. It was also suggested that by expanding the scope of application to true port-to-port carriage from that of tackle-to-tackle, a number of the traditional liability gaps in the network system could be closed, and stevedores and terminal operators could be drawn into the regime. It was submitted that the door-to-door approach advocated in the Working Group was truly multimodal transport, and the Group should take care to use precise language in describing the various options it

was considering. It was also stated that experience should be drawn from the UNCTAD/ICC Rules and from the Multimodal Convention, as well as from a previous effort by CMI, the Draft Convention on the International Combined Transport of Goods, or the TCM Convention. It was suggested that the "maritime plus" expression was merely a euphemism for the expansion of maritime law on to land, and that at least a true multimodal approach should be called for. Further, it was suggested that such a multimodal approach should take into account "generic" or "unspecified" transport, where the consignor might give an instruction to the carrier without indicating the mode of transport to be used. It was also urged that there should be a clear definition of what was meant by "strict" liability and "fault-based" liability, and that the Working Group should exercise caution in including rules of private international law in the draft instrument, since it was suggested that they tend to cause serious problems. It was also stated that the scope of application and the position of the performing parties were closely linked.

229. The Working Group also heard from the Association of American Railroads (AAR) (see also pp. 32-34, A/CN.9/WG.III/WP.28) that North American freight railroads had well-established systems in Canada and the United States that governed the liability of rail carriers for goods transported in connection with a movement by sea, and that fundamental to those systems was the right of every ocean carrier to choose the level of protection it desired for its cargo. It was stated that in this regard, the rail carrier had privity of contract only with the ocean carrier when transporting containers having a prior or subsequent movement by sea, but that the draft instrument would repress the ability of rail carriers to exercise this contractual right and would significantly and adversely affect the current system affecting United States and Canadian rail carriers' liability. It was suggested that the draft instrument was a maritime-oriented instrument that neither addressed in-depth nor resolved the significant issues affecting rail transport, and that it should not apply to the rail inland portion of a transport movement if a door-to-door concept was adopted. It was stated that vigorous debate over the full spectrum of issues that affect and impact upon the possible extension of the draft instrument on a door-to-door basis to rail land transport was welcomed and it was suggested that such a debate would result in an instrument that would not have application to rail carriage. It was also submitted that an exclusion for rail carriage should apply whether such rail carriage was subject to international conventions or national domestic law.

230. The Working Group also heard from the Intergovernmental Organisation for International Carriage by Rail (OTIF), which reiterated the support it expressed at the tenth session of the Working Group (see para. 28, A/CN.9/525) for the establishment of global rules to govern multimodal transport, provided that unimodal regimes such as COTIF and CMR were taken into consideration. It was suggested that adopting a network system rather than a uniform system would preserve the integrity of the existing unimodal conventions, and would thus reduce possible conflicts with them, and enhance the likelihood of widespread support for the draft instrument. It was suggested that only in cases when there was non-localized damage should a



uniform regime for multimodal transport apply rather than a network system, and it was submitted that the primary purpose of conventions for international carriage should not only be to promote uniformity, but also to ensure an acceptable and fair balance of rights and liabilities amongst the parties to the contract of carriage. It was stated that OTIF had doubts whether the draft instrument, as currently drafted, could serve as a useful basis for a door-to-door instrument, and that there was increasing scepticism that a multimodal regime on the basis of a maritime-based draft could gain general acceptance. The Working Group was urged to consider existing commercially-accepted solutions for multimodal transport, such as the UNCTAD/ICC Rules, as an alternative basis for a door-to-door convention.

231. The International Chamber of Shipping (ICS) reiterated its position on the scope of application of the draft instrument to the Working Group (see pp. 9-11, A/CN.9/WG.III/WP.28), noting that the shipping industry was in favour of a door-to-door regime that provided added value and went beyond the port-to-port system. It was also noted that ICS was in favour of an international maritime plus convention based upon the draft instrument, and that it supported a limited network system as contained in subparagraph 4.2.1.

232. It was recalled that the International Group of Protection & Indemnity Clubs (P&I Clubs) had made its views known to the Working Group (see pp. 36-41, A/CN.9/WG.III/WP.28) in the previous session. It was reiterated that the P&I Clubs supported a door-to-door scope of application, and it was suggested that although difficulties could arise with both the limited network system and a uniform system; it should be noted that industry had to a large extent adopted a network system for multimodal transportation, such as those found in the UNCTAD/ICC Rules and in the COMBICON bill of lading. The Working Group was urged to consider and respond to the needs of industry, and support was expressed for a limited network approach along the lines provided for in subparagraph 4.2.1.

233. Having heard the above statements, the Working Group entered into a general exchange of views on the scope of application of the draft instrument. Broad support was expressed for a door-to-door scope of application as best suited to meet current industry needs and demands. It was suggested that in its pursuit of appropriate provisions for door-to-door coverage, the Working Group should attempt to reach the optimal balance with respect to four competing principles: the promotion of uniformity to as great an extent as possible; the avoidance of conflicts of convention to as great an extent as possible; the accommodation to as great an extent as possible of those States that would prefer to leave the regime covering their inland carriers untouched; and the provision of rules in the draft instrument that should be particularly geared to the needs of practitioners so as to avoid ambiguity. It was suggested, however, that it was necessary to define more precisely what a door-to-door carrier meant, in particular, how a distinction could be drawn between a door-to-door carriage and a multimodal carriage. In addition, several delegations expressed the view that the issue of non-localized damage in a door-to-door context had to be solved in a satisfactory way regarding all parties concerned.

234. Support was expressed for the limited network principle embodied in subparagraph 4.2.1, since it would entail that the liability rules in the recourse action and the main action would be the same. It was also noted that industry had developed its own network system in the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents and in the COMBICON combined transport bill of lading adopted by the Baltic and International Maritime Council (BIMCO 1971, updated in 1995). Support was also expressed for a true multimodal system. Some caution was encouraged in this regard, however, since other multimodal regimes could be negotiated in the future, and States were unlikely to ratify and implement multiple multimodal regimes. It was also suggested that paragraph 1.5 together with subparagraph 4.2.1 was really a multimodal approach, but doubts were expressed regarding that characterization. A concern was also raised that the limited network system would disadvantage developing countries, because the draft instrument was mainly a maritime instrument and, since most developing countries were not party to mandatory inland transport conventions, this maritime draft instrument would govern the entire period of the multimodal transport in such countries.

235. Some support was expressed for the approach taken in option 2 of the Canadian proposal, in adding a reference to national law in subparagraph 4.2.1. It was stated that such an approach would be particularly appropriate for those States that were not parties to the European unimodal transport conventions, and that would prefer to have their national laws applicable in the treatment of performing carriers. It was stated in response that including national law in subparagraph 4.2.1 would dilute the uniformity of the limited network principle to such an extent that it would no longer be acceptable. In addition, the suggestion was made that option 2 might not be clear enough on the issue which national law would apply to inland carriers, since the law governing the contract for inland carriage would depend on the rules of applicable law, as well as the choice of law in the contract itself, and a provision regarding applicable law might be necessary. It was also stated that, if mandatory national law were added to subparagraph 4.2.1, aspects of its inclusion should be qualified, such that, for example, it could not create lower liability levels than the draft instrument. There was some support for another suggestion that the insertion of national law could be limited to national law based on international conventions, in order to limit the loss of uniformity that would result.

236. Support was also expressed for the Italian proposal, particularly for the third principle thereof which was felt to accommodate the concerns of those States that wished to preserve the applicability of their national law by holding that any action by an inland carrier should be governed by the applicable inland transport convention or applicable inland law. It was suggested that this aspect promoted uniformity by replacing subparagraph 4.2.1 and making the contracting carrier no longer potentially subject to an applicable inland convention, and by making clear that the inland performing carrier would at all times be subject to the inland convention or applicable national law through the contract concluded by that inland performing carrier. However, concern was expressed that the performing carrier could conclude a contract that would be detrimental for the shipper.

237. Some support was expressed for option 3 of the Canadian proposal, since it was suggested that, leaving aside questions of reservation until later, structuring the draft instrument in two separate chapters would deal with the two different regimes, it could promote long-term uniformity, and it would facilitate the discussion in the Working Group by proceeding on a structured basis. In addition, the precedent of the Convention on Contracts for the International Sale of Goods was cited in support of the structure suggested, since one part therein dealt with the formation of contracts, and another dealt with substantive sales contracts along with a reservation for opting out. Caution was expressed with respect to the approach suggested in option 3 of the Canadian proposal, however, since it was felt that accommodating reservations to the instrument at this point in the discussion was premature, and should be left to the closing stages of a diplomatic conference, when other means of bridging differences had been exhausted. Further, it was suggested that this structure could encourage States to opt for the port-to-port approach rather than the door-to-door option, and that it would thus dilute uniformity. An additional concern was raised that option 3 might serve to divide the process, and encourage negotiations on maritime provisions at first, and on multimodal provisions in the future. In addition, it was stated that option 3 would complicate discussions by requiring reference throughout the discussions on two different periods of responsibility. However, it was pointed out in response that there was no need to correlate the periods of responsibility in the two chapters, since the period would simply apply to the contract of carriage, depending on which of the multimodal or the maritime contract had been chosen. There was some support for the view that option 3 might be revisited at a later stage in the discussions.

238. It was also stated that subparagraph 4.2.1 did not solve the issue of a possible conflict with existing transport conventions, and that it should be deleted in favour of a general reservation for pre-existing transport conventions that could be inserted into chapter 16 of the draft instrument as a type of conflict of conventions clause.

239. After discussion, however, wide support was expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port. Support was expressed for a uniform system in the door-to-door instrument, and it was suggested that an effort should be made to achieve such a uniform system. However, there was broad acceptance that a uniform system was likely unattainable, and support was also expressed in favour of a limited network system along the lines of that set out in subparagraph 4.2.1, but for a corrected version thereof. Various means of correcting the limited network system were discussed, including those suggested in the Italian, the Canadian and the Swedish proposals, but no firm decision was made by the Working Group in this regard.

## 2. Consideration of specific issues related to the scope of the draft instrument

240. Having provisionally agreed that the scope of the draft instrument should cover door-to-door transport, the

Working Group proceeded with a more specific discussion of the following five issues: (a) the type of carriage covered by the draft instrument; (b) the relationship of the draft instrument with other conventions and with domestic legislation; (c) the manner in which performing parties should be dealt with under the draft instrument; (d) the limits of liability under the draft instrument; and (e) the treatment of non-localized damages under the draft instrument.

### (a) *Type of carriage covered by the draft instrument*

241. It was generally felt that more clarity was needed with respect to the type of carriage covered by the draft instrument. The frequent reference to the notion of "maritime plus" carriage, its implications regarding the use of non-maritime modes of transport, and the reliance on a network system to govern the relationships between the draft instrument and other transport conventions, created a need to review precisely the respective limits of "maritime plus" carriage as covered by the draft instrument and multimodal carriage of goods as understood, for example, in the 1980 Convention. One obvious distinction between the type of carriage covered by the draft instrument and unqualified multimodal carriage resulted from the definition of "contract of carriage" given by paragraph 1.5, under which the draft instrument applied to a carriage of goods "wholly or partly by sea". The discussion then focused on whether it would be desirable and feasible to establish any further distinction between multimodal carriage and the type of carriage covered by the draft instrument, or whether carriage of goods under the draft instrument should be understood as covering any multimodal carriage involving a sea leg.

242. Several possible criteria were suggested for establishing such a distinction. One suggestion was that the draft instrument should cover "intercontinental" carriage of goods wholly or partly by sea. That suggestion was generally objected to on the grounds that it would be highly impractical, politically unacceptable and legally unfounded to attempt establishing a distinction between "intercontinental" carriage and "international" carriage. Another suggestion was that, in view of the strong influence of maritime law reflected in the draft instrument, the draft instrument should only apply to a multimodal carriage where the importance of the maritime leg was predominant. Some support was expressed for the view that the respective importance of sea carriage and land carriage in the overall multimodal carriage should be taken into account. In that respect, it was stated that, in practice, the draft instrument was expected to apply mostly to the transport of containers that would be carried for the most part by sea, with inland carriage taking place on relatively short distances before or after the sea carriage. That view was objected to on the grounds that the respective importance of the sea carriage and carriage by other modes should not be assessed by reference to the itinerary actually followed by the goods but more subjectively by reference to the intent of the parties as expressed in the contract of carriage. From a statistical perspective, the example was given of a region where containers carried by rail before or after a sea leg would, on average, travel inland over 1,700 miles. The prevailing view was that no attempt should be made to establish in the draft instrument the ancillary character

of the land carriage. It was generally felt that the only practical way of addressing that aspect of the scope of the draft instrument was to decide that multimodal carriages involving a sea leg should be covered by the draft instrument, irrespective of the relative duration or distance involved in that sea leg.

243. A question was raised as to how the internationality of the carriage covered by the draft instrument should be reflected in the individual unimodal legs of the carriage. The suggestion was made that the draft instrument should only apply to those carriages where the maritime leg involved cross-border transport. Under that suggestion, it was said to be irrelevant whether the land legs involved in the overall carriage did or did not involve cross-border transport. It was pointed out that such an approach would be in line with other conventions such as the COTIF, under which the internationality of the carriage should be determined in respect of the carriage by rail only. The Working Group took note of that suggestion and requested the secretariat to reflect it, as a possible variant, in the revised draft to be prepared for continuation of the discussion at a future session. The prevailing view, however, was that, pursuant to draft article 3, the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States. For example, in the case of carriage of goods from Vancouver to Honolulu, the applicability of the draft instrument should not depend on whether the goods were shipped directly to Honolulu or first carried by road to Seattle and subsequently shipped to Honolulu.

244. After discussion, the Working Group agreed on a provisional basis that the draft instrument should cover any type of multimodal carriage involving a sea leg. No further distinction would be needed, based on the relative importance of the various modes of transport used for the purposes of the carriage. It was also agreed that draft article 3 might need to be redrafted to better reflect that the internationality of the carriage should be assessed on the basis of the contract of carriage. The secretariat was requested to prepare revised provisions, with possible variants, for continuation of the discussion at a future session. In view of the decision made by the Working Group regarding the type of carriage to be covered by the draft instrument, the attention of States members of the United Nations Economic Commission for Europe (UN/ECE) was drawn to the need to ensure coordination of their delegations in the Working Group and in the UN/ECE to avoid duplication of efforts.

*(b) Relationship of the draft instrument with other transport conventions and with domestic legislation*

245. The Working Group next considered the issue of the relationship of the draft instrument with other conventions and with domestic legislation. Discussion ensued in an effort to clarify views regarding the relationship between the draft instrument and multimodal and unimodal instruments, and with applicable national law.

246. The Working Group was reminded that subparagraph 4.2.1 was intended to accommodate the continued appli-

cation of the normally applicable inland conventions for the carriage of goods. The view was expressed that with respect to pure unimodal conventions, with no multimodal aspects, no conflict with the draft instrument would arise, and that, as a consequence, subparagraph 4.2.1 was unnecessary. A widely supported view was expressed that the limited network principle in subparagraph 4.2.1 of the draft instrument was effective in ensuring that there was no overlap with unimodal conventions or any future regional multimodal convention. Another view was expressed, however, that subparagraph 4.2.1 did not solve the issue of conflict of conventions, since it gave preference only to specific provisions of applicable unimodal conventions. The Working Group was reminded that certain States would find it impossible to be signatory to more than one multimodal convention, and that if the draft instrument was a multimodal instrument, ratification of it could preclude some States from ratifying broader multimodal conventions. A further concern was raised that if the draft instrument was multimodal, parties to other instruments that have multimodal aspects, such as the Montreal Convention and COTIF, might have to denounce those conventions in favour of the draft instrument.

247. It was also suggested that paragraph 3.1 should be clarified with respect to the situation where, for example, goods on a truck were not unloaded on to the vessel during a multimodal carriage of goods, such that the draft instrument and CMR would compete in terms of applicable law. A further suggestion was made that the network system in subparagraph 4.2.1 should be abandoned in favour of a uniform approach, and that, in its stead, a conflict of conventions provision could be inserted into article 16 of the draft instrument. It was also suggested that such a provision should be added to article 16, in any event, if it was decided that subparagraph 4.2.1 should be deleted.

248. Concern was raised with respect to how the draft instrument would deal with future regional transport conventions. The view was expressed that the terms of such future conventions might also prevail over those of the draft instrument pursuant to subparagraph 4.2.1, and thus that such future conventions represented at least as great a threat to uniformity as the inclusion of mandatory national law. The suggestion was made that since the limited network principle was intended as a practical approach to gain as much support for the draft instrument as possible, the problem of future conventions could be solved by limiting the operation of subparagraph 4.2.1 to existing international conventions.

249. It was reiterated that there was an important relationship between national law and the draft instrument, since the current version of the draft instrument would automatically supersede national law pursuant to subparagraph 4.2.1, yet the provisions of international conventions would stand. The suggestion was again made that the draft instrument should include mandatory national law in the exception to its scope of application set out in subparagraph 4.2.1, and reference was again made to option 2 of the Canadian proposal (see above, paras. 221 and 235). In response, the view was expressed that subparagraph 4.2.1 should not be so amended in order

to apply mandatory national law, since it could mean, in some cases, that the limit on liability in the national law would be lower than that set out in the draft instrument, and this would mean not only that performing parties would be protected in terms of the lower liability limits, but that contracting carriers could claim the same liability limit. It was explained that the change suggested with respect to the treatment of performing parties under the draft instrument was intended to take into account the concern with respect to national law, but at the same time to allow cargo interests to proceed directly against performing parties under whatever law would apply in the absence of the draft instrument. The point was made that option 2 of the Canadian proposal was not intended to allow the application of national law to the contracting carrier, but that the possibility of this unintended consequence would have to be assessed. Interest was voiced in pursuing further discussions based on both the Italian proposal (see above paras. 220 and 236) and the United States suggestion (see above paras. 226 and 227), one of which the Working Group might potentially adopt in the future to deal with concerns respecting the preservation of mandatory national law.

250. After discussion, the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 of the draft instrument, and to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1. The exchange of views regarding the relationship between the draft instrument and national law was inconclusive, and the decision was made to consider this issue further in light of anticipated future proposals. Given the level of support with respect to the issue of national law, however, the Working Group requested the secretariat to insert a reference to national law in square brackets into the text of subparagraph 4.2.1 for further reflection in the future.

*(c) Treatment of performing parties*

251. The Working Group was reminded that the issue of the treatment of performing parties pursuant to the draft instrument had been discussed in general terms by the delegations of the United States and of Italy in the presentation of their proposals regarding scope of application (see above, paras. 220, 226 and 227).

252. One concern raised with respect to the treatment in general of performing parties was the geographic reach of the draft instrument. The example was given of goods being shipped from Tokyo to Rotterdam via Singapore, and whether the stevedore handling the goods in Singapore was subject to the draft instrument if either Japan or the Netherlands had ratified it but Singapore had not. It was said that a direct cause of action against a performing party in a non-contracting State should not be maintained in the draft instrument.

253. Interest was shown in the proposal by the United States that the draft instrument should provide different treatment for maritime performing parties and for inland

performing parties, but the view was expressed that firm positions on the proposal could not be expressed until it was formally presented at a later date. It was stated that, under that proposal, maritime performing parties would be treated pursuant to paragraph 6.3, and thus they would be subject to action under the terms of the draft instrument, receiving all of the benefits of the carrier's defences and limitations. Subparagraphs 6.3.1 and 6.3.3 would have to be modified with respect to inland performing parties, however, so that the draft instrument would not create any additional cause of action against them, nor create any additional Himalaya protection for them, outside of the existing applicable law. The view was expressed that separate treatment of maritime and inland performing parties would be of particular importance if mandatory national law was not included in subparagraph 4.2.1. One concern was raised, however, that the institution of the performing party was created to protect both the shipper and the performing party from potential exposure to unlimited liability pursuant to an action in tort, and that the proposal could create problems in this regard in the multimodal environment, since the performing party could be sued by a claimant on the basis of a different contract. Another concern was raised with respect to whether the operation of this proposal could conflict with the 1991 Convention on the Liability of Operators of Transport Terminals in International Trade.

254. A request was made for clarification with respect to the difference between the performing party and the performing carrier in the Italian proposal. In responding to this question, it was said that the Italian proposal narrowly defined performing party to exclude from it those persons who handled and warehoused the goods, and who were not subject to any inland convention, leaving only those who actually moved or carried the goods as performing parties under the draft instrument. The proposal was said to include a right of suit against performing parties in this narrowed sense, such that the contract that the performing party itself concluded would apply. Some concern was expressed with respect to this narrowed definition of performing party, particularly with the Himalaya protection which, it was thought, should be available to all performing parties. Another concern raised with respect to the narrowed definition of performing party was that it was thought that performing parties should not be defined on the basis of their function, since to do so could give rise to uncertainty over who was covered in the draft instrument, and who should be sued. It was said that another aspect of the Italian proposal was a distinction drawn between maritime performing parties and inland performing parties, such that the draft instrument would apply to maritime performing parties, and the inland performing parties would be subject to the contract that they themselves concluded. It was thought that inland performing parties should have the Himalaya protection granted by the contract concluded by them. The view was expressed that allowing the inland performing party to make use of the protection in its own contract could unduly complicate matters, and might not provide sufficient clarity. Another concern raised with respect to this proposal was that the reference to international conventions and to the national law applicable between the performing carrier and the inland performing party could be understood to include

non-mandatory national law, and the terms of that contract could be binding on the shipper who would like to sue the inland performing party directly. It was said that this would unfairly allow the contracting carrier and the performing carrier to conclude a contract to the detriment of the shipper.

255. Some tentative support was expressed for a combination of the Italian and the United States proposals with respect to the treatment of performing parties. For example, there was general support for the separate treatment of maritime and inland performing parties, but it was thought to be better for the purposes of uniformity if the draft instrument would make specific reference to the rights of suit of inland performing parties. No conclusion was reached with regard to such a combination of proposals.

256. After discussion, it was agreed that the treatment of performing parties under the draft instrument was an important matter that would shape the entire instrument, and could help in the solution of other problems, such as the inclusion of mandatory national law in subparagraph 4.2.1. The anticipation of a more refined written proposal on this issue prevented a clear final or interim decision from being made at this stage. It was thought that the time was not yet ripe for revisions to be made to the draft instrument with respect to its treatment of performing parties.

#### (d) *Limits of liability*

257. A widely shared view was that no attempt should be made to reach an agreement on any specific amount for the limits of liability under subparagraph 6.7.1 at the current stage of the discussion. A suggestion was made that, irrespective of the amount that was finally retained, a rapid amendment procedure should be established by the draft instrument. It was suggested that the 1996 Protocol to the IMO Convention on Limitation of Liability for Maritime Claims might provide a model in that respect. That suggestion was widely supported.

258. The view was expressed that the limits of liability in the context of a multimodal instrument should be considerably higher than the maritime limits established in the Hague and Hague-Visby Rules. It was explained that, should the carrier engage in multimodal transport, a situation where different limits of liability might be applicable (ranging from 2 SDR per kilogram for maritime transport to 8.33 SDR per kilogram for road transport and even 17 SDR per kilogram for air transport), the carrier would in any event get insurance coverage for the higher limit applicable during the carriage, provided that a network system was applicable. It was stated in response that the purpose of a limitation of liability was not to ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. The purpose of limitation of liability, it was stated, was to ensure predictability and certainty. It was observed that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of losses and damages were fully compensated on the basis of the limitation per package. By way of explanation, it was stated that packages in the practice of modern

containerized transport had generally become smaller and that it was generally recognized that, in containerized transport, the notion of “package” applied to the individual packages inside the container and not to the container itself. It was also explained that the limitation per kilogram set out in the Hague-Visby Rules still corresponded to the average value of containerized cargo, despite considerable regional variations. From a similar perspective, it was stated that, since the adoption of the Hague-Visby protocol, the freight rates in maritime trade had decreased and that such decrease should be taken into account when determining the limits of liability.

259. With respect to the last sentence of subparagraph 6.7.1, it was recalled that the sentence had been bracketed pending a decision as to whether any mandatory provision should be one-sided or two-sided mandatory, that is whether or not it should be permissible for either party to increase its respective liabilities (see A/CN.9/WG.III/WP.21, para. 106). The earlier discussion by the Working Group (see above, para. 214) was noted and it was provisionally agreed that the square brackets should be removed from that provision.

260. With respect to the loss of the right to limit liability under paragraph 6.8, the view was expressed that the reference to the “personal act or omission” of the person claiming a right to limit should be replaced by a reference to the “act or omission” of that person. It was recalled that a similar suggestion had been made at the previous session of the Working Group, for reasons of consistency with the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. It was pointed out in response that the issue of consistency with the Athens Convention would arise mostly in the case where both cargo and passengers were carried on the same vessel, a case that was described as relatively rare. One delegation offered to prepare a study on the issue of consistency between the draft instrument and the Athens Convention for consideration by the Working Group at a future session.

261. It was widely felt that the reference to the “personal act or omission” of the person claiming a right to limit should be considered in the context of the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. In favour of introducing such a provision, it was stated that paragraph 6.8 dealt with the extreme situation where loss or damage to the goods had been caused by the intentional act or omission of the carrier who, in this case, should not be permitted to avoid liability by demonstrating that the acts that caused the loss or damage were those of a servant or agent and not the personal acts or omissions of the carrier. In response, it was recalled that, at the previous session of the Working Group, it had been suggested that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules (A/CN.9/525, para. 88). It was stated that an almost unbreakable limit of liability would result in a situation where it would be easier for the carrier to obtain insurance coverage. However, it was also recalled that, while there existed precedents of international instruments where such unbreakable limits of liability had been implemented, such instruments relied on a relatively high-

amount limitation (*ibid.*). With a view to alleviating the concern that had been expressed regarding the possibility for the carrier to avoid liability, it was pointed out that the notion of “personal act or omission” under paragraph 6.8 should be understood to apply not only to the contracting carrier but also to each performing party. After discussion, the Working Group decided that the word “personal” should be placed between square brackets for continuation of the discussion at a later stage.

262. A suggestion was made that the draft instrument should make it clear that the carrier should never be liable for more than the value of the goods. It was stated in response that a provision to that effect had been placed in subparagraph 6.2.3. It was generally felt that the purpose of that provision might need to be expressed more clearly in a future draft.

263. Another suggestion was made that the provisions dealing with limits of liability in the draft instrument might need to be adjusted in view of the decisions made by the Working Group with respect to the possibility for the carrier to qualify the description of the goods given by the shipper in the transport document. Should such a qualification be made by the shipper regarding the weight of the goods or the number of packages, the draft instrument should be clear as to which weight and number of packages should be used for the purposes of applying the limits of liability. It was suggested that, in such a context, the qualifications might need to be ignored, much in the same way as a “said to weigh” clause would be ignored under current practice. The Working Group took note of that suggestion.

(e) *Treatment of non-localized damages*

264. In light of the deliberations of the Working Group regarding the limits of liability, the view was expressed that the limits set out in the Hague-Visby Rules were too low to be acceptable as a default rule in case of non-localized damages. Support was expressed for a proposal that the following provision should be inserted after subpara-

graph 6.7.1: “Notwithstanding the provisions of subparagraph 6.7.1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.” It was explained that, where a non-localized damage occurred, the damages to the goods usually were detected at the place of receipt, which meant that only small amounts of goods were damaged (see A/CN.9/WG.III/WP.26). In addition to the proposal that higher limits of liability should apply in case of non-localized damages, it was suggested that the draft instrument should be amended to reflect the policy that, should the carrier wish to avoid the higher limit of liability, it should bear the burden of proving the part of the carriage during which the damage had occurred. It was stated that such a policy regarding the burden of proof was justified by the fact that the carrier was in a better position than the shipper to investigate the events that had occurred during the voyage.

265. In response to a question regarding the reasons why the draft instrument should apply as a default rule in case of non-localized damages, the view was reiterated that the main consideration regarding that matter should be to ensure predictability and certainty regarding the liability regime applicable to non-localized damages.

266. As a matter of drafting, it was suggested that the draft instrument might need to reflect more clearly the legal regimes governing localized damages under subparagraph 4.2.1 and non-localized damages under subparagraph 6.7.1. The secretariat was invited to consider the need for improved consistency between those two provisions when preparing a revised draft of the instrument.

267. After discussion, the Working Group decided that the proposal in paragraph 264 above should be reflected between square brackets as one possible variant in a revised version of the draft instrument to be considered at a future session.

**D. Working paper submitted to the Working Group on Transport Law:  
Preparation of a draft instrument on the carriage of goods [by sea]:  
Proposal by Italy**

(A/CN.9/WG.III/WP.25) [Original: English]

**NOTE BY THE SECRETARIAT**

In preparation for the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the Government of Italy, on 25 October 2002, submitted the text of a proposal concerning the scope and structure of the draft instrument for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the secretariat.

**ANNEX**

**Proposal by Italy on the application door-to-door of the instrument**

1. The first question that should be considered is whether it is right to approach the problem of the choice between a door-to-door and a port-to-port instrument as if these were really two alternatives. This would be the case if also a port-to-port instrument would likely obtain the support of the industry. It is felt, however, that this might not be the case and that certain sections of the industry (e.g. shipowners, P&I Clubs, insurers) might be prepared to leave the safe grounds of a well tested, albeit old fashioned, system such as that of the Hague-Visby Rules only if the new instrument would really constitute an answer to the reality of modern transportation. And the reality is door-to-door container transportation.

What is needed is to adopt a set of rules that apply throughout the door-to-door carriage in the relationship between the shipper and the carrier in order to ensure certainty in respect of the rules by which the contract is governed.

The type of carriage that demands such rules is the carriage by sea of containers preceded and/or followed by a carriage by road and/or railway: from the door of the shipper to the door of the consignee. This type of carriage, therefore, is a special category of multimodal transport.

The ideal solution would be to have a uniform set of rules applicable throughout the carriage, rather than a network system, even if limited in scope, because the network system creates uncertainty. The instrument however should apply only to the contract between the shipper and the carrier while the recourse action, if any, of the carrier against the performing carrier should remain subject to the specific rules applicable to the particular transport mode, be it carriage by sea, by road or railway. Nor ought the instrument to apply to claims of the shipper against the performing carrier, for that would again give rise to uncertainty, albeit in a different context: in that case the uncertainty would affect the performing carrier, who often would not even know what rules apply to the contract between the carrier and the shipper, a contract to which he is not a party.

The application of the instrument to the claims of the shipper against the performing carrier would, moreover, entail a possible conflict between the instrument and the transport convention applicable to the transport performed by the performing carrier.

This entails the restriction of the definition of "performing party" to persons other than performing carriers and the addition of the definition of "performing carrier".

The above change could be obtained by adding to the present definition, after the words "Performing party means a person other than the carrier" the words "and the performing carrier(s)" and by adding the following new definition:

"Performing carrier" means a person that at the request of the carrier performs in whole or in part the carriage of the goods either by sea or by [another mode] [rail or road].

In order, however, to avoid possible actions in tort of the shipper against the performing carrier, it should be provided that the action of the shipper against the performing carrier is subject to the rules that would apply if the action against the performing carrier is brought by the carrier. If this principle is accepted, it will of course be necessary to find out what legal technique can be used in order to achieve that result: for example, a legal subrogation of the shipper into the rights of the carrier against the performing carrier.

2. In order to see whether this scheme is workable it is necessary, however, to find out whether the provisions of conventions applicable to modes of transport other than maritime would directly apply to the door-to-door transport under consideration, with the consequent application of Article 30 of the Vienna Convention on the Law of Treaties. This problem exists mainly if not exclusively, in Europe, where there are already conventions applicable to carriage by road (the CMR)<sup>1</sup>, by rail (the COTIF-CIM)<sup>2</sup> and by inland waterway (CMNI)<sup>3</sup>.

*2.1 CMR*

Article 1 of the CMR provides that the Convention shall apply to every contract of carriage of goods by road in vehicles for reward when the place of taking over of the goods and the place of delivery are situated in two different countries of which at least one is a contracting country.

<sup>1</sup>Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the Protocol.

<sup>2</sup>Uniform Rules concerning the International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999

<sup>3</sup>Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2001.

It is thought, therefore, that a door-to-door contract such as that to which reference is made in article 4.2.1 of the Draft Instrument would not be subject to the CMR, first because it is not a “contract of carriage of goods by road” and, secondly, because the place of taking over of the goods and the place of delivery are not related to a specific contract of carriage by road, but rather to the door-to-door contract: the taking over in fact occurs at the place and time where the carrier (or a performing carrier) takes over the goods and delivery occurs at the time and place where the carrier (or a performing carrier) delivers the goods to the consignee. If there are two road legs, one before and one after the sea leg, the taking over and delivery are not related to the same road leg and if there is only one road leg, for example before the sea leg, delivery is wholly unrelated to a carriage by road.

Nor can the reference in article 1(1) of the CMR to the place of taking over and the place of delivery be read as a reference to the places which the contract specifies for the taking over and delivery by the carrier in its capacity as an international road carrier. In fact the carriage by road is followed by the carriage by sea, at the end of the carriage by road there is no delivery, since the goods remain in the custody of the carrier until delivery to the consignee at the final destination. In a door-to-door contract between Zurich and New York via Genoa, Genoa cannot be qualified as the place of delivery under that contract. It will only be the place of delivery in so far as the contract between the carrier and the performing carrier who has performed the road carriage is concerned. While, therefore, that contract would be subject to the CMR, the door-to-door contract would not.

The CMR would consequently apply to the contract of carriage by road between the carrier and the performing carrier if the conditions required by its Article 1 materialize. It would also apply to the claim of the shipper or consignee against the road carrier.

## 2.2 CIM

While CMR applies to any person who undertakes to carry goods by road irrespective of a consignment note having been issued or not, CIM in its 1980 version now in force only applies to contracts of carriage entered into by railways, covered by a through consignment note (art. 1). Its provisions, therefore, are not applicable to the contract of carriage covered by the Draft Instrument and consequently no conflict is conceivable. Of course the recourse of the carrier against the railway in respect of loss, damage or delay occurred during the railway carriage would be governed by the provisions of CIM.

The 1999 version of CIM instead provides (article 6 § 2), similarly to the CMR (article 4), that the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which shall remain subject to CIM. It is therefore necessary to find out whether CIM, in its 1999 version, would apply to a door-to-door contract of carriage covered by the Draft Instrument where one of the legs of the carriage is performed by rail between places situated in two different States members of COTIF. The relevant provision of CIM is Article 1 § 4 which so provides:

*When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention.*

As previously stated, the first condition is, therefore, that the carriage by sea must be a “supplement” to the carriage by rail. It is thought that this condition materializes where the contract is made between the consignor and a railway and that, therefore, CIM does not apply where the contracting carrier is not a rail-

way. A potential conflict between the Draft Instrument and CIM would thus be conceivable only if the “carrier”, as defined in Article 1.1 of the Instrument, is a railway.

In any event, even in such a rather unlikely case, it would be necessary that the carriage by sea be included in the list of services provided for in article 24 § 1 of COTIF.

## 2.3 CMNI

Carriage by different modes of transport, and more specifically by inland waterway and by sea, is regulated only in case it is performed by the same vessel, without transshipment. Article 2(2) provides that in such a case CMNI applies except where a “marine bill of lading” has been issued or the distance travelled by sea is greater than that travelled by inland waterway. Therefore, since normally both these conditions will materialize, CMNI would not apply. The case of a contract of carriage by sea and by inland waterway with transshipment of the goods from the seagoing vessel to the inland waterway vessel or vice versa is not contemplated. It is thought that such a contract is not covered by the definition of “contract of carriage” in article 1(1) of CMNI, where reference is made to a contract whereby a carrier undertakes to carry goods by inland waterways. If this view is correct, CMNI would only apply to the relation between the person who has stipulated the door-to-door contract and the carrier who performed the carriage by inland waterway.

It appears, therefore, that if the individual legs of the door-to-door carriage are subject to the international convention or to the law applicable to each of them, the application of the future Instrument to the global door-to-door carriage would not give rise to any conflict.

3. Article 4.2.1 would consequently become unnecessary and of course the text of the Draft Instrument should be reviewed in the light of its application to different modes of transport, in order to identify the provisions applicable to all transport modes and those that instead are applicable only to carriage by sea.

Article 6.3.3 could be replaced by the following provisions:

6.3.3-A. The recourse action of the carrier against the performing carrier, as well as any action against a performing carrier brought by the person entitled to assert claims in respect of loss of or damage to or delay in the goods, shall be governed by the international convention or national law applicable to the contract between the carrier and the performing carrier.

6.3.3-B. If an action is brought against the servants or agents of the carrier or of a performing party, such servants or agents are entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if they prove that they acted within the scope of their contract, employment or agency.

6.3.3-C. If an action is brought against the servants or agents of a performing carrier, such servants or agent are entitled to the benefit of the defences and limitations of liability available to the performing carrier under the applicable international convention or national law, if they prove that they acted within the scope of their contract, employment or agency.

Article 6.3.4 could be amended as follows:

6.3.4. If more than one person is liable for loss of, damage to, or delay in delivery of the goods, their liability is joint and several, but the aggregate liability of such persons shall not exceed the overall limits of liability under this instrument or the applicable international convention or national law, whichever is the highest.



**E. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: Proposal by Sweden**

**(A/CN.9/WG.III.WP.26) [Original: English]**

**NOTE BY THE SECRETARIAT**

In preparation for the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the Government of Sweden, on 14 November 2002, submitted the text of a proposal concerning the scope and structure of the draft instrument for consideration by the Working Group. The text of that proposal is reproduced as an annex to this note in the form in which it was received by the secretariat.

**ANNEX**

**Proposal by Sweden on the regulation of door-to-door shipments**

**1. Background**

Sweden welcomes the initiative by UNCITRAL to promote the cause of harmonization of international maritime law. Our gratitude also goes to the Comité Maritime International (CMI) for its immense contribution to this cause.

At the tenth session of Working Group III on transport law, held in Vienna, Austria, 16–20 September 2002, it was decided that the multimodal aspects of the draft instrument on maritime transport were to be discussed during the eleventh session in New York, USA, in the spring 2003. The secretariat also invited the States to submit papers on the multimodal aspects during the autumn 2002. This proposal by Sweden is a response to that. If it later on is decided that the draft instrument is going to cover door-to-door transports Sweden proposes that the text of the Instrument in A/CN.9/WG.III/WP.21 are changed in the following way (changes and commentaries are in italics):

**2. Scope of application**

**Art. 3.1**

3.1 Subject to article 3.3.1, the provisions of the draft instrument apply to all contracts of carriage *of goods by sea* in which the place of receipt and the place of delivery are in different States if

(a) the place of receipt [or port of loading] specified either in the contract of carriage or in the particulars is located in a Contracting State, or

(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or]

(d) [the contract of carriage is entered into in a Contracting State or the contract particulars state the transport document or electronic record is issued in a Contracting State, or]

(e) the contract of carriage provides that the provisions of this instrument, or the law of any State giving effect to them, are to govern the contract.

*Subject to 4.2.1 the provisions of this instrument also apply to carriage by inland waterway before and after the voyage by sea as well as to carriage by road or by rail from the place of receipt*

*to the port of loading and from the port of discharge to the place of delivery, provided that the goods, during the sea voyage, have been unloaded from the means of transport with which the land segment of the carriage is performed.*

*Commentary*

*In the first paragraph it is specified that the instrument apply to contracts of carriage of goods by sea instead of contracts of carriage. This is outlined also in paragraph 2 in which it is regulated that the instrument is not applicable to the ancillary transports if the goods are loaded on the truck or railway during the sea voyage. The idea behind this is to make it clear that the contract must be for a carriage of goods by sea and not by road or rail. Otherwise there is a risk that there will be collision between on the one hand art. 2 of the CMR Convention and art. 48 of the CIM Rules and on the other hand the proposed Instrument. If a ferry operator agrees to carry goods from for example Leeds in Great Britain to Stockholm in Sweden via the harbour of Gothen-burg and the goods are loaded on a truck during the sea voyage it is, as 3.1 stands today, uncertain whether the contract should be viewed as a contract of carriage by sea with ancillary transports under this instrument or as a contract of carriage by road under the CMR Convention. It is also important to notice here that a re-writing of the definition in 1.5 might be necessary.*

**Subparagraph 4.2.1**

**Carriage preceding or subsequent to sea carriage**

*Where it has been established that a claim arises out of loss or of damage to goods or delay and the event which caused the loss, damage or delay took place solely during either of the following periods:*

(a) *from the time of receipt of the goods by the carrier or a performing party until the goods are discharged in the sea port of loading from the means of transport with which the land segment of the carriage is performed;*

(b) *from the loading of the goods in the sea port of discharge on the means of transport with which the land segment of the carriage is performed until the time of their delivery to the consignee;*

*and at the time of such loss, damage or delay there are international conventions or national legislations that according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period and that cannot be departed*

from by private contract at all or to the detriment of the shipper, such provisions, to the extent they are mandatory, shall prevail over the provisions of this instrument.

Art. 4.2.2 ought to be deleted

#### Commentary

The words "or as a consequence of" indicates that the loss, damage or delay does not need to materialize during the periods in small (a) and (b). It is enough that they depend solely on what happened during these periods. An illustration to that could be that frozen food is carried by truck to the harbour at too high a temperature. The result of this is that the food starts to rot, but this is not detected until the goods are loaded on board the vessel. The liability will in this situation be governed by the liability regime for carriage of goods by road.

In small (a) and (b) the words "until the time of loading of the vessel" and "from the time of their discharge from the vessel" have been changed to "until the goods are discharged from the other transport mode" and "from the loading of the goods on the other transport mode" in order to specifically point out that the instrument is not only applicable during the loading and the discharge of the seagoing vessel but also during the storage in a sea harbour terminal. However the instrument is not applicable during the loading or discharge of the other transport mode if that part of the transport is covered by an international or national mandatory regime. The reason for this wording is that the mandatory international and national regulations on carriage of goods by land at least are applicable from the loading of the goods on to the truck or railway wagon to the discharge of the goods from those are completed. In the proposal the word "sea port" is used to point out that the instrument is not applicable if there are international or national mandatory provisions that govern the carriage by inland waterway, i.e. ancillary transports to and from an inland waterway harbour.

According to this proposal all the provisions in these mandatory regulations will prevail over the instrument. In the text in the WP.21 it is prescribed that only the specific provisions on carrier liability, limitation of liability and time for suit prevail over the instrument. The consequence of this is however, as the text appears in WP.21, that for example the mandatory provisions in the CMR Convention on reservations are excluded here and this will constitute a breach of the Convention. The present text ought therefore to be changed in this respect. As a consequence of the fact that national legislation will prevail over the instrument here, art. 4.2.2 should be deleted.

According to the proposed text this will also bring conformity in the chain of carriers. It will for example become impossible for a sub-carrier to hide behind the contracting carrier. If for example goods are carried by sea from USA to a harbour in Sweden and then transported by train from the harbour to an inland city the railway carrier may according to the existing text in the Instrument hide behind the sea carrier. According to the mandatory Swedish railway legislation the shipper is entitled to a compensation of SEK 150 per kilogram of the goods lost if there is a total loss. However if the American shipper sues the contracting carrier, i.e. the American shipping company—which is far more cheaper and convenient for him than suing the Swedish railway carrier—he will only get 2 SDR per kilogram (i.e. approximately SEK 30.) After that the American shipping company will in the recourse action only claim 2 SDR per kilogram from the railway carrier.

### 3. Calculation of the compensation

6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time of receipt according to the contract of carriage. In addition to this the carrier shall refund

the freight, customs duties and other charges incurred in respect of the carriage.

6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, or if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of receipt.

6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in subparagraphs 6.2.1 and 6.2.2.

#### Commentary

In the proposed text the place for the calculation of the compensation and the value of the goods have been altered from the place of delivery to the receipt. As a consequence of this it is also regulated that the carrier shall refund the freight, customs duties and other charges incurred in respect of the carriage, values that normally are included in the market price at the place of delivery. The reason for the change from the place of delivery to the place of receipt is to make the Instrument to conform with the CMR Convention art. 23 and the CIM Rules art. 40. Otherwise the calculation of the value of the goods will vary depending on during which leg, the land leg or the sea leg, the goods are damaged. However this also requires that the provisions on freight in chapter 9 of the Instrument are changed.

6.7.1 Subject to article 6.4.2 the carrier's liability for loss of or damage to or in connection with the goods is limited to [...] units of account per package or other shipping unit, or [...] of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and the value of the goods has been declared by the shipper before shipment and included in the contract particulars, [or where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper]

Notwithstanding the provisions of subparagraph 6.7.1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.

#### Commentary

In addition to subparagraph 6.7.1 which is regulating that liability is limited to units of account per package regarding losses and damages that have occurred during the sea voyage there is a need for regulating the text of the Instrument the limitation level will here be governed by article 6.7.1. Even if the exact level has not yet been decided upon it is likely that the level will be rather low (today it is 667 SDR per package or 2 SDR per kilogram) compared to other transport modes. A reason for having a rather low level for losses and damages during the sea voyage could be that if there is a total loss the carrier or his P&I Club would have to pay a very high compensation in total. However this reason does not make sense in a situation where there is a non-located damage. Here the damages to the goods usually are detected at the place of receipt which means that there are only small amounts of goods that are damaged. Regarding non-located damages, i.e. losses and damages where it is impossible to say whether they occurred during the sea voyage or during one of the ancillary transports, it seems preferable to protect the shipper/consignee by regulating that the carrier is only entitled to make use of the highest limitation level (according to the CMR Convention 8.33 SDR, and according to the CIM Rules 17 SDR) in the national or international mandatory liability regimes that govern the transport.

**F. Working paper submitted to the Working Group on Transport Law at its eleventh session: The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and the other transport conventions: Comparative tables**

**(A/CN.9/WG.III/WP.27) [Original: English]**

**NOTE BY THE SECRETARIAT**

In preparation for the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, Professor Francesco Berlingieri submitted a table comparing the provision of the UNCITRAL draft instrument on the carriage of goods by sea with those of other transport conventions for the information of the Working Group. The text of this extremely important reference document is reproduced as an annex to this note in the form in which it was received by the secretariat.

**THE UNCITRAL DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA  
AND THE OTHER TRANSPORT CONVENTIONS**

**Comparative Tables**

**CONTENTS**

	<i>Page</i>
Explanatory note .....	436
Abbreviations .....	436
Chapter 1. Definitions .....	437
Chapter 2. Electronic communications .....	442
Chapter 3. Scope of application .....	443
A. General provisions .....	443
B. Charter-party .....	445
Chapter 4. Period of responsibility .....	447
A. General provisions .....	447
B. Carriage preceding or subsequent to sea carriage .....	448
C. Mixed contracts of carriage and forwarding .....	451
Chapter 5. Obligations of the carrier .....	456
Chapter 6. Liability of the carrier .....	457
6.1. Basis of liability .....	457
6.2. Calculation of compensation .....	461
6.3. Liability of performing parties .....	463
6.4. Delay .....	465
6.5. Deviation .....	467
6.6. Deck cargo .....	468
6.7. Limits of liability .....	470
6.8. Loss of the right to limit liability .....	477
6.9. Notice of loss, damage or delay .....	479
6.10. Non-contractual claims .....	482
Live animals .....	483
Chapter 7. Obligations of the shipper .....	484
Chapter 8. Transport documents and electronic records .....	489
8.1. Issuance of the transport document or the electronic record .....	489
8.2. Contract particulars .....	491
8.3. Qualifying the description of the goods in the contract particulars .....	494
8.4. Deficiencies in the contract particulars .....	498
Chapter 9. Freight .....	500

	<i>Page</i>
Chapter 10. Delivery to the consignee . . . . .	503
Chapter 11. Right of control . . . . .	510
Chapter 12. Transfer of rights . . . . .	516
Chapter 13. Rights of suit . . . . .	517
Chapter 14. Time for suit . . . . .	518
Chapter 15. General average . . . . .	522
Chapter 16. Other conventions . . . . .	523
Chapter 17. Limits of contractual freedom . . . . .	527
Chapter <sup>1</sup> Jurisdiction and arbitration . . . . .	530

#### EXPLANATORY NOTE

The comparative tables that follow are arranged in the order in which the individual subjects appear in the UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea and the title of the chapter shown in each table is the title of the individual chapter of the Preliminary Draft Instrument.

#### ABBREVIATIONS

INSTRUMENT:	UNCITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea
HAGUE-VISBY:	International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 1924 as amended by the 1968 and 1979 Protocols
HAMBURG:	United Nations Convention on the Carriage of Goods by Sea, 1978
MULTIMODAL:	United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980
CMR:	Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol
COTIF-CIM 1999:	Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999
CMNI:	Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000
WARSAW:	Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as amended by the Protocol signed at Le Hague on 28 September 1955 and by the Protocol no. 4 signed at Montreal on 25 September 1975
MONTREAL:	Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999

<sup>1</sup>The chapter number, if any, to be determined in the course of discussions on the Draft Instrument.

## CHAPTER 1 – DEFINITIONS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><b>Article 1 – Definitions</b>  <b>For the purposes of this instrument:</b>  <b>1.1 “Carrier” means a person that enters into a contract of carriage with a shipper.</b>  <b>1.2 “Consignee” means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record.</b>  <b>1.3 “Consignor” means a person that delivers the goods to a carrier for carriage.</b>  <b>1.4 “Container” includes any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.</b>  <b>1.5 “Contract of carriage” means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another.</b>  <b>1.6 “Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that appears in a transport document or an electronic record.</b>  <b>1.7 “Controlling party” means the person that pursuant to article 11.2 is entitled to exercise the right of control.</b></p>	<p><b>Article 1</b>  <b>In this Convention the following words are employed with the meanings set out below:</b>  <b>a) “Carrier” includes the owner or the charterer who enters into a contract of carriage with a shipper.</b>  <b>b) “Contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.</b>  <b>c) “Goods” includes goods, wares, merchandise, and whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.</b>  <b>d) “Ship” means any vessel used for the carriage of goods by sea.</b></p>	<p><b>Article 1 – Definitions</b>  <b>In this Convention:</b>  <b>1. “Carrier” means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.</b>  <b>2. “Actual carrier” means any person to whom the performance of the carriage, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.</b>  <b>3. “Shipper” means any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.</b>  <b>4. “Consignee” means the person entitled to take delivery of the goods.</b>  <b>5. “Goods” includes live animals; where the goods are consolidated in a container, pallet or similar article of</b></p>	<p><b>Article 1 – Definitions</b>  <b>For the purposes of this Convention:</b>  <b>1. “International multimodal transport” means the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country.</b>  <b>The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.</b>  <b>2. “Multimodal transport operator” means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignee or of the carriers participating in the multimodal transport operations, and who</b></p>	<p><b>Article 3 – Definitions</b>  <b>For purposes of these Uniform Rules the term</b>  <b>a) “carrier” means the contractual carrier with whom the consignor has concluded the contract of carriage pursuant to these Uniform Rules, or a subsequent carrier who is liable on the basis of this contract;</b>  <b>b) “substitute carrier” means a carrier, who has not concluded the contract of carriage with the consignor, but to whom the carrier referred to in letter a) has entrusted, in whole or in part, the performance of the carriage by rail;</b>  <b>c) “General Conditions of Carriage” means the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it;</b>  <b>d) “intermodal transport unit” means a container, swap body, semi-trailer or other comparable loading unit used in intermodal transport.</b></p>	<p><b>Article 1 – Definitions</b>  <b>In this Convention,</b>  <b>1. “Contract of carriage” means any contract, whereby a carrier undertakes against payment of freight to carry goods by inland waterways;</b>  <b>2. “Carrier” means any person by whom or in whose name a contract of carriage has been concluded with a shipper;</b>  <b>3. “Actual carrier” means any person, other than a servant or an agent of the carrier, to whom the performance of the carriage or of part of such carriage has been entrusted by the carrier;</b>  <b>4. “Shipper” means any person by whom or in whose name or on whose behalf a contract of carriage has been concluded with a carrier;</b>  <b>5. “Consignee” means the person entitled to take delivery of the goods;</b>  <b>6. “Transport document” means a document which evidences a contract of carriage and the taking over or loading of goods by a carrier, made out in the form of a bill of lading or consign-</b></p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>1.8 "Electronic communication" means communication by electronic, optical, or digital images or by similar means with the result that the information communicated is accessible so as to be usable for subsequent reference. Communication includes generation, storing, sending, and receiving.</p> <p>1.9 "Electronic record" means information in one or more messages issued by electronic communication pursuant to a contract of carriage by a carrier or a performing party that (a) evidences a carrier's or a performing party's receipt of goods under a contract of carriage, or (b) evidences or contains a contract of carriage, or both.</p> <p>It includes information attached or otherwise linked to the electronic record contemporaneously with or subsequent to its issue by the carrier or a performing party.</p> <p>1.10 "Freight" means the remuneration payable to a carrier for the carriage of goods under a contract of carriage.</p> <p>1.11 "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier or a performing party received for carriage and includes the packing and any</p>	<p>e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.</p>	<p>transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper.</p> <p>6. "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.</p> <p>7. "Bill of lading" means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking.</p> <p>8. "Writing" includes, inter alia, telegram and telex.</p>	<p>assumes responsibility for the performance of the contract.</p> <p>3. "Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.</p> <p>4. "Multimodal transport document" means a document which evidences a multimodal transport contract, the taking in charge of the goods by the multimodal transport operator, and an undertaking by him to deliver the goods in accordance with the terms of that contract.</p> <p>5. "Consignor" means any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract.</p> <p>6. "Consignee" means the person</p>			<p>ment note or of any other trade document;</p> <p>7. "Goods" does not include either towed or pushed vessels or the luggage or vehicles of passengers; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper;</p> <p>8. "In writing" includes, unless otherwise agreed between the parties concerned, the transmission of information by electronic, optical or similar means of communication, including, but not limited to, telegram, facsimile, telex, electronic mail or electronic data interchange (EDI), provided the information is accessible so as to be usable for subsequent reference.</p> <p>9. The law of a State applicable in accordance with this Convention means the rules of law in force in that State other than its rules of private international law.</p>		

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>equipment and container not supplied by or on behalf of a carrier or a performing party.                      1.12 "Holder" means a person that                      (a) is for the time being in possession of a negotiable transport document or has the exclusive [access to] [control of] a negotiable electronic record, and                      (b) either:                      (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to whom the document is duly endorsed, or                      (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof, or                      (iii) if a negotiable electronic record is used, is pursuant to article 2.4 able to demonstrate that it has [access to] [control of] such record.                      1.13 "Negotiable electronic record" means an electronic record                      (i) that indicates, by statements such as "to order", or "negotiable", or other appropriate statements recognized as having the same effect by the law governing the record, that the goods have been consigned to the order of the consignee, and is not explicitly stated as</p>			<p>entitled to take delivery of the goods.                      7. "Goods" includes any container, pallet or similar article of transport or packaging, if supplied by the consignor.                      8. "International convention" means an international agreement concluded among States in written form and governed by international law.                      9. "Mandatory national law" means any statutory law concerning carriage of goods the provisions of which cannot be departed from by contractual stipulation to the detriment of the consignor.                      10. "Writing" means, inter alia, telegram or telex.</p>					

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>being “non-negotiable” or “not negotiable”, and (ii) is subject to rules of procedure as referred to in article 2.4, which include adequate provisions relating to the transfer of that record to a further holder and the manner in which the holder of that record is able to demonstrate that it is such holder.</p> <p><i>1.14</i> “Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law governing the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.</p> <p><i>1.15</i> “Non-negotiable electronic record” means an electronic record that does not qualify as a negotiable electronic record.</p> <p><i>1.16</i> “Non-negotiable transport document” means a transport document that does not qualify as a negotiable transport document.</p> <p><i>1.17</i> “Performing party” means a person other than the carrier that physically performs [or fails to perform in whole or in part] any of the</p>								





## CHAPTER 2 – ELECTRONIC COMMUNICATIONS

<p style="text-align: center;">INSTRUMENT</p>	<p style="text-align: center;">HAGUE-VISBY HAMBURG MULTIMODAL CMR COTIF-CIM 1999 CMNI WARSAW MONTREAL</p>
<p style="text-align: center;"><i>Article 2 – Electronic Communications</i></p> <p>2.1 Anything that is to be in or on a transport document in pursuance of this instrument may be recorded or communicated by using electronic communication instead of by means of the transport document, provided the issuance and subsequent use of an electronic record is with the express or implied consent of the carrier and the shipper.</p> <p>2.2.1 If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic record,</p> <p>(a) the holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier; and</p> <p>(b) the carrier shall issue to the holder a negotiable electronic record that includes a statement that it is issued in substitution for the negotiable transport document,</p> <p>whereupon the negotiable transport document ceases to have any effect or validity.</p> <p>2.2.2 If a negotiable electronic record has been issued and the carrier and the holder agree to replace that electronic record by a negotiable transport document,</p> <p>(a) the carrier shall issue to the holder, in substitution for that electronic record, a negotiable transport document that includes a statement that it is issued in substitution for the negotiable electronic record; and</p> <p>(b) upon such substitution, the electronic record ceases to have any effect or validity.</p> <p>2.3 The notices and confirmation referred to in articles 6.9.1, 6.9.2, 6.9.3, 8.2.1 (b) and (c), 10.2, 10.4.2, the declaration in article 14.3 and the agreement as to weight in article 8.3.1 (c) may be made using electronic communication, provided the use of such means is with the express or implied consent of the party by whom it is communicated and of the party to whom it is communicated. Otherwise, it must be made in writing.</p> <p>2.4 The use of a negotiable electronic record is subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 2.2.1. The rules of procedure shall be referred to in the contract particulars and shall include adequate provisions relating to</p> <p>(a) the transfer of that record to a further holder,</p> <p>(b) the manner in which the holder of that record is able to demonstrate that it is such holder, and</p> <p>(c) the way in which confirmation is given that</p> <p>(i) delivery to the consignee has been effected; or</p> <p>(ii) pursuant to articles 2.2.2 or 10.3.2(i)(b), the negotiable electronic record has ceased to have any effect or validity.</p>	<p style="text-align: center;"><i>There are no corresponding provisions in any other Transport Convention</i></p>

**CHAPTER 3 – SCOPE OF APPLICATION**

**A. GENERAL PROVISIONS**

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 3-Scope of application</i></p> <p><b>3.1 Subject to article 3.3.1, the provisions of this instrument apply to all contracts of carriage in which the place of receipt and the place of delivery are in different States if</b></p> <p><b>(a) the place of receipt [or port of loading] specified either in the contract of carriage<sup>2</sup> or in the contract particulars is located in a Contracting State, or</b></p> <p><b>(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or</b></p> <p><b>(c) [the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or] (d) [the contract of carriage is entered into in a Contracting State or the contract particulars state that the transport document</b></p>	<p><i>Article 10</i></p> <p>The provisions of this Convention shall apply to every bill of lading relating to the carriage of goods<sup>3</sup> between ports in two different States if:</p> <p>(a) the bill of lading is issued in a Contracting State, or</p> <p>(b) the carriage is from a port in a Contracting State, or</p> <p>(c) the contract contained in or evidenced by the bill of lading provides that the rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the consignee, or any other interested person.</p> <p>Each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above.</p> <p>This Article shall not prevent a</p>	<p><i>Article 2-Scope of application</i></p> <p>The provisions of this Convention shall apply to all contracts of carriage<sup>4</sup> by sea between two different States, if:</p> <p>(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State, or</p> <p>(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State, or</p> <p>(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or</p> <p>(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State, or</p> <p>(e) the bill of lading or other document evidencing the</p>	<p><i>Article 2-Scope of application</i></p> <p>The provisions of this Convention shall apply to all contracts of multimodal transport<sup>5</sup> between places in two States, if:</p> <p>(a) The place for the taking in charge of the goods by the multimodal transport operator as provided for in the contract is located in a Contracting State, or</p> <p>(b) The place for delivery of the goods by the multimodal transport operator as provided for in the contract is located in a Contracting State, or</p> <p>(c) one of the multimodal transport contracts is provided for in the contract is located in a Contracting State.</p>	<p><i>Article 1-Scope of application</i></p> <p>1. This Convention shall apply to every contract of carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.</p> <p>2. For the purpose of this Convention, "vehicles" means motor vehicles, articulated vehicles, trailers and semi-trailers as defined in article 4 of the Convention on Road Traffic dated 19<sup>th</sup> September 1949.</p> <p>3. This Convention shall apply, also where carriage coming within its scope is carried out by States or by governmental</p>	<p><i>Article 1-Scope of application</i></p> <p>1. These Uniform Rules shall apply to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage.</p> <p>2. These Uniform Rules shall apply also to contracts of carriage of goods by rail for reward, when the place of taking over of the goods and the place designated for delivery are situated in two different States, of which at least one is a Member State and the parties to the contract agree that the contract is subject to these Uniform Rules.</p> <p>3. When international carriage being the subject of a single contract</p>	<p><i>Article 2-Scope of application</i></p> <p>1. This Convention is applicable to any contract of carriage<sup>6</sup> according to which the port of loading or the place of taking over of the goods and the port of discharge or the place of delivery of the goods are located in two different States of which at least one is a State Party to this Convention. If the contract stipulates a choice of several ports of discharge or places of delivery, the port of discharge or the place of delivery to which the goods have actually been delivered shall determine the choice.</p> <p>2. This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland waterways and in waters to which maritime</p>	<p><i>Article 1-Scope of application</i></p> <p>1. This Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.</p> <p>2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party.</p> <p>Carriage between two points within the</p>	<p><i>Article 1-Scope of application</i></p> <p>1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.</p> <p>2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State</p>

<sup>2</sup> See the definition of "contract of carriage" in Article 1.5 at p. 6.

<sup>3</sup> See the definition of "carriage of goods" in Article 1(e) at p. 7.

<sup>4</sup> See the definition of "contract of carriage by sea" in Article 1.6 at p. 7.

<sup>5</sup> See the definition of "multimodal transport contract" in Article 1.3 at p. 7.

<sup>6</sup> See the definition of "contract of carriage" in Article 1.1 at p. 6.

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>or electronic record is issued in a Contracting State, or]</p> <p>(e) the contract of carriage provides that the provisions of this instrument, or the law of any State giving effect to them, are to govern the contract.</p> <p>3.2 The provisions of this instrument apply without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.</p>	<p>Contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs.</p>	<p>contract of carriage by sea provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.</p> <p>2. The provisions of this Convention are applicable without regard to the nationality of the ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.</p>		<p>institutions or organizations.</p> <p>4. This Convention shall not apply:</p> <p>(a) to carriage performed under the terms of any international postal convention;</p> <p>(b) to funeral consignments;</p> <p>(c) to furniture removal.</p> <p>5. The Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them, except to make it inapplicable to their frontier traffic or to authorise the use in transport operations entirely confined to their territory of consignment notes representing a title to the goods.</p>	<p>includes carriage by road or inland waterway in internal traffic of a Member State as a supplement to transfrontier carriage by rail, these Uniform Rules shall apply:</p> <p>4. When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24 § 1 of the Convention.</p> <p>5. These Uniform Rules shall not apply to carriage performed between stations situated on the territory of neighbouring States, when the infrastructure of these stations is managed by one or more infrastructure managers subject to only one of those States.</p>	<p>regulations apply, under the conditions set out in paragraph 1, unless:</p> <p>(a) a maritime bill of lading has been issued in accordance with the maritime law applicable, or</p> <p>(b) the distance to be travelled in waters to which maritime regulations apply is the greater.</p> <p>3. This Convention is applicable regardless of the nationality, place of registration or home port of the vessel or whether the vessel is a maritime or inland navigation vessel and regardless of the nationality, domicile, head office or place of residence of the carrier, the shipper or the consignee.</p>	<p>territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.</p> <p>3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been agreed upon under the form of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.</p> <p><i>Article XIV of the Montreal Protocol</i></p> <p>The Warsaw Convention as amended at The Hague in 1955 and by this Protocol shall apply to international carriage as defined in Article I of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single Party to this Protocol with an agreed stopping</p>	<p>Party. Carriage between two points within the territory of a single State</p> <p>Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.</p> <p>3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.</p> <p>4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
							place in the territory of another State. <i>Article 2</i> 1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1. 2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations. 3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.	

**B. CHARTER PARTY**

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<b>Article 3.3.1</b> The provisions of this instrument do not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements]. <b>3.3.2 Notwithstanding the provisions of article 3.3.1, if a negotiable transport document or a record is issued pursuant to a charter party, [contract of affreightment, volume contract, or similar</b>	<i>Article 1(b)</i> "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of	<i>Article 2</i> 3. The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer. 4. If a contract						

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>a agreement), then the provisions of this instrument apply to the contract evidenced by or contained in that document or that electronic record from the time when and to the extent that the document or the electronic record governs the relations between the carrier and a holder other than the charterer.</p> <p>3.4 If a contract provides for the future carriage of goods in a series of shipments, the provisions of this instrument apply to each shipment to the extent that articles 3.1, 3.2, and 3.3 so specify.</p>	<p>title regulates the relations between a carrier and a holder of the same.</p> <p><i>Article 5</i></p> <p>The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.</p>	<p>provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment.</p> <p>However, where a shipment is made under a charter-party, the provisions of paragraph 3 of this article apply.</p>						

**CHAPTER 4 – PERIOD OF RESPONSIBILITY****A. GENERAL PROVISIONS**

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 4-Period of responsibility</i></p> <p>4.1.1 Subject to the provisions of article 4.3, the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing party has received the goods for carriage until the time when the goods are delivered to the consignee.</p> <p>4.1.2 The time and location of receipt of the goods is the time and location agreed in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and location of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.</p> <p>4.1.3 The time and location of delivery of the goods is the time and location agreed in the contract of carriage, or, failing any specific provision relating to the</p>	<p><i>Article 1(e)</i></p> <p>“Carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship.</p> <p><i>Article 2</i></p> <p>Subject to the provisions of Article 6, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.</p>	<p><i>Article 4-Period of responsibility</i></p> <p>1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.</p> <p>2. For the purpose of paragraph 1 of this Article, the carrier is deemed to be in charge of the goods</p> <p>(a) From the time he has taken over the goods from:</p> <p>(i) The shipper, or a person acting on his behalf; or</p> <p>(ii) An authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;</p> <p>(b) Until the time he has delivered the goods:</p> <p>(i) By handing over the goods to the consignee; or</p> <p>(ii) In cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the</p>	<p><i>Article 14-Period of responsibility</i></p> <p>1. The responsibility of the multimodal transport operator for the goods under this Convention covers the period from the time he takes the goods in his charge to the time of their delivery.</p> <p>2. For the purpose of this article, the multimodal transport operator is deemed to be in charge of the goods:</p> <p>(a) From the time he has taken over the goods from:</p> <p>(i) The consignor or a person acting on his behalf; or</p> <p>(ii) An authority or other third party to whom, pursuant to law or regulations applicable at the place of taking in charge, the goods must be handed over for transport;</p> <p>(b) Until the time he has delivered the goods:</p> <p>(i) By handing over the goods to the consignee; or</p> <p>(ii) In cases where the consignee does not receive the goods from the multimodal transport operator, by placing them at the disposal of the</p>	<p><i>CMR</i></p>	<p><i>Article 23-Basis of liability</i></p> <p>1. The carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery and for the loss or damage resulting from the transit period being exceeded, whatever the railway infrastructure used.</p>	<p><i>Article 16-Liability for loss</i></p> <p>1. The carrier shall be liable for loss resulting from loss or damage to the goods caused between the time when he took them over for carriage and the time of their delivery, or resulting from delay in delivery, unless he can show that the loss was due to circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.</p> <p>2. The carrier's liability for loss resulting from loss or damage to the goods caused during the time before the goods are loaded on the vessel or the time after they have been discharged from the vessel shall be governed by the law of the State applicable to the contract of carriage.</p>	<p><i>Article 18</i></p> <p>2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.</p> <p>4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.</p> <p>5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the</p>	<p><i>Article 18-Damage to cargo</i></p> <p>3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.</p> <p>4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract of carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
delivery of the goods in such contract, the time and location that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and location of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.	contract or with the law or with the usage of the particular trade, applicable at the port of discharge, or (iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.	contract or with the law or with the usage of the particular trade, applicable at the port of discharge, or (iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.	consignee in accordance with the multimodal transport contract or with the law or with the usage of the particular trade applicable at the place of delivery; or (iii) By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the place of delivery, the goods must be handed over.				event which took place during the carriage by air.	period of carriage by air.
4.1.4 If the carrier is required to hand over the goods at the place of delivery to an authority or other third party to whom, pursuant to law or regulation applicable at the place of delivery, the goods must be handed over and from whom the consignee may collect them, such handing over will be regarded as a delivery of the goods by the carrier to the consignee under article 4.1.3.	carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.	carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.	operator shall include his servants or agents or any other person of whose services he makes use for the performance of the multimodal transport contract, and reference to the consignee or consignee shall include their servants or agents.					

*B. CARRIAGE PRECEDING OR SUBSEQUENT TO SEA CARRIAGE (MULTIMODAL/DOOR-TO-DOOR)*

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
Article 4-Period of responsibility 4.1.1 Subject to the provisions of article 4.3, the responsibility of the carrier for the goods under this instrument covers the period from the time when the carrier or a performing			Article 1-Definitions 2. "Multimodal transport operator" means any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport	Article 2 1. Where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways or air, and, except where the provisions of article 14 are applicable, the	Article 38-Liability in respect of rail-sea traffic 1. In rail-sea carriage by the services referred to in Article 24 § 1 of the Convention any Member State may, by requesting that a	Article 2-Scope of application 2. This Convention is applicable if the purpose of the contract of carriage is the carriage of goods, without transshipment, both on inland water ways and in	Article 18 5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the	Article 38-Combined carriage 1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall,



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>party has received the goods for carriage until the time when the goods are delivered to the consignee.</p> <p>4.2.1 Carriage preceding or subsequent to sea carriage. Where a claim or dispute arises out of loss of or damage to goods or delay occurring solely during either of the following periods:</p> <p>(a) from the time of receipt of the goods by the carrier or a performing party to the time of their loading on to the vessel;</p> <p>(b) from the time of their discharge from the vessel to the time of their delivery to the consignee;</p> <p>and, at the time of such loss, damage or delay, there are provisions of an international convention that</p> <p>(i) according to all or terms apply to all or any of the carrier's activities under the contract of carriage during that period, irrespective whether the issuance of any particular document is needed in order to make such international convention applicable, and</p> <p>(ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and</p> <p>(iii) cannot be departed</p>			<p>contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract.</p> <p>3. "Multimodal transport contract" means a contract whereby a multimodal transport operator undertakes, against payment of freight, to perform or to procure the performance of international multimodal transport.</p> <p><i>Article 3-Mandatory application</i></p> <p>2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport.</p> <p><i>Article 19-Localized damage</i></p> <p>When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law provides a higher limit of liability than the limit that would follow from application of paragraphs 1</p>	<p>goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage. Provided that to the extent that it is proved that any loss, damage or delay in delivery of the goods which occurs during the carriage by the other means of transport was not caused by an act or omission of the carrier by road, but by some event which could only have occurred in the course of and by reason of the carriage by that other means of transport, the liability of the carrier by road shall be determined not by this Convention but in the manner in which the liability of the carrier by the other means of transport would have been determined if a contract for the carriage of the goods alone had been made by the sender with the carrier by the other means of transport in accordance with the conditions prescribed by law for the carriage of goods by that means of transport. If, however, there are no such prescribed conditions, the</p>	<p>suitable note be included in the list of services to which these Uniform Rules apply, add the following grounds for exemption from liability in their entirety to those provided for in Article 23:</p> <p>a) fire, if the carrier proves that it was not caused by his act or default, or that of the master, a mariner, the pilot or the carrier's servants;</p> <p>b) saving or attempting to save life or property at sea;</p> <p>c) loading of goods on the deck of the ship, if they are so loaded with the consent of the consignor given on the consignment note and are not in wagons;</p> <p>d) perils, dangers and accidents of the sea or other navigable waters.</p> <p>2. The carrier may only avail himself of exemption referred to in § 1 if he proves that the loss, damage or exceeding the transit period occurred in the course of the journey by sea between the time when the goods were loaded on board the ship and the time when they were unloaded from the</p>	<p>waters to which maritime regulations apply, under the conditions set out in paragraph 1, unless:</p> <p>(a) A marine bill of lading has been issued in accordance with the maritime law applicable, or</p> <p>(b) The distance to be travelled in waters to which maritime regulations apply is the greater.</p>	<p>performance of a contract for carriage by air, for the purpose of loading, delivery or transport, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.</p> <p><i>Article 30</i></p> <p>1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.</p> <p>2. In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed</p>	<p>subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.</p> <p>2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>from by private contract either at all or to the detriment of the shipper, such provisions shall, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this instrument.</p> <p><i>/4.2.2 Article 4.2.1 applies regardless of the national law otherwise applicable to the contract of carriage.]</i></p>			<p>to 3 of article 18, then the limit of the multimodal transport operator's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.</p>	<p>liability of the carrier by road shall be determined by this Convention.</p> <p>2. If the carrier by road is also himself the carrier by the other means of transport, his liability shall also be determined in accordance with the provisions of paragraph 1 of this article, but as if, in his capacities as carrier by road and as carrier by the other means of transport, he were two separate persons.</p>	<p>ship.</p> <p>3. When the carrier relies on the grounds for exemption referred to in § 1, he shall nevertheless remain liable if the person entitled proves that the loss, damage or exceeding the transit period is due to the fault of the carrier, the master, a mariner, the pilot or the carrier's servants.</p> <p>4. Where a sea route is served by several undertakings included in the list of services in accordance with Article 24 § 1 of the Convention, the liability regime applicable to that route must be the same for all those undertakings. In addition, where those undertakings have been included in the list at the request of several Member States, the adoption of this regime must be the subject of prior agreement between those States.</p> <p>5. The measures taken in accordance with §§ 1 and 4 shall be notified to the Secretary General. They shall come into force at the earliest at the expiry of a period of thirty days from the day on which the Secretary General notifies them to the other Member States.</p>		<p>liability for the whole journey.</p> <p>3. As regards luggage or goods, the consignee will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignee.</p> <p><i>Article 30 A</i></p> <p>Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.</p> <p><i>Article 31</i></p> <p>1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air</p>	

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
					Consignments already in transit shall not be affected by such measures.		falls within the terms of Article 1. 2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.	

C. MIXED CONTRACTS OF CARRIAGE AND FORWARDING

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 4.3-Mixed contracts of carriage and forwarding</i></p> <p>4.3.1 The parties may expressly agree in the contract of carriage that in respect of a specified part or parts of the transport of the goods the carrier, acting as a agent, will arrange carriage by another carrier or carriers.</p> <p>4.3.2 In such event the carrier shall exercise due diligence in selecting the other carrier, conclude a contract with such other carrier on usual and normal terms, and do everything that is reasonably required to enable such other carrier to perform duly under its contract.</p>	<p><i>Article 11-Through carriage</i></p> <p>1. Notwithstanding the provisions of paragraph 1 of Article 10, where a contract of carriage by sea provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage. Nevertheless, any</p>	<p><i>Article 3 - Mandatory application</i></p> <p>2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport.</p>	<p><i>Article 34</i></p> <p>If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note.</p> <p><i>Article 35</i></p> <p>1. A carrier accepting the goods from a previous carrier shall give the latter a dated and signed receipt. He shall enter his name and address on the second copy of</p>	<p><i>Article 26-Successive carriers</i></p> <p>If carriage governed by a single contract is performed by several successive carriers, each carrier, by the very act of taking over the goods with the consignment note, shall become a party to the contract of carriage in accordance with the terms of that document and shall assume the obligations arising therefrom. In such a case each carrier shall be responsible in respect of carriage over the entire route up to delivery.</p> <p><i>Article 49-Settlement of accounts</i></p> <p>1. Any carrier who has collected or ought to have</p>			<p><i>Article 30</i></p> <p>1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.</p> <p>2. In the case of carriage of this nature, the passenger or his representative can take action only</p>	<p><i>Article 36-Successive Carriage</i></p> <p>1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.</p> <p>2. In the case of carriage of this nature, the passenger or any person entitled to compensation in</p>

INSTRUMENT	HAGUE-VISBY	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>stipulation limiting or excluding such liability is without effect if no judicial proceedings can be instituted against the actual carrier in a court competent under paragraph 1 or 2 of article 21. The burden of proving that any loss, damage or delay in delivery has been caused by such an occurrence rests upon the carrier.</p> <p>2. The actual carrier is responsible in accordance with the provisions of paragraph 2 of Article 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.</p>	<p>the consignment note. Where applicable, he shall enter on the second copy of the consignment note and on the receipt reservations of the kind provided for in article 8, paragraph 2.</p> <p>2. The provisions of article 9 shall apply to the relations between successive carriers.</p> <p><i>Article 36</i> Except in the case of a counterclaim or a setoff raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred, an action may be brought at the same time against several of these carriers.</p> <p><i>Article 37</i> A carrier who has paid compensation in compliance with the provisions of this Convention, shall be entitled to recover such compensation, together with interest thereon and all costs and expenses incurred by reason of</p>	<p>collected, either at departure or on arrival, charges or other costs arising out of the contract of carriage must pay to the carriers concerned their respective shares. The methods of payment shall be fixed by agreement between the carriers.</p> <p>2. Article 12 shall also apply to the relations between successive carriers.</p> <p><i>Article 50-Right of recourse</i> 1. A carrier who has paid compensation pursuant to these Uniform Rules shall have a right of recourse against the carriers who have taken part in the carriage in accordance with the following provisions: a) the carrier who has caused the loss or damage shall be solely liable for it; b) when the loss or damage has been caused by several carriers, each shall be liable for the loss or damage he has caused; if such distinction is impossible, the compensation shall be apportioned between them in accordance with letter c); c) if it cannot be proved which of the carriers has caused</p>		<p>against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.</p> <p>3. As regards luggage or goods, the passenger or consignator will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignator or consignee.</p> <p><i>Article 30 A</i> Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.</p>	<p>respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.</p> <p>3. As regards baggage or cargo, the passenger or consignator will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignator or consignee.</p>	

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
				<p>the claim, from the other carriers who have taken part in the carriage, subject to the following provisions:</p> <p>(a) The carrier responsible for the loss or damage shall be solely liable for the compensation whether paid by himself or by another carrier;</p> <p>(b) When the loss or damage has been caused by the action of two or more carriers, each of them shall pay an amount proportionate to his share of liability; should it be impossible to apportion the liability, each carrier shall be liable in proportion to the share of the payment for the carriage which is due to him;</p> <p>(c) If it cannot be ascertained to which carriers liability is attributable for the loss or damage, the amount of the compensation shall be apportioned between all the carriers as laid down in (b) above.</p> <p><b>Article 38</b></p> <p>If one of the carriers is insolvent, the share of the compensation due from him and unpaid by him shall be divided among the other carriers in proportion to the share of the payment</p>	<p>the loss or damage, the compensation shall be apportioned between all the carriers who have taken part in the carriage, except those who prove that the loss or damage was not caused by them; such apportionment shall be in proportion to their respective shares of the carriage charge.</p> <p>2. In the case of insolvency of any one of these carriers, the unpaid share due from him shall be apportioned among all the other carriers who have taken part in the carriage, in proportion to their respective shares of the carriage charge.</p> <p><b>Article 51-Procedure for recourse</b></p> <p>1. The validity of the payment made by the carrier exercising a right of recourse pursuant to Article 50 may not be disputed by the carrier against whom the right of recourse is exercised, when compensation has been determined by a court or tribunal and when the latter carrier, duly served with notice of the proceedings, has been afforded an opportunity to intervene in the proceedings. The court or tribunal seized of the</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
				<p>for the carriage due to them.</p> <p><i>Article 39</i></p> <p>1. No carrier against whom a claim is made under articles 37 and 38 shall be entitled to dispute the validity of the payment made by the carrier making the claim if the amount of the compensation was determined by judicial authority after the first mentioned carrier had been given due notice of the proceedings and afforded an opportunity of entering an appearance.</p> <p>2. A carrier wishing to take proceedings to enforce his right of recovery may make his claim before the competent court or tribunal of the country in which one of the carriers concerned is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made. All the carriers concerned may be made defendants in the same action.</p> <p>3. The provisions of article 31, paragraphs 3 and 4, shall apply to judgements entered in the proceedings referred to in articles 37 and 38.</p> <p>4. The provisions of</p>	<p>principal action shall determine what time shall be allowed for the proceedings and for intervention in the proceedings.</p> <p>2. A carrier exercising his right of recourse must make his claim in one and the same proceedings against all the carriers with whom he has not reached a settlement, failing which he shall lose his right of recourse in the case of those against whom he has not taken proceedings.</p> <p>3. The court or tribunal must give its decision in one and the same judgment on all recourse claims brought before it.</p> <p>4. The carrier wishing to enforce his right of recourse may bring his action in the courts or tribunals of the State on the territory of which one of the carriers participating in the carriage has his principal place of business, or the branch or agency which concluded the contract of carriage.</p> <p>5. Then the action must be brought against several carriers, the plaintiff carrier shall be entitled to choose the court or tribunal in which he will bring the proceedings from</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
				<p>article 32 shall apply to claims between carriers. The period of limitation shall, however, begin to run either on the date of the final judicial decision fixing the amount of compensation payable under the provisions of this Convention, or, if there is no such judicial decision, from the actual date of payment.</p> <p><i>Article 40</i> Carriers shall be free to agree among themselves on provisions other than those laid down in articles 37 and 38.</p>	<p>among those having competence pursuant to § 4.</p> <p>6. Recourse proceedings may not be joined with proceedings for compensation taken by the person entitled under the contract of carriage.</p> <p><i>Article 52- Agreements concerning recourse</i> The carriers may conclude agreements which derogate from Articles 49 and 50.</p>			

## CHAPTER 5 – OBLIGATIONS OF THE CARRIER

INSTRUMENT	HAGUE-VISBY
<p><i>Article 5–Obligations of the carrier</i></p> <p>5.1 The carrier shall, subject to the provisions of this instrument and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.</p> <p>5.2.1 The carrier shall during the period of its responsibility as defined in article 4.1, and subject to article 4.2, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.</p> <p>5.2.2 The parties may agree that certain of the functions referred to in article 5.2.1 shall be performed by or on behalf of the shipper, the controlling party or the consignee. Such an agreement must be referred to in the contract particulars.</p> <p>5.3 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier may decline to load, or may unload, destroy, or render goods harmless or take such other measures as are reasonable if goods are, or reasonably appear likely during its period of responsibility to become, a danger to persons or property or an illegal or unacceptable danger to the environment.</p> <p>5.4 The carrier shall be bound, before, at the beginning of, [and during] the voyage by sea, to exercise due diligence to:</p> <p>(a) make [and keep] the ship seaworthy;</p> <p>(b) properly man, equip and supply the ship;</p> <p>(c) make [and keep] the holds and all other parts of the ship in which the goods are carried, including containers where supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.</p> <p>5.5 Notwithstanding the provisions of articles 5.1, 5.2, and 5.4, the carrier in the case of carriage by sea [or by inland waterway] may sacrifice goods when the sacrifice is reasonably made for the common safety or for the purpose of preserving other property involved in the common adventure.</p>	<p><i>Article 3</i></p> <p>1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:</p> <p>a) Make the ship seaworthy.</p> <p>b) Properly man, equip and supply the ship.</p> <p>c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.</p> <p>2. Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.</p>



**CHAPTER 6 – LIABILITY OF THE CARRIER**

**6.1. BASIS OF LIABILITY**

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 6-Liability of the carrier</i></p> <p><b>6.1 Basis of liability</b></p> <p><b>6.1.1 The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier's responsibility as defined in article 4, unless the carrier proves that neither its fault nor that of any person referred to in article 6.3.2(a) caused or contributed to the loss, damage or delay.</b></p> <p><b>6.1.2 [Notwithstanding the provisions of article 6.1.1 the carrier is not responsible for loss, damage or delay arising or resulting from</b></p> <p><b>(a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship;</b></p> <p><b>(b) fire on the ship, unless caused by the fault or privity of the carrier]</b></p> <p><b>6.1.3 Notwithstanding the provisions of article 6.1.1, if the carrier proves that loss of or damage to the goods or delay in delivery has been</b></p>	<p><i>Article 4</i></p> <p>1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.</p> <p>2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:</p> <p>a) Act, neglect, or default of the master, mariner, pilot, or the</p>	<p><i>Article 5-Basis of liability</i></p> <p>1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.</p> <p>4 (a) The carrier is liable</p> <p>(i) For loss or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;</p> <p>(ii) For such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be</p>	<p><i>Article 15-The liability of the multimodal transport operator for his servants, agents and other persons</i></p> <p>Subject to article 21, the multimodal transport operator shall be liable for the acts and omissions of his servants or agents, when any such servant or agent is acting within the scope of his employment, or of any other person of whose services he makes use for the multimodal transport contract, when such person is acting in the performance of the contract, as if such acts and omissions were his own.</p> <p><i>Article 16-Basis of liability</i></p> <p>1. The multimodal transport operator shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in article 14.</p>	<p><i>Article 17</i></p> <p>1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.</p> <p>2. The carrier shall, however, be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.</p> <p>3. The carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle</p>	<p><i>Article 23-Basis of liability</i></p> <p>1. The carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery and for the loss or damage resulting from the transit period being exceeded, whatever the railway infrastructure used.</p> <p>2. The carrier shall be relieved of this liability to the extent that the loss or damage or the exceeding of the transit period was caused by the fault of the person entitled, before the goods are loaded on the vessel or the time after they have been discharged from the vessel shall be governed by the law of the State applicable to the contract of carriage.</p> <p><i>Article 17-Servants and agents</i></p> <p>1. The carrier shall be responsible for the acts and omissions of his servants and agents of whose services he makes use during the performance of the contract of carriage.</p>	<p><i>Article 16-Liability for loss</i></p> <p>1. The carrier shall be liable for loss resulting from loss or damage to the goods caused between the time when he took them over for carriage and the time of their delivery, or resulting from delay in delivery, unless he can show that the loss was due to circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.</p> <p>2. The carrier's liability for loss resulting from loss or damage to the goods caused during the time before the goods are loaded on the vessel or the time after they have been discharged from the vessel shall be governed by the law of the State applicable to the contract of carriage.</p> <p><i>Article 17-Servants and agents</i></p> <p>1. The carrier shall be responsible for the acts and omissions of his servants and agents of whose services he makes use during the performance of the contract of carriage.</p>	<p><i>Article 10.3</i></p> <p>Subject to the provisions of paragraphs 1 and 2 of this article, the carrier shall indemnify, the consignee against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5.</p> <p><i>Article 18</i></p> <p>2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.</p> <p>3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:</p>	<p><i>Article 18-Damage to cargo</i></p> <p>1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.</p> <p>2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:</p> <p>(a) inherent defect, quality or vice of that cargo;</p> <p>(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;</p> <p>(c) an act of war or an armed conflict;</p> <p>(d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.</p> <p>3. The carriage by air within the meaning of paragraph 1 of this article comprises the period during which the cargo is in the charge of the carrier.</p> <p>4. The period of the</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>caused by one of the following events it is presumed, in the absence of proof to the contrary, that neither its fault nor that of a performing party has caused or contributed to cause that loss, damage or delay.</p> <p>(i) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;</p> <p>(ii) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];</p> <p>(iii) act or omission of the shipper, the controlling party or the consignee;</p> <p>(iv) strikes, lock-outs, stoppages or restraints of labour;</p> <p>(v) saving or attempting to save life or property at sea;</p> <p>(vi) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;</p> <p>(vii) insufficiency or defective condition of packing or marking;</p> <p>(viii) latent defects not discoverable by due diligence.</p> <p>(ix) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;</p> <p>(x) acts of the carrier or</p>	<p>servants of the carrier in the navigation or in the management of the ship.</p> <p>b) Fire, unless caused by the actual fault or privity of the carrier.</p> <p>c) Perils, dangers and accidents of the sea or other navigable waters.</p> <p>d) Act of God.</p> <p>e) Act of war.</p> <p>f) Act of public enemies.</p> <p>g) Arrest or restraint of princes, rulers or people, or seizure under legal process.</p> <p>h) Quarantine restrictions.</p> <p>i) Act or omission of the shipper or owner of the goods, his agent or representative.</p> <p>j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.</p> <p>k) Riots and civil commotion.</p> <p>l) Saving or attempting to save life or property at sea.</p> <p>m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.</p> <p>n) Insufficiency of packing.</p> <p>o) Insufficiency or inadequacy of marks.</p> <p>p) Latent defects not discoverable by due diligence.</p> <p>q) Any other cause</p>	<p>required to put out the fire and avoid or mitigate its consequences.</p> <p>(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipment practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.</p> <p>6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.</p> <p>7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the multimodal operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the multimodal transport operator proves the part of the loss, damage or delay in delivery not attributable thereto.</p>	<p>unless the multimodal transport operator proves that he, his servants or agents or any other person referred to in article 15 took all measures that could reasonably be required to avoid the occurrence and its consequences.</p> <p><i>Article 17-</i> <i>Concurrent causes</i> Where fault or neglect on the part of the multimodal transport operator, his servants or agents or any other person referred to in article 15 combines with another cause to produce loss, damage or delay in delivery, the multimodal operator shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the multimodal transport operator proves the part of the loss, damage or delay in delivery not attributable thereto.</p>	<p>or of the agents or servants of the latter.</p> <p>4. Subject to article 8, paragraphs 2 to 5, the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one more of the following circumstances:</p> <p>(a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note;</p> <p>(b) The lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;</p> <p>(c) Handling, loading, stowage or unloading of the goods by the sender, the consignee or person acting on behalf of the sender or the consignee;</p> <p>(d) The nature of certain kinds of goods which particularly exposes them to total or partial loss or damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;</p> <p>(e) Insufficiency or inadequacy of marks or numbers on the packages;</p> <p>(f) The carriage of</p>	<p>the special risks inherent in one or more of the following circumstances:</p> <p>a) carriage in open wagons pursuant to the General Conditions of Carriage or when it has been expressly agreed and entered in the consignment note; subject to damage sustained by the goods because of atmospheric influences, goods carried in intermodal transport units and in closed road vehicles carried on wagons shall not be considered as being carried in open wagons; if for the carriage of goods in open wagons, the consignor uses sheets, the carrier shall assume the same liability as falls to him for carriage in open wagons without sheeting, even in respect of goods which, according to the General Conditions of Carriage, are not carried in open wagons;</p> <p>b) absence or inadequacy of packaging in the case of goods which by their nature are liable to loss or damage when not packed properly;</p> <p>c) loading of the goods by the consignor or</p>	<p>when such persons are acting within the scope of their employment, as if such acts or omissions were his own.</p> <p>2. When the carriage is performed by an actual carrier in accordance with article 4, the carrier is also responsible for the acts and omissions of the actual carrier acting within the scope of their employment.</p> <p>3. If an action is brought against the servants and agents of the carrier or the actual carrier, such persons, if they prove that they acted within the scope of their employment, are entitled to avail themselves of the defences and limits of liability which the carrier or the actual carrier is entitled to invoke under this Convention.</p> <p>4. A pilot designated by an authority and who cannot be freely selected shall not be considered to be a servant or agent within the meaning of paragraph 1.</p> <p><i>Article 18-Special exonerations from liability</i></p> <p>1. The carrier and the actual carrier shall be exonerated from their</p>	<p>(a) inherent defect, quality or vice of that cargo;</p> <p>(b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;</p> <p>(c) an act of war or an armed conflict;</p> <p>(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.</p> <p><i>Article 21</i></p> <p>1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.</p> <p>2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the extent that such negligence</p>	<p>carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract of carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>a performing party in pursuance of the powers conferred by article 5.3 and 5.5 when the goods have been become a danger to persons, property or the environment or have been sacrificed; [(xi) perils, dangers and accidents of the sea or other navigable waters;]</p> <p>6.1.4 [If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.]</p> <p>[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is</p> <p>(a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and</p> <p>(b) not liable for the loss, damage, or delay</p>	<p>arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.</p>	<p>livestock.</p> <p>5. Where under this article the carrier is not under any liability in respect of some of the factors causing the loss, damage or delay, he shall only be liable to the extent that those factors for which he is liable under this article have contributed to the loss, damage or delay.</p> <p><i>Article 18</i></p> <p>1. The burden of proving that loss, damage or delay was due to one of the causes specified in article 17, paragraph 2, shall rest upon the carrier.</p> <p>2. When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 17, paragraph 4, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks.</p> <p>3. This presumption shall not apply in the circumstances set out in article 17, paragraph 4(a), if there has been an abnormal shortage, or a loss of</p>	<p>unloading by the consignee;</p> <p>d) the nature of certain goods which particularly exposes them to total or partial loss or damage, especially through breakage, rust, interior and spontaneous decay, desiccation or wastage;</p> <p>e) irregular, incorrect or incomplete description or numbering of packages;</p> <p>f) carriage of live animals;</p> <p>g) carriage which, pursuant to applicable provisions or agreements made between the consignor and the carrier and entered on the consignment note, must be accompanied by an attendant, if the loss or damage results from a risk which the attendant was intended to avert.</p> <p><i>Article 24-Liability in case of carriage of railway vehicles as goods</i></p> <p>1. In case of carriage of railway vehicles running on their own wheels and consigned as goods, the carrier shall be liable for the loss or damage resulting from the loss of, or damage to, the vehicle or to its removable parts</p>	<p>liability when the loss, damage or delay are the result of one or risks listed below:</p> <p>(a) Acts or omissions of the shipper, the consignee or the person entitled to dispose of the goods;</p> <p>(b) Handling, loading, stowage or discharge of the goods by the shipper, the consignee or third parties acting on behalf of the shipper or the consignee;</p> <p>(c) Carriage of the goods on deck or in open vessels, where such carriage has been agreed with the shipper or is in accordance with the practice of the particular trade, or if it is required by the regulations in force;</p> <p>(d) The nature of the goods which exposes them to total or partial loss or damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage (in volume or weight), or the action of vermin or rodents;</p> <p>(e) The lack of or defective condition of packaging in the case of goods which, by their nature, are liable to loss or damage when not packed or when the packaging is defective;</p>	<p>or wrongful act or omission caused or contributed to the damage.</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.</p> <p>If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.]</p>				<p>any package.</p> <p>4. If the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat, cold, variations in temperature or the humidity of the air, the carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (d), unless he proves that all steps incumbent on him in the circumstances with respect to the choice, maintenance and use of such equipment were taken and that he complied with any special instructions issued to him.</p> <p>5. The carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (f), unless he proves that all steps normally incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him.</p>	<p>arising between the time of taking over for carriage and the time of delivery and for loss or damage resulting from exceeding the transit period, unless he proves that the loss or damage was not caused by his fault.</p> <p>2. The carrier shall not be liable for loss or damage resulting from the loss of accessories which are not mentioned on both sides of the vehicle or in the inventory which accompanies it.</p> <p><i>Article 25-Burden of proof</i></p> <p>1. The burden of proving that the loss, damage or exceeding of the transit period was due to one of the causes specified in article 23 § 2 shall lie on the carrier.</p> <p>2. When the carrier establishes that, having regard to the circumstances of a particular case, the loss or damage could have arisen from one or more of the special risks referred to in article 23 § 3, it shall be presumed that it did so arise. The person entitled shall, however, have the right to prove that the loss or damage was not attributable either wholly or in part to one of those risks.</p> <p>3. The presumption</p>	<p>(f) Insufficiency or inadequacy of marks identifying the goods;</p> <p>(g) Rescue or salvage operations or attempted rescue or salvage operations on inland waterways;</p> <p>(h) Carriage of live animals, unless the carrier has not taken the measures or observed the instructions agreed upon in the contract of carriage.</p> <p>2. When, in the circumstances of the case, the loss or damage could be attributed to one or more of the circumstances or risks listed in paragraph 1 of the present article, it is presumed to have been caused by such a circumstance or risk. This presumption does not apply if the injured party proves that the loss suffered does not result, or does not result exclusively, from one of the circumstances or risks listed in paragraph 1 of this article.</p> <p><i>Article 22- Application of the defences and limits of liability</i></p> <p>The exonerations and limits of liability provided for in this Convention or in the contract of carriage apply in any action in</p>		

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
					according to § 2 shall not apply in the case provided for in article 23 § 3, letter a) if an abnormally large quantity has been lost or if a package has been lost.	respect of loss or damage to or delay in delivery of the goods covered by the contract of carriage, whether the action is founded in contract, in tort or on some other legal grounds.		

## 6.2. CALCULATION OF COMPENSATION

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL	
6.2 Calculation of compensation 6.2.1 If the carrier is liable for loss of or damage to the goods, the compensation payable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. 6.2.2 The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery. 6.2.3 In case of loss of or damage to the goods and save as provided for in article 6.4, the carrier shall not be liable for payment of any compensation beyond what is provided for in	Article 4.5 b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.			Article 23 1. When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage. 2. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to normal value of goods of the same kind and quality.		Article 19- Calculation of compensation 1. Where the carrier is liable in respect of total loss of goods, the compensation payable by him shall be equal to the value of the goods at the place and on the day of delivery according to the contract of carriage. Delivery to a person other than the person entitled is deemed to be a loss. 2. In the event of partial loss or damage to goods, the carrier shall be liable only to the extent of the loss in value. 3. The value of the goods shall be fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or			

INSTRUMENT articles 6.2.1 and 6.2.2.	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
						<p>market price, by reference to the normal value of goods of the same kind and quality at the place of delivery.</p> <p>4. In respect of goods which by reason of their nature are exposed to normal wastage during carriage, the carrier shall only be held liable, whatever the length of the carriage, for that part of the wastage which exceeds normal wastage (in volume or weight) as determined by the parties to the contract of carriage or, if not, by the regulations or established practice at the place of destination.</p> <p>5. The provisions of this article shall not affect the carrier's right concerning the freight as provided by the contract of carriage or, in the absence of special agreements in this regard, by the applicable national regulations or practices.</p>		

## 6.3. LIABILITY OF PERFORMING PARTIES

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
6.3 Liability of performing parties 6.3.1(a) A performing party is subject to the responsibilities and liabilities imposed on the carrier under this instrument, and entitled to the carrier's rights and immunities provided by this instrument (i) during the period in which it has custody of the goods; and (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage. (b) If the carrier agrees to assume responsibilities other than those imposed on the carrier under this instrument, or agrees that its liability for the delay in delivery of, loss of, or damage to or in connection with the goods is higher than the limits imposed under articles 6.4.2, 6.6.4, and 6.7, a performing party is not bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits. 6.3.2(a) Subject to article 6.3.3, the carrier is responsible for the acts and omissions of (i) any performing party, and (ii) any other person, including a performing	<i>Article 10-Liability of the carrier and actual carrier</i> 1. Where the performance of the carriage or part thereof has been entrusted to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage by sea to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment. 2. All the provisions of this Convention governing the responsibility of the carrier also apply to the actual carrier for the carriage performed by him. The provisions of this Convention apply to the carrier notwithstanding that he acted within the performance of the contract, the servant or agent of such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention. 3. Except as provided in article 21, the aggregate of the amounts recoverable from the multimodal transport operator and from a servant or agent or any other person of whose services he makes use for the perform-	<i>Article 20-Non-contractual liability</i> 2. If an action in respect of loss resulting from loss of or damage to the goods or from delay in delivery is brought against the servant or agent of the multimodal transport operator, if such servant or agent proves that he acted within the scope of his employment, or against any other person of whose services he makes use for the performance of the multimodal transport contract, if such other person proves that he acted within the performance of the contract, the servant or agent of such other person shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke under this Convention. 3. Except as provided in article 21, and 3 of Article 7 and of paragraph 2 of Article 8 apply, if an action is brought against a servant or agent of the actual carrier. 3. Any special agreement under which the	<i>Article 27-Substitute carrier</i> 1. Where the carrier has entrusted the performance of the carriage, in whole or in part, to a substitute carrier, whether or not in pursuance of a right under the contract of carriage to do so, the carrier shall nevertheless remain liable in respect of the entire carriage. 2. All the provisions of these Uniform Rules governing the liability of the carrier shall also apply to the liability of the substitute carrier for the carriage performed by him. Articles 36 and 41 shall apply if an action is brought against the servants and any other persons whose services the substitute carrier makes use of for the performance of the carriage. 3. Any special agreement under which the carrier assumes obligations not imposed by these Uniform Rules or waives rights conferred by these Uniform Rules shall be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing. Whether or not the substitute carrier has accepted	<i>Article 4-Actual carrier</i> 1. A contract complying with the definition set out in article 1, paragraph 1, concluded between a carrier and an actual carrier constitutes a contract of carriage within the meaning of this Convention. For the purpose of such contract, all the provisions of this Convention concerning the shipper shall apply to the carrier and those concerning the carrier to the actual carrier. 2. Where the carrier has entrusted the carriage or part thereof to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. All the provisions of this Convention governing the liability of the carrier shall apply to the carrier and those concerning the carrier to the actual carrier. 3. Where the carrier has entrusted the carriage or part thereof to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. All the provisions of this Convention governing the liability of the carrier shall also apply to the liability of the substitute carrier for the carriage performed by him. Articles 36 and 41 shall apply if an action is brought against the servants and any other persons whose services the substitute carrier makes use of for the performance of the carriage. 3. Any special agreement under which the carrier assumes obligations not imposed by these Uniform Rules or waives rights conferred by these Uniform Rules shall be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing. Whether or not the substitute carrier has accepted	<i>Article 27-Substitute carrier</i> 1. Where the carrier has entrusted the performance of the carriage, in whole or in part, to a substitute carrier, whether or not in pursuance of a right under the contract of carriage to do so, the carrier shall nevertheless remain liable in respect of the entire carriage. 2. All the provisions of these Uniform Rules governing the liability of the carrier shall also apply to the liability of the substitute carrier for the carriage performed by him. Articles 36 and 41 shall apply if an action is brought against the servants and any other persons whose services the substitute carrier makes use of for the performance of the carriage. 3. Any special agreement under which the carrier assumes obligations not imposed by these Uniform Rules or waives rights conferred by these Uniform Rules shall be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing. Whether or not the substitute carrier has accepted	<i>Article 4-Actual carrier</i> 1. A contract complying with the definition set out in article 1, paragraph 1, concluded between a carrier and an actual carrier constitutes a contract of carriage within the meaning of this Convention. For the purpose of such contract, all the provisions of this Convention concerning the shipper shall apply to the carrier and those concerning the carrier to the actual carrier. 2. Where the carrier has entrusted the carriage or part thereof to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. All the provisions of this Convention governing the liability of the carrier shall apply to the carrier and those concerning the carrier to the actual carrier. 3. Where the carrier has entrusted the carriage or part thereof to an actual carrier, whether or not in pursuance of a liberty under the contract of carriage to do so, the carrier nevertheless remains responsible for the entire carriage according to the provisions of this Convention. All the provisions of this Convention governing the liability of the carrier shall also apply to the liability of the substitute carrier for the carriage performed by him. Articles 36 and 41 shall apply if an action is brought against the servants and any other persons whose services the substitute carrier makes use of for the performance of the carriage. 3. Any special agreement under which the carrier assumes obligations not imposed by these Uniform Rules or waives rights conferred by these Uniform Rules shall be of no effect in respect of the substitute carrier who has not accepted it expressly and in writing. Whether or not the substitute carrier has accepted	<i>Article 30</i> 1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision. 2. In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey. 3. As regards luggage or goods, the passenger or consignator will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery	<i>Article 39-Actual Carrier</i> The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignator or with a person acting on behalf of the passenger or consignator, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary. <i>Article 40-Respective Liability of Contracting and Actual Carriers</i> If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, as if such acts or omissions were its own. A carrier is responsible under this provision only when the performing party's or other person's act or omission is within the scope of its contract, employment, or agency. (b) Subject to article 6.3.3, a performing party is responsible for the acts and omissions of any person to whom it has delegated the performance of any of the carrier's responsibilities under the contract of carriage, including its sub-contractors, employees, and agents, as if such acts or omissions were its own. A performing party is responsible under this provision only when the act or omission of the person concerned is within the scope of its contract, employment, or agency. 6.3.3 If an action is brought against any person, other than the carrier, mentioned in article 6.3.2, that person is entitled to the</p>	<p>carrier assumes obligations not imposed by this Convention or waives rights conferred by this Convention affects the actual carrier only if agreed to by him expressly and in writing. Whether or not the actual carrier has so agreed, the carrier nevertheless remains bound by the obligations or waivers resulting from such special agreement. 4. Where and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several. 5. The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability provided for in this Convention. 6. Nothing in this Article shall prejudice any right of recourse as between the carrier and the actual carrier.</p>	<p>it, the carrier shall nevertheless remain bound by the obligations or waivers resulting from such special agreement. 4. Where and to the extent that both the carrier and the substitute carrier are liable, their liability shall be joint and several. 5. The aggregate amount of compensation payable by the carrier and their servants and other persons whose services they make use of for the performance of the carriage shall not exceed the limits provided for in these Uniform Rules. 6. This article shall not prejudice rights of recourse which may exist between the carrier and the substitute carrier.</p>	<p>in all cases inform the shipper when he entrusts the performance of the carriage or part thereof to an actual carrier. 4. Any agreement with the shipper or the consignee extending the carrier's responsibility according to the provisions of this Convention affects the actual carrier only to the extent that he has agreed to it expressly and in writing. The actual carrier may avail himself of all the objections invocable by the carrier under the contract of carriage. 5. If and to the extent that both the carrier and the actual carrier are liable, their liability is joint and several. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.</p>	<p>will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignee or consignee. <i>Article 30 A</i> Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.</p>	<p>shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs. <i>Article 41-Mutual Liability</i> 7. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier. 2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier</p>			



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment, or agency. 6.3.4 If more than one person is liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for in articles 6.4, 6.6 and 6.7. 6.3.5 Without prejudice to the provisions of article 6.8, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument.								assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

## 6.4. DELAY

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
6.4 Delay 6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon or, in the absence of such a agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage. 6.4.2 If delay in delivery causes loss not resulting		<i>Article 5-Basis of liability</i> 2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to expect of a diligent carrier, having regard to the circumstances of the case.	<i>Article 16-Basis of liability</i> 2. Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent multimodal transport operator, having regard to the circumstances of the case. 3. If the goods have not been delivered within 90 consecutive days following	<i>Article 19</i> Delay in delivery shall be said to occur when the goods have not been delivered within the agreed time-limit or when, failing an agreed time-limit, the actual duration of the carriage having regard to the circumstances of the case, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a	<i>Article 16-Transit periods</i> 1. The consignor and the carrier shall agree the transit period. In the absence of an agreement, the transit period must not exceed that which would result from the application of §§ 2 to 4. 2. Subject to §§ 3 and 4, the maximum transit periods shall be as follows: a) for wagon-load consignments - period for consignment 12 hours, - period for carriage, for each 400 km or	<i>Article 5-Delivery time</i> The carrier shall deliver the goods within the time limit agreed in the contract of carriage or, if no time limit has been agreed, within the time limit which could reasonably be required of a diligent carrier, taking into account the circumstances of the voyage and unimpeded navigation.	<i>Article 19</i> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods. <i>Article 20</i> In the carriage of passengers and baggage, and in the case of damage occasioned by delay its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.	<i>Article 19-Delay</i> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>from destruction of or damage to the goods carried and hence not covered by article 6.2, the amount payable as compensation for such loss is limited to an amount equivalent to [...times the freight payable on the goods delayed]. The total amount payable under this provision and article 6.7.1 shall not exceed the limit that would be established under article 6.7.1 in respect of the total loss of the goods concerned.</p>			<p>the date of delivery determined according to paragraph 2 of this article, the claimant may treat the goods as lost.</p>	<p>diligent carrier. <i>Article 20</i> 1. The fact that goods have not been delivered within thirty days following the expiry of the agreed time-limit, or, if there is no agreed time-limit, within sixty days from the time when the carrier took over the goods, shall be conclusive evidence of the loss of the goods, and the person entitled to make a claim may thereupon treat them as lost. 2. The person so entitled may, on receipt of compensation for the missing goods, request in writing that he shall be notified immediately should the goods be recovered in the course of the year following the payment of compensation. He shall be given a written acknowledgement of such request. 3. Within the thirty days following receipt of such notification, the person entitled as aforesaid may require the goods to be delivered to him against payment of the charges shown to be due on the consignment note and also against refund of the compensation he received less any charges</p>	<p>fraction thereof 24 hours; b) for less than wagon-load consignment - period for consignments 24 hours, - period for carriage, for each 200 km or fraction thereof 24 hours. The distances shall relate to the agreed route or, in the absence thereof, to the shortest possible route. 3. The carrier may fix additional transit periods of specified duration in the following cases: a) consignments to be carried - by lines of a different gauge, - by sea or inland waterway, - by road if there is no rail link; b) exceptional circumstances causing an exceptional increase in traffic or exceptional operating difficulties. The duration of the additional transit periods must appear in the General Conditions of Carriage. 4. The transit period shall start to run after the taking over of the goods; it shall be extended by the duration of a stay caused without any fault of the carrier. The transit period shall be suspended on</p>		<p>impossible for them to take such measures.</p>	

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
				included therein but without prejudice to any claims to compensation for delay in delivery under article 23 and where applicable, article 26. 4. In the absence of the request mentioned in paragraph 2 or of any instructions given within the period of thirty days specified in paragraph 3, or if the goods are not recovered until more than one year after the payment of compensation, the carrier shall be entitled to deal with them in accordance with the law of the place where the goods are situated.	Sundays and statutory holidays.			

## 6.5. DEVIATION

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>6.5-Deviation</i></p> <p>(a) The carrier is not liable for loss, damage, or delay in delivery caused by a deviation to save life or property at sea, or by any other reasonable deviation.</p> <p>(b) Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with the provisions of this instrument.</p>	<p><i>Article 4</i></p> <p>4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.</p>	<p><i>Article 5-Basis of liability</i></p> <p>6. The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.</p>						

## 6.6. DECK CARGO

INSTRUMENT	HAGUE-VISBY <i>Article 1</i>	HAMBURG <i>Article 9 - Deck cargo</i>	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>6.6 Deck cargo</p> <p>6.6.1 Goods may be carried on or a above deck only if</p> <p>(i) such carriage is required by applicable laws or administrative rules or regulations, or</p> <p>(ii) they are carried in or on containers on decks that are specially fitted to carry such containers, or</p> <p>(iii) in cases not covered by paragraphs (i) or (ii) of this article, the carriage on deck is in accordance with the contract of carriage, or complies with the customs, usages, and practices of the trade, or follows from other usages or practices in the trade in question.</p> <p>6.6.2 If the goods have been shipped in accordance with article 6.6.1(i) and (iii), the carrier is not liable for loss of or damage to these goods or delay in delivery caused by the special risks involved in their carriage on deck. If the goods are carried on or above deck pursuant to article 6.6.1 (ii), the carrier is liable for loss of or damage to such goods, or for delay in delivery, without regard to whether they are carried on or a above deck. If the goods are carried on deck in cases other than those permitted under article 6.6.1, the carrier</p>	<p>c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.</p>	<p>1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.</p> <p>2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.</p> <p>3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this Article or where the carrier may not under paragraph 2 of this Article invoke an agreement for carriage on deck,</p>						

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>is liable, irrespective of the provisions of article 6.1, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.                      6.6.3 If the goods have been shipped in accordance with article 6.6.1(iii), the fact that particular goods are carried on deck must be included in the contract particulars. Failing this, the carrier has the burden of proving that carriage on deck complies with article 6.6.1(iii) and, if a negotiable transport document or a negotiable electronic record is issued, is not entitled to invoke that provision against a third party that has acquired such negotiable transport document or electronic record in good faith.                      6.6.4 If the carrier under this article 6.6 is liable for loss or damage to goods carried on deck or for delay in their delivery, its liability is limited to the extent provided for in articles 6.4 and 6.7; however, if the carrier and shipper expressly have agreed that the goods will be carried under deck, the carrier is not entitled to limit its liability for any loss or damage to the goods that exclusively resulted from their carriage on deck.</p>		<p>the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of Article 6 or Article 8 of this Convention, as the case may be.                      4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of Article 8.</p>						

## 6.7. LIMITS OF LIABILITY

INSTRUMENT	HAGUE-VISBY Article 4	HAMBURG Article 6-Limits of liability	MULTIMODAL Article 18-Limitation of liability	CMR Article 23	COTIF-CIM 1999 Article 30-Compensation for loss	CMNI Article 20-Maximum limits of liability	WARSAW Article 22	MONTREAL Article 22-Limits of Liability in Relation to Delay, Baggage and Cargo
6.7-Limits of liability 6.7.1. Subject to article 6.4.2 the carrier's liability for loss of or damage to or in connection with the goods is limited to [...] package or other shipping unit, or [...] units of account per kilogram of the gross weight of the goods lost or damaged, whichever is the higher, except where the nature and value of the goods has been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods exceeding 666.67 units of account per package or unit or 2 kilograms of gross weight of the goods lost or damaged, whichever is the higher.	5.a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods exceeding 666.67 units of account per package or unit or 2 kilograms of gross weight of the goods lost or damaged, whichever is the higher.	1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is the higher. (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea. (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred. 2. For the purpose of	1. When the multimodal transport operator is liable for loss of or damage to the goods according to article 16, his liability shall be limited to an amount not exceeding 920 units of account per package of other shipping unit or 2.75 kilograms of gross weight of the goods lost or damaged, whichever is the higher. 2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules apply: (a) Where a container, pallet or similar article of transport is used to consolidate goods, the packages or other shipping units enumerated in the multimodal transport document as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, the goods in such article of transport are deemed one shipping unit. (b) In cases where	3. Compensation shall not exceed 8.33 units of account per kilogram of gross weight short. 4. In addition, the carriage charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, but no further damage shall be payable. 5. In the case of delay: if the claimant proves that damage has resulted therefrom the carrier shall pay compensation for such damage not exceeding the carriage charges. 6. Higher compensation may only be claimed where the value of the goods or a special interest in delivery has been declared in accordance with articles 24 and 26. 7. The unit of account mentioned in this Convention is already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending article shall be converted into the	2. Compensation shall not exceed 17 units of account per kilogram of gross mass short. 3. In case of loss of a railway vehicle running on its own wheels and consigned as goods, or of an intermodal transport unit, or of their removable parts, the compensation shall be limited, to the exclusion of all other damages, to the usual value of the vehicle or the intermodal transport unit, or their removable parts, on the day and at the place of loss. If it is impossible to ascertain the day or the place of the loss, the compensation shall be limited to the usual value on the day and at the place where the vehicle has been taken over by the carrier. 4. The carrier must, in addition, refund the carriage charge, customs duties already paid and other sums paid in relation to the carriage of the goods lost except excise duties for goods carried under a procedure suspending article shall be converted into the	1. Subject to article 21 and paragraph 4 of the present article, and regardless of the action brought against him, the carrier shall under no circumstances be liable for amounts exceeding 666.67 units of account per package or other loading unit, or 2 kilograms of weight, specified in the transport document, of the goods lost or damaged, whichever is the higher. If the package or other loading unit is a container and if there is no mention in the transport document of any package or loading unit consolidated in the container, the amount of 666.67 units of account shall be replaced by the amount of 1,500 units of account for the container without the goods it contains and, in addition, the amount of 25,000 units of account for the goods which are in the container. 2. Where a container, pallet or similar article of	2.(b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination. 5. The sums mentioned in francs in this Article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment.	3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination. 4. In the case of destruction, loss, damage or delay of part of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the "package or packages" concerned. Nevertheless, when the destruction,

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999 <i>Article 33- Compensation for exceeding the transit period</i>	CMNI	WARSAW	MONTREAL
<p>Monetary Fund. The amounts mentioned in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Rights, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.</p>	<p>normal value of goods of the same kind and quality. c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. d) The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in</p>	<p>calculating which amount is the higher in accordance with paragraph 1 (a) of this article, the following rules apply: (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid such article of transport shall be considered the package or unit. e) The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in</p>	<p>the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the multimodal transport operator, is considered one separate shipping unit. 3. Notwithstanding the provisions of paragraphs 1 and 2 of this article, if the international multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the multimodal transport operator shall be limited to an amount not exceeding 8.33 units of account per kilogram of gross weight of the goods lost or damaged. 4. The liability of the multimodal transport operator for loss resulting from delay in delivery according to the provisions of article 16 shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.</p>	<p>national currency of the State of the Court seized of the case on the basis of the value of that currency on the date of the judgement or the date agreed upon by the Parties. The value of the national currency, in terms of the Special Drawing Right, of a State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect on the date in question for its operations and transactions. The value of the national currency, in terms of the Special Drawing Right, of a State which is not a member of the International Monetary Fund, shall be calculated in a manner determined by the State. 8. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 7 of this article may, at the time of ratification of or accession to the Protocol to the CMR</p>	<p><i>Article 33- Compensation for exceeding the transit period</i> 1. If loss or damage results from the transit period being exceeded, the carrier must pay compensation not exceeding four times the carriage charge. 2. In case of total loss of the goods, the compensation provided for in § 1 shall not be payable in addition to that provided for in article 30. 3. In case of partial loss of the goods, the compensation provided for in § 1 shall not exceed four times the carriage charge in respect of that part of the consignment which has not been lost. 4. In case of damage to the goods, not resulting from the transit period being exceeded, the compensation provided for in § 1 shall, where appropriate, be payable in addition to that provided for in article 32. 5. In no case shall the total of compensation provided for in § 1 together with that provided for in articles 30 and 32 exceed the compensation which would be payable in</p>	<p>transport is used to consolidate goods, the package or shipping units enumerated in the transport document as packed in or on such article of transport are deemed packages or shipping units. Except as aforesaid the goods themselves have been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit. 3. In the event of loss due to delay in delivery, the carrier shall be liable only for an amount not exceeding the value of the freight. However, the aggregate liability under paragraph 1 of the present paragraph shall not exceed the limitation, which would be established under paragraph 1 for total loss of the goods with respect to which such liability was incurred. 4. The maximum limits of liability</p>	<p>6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined</p>	<p>loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability. 5. The foregoing provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment. 6. The limits prescribed in article 21 and in this article shall not prevent the court from awarding,</p>





INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>account mentioned in sub-paragraph a) of paragraph 5 of this Article, 30 monetary units.</p> <p>The monetary unit referred to in the preceding sentence corresponds to 65.5 milligrammes of gold of millesimal fineness 900'. The conversion of the amounts specified in that sentence into the national currency shall be made according to the law of the State concerned. The calculation and the conversion mentioned in the preceding sentences shall be made in such a manner as to express in the national currency of that State as far as possible the same real value for the amounts in sub-paragraph a) of paragraph 5 of this Article as is expressed there in units of account.</p> <p>States shall communicate to the depositary the manner of calculation or the result of the conversion as the case may be, when depositing an instrument of ratification of the Protocol of 1979 or of accession thereto and whenever there is a change in either.</p> <p>f) The declaration</p>	<p>Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of signature, or at the time of ratification, approval or accession, or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as: 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogram of gross weight of the goods.</p> <p>3. The monetary unit referred to in paragraph 2 of this Article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.</p> <p>4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this Article is to be made in such a manner as to express in the national currency of the Contracting State</p>	<p>parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect on the date in question, for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund shall be calculated in a manner determined by that State.</p> <p>2. Nevertheless, a State which is not a member of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, ratification, approval or accession, or at any time thereafter, declare that the limits of liability provided for in this Convention to be</p>	<p>Protocol to the CMR and whenever there is a change in either.</p> <p><b>Article 24</b></p> <p>The sender may, against payment of a surcharge to be agreed upon, declare in the consignment note a value for the goods exceeding the limit laid down in article 23, paragraph 3, and in that case the amount of the declared value shall be substituted for that limit.</p> <p><b>Article 25</b></p> <p>1. In case of damage, the carrier shall be liable for the amount by which the goods have diminished in value, calculated by reference to the value of the goods fixed in accordance with article 23, paragraphs 1, 2 and 4.</p> <p>2. The compensation may not, however, exceed:</p> <p>(a) If the whole consignment has been damaged, the amount payable in the case of total loss;</p> <p>(b) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected.</p> <p><b>Article 26</b></p> <p>1. The sender may, against payment of a surcharge to be agreed upon, fix the amount of a special</p>		<p>currency, in terms of the Special Drawing Rights, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions.</p>		<p>value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.</p> <p>2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in article 21 is fixed at a sum of 1500000 monetary units per passenger in judicial proceedings in their</p>	

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>mentioned in sub-paragraph (a) of this paragraph, if embodied in the bill of lading, shall be prima facie evidence, but shall not be binding or conclusive on the carrier.</p> <p>g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in sub-paragraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that sub-paragraph.</p> <p>h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.</p>	<p>as far as possible the same real value for the amounts in Article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion mentioned in paragraph 3 of this Article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this Article and whenever there is a change in the manner of such calculation or in the result of such conversion.</p>	<p>applied in its territory shall be fixed as follows: with regard to the limits provided for in paragraph 1 of article 18, to 13,750 monetary units per package or other shipping unit or 41.25 monetary units per kilogram of gross weight of the goods, and with regard to the limit provided for in paragraph 3 of article 18, to 124 monetary units.</p> <p>3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The conversion of the amount referred to in paragraph 2 of this article into national currency shall be made according to the law of the State concerned.</p> <p>4. The calculation mentioned in the last sentence of paragraph 1 of this article and the conversion referred to in paragraph 3 of this article shall be made in such a manner as to express in the national currency of the Contracting State as far as possible the</p>	<p>interest in delivery in the case of loss or damage or of the agreed time-limit being exceeded, by entering such amount in the consignment note.</p> <p>2. If a declaration of a special interest in delivery has been made, compensation for the additional loss or damage proved may be claimed, up to the total amount of the interest declared, independently of the compensation provided for in articles 23, 24 and 25.</p> <p><i>Article 27</i></p> <p>1. The claimant shall be entitled to claim interest on compensation payable. Such interest, calculated at five per centum per annum, shall accrue from the date on which the claim was sent in writing to the carrier or, if no such claim has been made, from the date on which legal proceedings were instituted.</p> <p>2. When the amounts on which the compensation of the compensation is based are not expressed in the currency of the country in which payment is claimed, conversion shall be at the rate of exchange applicable on the day and at the</p>				<p>territories; 62500 monetary units per passenger with respect to paragraph 1 of Article 22; 15000 monetary units per passenger with respect to paragraph 2 of article 22; and 250 monetary units per kilogramme with respect to paragraph 3 of article 22. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.</p> <p>3. The calculation mentioned in the last sentence of paragraph 1 of this article and the conversion method mentioned in paragraph 2 of this article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this article. States Parties</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
			<p>same real value for the amounts in article 18 as is expressed there in units of account.</p> <p>5. Contracting States shall communicate to the depository the manner of calculation pursuant to the last sentence of paragraph 1 of this article, or the result of the conversion pursuant to paragraph 3 of this article, as the case may be, at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.</p>	<p>place of payment of compensation.</p>				<p>shall communicate to the depository the manner of calculation pursuant to paragraph 1 of this article, or the result of the conversion in paragraph 2 of this article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.</p> <p><i>Article 24-Review of Limits</i></p> <p>1. Without prejudice to the provisions of article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in articles 21, 22 and 23 shall be reviewed by the Depository at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
								<p>since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of article 23.</p> <p>2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depository shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depository shall refer the matter to a meeting of the States Parties. The Depository shall immediately notify all States Parties of the coming into force of any revision.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
								3. Notwithstanding paragraph 1 of this article, the procedure referred to in paragraph 2 of this article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

6.8. LOSS OF THE RIGHT TO LIMIT LIABILITY

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
6.8 Loss of the right to limit liability Neither the carrier nor any of the persons mentioned in article 6.3.2 is entitled to limit their liability as provided in articles [6.4.2,] 6.6.4, and 6.7 of this instrument, [or as provided in the contract of carriage,] if the claimant proves that	Article 4.5 (e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge	Article 8 - Loss of responsibility 1. The carrier is not entitled to the benefit of the limitation of liability provided for in Article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause	Article 21 - Loss of the right to limit liability 1. The multimodal transport operator is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or	Article 29 1. The carrier shall not be entitled to avail himself of the provisions of this chapter which exclude or limit his liability or which shift the burden of proof if the damage was caused by his wilful misconduct or by such default on his part as, in accordance	Article 36-Loss of right to invoke the limits of liability The limits of liability provided for in Article 15 § 3, Article 19 §§ 6 and 7, Article 30 and Articles 32 to 35 shall not apply if it is proved that the loss or damage results from an act or	Article 21-Loss of right to limit liability 1. The carrier or the actual carrier is not entitled to the defences and limits of liability provided for in this Convention or in the contract of carriage if it is proved that he himself caused the damage by an act or	Article 25 In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly.	Article 22-Limits of Liability in Relation to Delay, Baggage and Cargo 5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
[the delay in delivery of,] the loss of, or the damage to or in connection with the goods resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.	that damage would probably result.	such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result. 2. Notwithstanding the provisions of paragraph 2 of Article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in Article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.	omission of the multimodal transport operator done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result. 2. Notwithstanding paragraph 2 of article 20, a servant or agent of the multimodal transport operator or other person of whose services he makes use for the performance of the multimodal transport contract is not entitled to the benefit of the limitation of liability provided for in this Convention if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant, agent or other person, done with the intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.	with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct. 2. The same provision shall apply if the wilful misconduct or default is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants or other persons are acting within the scope of their employment. Furthermore, in such a case such agents, servants or other persons shall not be entitled to avail themselves, with regard to their personal liability, of the provisions of this chapter referred to in paragraph 1.	omission, which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result.	omission, either with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. 2. Similarly, the servants and agents acting on behalf of the carrier or the actual carrier are not entitled to the defences and limits of liability provided for in this Convention or in the contract of carriage, if it is proved that they caused the damage in the manner described in paragraph 1.	and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.	intent to cause damage or recklessly and with knowledge that damage would probably result; provided that in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

## 6.9. NOTICE OF LOSS, DAMAGE OR DELAY

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>6.9 Notice of loss, damage or delay</p> <p>6.9.1 The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to or in connection with the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within three working days after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.</p> <p>6.9.2 No compensation is payable under article 6.4 unless notice of such loss was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.</p> <p>6.9.3 When the notice referred to in this</p>	<p>Article 3</p> <p>6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.</p> <p>The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.</p>	<p>Article 19-Notice of loss, damage or delay</p> <p>1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.</p> <p>2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this Article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.</p> <p>3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.</p>	<p>Article 24-Notice of loss, damage or delay</p> <p>1. Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the multimodal transport operator not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the multimodal transport operator of the goods as described in the multimodal transport document.</p> <p>2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within six consecutive days after the day when the goods were handed over to the consignee.</p> <p>3. If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.</p>	<p>Article 30</p> <p>1. If the consignee takes delivery of the goods without duly checking their condition with the carrier or without sending him reservations giving a general indication of the loss or damage, not later than the time of delivery in the case of apparent loss or damage and within seven days of delivery, Sundays and public holidays excepted, in the case of loss or damage which is not apparent, the fact of this taking delivery shall be prima facie evidence that he has received the goods in the condition described in the consignment note. In the case of loss or damage which is not apparent the reservations referred to shall be made in writing.</p> <p>2. When the condition of the goods has been duly checked by the consignee and the carrier, evidence contradicting the result of this checking shall only be admissible in the case of loss or damage which is not apparent and provided that the consignee has duly sent reservations in</p>	<p>Article 44-Persons who may bring an action against the carrier</p> <p>2. The right of the consignee to bring an action shall be extinguished from the time when the person designated by the consignee in accordance with Article 18 § 5 has taken possession of the consignment note, accepted the goods or asserted his rights pursuant to Article 17 § 3.</p>	<p>Article 23-Notice of damage</p> <p>1. The acceptance without reservation of the goods by the consignee is prima facie evidence of the delivery by the carrier of the goods in the same condition and quantity as when they were handed over to him for carriage.</p> <p>2. The carrier and the consignee may require an inspection of the condition and quantity of the goods on delivery in the presence of the two parties.</p> <p>3. Where the loss or damage to the goods is apparent, any reservation on the part of the consignee must be formulated in writing specifying the general nature of the damage, at latest at the time of delivery, unless the consignee and the carrier have jointly checked the condition of the goods.</p> <p>4. Where the loss or damage to the goods is not apparent, any reservation on the part of the consignee must be notified in writing specifying the general nature of the damage, at latest within 7 consecutive days from the time of</p>	<p>Article 26</p> <p>1. Receipt by the person entitled to delivery of luggage or goods without complaint is prima facie evidence that the same have been delivered in good condition and in accordance with the document of carriage.</p> <p>2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.</p> <p>3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.</p> <p>4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the</p>	<p>Article 31-Timely Complaints</p> <p>1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.</p> <p>2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.</p> <p>3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.</p> <p>4. Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>chapter is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as notice given to the performing party that delivered the goods.</p> <p>6.9.4 In the case of any actual or apprehended loss or damage, the parties to the claim or dispute must give all reasonable facilities to each other for inspecting and tallying the goods.</p>	<p>4. In the case of any actual or apprehended loss or damage the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.</p> <p>5. No compensation shall be payable for loss resulting from delay in delivery unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.</p> <p>6. If the goods have been delivered by an actual carrier, any notice given under this Article to him shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall have effect as if given to such actual carrier.</p> <p>7. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with paragraph 2 of Article 4, whichever is later, the failure to give such notice is prima facie evidence</p>	<p>4. In the case of any actual or apprehended loss or damage the multimodal transport operator and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.</p> <p>5. No compensation shall be payable for loss resulting from delay in delivery unless notice has been given in writing to the multimodal transport operator within 60 consecutive days after the goods were delivered by the consignee or when the consignee has been notified that the goods have been delivered in accordance with paragraph 2 (b) (ii) or (iii) of article 14.</p> <p>6. Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the multimodal transport operator to the consignor not later than 90 consecutive days after the occurrence of such loss or damage or</p>	<p>writing to the carrier within seven days, Sundays and public holidays excepted, from the date of checking.</p> <p>3. No compensation shall be payable for delay in delivery unless a reservation has been sent in writing to the carrier, within twenty-one days from the time that the goods were placed at the disposal of the consignee.</p> <p>4. In calculating the time-limits provided for in this article the date of delivery, or the date when the goods were placed at the disposal of the consignee, as the case may be, shall not be included.</p> <p>5. The carrier and the consignee shall give each other every reasonable facility for making the requisite investigations and checks.</p>	<p>delivery; in such case, the injured party shall show that the damage was caused while the goods were in the charge of the carrier.</p> <p>5. No compensation shall be payable for damage resulting from delay in delivery unless the consignee can prove that he gave notice of the delay to the carrier within 21 consecutive days following delivery of the goods and that this notice reached the carrier.</p>	<p>case of fraud on his part.</p>	<p>dispatched within the times aforesaid.</p> <p>4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.</p>		



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
		<p>that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.</p> <p>8. For the purpose of this Article, notice given to a person acting on the carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the actual carrier or to the shipper, respectively;</p>	<p>after the delivery of the goods in accordance with paragraph 2 (b) of article 14, whichever is later, the failure to give such notice is prima facie evidence that the multimodal transport operator has sustained no loss or damage due to the fault or neglect of the consignor, his servants or agents.</p> <p>7. If any of the notice periods provided for in paragraphs 2,5 and 6 of this article terminates on a day which is not a working day at the place of delivery, such period shall be extended until the next working day.</p> <p>8. For the purpose of this article, notice given to a person acting on the multimodal transport operator's behalf, including any person of whose services he makes use at the place of delivery, or to a person acting on the consignor's behalf, shall be deemed to have been given to the multimodal transport operator, or to the consignor, respectively;</p>					

## 6.10. NON-CONTRACTUAL CLAIMS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>6.10-Non-contractual claims</i></p> <p><b>The defences and limits of liability provided for in this instrument and the responsibilities imposed by this instrument apply in any action against the carrier or a performing party for loss of, for damage to, or in connection with the goods covered by a contract of carriage, whether the action is founded in contract, in tort, or otherwise.</b></p>	<p><i>Article 4 bis</i></p> <p>1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.</p>	<p><i>Article 7-Application to non-contractual claims</i></p> <p>1. The defences and limits of liability provided for in this Convention apply in any action against the carrier in respect of loss or damage to the goods covered by the contract of carriage by sea, as well as of delay in delivery whether the action is founded in contract, in tort or otherwise.</p> <p>2. If such action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.</p> <p>3. Except as provided in Article 8, the aggregate of the amounts recoverable from the carrier and from any persons referred to in paragraph 2 of this Article shall not exceed the limits of liability provided for in this Convention.</p>	<p><i>Article 20-Non-contractual liability</i></p> <p>1. The defences and limits of liability provided for in this Convention shall apply in any action against the multimodal operator in respect of loss resulting from loss of or damage to the goods, as well as from delay in delivery, whether the action be founded in contract, in tort or otherwise.</p>	<p><i>Article 28</i></p> <p>1. In cases where, under the law applicable, loss, damage or delay arising out of carriage under this Convention gives rise to an extra-contractual claim, the carrier may avail himself of the provisions of this Convention which exclude his liability of which fix or limit the compensation due.</p> <p>2. In cases where the extra-contractual liability for loss, damage or delay of one of the persons for whom the carrier is responsible under the terms of article 3 is in issue, such person may also avail himself of the provisions of this Convention which exclude the liability of the carrier or which fix or limit the compensation due.</p>	<p><i>Article 41-Other actions</i></p> <p>1. In all cases where these Uniform Rules shall apply, any action in respect of liability, on whatever grounds, may be brought against the carrier only subject to the conditions and limitations laid down in these Uniform Rules.</p> <p>2. The same shall apply to any action brought against the servants or other persons for whom the carrier is liable pursuant to Article 40.</p>	<p><i>Article 22-Defences and limits of liability</i></p> <p>The defences and limits of liability provided for in the Convention or in the contract of carriage apply in any action in respect of loss or damage to or delay in delivery of the goods covered by the contract of carriage, whether the action is founded in contract, in tort or otherwise.</p>	<p><i>Article 24</i></p> <p>1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.</p>	<p><i>Article 29-Basis of Claims</i></p> <p>In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.</p>

LIVE ANIMALS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>17-Limits of contractual freedom</i>                      17.2 Notwithstanding the provisions of chapters 5 and 6 of this instrument, both the carrier and any performing party may by the terms of the contract of carriage exclude or limit their liability for loss or damage to the goods if (a) the goods are live animals, or (b) the character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic record is or is to be issued for the carriage of the goods.</p>	<p><i>Article 1</i>                      c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.</p>	<p><i>Article 5-Basis of liability</i>                      5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.</p>						

## CHAPTER 7 – OBLIGATIONS OF THE SHIPPER

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<i>Article 7-Obligations of the shipper</i> 7.1 Subject to the provisions of the contract of carriage, the shipper shall deliver the goods ready for carriage and in such condition that they will withstand the intended carriage, including their loading, handling, stowage, lashing and securing, and that discharge, and that they will not cause injury or damage. In the event the goods are delivered in or on a container or trailer packed by the shipper, the shipper must stow, lash and secure the goods in or on the container or trailer in such a way that the goods will withstand the intended carriage, including loading and discharge of the container or trailer, and that they will not cause injury or damage.	<i>Article 3(5)</i> The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper. <i>Article 4(3)</i> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants. <i>Article 4(6)</i> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any	<i>Article 12-General rule</i> The shipper is not liable for loss sustained by the carrier or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part. <i>Article 13-Special rules on dangerous goods</i> 1. The shipper must mark or label in a suitable manner dangerous goods as dangerous. 2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character: (a) The shipper is liable to the carrier and any actual carrier	<i>Article 12-Guarantee by the consignor</i> 1. The consignor shall be deemed to have guaranteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document. 2. The consignor shall indemnify the multimodal transport operator against loss resulting from inaccuracies in or inadequacies of the particulars referred to in paragraph 1 of this article. The consignor shall remain liable even if the multimodal transport document has been transferred by him. The right of the multimodal transport operator to such indemnity shall in no way limit his liability under the multimodal transport contract to any	<i>Article 7</i> 1. The sender shall be responsible for all expenses, loss and damage sustained by the carrier by reason of the inaccuracy or inadequacy of: (a) The particulars specified in article 6, paragraph 1, (b), (d), (e), (f), (g), (h) and (j); (b) The particulars specified in article 6, paragraph 2; (c) Any other particulars or instructions given by him to enable the consignment note to be made out or for the purpose of their being entered therein. 2. If, at the request of the sender, the carrier enters in the consignment note the particulars referred to in paragraph 1 of this article, he shall be deemed, unless the contrary is proved, to have done so on behalf of the sender. 3. If the consignment note does not contain the statement specified in article 6, paragraph 1 (k), the carrier shall be liable for all costs, loss or damage sustained through such omission by the person entitled to dispose of the goods.	<i>Article 8-Responsibility for particulars entered on the consignment note</i> 1. The consignor shall be responsible for all costs, loss or damage sustained by the carrier by reason of: a) the entries made by the consignor in the consignment note being irregular, incorrect, incomplete or made elsewhere than in the allotted space, or b) the consignor omitting to make the entries prescribed by RID. 2. If, at the request of the consignor, the carrier makes entries on the consignment note, he shall be deemed, unless the contrary is proved, to have done so on behalf of the consignor. 3. If the consignment note does not contain the statement provided for in Article 7 § 1, letter p), the carrier shall be liable for all costs, loss or damage sustained through such omission by the person entitled. <i>Article 9-Dangerous goods</i> If the consignor has failed to make the	<i>Article 6-Obligations of the shipper</i> 1. The shipper shall be required to pay the amounts due under the contract of carriage. 2. The shipper shall furnish the carrier in writing, before the goods are handed over, with the following particulars concerning the goods to be carried: (a) Dimensions, number or weight and stowage factor of the goods; (b) Marks necessary for identification of the goods; (c) Nature, characteristics and properties of the goods; (d) Instructions concerning the Customs or administrative regulations applying to the goods; and (e) Other necessary particulars to be entered in the transport document. The shipper shall also hand over to the carrier, when the goods are handed over, all the required accompanying documents. 3. If the nature of the goods so requires, the shipper shall, bearing in mind the agreed transport operation, pack the goods in such a way as to prevent their loss or damage between the time they are taken over by the carrier and their delivery, and so as	<i>Article 10</i> 1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of article 5. 2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf. 3. Subject to the provisions of paragraphs 1 and 2 of this article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf. 3. Subject to the provisions of paragraphs 1 and 2 of this article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the carrier is liable, by reason	<i>Article 10-Responsibility for Documentation</i> 1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the record preserved by the other means referred to in paragraph 2 of article 4. The consignor shall also apply where the person acting on behalf of the consignor is also the agent of the carrier. 2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf. 3. Subject to the provisions of paragraphs 1 and 2 of this article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf. 3. Subject to the provisions of paragraphs 1 and 2 of this article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the carrier is liable, by reason

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>7.3 The shipper shall provide to the carrier the information, instructions, and documents that are reasonably necessary for:</p> <p>(a) the handling and carriage of the goods, including precautions to be taken by the carrier or a performing party;</p> <p>(b) compliance with rules, regulations, and other requirements of authorities in connection with the intended carriage, including filings, applications, and licences relating to the goods;</p> <p>(c) the compilation of the contract particulars and the issuance of the transport documents or electronic records, including the particulars referred to in article 8.2.1(b) and (c), the name of the party to be identified as the shipper in the contract particulars, and the name of the consignee or order, unless the shipper may reasonably assume that such information is already known to the carrier.</p> <p>7.4 The information, instructions, and documents that the shipper and the carrier provide to each other under articles 7.2 and 7.3 must be given in a timely manner, and be</p>	<p>place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average if any.</p>	<p>for the loss resulting from the shipment of such goods, and (b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.</p> <p>3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.</p> <p>4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.</p> <p><i>Article 17- Guarantees by the shipper</i></p> <p>1. The shipper is deemed to have</p>	<p>person other than the consignee.</p> <p><i>Article 22-General rule</i></p> <p>The consignee shall be liable for loss sustained by the multimodal transport operator if such loss is caused by the fault or neglect of the consignee, or his servants or agents when such servants or agents are acting within the scope of their employment. Any servant or agent of the consignee shall be liable for such loss if the loss is caused by fault or neglect on his part.</p> <p><i>Article 23-Special rules on dangerous goods</i></p> <p>1. The consignee shall mark or label in a suitable manner dangerous goods as dangerous.</p> <p>2. Where the consignee hands over dangerous goods to the multimodal transport operator or any person acting on his behalf, the consignee shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the consignee fails to do so and the multimodal transport operator does not otherwise have knowledge of</p>	<p><i>Article 10</i></p> <p>The sender shall be liable to the carrier for damage to persons, equipment or other goods, and for any expenses due to defective packing of the goods, unless the defect was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it.</p> <p><i>Article 11</i></p> <p>1. For the purposes of the Customs or other formalities which have to be completed before delivery of the goods, the sender shall attach the necessary documents to the place them at the disposal of the carrier and shall furnish him with all the information which he requires.</p> <p>2. The carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents and information. The sender shall be liable to the carrier for any damage caused by the absence, inadequacy or irregularity of such documents and information, except in the case of some wrongful act or neglect on the part of the carrier.</p>	<p>entries prescribed by RID, the carrier may at any time unload or destroy the goods or render them innocuous, as the circumstances may require, without payment of compensation, save when he was aware of their dangerous nature on taking them over.</p> <p><i>Article 13-Loading and unloading of the goods</i></p> <p>1. The consignee and the carrier shall agree who is responsible for the loading and unloading of the goods. In the absence of such an agreement, for packages the loading and unloading shall be the responsibility of the carrier whereas for full wagon loads loading shall be the responsibility of the consignee and delivery, the responsibility of the consignee.</p> <p>2. The consignee shall be liable for all the consequences of defective loading carried out by him and must in particular compensate the carrier for the loss or damage sustained in consequence by him. The burden of proof of defective loading shall lie on the carrier.</p>	<p>to ensure that they do not cause damage to the vessel or to other goods. According to what has been agreed with a view to carriage, the shipper shall also make provision for appropriate marking in conformity with the applicable international or national regulations or, in the absence of such regulations, in accordance with rules and practices generally recognized in inland navigation.</p> <p>4. Subject to the obligations to be borne by the carrier, the shipper shall load and stow the goods and secure them in accordance with inland navigation practice unless the contract of carriage specifies otherwise.</p> <p><i>Article 7-Dangerous and polluting goods</i></p> <p>1. If dangerous or polluting goods are to be carried, the shipper shall, before handing over the goods, and in addition to the particulars referred to in article 6, paragraph 2, inform the carrier clearly and in writing of the danger and the risks of pollution, inherent in the goods and of the precautions to be taken.</p> <p>2. Where the carriage of dangerous or polluting goods requires an authorization, the shipper shall hand over the necessary docu-</p>	<p>of the irregularity, incorrectness or incompleteness of the particulars inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of article 5.</p> <p><i>Article 16</i></p> <p>1. The consignee must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignee is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.</p> <p>2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.</p>	<p>nify the consignee against all damage suffered by it, or by any other person to whom the consignee is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of article 5.</p> <p>1. The consignee must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignee is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.</p> <p>2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>accurate and complete.</p> <p>7.5 The shipper and the carrier are liable to each other, the consignee, and the controlling party for any loss or damage caused by either party's failure to comply with its respective obligations under articles 7.2, 7.3, and 7.4.</p> <p>7.6 The shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1, unless the shipper proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which a diligent shipper was unable to prevent.</p> <p>7.7 If a person identified as "shipper" in the contract particulars, although not the shipper as defined in article 1.19, accepts the transport document or electronic record, then such person is (a) subject to the responsibilities and liabilities imposed on the shipper under this chapter and under article 11.5, and (b) shipper's rights and immunities provided by this chapter and by chapter 13.</p>	<p>guaranteed to the carrier the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity as furnished by him for insertion in the bill of lading. The shipper must indemnify the carrier against the loss resulting from inaccuracies in such particulars. The shipper remains liable even if the bill of lading has been transferred by him. The right of the carrier to such indemnity in no way limits his liability under the contract of carriage by sea to any person other than the shipper.</p> <p>2. Any letter of guarantee or agreement by which the shipper undertakes to indemnify the carrier against loss resulting from the issuance of the bill of lading by the carrier, or by a person acting on his behalf, without entering a reservation relating to particulars furnished by the shipper for insertion in the bill of lading, or to the apparent condition of the goods, is void and of no effect as against any third party, including a consignee, to whom the bill of</p>	<p>their dangerous character:</p> <p>(a) The consignee shall be liable to the multimodal transport operator for all loss resulting from the shipment of such goods; and</p> <p>(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.</p> <p>3. The provisions of paragraph 2 of this article may not be invoked by any person if during the multimodal transport he has taken the goods in his charge with knowledge of their dangerous character.</p> <p>4. If, in cases where the provisions of paragraph 2 (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the multimodal transport operator is liable in accordance with the</p>	<p><b>Article 22</b></p> <p>1. When the sender hands goods of a dangerous nature to the carrier, he shall inform the carrier of the exact nature of the danger and indicate if necessary, precautions to be taken. If this information has not been entered in the consignment note, the burden of proving, by some other means, that the carrier knew the exact nature of the danger constituted by the carriage of the said goods shall rest upon the sender or the consignee.</p> <p>2. Goods of a dangerous nature which, in the circumstance referred to in paragraph 1 of this article, the carrier did not know were dangerous, may, at any time or place, be unloaded, destroyed or rendered harmless by the carrier without compensation; further, the sender shall be liable for all expenses, loss or damage arising out of their handing over for carriage or of their carriage.</p>	<p>The consignee shall be liable to the carrier for any loss or damage and costs due to the absence of, or defects in, the packing of goods, unless the defectiveness was apparent or known to the carrier at the time when he took over the goods and he made no reservations concerning it.</p>	<p>ments at latest when handing over the goods.</p> <p>3. Where the continuation of the carriage, the discharge or the delivery of the dangerous or polluting goods is rendered impossible owing to the absence of an administrative authorization, the shipper shall bear the costs incurred by the carrier for the return of the goods to the port of loading or a nearer place, where the goods may be discharged and delivered or disposed of.</p> <p>4. In the event of immediate danger to life, property or the environment, the carrier shall be entitled to unload the goods, to render them innocuous or, provided that such a measure is not disproportionate to the danger they represent, to destroy them, even if, before they were taken over, he was informed or was apprised by other means of the nature of the danger or the risks of pollution inherent in the goods.</p> <p>5. Where the carrier is entitled to take the measures referred to in paragraphs 3 or 4 above, he may claim compensation for damages.</p> <p><b>Article 8-Liability of the shipper</b></p> <p>1. The shipper shall, even if no fault can be attributed to him, be liable for all the</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>7.8 The shipper is responsible for the acts and omissions of any person to which it has delegated the performance of any of its responsibilities under this chapter, including its sub-contractors, employees, agents, and any other persons who act, either directly or indirectly, at its request, or under its supervision or control, as if such acts or omissions were its own. Responsibility is imposed on the shipper under this provision only when the act or omission of the person concerned is within the scope of that person's contract, employment, or agency.</p>		<p>lading has been transferred.</p> <p>3. Such letter of guarantee or agreement is valid as against the shipper unless the carrier or the person acting on his behalf, by omitting the reservation referred to in paragraph 2 of this article, intends to defraud a third party, including a consignee, who acts in reliance on the description of the goods in the bill of lading. In the latter case, if the reservation omitted relates to particulars furnished by the shipper for insertion in the bill of lading, the carrier has no right of indemnity from the shipper pursuant to paragraph 1 of this article.</p> <p>4. In the case of intended fraud referred to in paragraph 3 of this article the carrier is liable, without the benefit of the limitation of liability provided for in this Convention, for the loss incurred by a third party, including a consignee, because he has acted in reliance on the description of the goods in the bill of lading.</p>	<p>provisions of article 16.</p>			<p>damages and costs incurred by the carrier or the actual carrier by reason of the fact that:</p> <p>(a) The particulars or information referred to in articles 6, paragraph 2, or 7, paragraph 1, are missing, inaccurate or incomplete;</p> <p>(b) The dangerous or polluting goods are not marked or labelled in accordance with the applicable international or national regulations or, if no such regulations exist, in accordance with rules and practices generally recognized in inland navigation;</p> <p>(c) The necessary accompanying documents are missing, inaccurate or incomplete.</p> <p>The carrier may not avail himself of the liability of the shipper if it is proven that the fault is attributable to the carrier himself, his servants or agents. The same applies to the actual carrier.</p> <p>2. The shipper shall be responsible for the acts and omissions of persons of whose services he makes use to perform the tasks and meet the obligations referred to in articles 6 and 7, when such persons are acting within the scope of their employment, as if such acts or omissions were his own.</p>		

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
						<p><i>Article 9-Termination of the contract of carriage by the carrier</i></p> <p>1. The carrier may terminate the contract of carriage if the shipper has failed to perform the obligations set out in article 6, paragraph 2, or article 7, paragraphs 1 and 2.</p> <p>2. If the carrier makes use of his right of termination, he may unload the goods at the shipper's expense and claim optionally the payment of any of the following amounts:</p> <p>(a) one third of the agreed freight; or</p> <p>(b) in addition to any demurrage charge, a compensation equal to the amount of costs incurred and the loss caused, as well as, should the voyage have already begun, a proportional freight for the part of the voyage already performed.</p>		



**CHAPTER 8 – TRANSPORT DOCUMENTS AND ELECTRONIC RECORDS**

**8.1. ISSUANCE OF THE TRANSPORT DOCUMENT OR THE ELECTRONIC RECORD**

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>8. Transport documents and electronic records</p> <p>8.1 Issuance of the transport document or the electronic record</p> <p>Upon delivery of the goods to a carrier or performing party (f) the consignee is entitled to obtain a transport document or, if the carrier so agrees, an electronic record evidencing the carrier's or performing party's receipt of the goods;</p> <p>(ii) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 7.7, is entitled to obtain from the carrier an appropriate negotiable transport document, unless the shipper and the carrier, expressly or impliedly, have agreed not to use a negotiable transport document, or it is the custom, usage, or practice in the trade not to use one. If the carrier and the shipper have agreed to use of an electronic record, the shipper is entitled to obtain from the carrier a negotiable electronic record unless they have agreed not to use a negotiable electronic record or it is the</p>	<p>Article 3</p> <p>3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:</p> <p>a) the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.</p> <p>b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.</p> <p>c) The apparent order and conditions of the goods.</p> <p>Provided that no carrier, master or agent of the carrier shall be bound to state or show in the</p>	<p>Article 14-Issue of bill of lading</p> <p>1. When the carrier or the actual carrier takes the goods in his charge, the carrier must, on demand of the shipper, issue to the shipper a bill of lading.</p> <p>2. The bill of lading may be signed by a person having authority from the carrier. A bill of lading signed by the master of the ship carrying the goods is deemed to have been signed on behalf of the carrier.</p> <p>3. The signature on the bill of lading may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the bill of lading is issued.</p> <p><b>Article 15-Contents of bill of lading</b></p> <p>2. After the goods have been loaded on board, if the shipper so demands, the carrier must issue to the shipper a "shipped" bill of lading which, in addition to the particulars</p>	<p>Article 5-Issue of multimodal transport document</p> <p>1. When the goods are taken in charge by the multimodal transport operator, he shall issue a multimodal transport document which, at the option of the consignee, shall be in either negotiable or non-negotiable form.</p> <p>2. The multimodal transport document shall be signed by the multimodal transport operator or by a person having authority from him.</p> <p>3. The signature on the multimodal transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, if not inconsistent with the law of the country where the multimodal transport document is issued.</p> <p>4. If the consignee so agrees, a non-negotiable multimodal transport document may be issued by making use of any mechanical or other means preserving a record of the</p>	<p>Article 4</p> <p>The contract of carriage shall be confirmed by the making out of a consignment note. The absence, irregularity or loss of the consignment note shall not affect the existence or the validity of the contract of carriage which shall remain subject to the provisions of this Convention.</p> <p><b>Article 5</b></p> <p>1. The consignment note shall be made in three original copies signed by the sender and by the carrier. These signatures may be printed or replaced by the stamps of the sender and the carrier if the law of the country in which the consignment note has been made out so permits. The first copy shall be handed to the sender, the second shall accompany the goods and the third shall be retained by the carrier.</p> <p>2. When the goods which are to be loaded in different vehicles, or are of different kinds or are divided into different lots, the sender or the</p>	<p>Article 6-Contract of carriage</p> <p>2. The contract of carriage must be confirmed by a consignment note which accords with a uniform model. However, the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which shall remain subject to these Uniform Rules.</p> <p>3. The consignment note shall be signed by the consignee and the carrier. The signature can be replaced by a stamp, by an accounting machine entry or in any other appropriate manner.</p> <p>4. The carrier must certify the taking over of the goods on the duplicate of the consignment note in an appropriate manner and return the duplicate to the consignee.</p> <p>5. The consignment note shall not have effect as a bill of lading.</p> <p>6. A consignment note must be made out for each consignment. In the absence of a contrary</p>	<p>Article 11-Nature and content</p> <p>1. For each carriage governed by this Convention the carrier shall issue a transport document, and if it has been so lading only if the shipper so requests and if it has been so agreed before the goods were loaded or before they were taken over for carriage. The lack of a transport document or the fact that it is incomplete shall not affect the validity of the contract of carriage.</p> <p>2. The original of the transport document must be signed by the carrier, the master of the vessel or a person authorized by the carrier. The carrier may require the shipper to countersign the original or a copy. The signature may be in handwriting, printed in facsimile, perforated, stamped, in symbols or made by any other mechanical or electronic means, if this is not prohibited by the law of the State where the transport document was issued.</p>	<p>Article 5</p> <p>1. In respect of the carriage of cargo an air waybill shall be delivered.</p> <p>2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignee, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignee, deliver to the consignee a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.</p>	<p>Article 4-Cargo</p> <p>1. In respect of the carriage of cargo, an air waybill shall be delivered.</p> <p>2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignee, deliver to the consignee a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>custom, usage or practice in the trade not to use one.</p> <p>8.2 <i>Contract Particulars</i></p> <p>8.2.3 <i>Signature</i></p> <p>(a) A transport document shall be signed by or for the carrier or a person having authority from the carrier.</p> <p>(b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier's authorization of the electronic record.</p>	<p>bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.</p> <p>7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 18-</p> <p><i>Documents other than bills of lading</i></p> <p>Where a carrier issues a document other than a bill of lading to evidence the receipt</p>	<p>required under paragraph 1 of this Article, must state that the goods are on board a named ship or ships, and the date or dates of loading. If the carrier has previously issued to the shipper a bill of lading or other document of title with respect to any of such goods, on request of the carrier, the shipper must surrender such document in exchange for a "shipped" bill of lading. The carrier may amend any previously issued document in order to meet the shipper's demand for a "shipped" bill of lading if, as amended, such document includes all the information required to be contained in a "shipped" bill of lading.</p> <p>3. The absence in the bill of lading of one or more particulars referred to in this Article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of Article 1.</p> <p><i>Article 18-</i></p> <p><i>Documents other than bills of lading</i></p> <p>Where a carrier issues a document other than a bill of lading to evidence the receipt</p>	<p>particulars stated in article 8 to be contained in the multimodal document. In such a case the multimodal transport operator, after having taken the goods in charge, shall deliver to the consignor a readable document containing all the particulars so recorded, and such document shall for the purposes of the provisions of this Convention be deemed to be a multimodal transport document.</p>	<p>carrier shall have the right to require a separate consignment note to be made out for each kind or lot of goods.</p>	<p>agreement between the consignor and the carrier, a consignment note may not relate to more than one wagon load.</p> <p>7. In the case of carriage which enters the customs territory of the European Community or the territory on which the common transit procedure is applied, each consignment must be accompanied by a consignment note satisfying the requirements of Article 7.</p> <p>8. The international associations of carriers shall establish uniform model consignment notes in agreement with the customers' international associations and the bodies having competence for customs matters in the Member States as well as any inter-governmental regional economic integration organisation having competence to adopt its own customs legislation.</p> <p>9. The consignment note and its duplicate may be established in the form of electronic data registration which can be transformed into legible written symbols. The procedure used for the registration and treatment of data</p>		<p>be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.</p> <p>3. The signature of the carrier and that of the consignor may be printed or stamped.</p> <p>4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.</p> <p><i>Article 7</i></p> <p>When there is more than one package:</p> <p>(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;</p> <p>(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used.</p>	

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
		of the goods to be carried, such a document is prima facie evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods as therein described.			must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by; those data.			

8.2. CONTRACT PARTICULARS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
8.2-Contract Particulars	<i>Article 3</i>	<i>Article 15-Contents of bill of lading</i>	<i>Article 8-Contents of the multimodal transport document</i>	<i>Article 6</i>	<i>Article 7-Wording of the consignment note</i>	<i>Article 11-Nature and content</i>	<i>Article 8</i>	<i>Article 5-Contents of Air Waybill or Cargo Receipt</i>
8.2.1 The contract particulars in the document or electronic record referred to in article 8.1 must include:	3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:	1. The bill of lading must include, inter alia, the following particulars:	1. The multimodal transport document shall contain the following particulars:	1. The consignment note shall contain the following particulars:	1. The consignment note must contain the following particulars:	5. The transport document, in addition to its denomination, contains the following particulars:	The air waybill and the receipt for the cargo shall contain:	The air waybill or the cargo receipt shall include:
(a) a description of the goods;	a) the leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;	(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;	(a) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the gross weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;	(a) The name and address of the sender;	a) the place at which and the day on which it is made out;	(a) The name, address, head office or place of residence of the carrier and of the shipper;	(a) an indication of the places of departure and destination;	(a) an indication of the places of departure and destination;
(b) the leading marks necessary for identification of the goods as furnished by the shipper before the carrier or a performing party receives the goods;	b) the apparent condition of the goods;	(b) The bill of lading must include, inter alia, the following particulars:	(b) The apparent condition of the goods;	(b) The name and address of the carrier;	b) the name and address of the consignee;	(b) The consignee of the goods;	(b) if the places of departure and destination are within the territory of a single High Contracting Party;	(b) if the places of departure and destination are within the territory of a single State Party;
(c)(i) the number of packages, the number of pieces, or the quantity, and	(c) the name and principal place of business of the carrier;	(c) The general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;	(c) The name and principal place of business of the multimodal transport operator;	(c) The name and address of the carrier;	c) the name and address of the carrier who has concluded the contract of carriage;	(c) The name or number of the vessel, where the goods have been taken on board, or particulars in the transport document stating that the goods have been taken over by the carrier but not yet loaded on the vessel;	(c) an indication of the weight of the consignment.	(c) an indication of the weight of the consignment.
(ii) the weight as furnished by the shipper before the carrier or a performing party receives the goods;	(d) the name and principal place of business of the shipper;	(d) The apparent condition of the goods;	(d) The name of the operator;	(d) The place and the date of taking over of the goods and the place designated for delivery;	d) the name and address of the person to whom the goods have effectively been handed over if he is not the carrier referred to in letter c);	(d) The name of the port of loading or the place where the goods were taken over and the port of discharge or the place of delivery;	(c) an indication of the weight of the consignment.	(c) an indication of the weight of the consignment.
(d) a statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for shipment;	(e) the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.	(e) the consignee if named by the shipper;	(e) The consignee, if named by the shipper;	(e) The name and address of the carrier;	e) the place and the day of taking over of the goods;	(d) The port of loading or the place where the goods were taken over and the port of discharge or the place of delivery;	(c) an indication of the weight of the consignment.	(c) an indication of the weight of the consignment.
(e) the name and address of the carrier; and	(f) the name of the carrier;	(f) The port of loading under the contract of carriage by sea and the date on which the	(f) The name of the operator;	(f) The description in common use of the nature of the goods and the method of packing, and, in the case of dangerous goods, their generally recognized description;	f) the place of delivery;	(e) The usual name of the type of goods and their method of packaging and, for dangerous or polluting goods, their name according to	(c) an indication of the weight of the consignment.	(c) an indication of the weight of the consignment.

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>(f) the date; (i) on which the carrier or a performing party received the goods, or (ii) on which the goods were loaded on board the vessel, or (iii) on which the transport document or electronic record was issued.</p> <p>8.2.2 The phrase "apparent order and condition of the goods" in article 8.2.1 refers to the order and condition of the goods based on</p> <p>(a) a reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party and (b) any additional inspection that the carrier or a performing party actually performs before issuing the transport document or the electronic record.</p> <p>8.2.3-Signature (a) A transport document shall be signed by or for the carrier or a person having authority from the carrier. (b) An electronic record shall be authenticated by the electronic signature of the carrier or a person having authority from the carrier. For the purpose of this provision such electronic signature means data in</p>	<p>c) The apparent order and conditions of the goods. Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.</p>	<p>goods were taken over by the carrier at the port of loading; (g) the port of discharge under the contract of carriage by sea; (h) the number of originals of the bill of lading, if more than one; (i) the place of issuance of the bill of lading; (j) the signature of the carrier or a person acting on his behalf; (k) the freight to the extent payable by the consignee or other indication that freight is payable by him; (l) the statement referred to in paragraph 3 of article 23; (m) the statement, if applicable, that the goods shall or may be carried on deck; (n) the date or the period of delivery of the goods at the port of discharge if expressly agreed upon between the parties; (o) any increased limit or limits of liability where agreed in accordance with paragraph 4 of article 6.</p>	<p>(f) The place and date of taking in charge of the goods by the multimodal transport operator; (g) The place of delivery of the goods; (h) The date or the period of delivery of the goods at the place of delivery, if expressly agreed upon between the parties; (i) A statement indicating whether the multimodal transport document is negotiable or non-negotiable; (j) The place and date of issue of the multimodal transport document; (k) The signature of the multimodal transport operator or of a person having authority from him; (l) The freight for each mode of transport, if expressly agreed between the parties, including its currency; to the extent payable by the consignee or other indication that freight is payable by him; (m) The intended journey route, modes of transport and places of transshipment, if known at the time of issuance of the multimodal transport document;</p>	<p>the carriage (carriage charges, supplementary charges, customs duties and other charges incurred from the making of the contract to the time of delivery); (i) The requisite instructions for Customs and other formalities; (k) A statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention. 2. Where applicable, the consignment note shall also contain the following particulars: (a) A statement that trans-shipment is not allowed; (b) The charges which the sender undertakes to pay; (c) The amount of "cash on delivery" charges; (d) A declaration of the value of the goods and the amount representing special interest in delivery; (e) The sender's instructions to the carrier regarding insurance of the goods; (f) The agreed time limit within which the carriage is to be carried out; (g) A list of the documents handed to the carrier. 3. The parties may</p>	<p>dangerous goods, the description provided for in the Regulation concerning the International Carriage of Dangerous Goods by Rail (RID); i) the number of packages and the special marks and numbers necessary for the identification of consignments in less than full wagon loads; j) the number of the wagon in the case of carriage of full wagon loads; k) the number of the railway vehicle running on its own wheels, if it is handed over for carriage as goods; l) in addition, in the case of intermodal transport units, the category, the number or other characteristics necessary for their identification; m) the gross mass or the quantity of the goods expressed in other ways; n) a detailed list of the documents which are required by customs or other administrative authorities and are attached to the consignment note or held at the disposal of the carrier at the offices of a duly designated authority or a body designated in the contract;</p>	<p>the requirements in force or, otherwise, their general name; (f) The dimensions, number or weight as well as the identification marks of the goods taken on board or taken over for the purpose of carriage; (g) The statement, if applicable, that the goods shall or may be carried on deck or on board open vessels; (h) The agreed provisions concerning freight; (i) For consignment notes, the specification as to whether it is an original or a copy; for bills of lading, the number of originals; (j) The place and date of issue. The legal character of a transport document in the sense of article 1, paragraph 6, of this Convention is not affected by the absence of one or more particulars referred to in this paragraph.</p>		

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>electronic form included in, or otherwise logically associated with, the electronic record and that is used to identify the signatory in relation to the electronic record and to indicate the carrier's authorisation of the electronic record.</p> <p><i>8.2.4-Omission of required contents from the contract particulars.</i></p> <p>The absence of one or more of the contract particulars referred to in article 8.2.1, or the inaccuracy of one or more of those particulars, does not of itself affect the legal character or validity of the transport document or of the electronic record.</p>			<p>(n) The statement referred to in paragraph 3 of article 28;</p> <p>(o) Any other particulars which the parties may agree to insert in the multimodal transport document, if not inconsistent with the law of the country where the multimodal transport document is issued.</p> <p>2. The absence from the multimodal transport document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.</p>	<p>enter in the consignment note any other particulars which they may deem useful.</p>	<p>o) the costs relating to carriage (the carriage charge, incidental costs, customs duties and other costs incurred from the conclusion of the contract until delivery) in so far as they must be paid by the consignee or any other statement that the costs are payable by the consignee;</p> <p>p) a statement that the carriage is subject, notwithstanding any clause to the contrary, to these Uniform Rules.</p> <p>2. Where applicable the consignment note must also contain the following particulars:</p> <p>a) in the case of carriage by successive carriers, the carrier who must deliver the goods when he has consented to this entry in the consignment note;</p> <p>b) the costs which the consignor undertakes to pay;</p> <p>c) the amount of the cash on delivery charge;</p> <p>d) the declaration of the value of the goods and the amount representing the special interest in delivery;</p> <p>e) the agreed transit period;</p> <p>f) the agreed route;</p> <p>g) a list of the documents not</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
					mentioned in § 1, letter n) handed over to the carrier; h) the entries made by the consignor concerning the number and description of seals he has affixed to the wagon. 3. The parties to the contract may enter on the consignment note any other particulars they consider useful.			

### 8.3. QUALIFYING THE DESCRIPTION OF THE GOODS IN THE CONTRACT PARTICULARS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
8.3- Qualifying the description of the goods in the contract particulars	Article 3 Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.	Article 16-Bills of lading: reservations and evidentiary effect 1. If the bill of lading contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the carrier or other person issuing the bill of lading on his behalf knows or has reasonable grounds to suspect do not accurately represent the goods actually taken over or, where lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds	Article 9- Reservations in the multimodal transport document 1. If the multimodal transport document contains particulars concerning the general nature, leading marks, number of packages or pieces, weight or quantity of the goods which the multimodal transport operator or a person acting on his behalf knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the operator or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these	Article 8 1. On taking over the goods, the carrier shall check: (a) The accuracy of the statements in the consignment note as to the number of packages and their marks and numbers, and (b) The apparent condition of the goods and their packaging. 2. Where the carrier has no reasonable means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds for any reservations which he makes with regard to the apparent condition of the goods and	Article 11- Examination 1. The carrier shall have the right to examine at any time whether the conditions of carriage have been complied with and whether the consignment corresponds with the entries in the consignment note made by the consignor. If the examination concerns the contents of the consignment, this shall be carried out as far as possible in the presence of the person entitled; where this is not possible, the carrier shall require the presence of two independent witnesses, unless the laws and prescriptions of the State where the examination takes place provide otherwise. 2. If the consignment	Article 11-Nature and content 3. The transport document shall be prima facie evidence, unless proved to the contrary, of the conclusion and content of the contract of carriage and of the taking over of the goods by the carrier. In particular, it shall provide a basis for the presumption that the goods have been taken over for carriage as they are described in the transport document. 4. When the transport document is a bill of lading, it alone shall determine the relations between the carrier and the consignee. The conditions of the contract of carriage shall continue to determine the relations between carrier and shipper.	Article 11 1. The air waybill or the receipt for the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein. 2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in	Article 11- Evidentiary value of documentation 1. The air waybill or the cargo receipt is <i>prima facie</i> evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein. 2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are <i>prima facie</i> evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence
8.3.1. Under the following circumstances, the carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 8.2.1(b) or 8.2.1(c) with an appropriate clause therein to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:	4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in	to suspect do not accurately represent the goods actually taken over or, where lading is issued, loaded, or if he had no reasonable means of checking such particulars, the carrier or such other person must insert in the bill of lading a reservation specifying these inaccuracies, grounds	knows, or has reasonable grounds to suspect, do not accurately represent the goods actually taken in charge, or if he has no reasonable means of checking such particulars, the operator or a person acting on his behalf shall insert in the multimodal transport document a reservation specifying these	means of checking the accuracy of the statements referred to in paragraph 1 (a) of this article, he shall enter his reservations in the consignment note together with the grounds on which they are based. He shall likewise specify the grounds for any reservations which he makes with regard to the apparent condition of the goods and	of the consignment, this shall be carried out as far as possible in the presence of the person entitled; where this is not possible, the carrier shall require the presence of two independent witnesses, unless the laws and prescriptions of the State where the examination takes place provide otherwise. 2. If the consignment	the goods have been taken over for carriage as they are described in the transport document. 4. When the transport document is a bill of lading, it alone shall determine the relations between the carrier and the consignee. The conditions of the contract of carriage shall continue to determine the relations between carrier and shipper.	checked by him in	constitute evidence

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>reasonably considers the information furnished by the shipper to be inaccurate, it may include a clause providing what it reasonably considers accurate information.</p> <p>(b) For goods delivered to the carrier in a closed container, the carrier may include an appropriate qualifying clause in the contract particulars with respect to:</p> <p>(i) the leading marks on the goods inside the container; or</p> <p>(ii) the number of packages, the number of pieces, or the quantity of the goods inside the container;</p> <p>unless the carrier or a performing party in fact inspects the goods inside the container or otherwise has actual knowledge of the contents of the container.</p> <p>(c) For goods delivered to the carrier or a performing party in a closed container, the carrier may qualify any statement of the weight of goods or the weight of a container and its contents with an explicit statement that the carrier has not weighed the container if:</p> <p>(i) the carrier can show that neither the carrier nor a performing party weighed the container, and</p> <p>(ii) the shipper and the</p>	<p>good faith.</p> <p>of suspicion or the absence of reasonable means of checking.</p> <p>2. If the carrier or other person issuing the bill of lading on his behalf fails to note on the bill of lading the apparent condition of the goods, he is deemed to have noted on the bill of lading that the goods were in apparent good condition.</p> <p>3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:</p> <p>(a) The bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and</p> <p>(b) Proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.</p> <p>4. A bill of lading which does not, as provided in</p>	<p>inaccuracies, grounds of suspicion or the absence of reasonable means of checking.</p> <p>2. If the multimodal transport operator or a person acting on his behalf fails to note on the multimodal transport document the apparent condition of the goods, he is deemed to have noted on the multimodal transport document that the goods were in apparent good condition.</p> <p>3. Except for particulars in respect of which and to the extent to which a reservation permitted under paragraph 1 of this article has been entered:</p> <p>(a) The bill of lading is prima facie evidence of the taking over or, where a "shipped" bill of lading is issued, loading, by the carrier of the goods as described in the bill of lading; and</p> <p>(b) Proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.</p> <p>4. A bill of lading which does not, as provided in</p>	<p>their packaging, such reservations shall not bind the sender unless he has expressly agreed to be bound by them in the consignment note.</p> <p>3. The sender shall be entitled to require the carrier to check the gross weight of the goods or their quantity otherwise expressed. He may also require the contents of the packages to be checked. The carrier shall be entitled to claim the cost of such checking. The result of the checks shall be entered in the consignment note.</p> <p><b>Article 9</b></p> <p>1. The consignment note shall be prima facie evidence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier.</p> <p>2. If the consignment note contains no specific reservations by the carrier, it shall be presumed, unless the contrary is proved, that the goods and their packaging appeared to be in good condition when the carrier took them over and that the number of packages, their marks and</p>	<p>does not correspond with the entries in the consignment note or if the provisions relating to the carriage of goods accepted subject to conditions have not been complied with, the result of the examination must be entered in the copy of the consignment note which accompanies the goods, and also in the duplicate of the consignment note, if it is still held by the carrier. In this case the costs of the examination shall be charged against the goods, if they have not been paid immediately.</p> <p>3. When the consignor loads the goods, he shall be entitled to require the carrier to examine the condition of the goods and their packaging as well as the accuracy of the statements on the consignment note as to the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed. The carrier shall be obliged to proceed with the examination only if he has approved means of carrying it out. The carrier may demand</p>	<p><b>Article 12-Reservations in transport documents</b></p> <p>1. The carrier is entitled to include in the transport document reservations concerning:</p> <p>(a) The dimensions, the goods, if he has grounds to suspect that the particulars supplied by the shipper are inaccurate or if he had no reasonable means of checking such particulars, especially because the goods have not been counted, measured or weighed in his presence or because, without explicit agreement, the dimensions or weights have been determined by draught measurement.</p> <p>(b) Identification marks which are not clearly and durably affixed on the goods themselves or, if they are packed, on the receptacles or packaging;</p> <p>(c) The apparent condition of the goods.</p> <p>2. If the carrier fails to note the apparent condition of the goods or does not enter reservations in that respect, he is deemed to have noted in the transport document that the</p>	<p>the presence of the consignor, or relate to the apparent condition of the cargo.</p>	<p>against the carrier except so far as they: both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.</p>	

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>carrier did not agree prior to the shipment that the container would be weighed and the weight would be included in the contract particulars.</p> <p><i>8.3.2-Reasonable means of checking</i></p> <p>For purposes of article 8.3.1:</p> <p>(a) a "reasonable means of checking" must be not only physically practicable but also commercially reasonable;</p> <p>(b) a carrier acts in "good faith" when issuing a transport document or an electronic record if:</p> <p>(i) the carrier has no actual knowledge that any material statement in the transport document or electronic record is materially false or misleading, and</p> <p>(ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic record is materially false or misleading because it believes that the statement is likely to be false or misleading.</p> <p>(c) The burden of proving whether a carrier acted in good faith when issuing a transport document or an electronic record is on the party claiming that the carrier did not act in good faith.</p> <p><i>8.3.3-Prima facie and conclusive evidence</i></p>	<p>paragraph 1, subparagraph 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him.</p> <p>However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.</p>	<p>numbers corresponding with the statements in the consignment note.</p>	<p>the payment of the costs of the examination. The result of the examination shall be entered on the consignment note.</p> <p><i>Article 12-Evidential value of the consignment note</i></p> <p>1. The consignment note shall be prima facie evidence of the conclusion and the conditions of the contract of carriage and the taking over of the goods by the carrier.</p> <p>2. If the carrier has loaded the goods, the consignment note shall be prima facie evidence of the condition of the goods and their packaging indicated on the consignment note or, in the absence of such indications, of their apparently good condition at the moment they were taken over by the carrier and of the accuracy of the statements in the consignment note concerning the number of packages, their marks and numbers as well as the gross mass of the goods or their quantity otherwise expressed.</p> <p>3. If the consignee has loaded the goods, the consignment note shall be prima facie evidence of the condition of the goods</p>	<p>goods were in apparent good condition.</p> <p>3. If, in accordance with the particulars set out in the transport document, the goods are placed in a container or in the holds of the vessel and sealed by other persons than the carrier, his servants or his agents, and if neither the container nor the seals are damaged or broken when they reach the port of discharge, it shall be presumed that the loss or damage to the goods did not occur during carriage.</p>	<p>goods were in apparent good condition.</p> <p>3. If, in accordance with the particulars set out in the transport document, the goods are placed in a container or in the holds of the vessel and sealed by other persons than the carrier, his servants or his agents, and if neither the container nor the seals are damaged or broken when they reach the port of discharge, it shall be presumed that the loss or damage to the goods did not occur during carriage.</p>			



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COFI-CIM 1999	CMNI	WARSAW	MONTREAL
<p>Except as otherwise provided in article 8.3.4, a transport document or an electronic record that evidences receipt of the goods is:</p> <p>(a) prima facie evidence of the carrier's receipt of the goods as described in the contract particulars; and</p> <p>(b) conclusive evidence of the carrier's receipt of the goods as described in the contract particulars</p> <p>[(f)] if a negotiable transport document or a negotiable electronic record has been transferred to a third party acting in good faith [or (ii) if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars].</p> <p><i>8.3.4-Effect of qualifying clauses</i></p> <p>If the contract particulars include a qualifying clause that complies with the requirements of article 8.3.1, then the transport document will not constitute prima facie or conclusive evidence under article 8.3.3 to the extent that the description of the goods is qualified by the clause.</p>					<p>and of their packaging indicated in the consignment note or, in the absence of such indication, of their apparently good condition and of the accuracy of the statements referred to in § 2 solely in the case where the carrier has examined them and recorded on the consignment note a result of his examination which tallies.</p> <p>4. However, the consignment note will not be prima facie evidence in a case where it bears a reasoned reservation. A reason for a reservation could be that the carrier does not have the appropriate means to examine whether the consignment corresponds to the entries in the consignment note.</p>			

## 8.4. DEFICIENCIES IN THE CONTRACT PARTICULARS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>8.4-Deficiencies in the contract particulars</p> <p>8.4.1-Date</p> <p>If the contract particulars include the date but fail to indicate the significance thereof, then the date is considered to be:</p> <p>(a) if the contract particulars indicate that the goods have been loaded on board a vessel, the date on which all of the goods indicated in the transport document or electronic record were loaded on board the vessel; or</p> <p>(b) if the contract particulars do not indicate that the goods have been loaded on board a vessel, the date on which the carrier or a performing party received the goods.</p> <p>8.4.2-Failure to identify the carrier</p> <p>If the contract particulars fail to identify the carrier but indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel is presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage which transfers contractual responsibility for the carriage of the</p>		<p>Article 15-Contents of bill of lading</p> <p>3. The absence in the bill of lading of one or more particulars referred to in this article does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements set out in paragraph 7 of article 1.</p>	<p>Article 8-Contents of the multimodal transport document</p> <p>2. The absence from the multimodal transport document of one or more of the particulars referred to in paragraph 1 of this article shall not affect the legal character of the document as a multimodal transport document provided that it nevertheless meets the requirements set out in paragraph 4 of article 1.</p>	<p>Article 4</p> <p>The contract of carriage shall be confirmed by the making out of a consignment note. The absence, irregularity or loss of the consignment note shall not affect the validity of the contract of carriage which shall remain subject to the provisions of this Convention.</p>	<p>Article 6-Contract of carriage</p> <p>2. The contract of carriage must be confirmed by a consignment note which accords with a uniform model. However, the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which shall remain subject to these Uniform Rules.</p>	<p>Article 11-Nature and content</p> <p>1. For each carriage governed by this Convention the carrier shall issue a transport document; he shall issue a bill of lading only if the shipper so requests and if it has been so agreed before the goods were loaded or before they were taken over for carriage. The lack of a transport document or the fact that it is incomplete shall not affect the validity of the contract of carriage.</p>	<p>Article 9</p> <p>Non-compliance with the provisions of articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.</p>	<p>Article 9-Non-compliance with Documentary Requirements</p> <p>Non-compliance with the provisions of articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>goods to an identified bareboat charterer. If the registered owner defeats the presumption that it is the carrier under this article, then the bareboat charterer at the time of the carriage is presumed to be the carrier in the same manner as that in which the registered owner was presumed to be the carrier.]</p> <p><i>8.4.3-Apparent order and condition</i></p> <p>If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them from the shipper, the transport document or electronic record is either prima facie or conclusive evidence under article 8.3.3, as the case may be, that the goods were in apparent good order and condition at the time the shipper delivered them to the carrier or a performing party.</p>								

## CHAPTER 9 – FREIGHT

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><b>Article 9-Freight</b>            9.1(a) Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 4.1.3, unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.            (b) Unless otherwise agreed, no freight becomes due for any goods that are lost before the freight for those goods is earned.            9.2(a) Freight is payable when it is earned, unless the parties have agreed that the freight is payable, wholly or partly, at an earlier or later point in time.            (b) If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight remains payable irrespective of the cause of such loss, damage or failure in delivery.            (c) Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not yet been agreed or established].            9.3(a) Unless otherwise agreed, the shipper is liable to pay the freight and other</p>	<p><b>Article 16-Bills of lading; reservations and evidentiary effect</b>            4. A bill of lading which does not, as provided in paragraph 1, subparagraph (h) of Article 15, set forth the freight or otherwise indicate that freight is payable by the consignee or does not set forth demurrage incurred at the port of loading payable by the consignee, is prima facie evidence that no freight or such demurrage is payable by him. However, proof to the contrary by the carrier is not admissible when the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the absence in the bill of lading of any such indication.</p>	<p><b>Article 10-Payment of costs</b>            1. Unless otherwise agreed between the consignor and the carrier, the costs (the carriage charge, incidental costs, customs duties and other costs incurred from the time of the conclusion of the contract to the time of delivery) shall be paid by the consignor.            2. When by virtue of an agreement between the consignor and the carrier, the costs are payable by the consignee and the consignee has not taken possession of the consignment note nor asserted his rights in accordance with Article 17 § 3, nor modified the contract of carriage in accordance with Article 18, the consignor shall remain liable to pay the costs.</p>						

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>charges incidental to the carriage of the goods.                      (b) If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:                      (i) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 7.7; or                      (ii) with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 9.5 or otherwise for the payment of such amounts.                      (iii) to the extent that it conflicts with the provisions of article 12.4.                      9.4(a) If the contract particulars in a transport document or an electronic record contain the statement "freight prepaid" or a statement of a similar nature, then neither the holder, nor the consignee, is liable for the payment of the freight. This provision does not apply if the holder or the consignee is also the shipper.                      (b) If the contract particulars in a transport document or an electronic record contain the statement "freight collect" or a statement of similar nature, such a statement puts the consignee on notice that it may be liable</p>								

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>for the payment of the freight.</p> <p>9.5(a) [Notwithstanding any agreement to the contrary,] if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payments referred to below, the carrier is entitled to retain the goods until payment of</p> <p>(i) freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,</p> <p>(ii) any damages due to the carrier under the contract of carriage,</p> <p>(iii) any contribution in general average due to the carrier relating to the goods</p> <p>has been effected, or adequate security for such payment has been provided.</p> <p>(b) If the payment as referred to in paragraph (a) of this article is not, or is not fully, effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to it (including the costs of such recourse) from the proceeds of such sale. Any balance remaining from the proceeds of such sale shall be made available to the consignee.</p>								

## CHAPTER 10 – DELIVERY TO THE CONSIGNEE

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 10-Delivery to the consignee</i></p> <p>10.1 When the goods have arrived at their destination, the consignee that exercises any of its rights under the contract of carriage shall accept delivery of the goods at the time and location mentioned in article 4.1.3. If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, such carrier or performing party will act in respect of the goods as an agent of the consignee, but without any liability for loss or damage to these goods, unless the loss or damage results from a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.</p> <p>10.2 On request of the carrier or the performing party that delivers the goods, the consignee shall confirm delivery of the goods by the carrier or the performing party in the manner that is customary at the place of destination.</p> <p>10.3.1 If no negotiable transport document or no negotiable electronic record has been issued:</p>	<p><i>Article 13</i></p> <p>1. After arrival of the goods at the place designated for delivery, the consignee shall be entitled to require the carrier to deliver to him, against a receipt, the second copy of the consignment note and the goods. If the loss of the goods is established or if the goods have not arrived after the expiry of the period provided for in article 19, the consignee shall be entitled to enforce in his own name against the carrier any rights arising from the contract of carriage.</p> <p>2. The consignee who avails himself of the rights granted to him under paragraph 1 of this article shall pay the charges shown to be due on the consignment note, but in the event of dispute on this matter the carrier shall not be required to deliver the goods unless security has been furnished by the consignee.</p> <p><i>Article 14</i></p> <p>1. If for any reason it is or becomes impossible to carry out the contract in accordance with the terms laid down in the consignment note</p>	<p><i>Article 17-Delivery of the goods</i></p> <p>1. The carrier must hand over the consignment note and deliver the goods to the consignee at the place designated for delivery against receipt and payment of the amounts due according to the contract of carriage.</p> <p>2. It shall be equivalent to delivery to the consignee if, in accordance with the prescriptions in force at the place of destination,</p> <p>a) the goods have been handed over to customs or other authorities at their premises or warehouses, when these are not subject to the carrier's supervision;</p> <p>b) the goods have been deposited for storage with the carrier, with a forwarding agent or in a public warehouse.</p> <p>3. After the arrival of the goods at the place of destination, the consignee may ask the carrier to hand over the consignment note and deliver the goods to him. If the loss of the goods is established or if the goods have not arrived on the expiry of the period provided for in Article 29 § 1, the consignee may</p>	<p><i>Article 10-Delivery of the goods</i></p> <p>1. Notwithstanding the obligation of the shipper under article 6, paragraph 1, the consignee who, following the arrival of the goods at the place of delivery requests their delivery, shall, in accordance with the contract of carriage, be responsible for the freight and other charges due on the goods, as well as for his contribution to any general average.</p> <p>In the absence of a transport document, or if such document has not been presented, the consignee shall be responsible for the freight agreed with the shipper if it corresponds to market practice.</p> <p>2. The placing of the goods at the disposal of the consignee in accordance with the contract of carriage or with the usage of the particular trade or with the statutory regulations applicable at the port of discharge shall be considered a delivery. The imposed handing over the goods to an authority or a third party shall also be considered a delivery.</p>	<p><i>Article 13</i></p> <p>1. Except when the consignee has exercised his right under article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.</p> <p>2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.</p> <p>3. If the carrier admits the loss of the cargo, or if the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.</p> <p><i>Article 14</i></p> <p>The consignee and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obliga-</p>	<p><i>Article 13-Delivery of the Cargo</i></p> <p>1. Except when the consignee has exercised its right under article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.</p> <p>2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.</p> <p>3. If the carrier admits the loss of the cargo, or if the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.</p> <p><i>Article 14-Enforcement of the Rights of Consignor and Consignee</i></p> <p>The consignor and the consignee can respectively enforce all the rights given to them by articles 12 and 13, each in its own</p>	<p><i>Article 13-Delivery of the Cargo</i></p> <p>1. Except when the consignee has exercised its right under article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.</p> <p>2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.</p> <p>3. If the carrier admits the loss of the cargo, or if the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.</p> <p><i>Article 14-Enforcement of the Rights of Consignor and Consignee</i></p> <p>The consignor and the consignee can respectively enforce all the rights given to them by articles 12 and 13, each in its own</p>	<p><i>Article 13-Delivery of the Cargo</i></p> <p>1. Except when the consignee has exercised its right under article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.</p> <p>2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.</p> <p>3. If the carrier admits the loss of the cargo, or if the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.</p> <p><i>Article 14-Enforcement of the Rights of Consignor and Consignee</i></p> <p>The consignor and the consignee can respectively enforce all the rights given to them by articles 12 and 13, each in its own</p>	<p><i>Article 13-Delivery of the Cargo</i></p> <p>1. Except when the consignee has exercised its right under article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.</p> <p>2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.</p> <p>3. If the carrier admits the loss of the cargo, or if the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.</p> <p><i>Article 14-Enforcement of the Rights of Consignor and Consignee</i></p> <p>The consignor and the consignee can respectively enforce all the rights given to them by articles 12 and 13, each in its own</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>(i) The controlling party shall advise the carrier, prior to or upon the arrival of the goods at the place of destination, of the name of the consignee.</p> <p>(ii) The carrier shall deliver the goods at the time and location mentioned in article 4.1.3 to the consignee upon the consignee's production of proper identification.</p> <p>1/0.3.2 If a negotiable transport document or a negotiable electronic record has been issued, the following provisions shall apply:</p> <p>(a)(i) Without prejudice to the provisions of article 10.1 the holder of a negotiable transport document 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 mentioned in article 4.1.3 to such holder upon surrender of the negotiable transport document. In the event that more than one original of the negotiable transport document has been issued, the surrender of one original will suffice and the other originals will cease to have any effect or validity.</p> <p>(ii) Without prejudice to the provisions of article 10.1 the holder of a negotiable electronic record is entitled to</p>				<p>before the goods reach the place designated for delivery, the carrier shall ask for instructions from the person entitled to dispose of the goods in accordance with the provisions of article 12.</p> <p>2. Nevertheless, if circumstances are such as to allow the carriage to be carried out under conditions differing from those laid down in the consignment note and if the carrier has been unable to obtain instructions in reasonable time the person entitled to dispose of the goods in accordance with the provisions of article 12, he shall take such steps as seem to him to be in the best interests of the person entitled to dispose of the goods.</p> <p><b>Article 15</b></p> <p>1. Where circumstances prevent delivery of the goods after their arrival at the place designated for delivery, the carrier shall ask the sender for his instructions. If the consignee refuses the goods the sender shall be entitled to dispose of them without being obliged to produce the first copy of the consignment note.</p> <p>2. Even if he has refused the goods, the consignee may</p>	<p>asset, in his own name, his rights against the carrier under the contract of carriage.</p> <p>4. The person entitled may refuse to accept the goods, even when he has received the consignment note and paid the charges resulting from the contract of carriage, so long as an examination which he has demanded in order to establish alleged loss or damage has not been carried out.</p> <p>5. In other respects, delivery of the goods shall be carried out in accordance with the prescriptions in force at the place of destination.</p> <p>6. If the goods have been delivered without prior collection of a cash on delivery charge, the carrier shall be obliged to compensate the consignee up to the amount of the cash on delivery charge without prejudice to his right of recourse against the consignee.</p> <p><b>Article 21-Circumstances preventing delivery</b></p> <p>1. When circumstances prevent delivery, the carrier must without delay inform the consignee and ask him for instructions, save where the consignee has requested.</p>	<p><b>Article 13-Bill of lading</b></p> <p>1. The originals of a bill of lading shall be documents of title issued in the name of the consignee, to order or to bearer.</p> <p>2. At the place of destination, the goods shall be delivered only in exchange for the original of the bill of lading submitted initially; thereafter, further delivery cannot be claimed against other originals.</p> <p>3. When the goods are taken over by the carrier, handing over the bill of lading to the person entitled to take delivery of the goods has the same effects as the handing over of the goods as far as the acquisition of rights to the goods is concerned.</p> <p>4. If the bill of lading has been transferred to a third party, including the consignee, who has acted in good faith in reliance on the description of the goods therein, proof to the contrary of the presumption set out in article 11, paragraph 3, and article 12, paragraph 2, shall not be admissible.</p>	<p>tions imposed by the contract of carriage.</p> <p><b>Article 15</b></p> <p>1. Articles 12, 13 and 14 do not affect either the relations of the consignee and the other or the mutual relations of third parties whose rights are derived either from the consignee or from the consignee.</p> <p>2. The provisions of articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo.</p>	<p>name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.</p>



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>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 mentioned in article 4.1.3 to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 2.4 that it is the holder of the electronic record. Upon such delivery, the electronic record will cease to have any effect or validity.</p> <p>(b) If the holder does not claim delivery of the goods from the carrier after their arrival at the place of destination, the carrier shall advise the controlling party or, if it, after reasonable effort, is unable to identify or find the controlling party, the shipper, accordingly. In such event such controlling party or shipper shall give the carrier instructions in respect of the delivery of the goods. If the carrier is unable, after reasonable effort, to identify and find the controlling party or the shipper, then the person mentioned in article 7.7 shall be deemed to be the shipper for purposes of this paragraph.</p> <p>(c) Notwithstanding the provision of paragraph (d) of this article, a carrier that delivers the goods upon</p>				<p>nevertheless require delivery so long as the carrier has not received instructions to the contrary from the sender.</p> <p>3. When circumstances preventing delivery of the goods arise after the consignee, in exercise of his rights under article 12, paragraph 3, has given an order for the goods to be delivered to another person, paragraphs 1 and 2 of this article shall apply as if the consignee were the sender and that other person were the consignee.</p> <p><b>Article 16</b></p> <p>1. The carrier shall be entitled to recover the cost of his request for instructions and any expenses entailed in carrying out such instructions, unless such expenses were caused by the wrongful act or neglect of the carrier.</p> <p>2. In the cases referred to in article 14, paragraph 1, and in article 15, the carrier may immediately unload the goods for account of the person entitled to dispose of them and thereupon the carriage shall be deemed to be at an end. The carrier shall then hold the goods on behalf of the</p>	<p>by an entry in the consignment note, that the goods be returned to him as a matter of course in the event of circumstances preventing delivery.</p> <p>2. When the circumstances preventing delivery cease to exist before arrival of instructions from the consignee, the carrier shall be delivered to the consignee. The consignee must be notified without delay.</p> <p>3. If the consignee refuses the goods, the consignee shall be entitled to give instructions even if he is unable to produce the duplicate of the consignment note.</p> <p>4. When the circumstances preventing delivery arise after the consignee has modified the contract of carriage in accordance with Article 18 §§ 3 to 5 the carrier must notify the consignee.</p> <p><b>Article 22- Consequences of preventing carriage and delivery</b></p> <p>1. The carrier shall be entitled to recover the costs occasioned by</p> <ol style="list-style-type: none"> <li>his request for instructions,</li> <li>the carrying out of instructions received,</li> </ol>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>instruction of the controlling party or the shipper in accordance with paragraph (b) of this article, shall be discharged of its obligation to deliver the goods under the contract of carriage [to the holder], irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic record has demonstrated, in accordance with the rules of procedure referred to in article 2.4, that he is the holder.</p> <p>(d) If the delivery of the goods by the carrier at the place of destination takes place without the negotiable transport document being surrendered to the carrier or without the demonstration referred to in paragraph (a)(ii) above, a holder who becomes a holder after the carrier has delivered the goods to the consignee or to a person entitled to these goods pursuant to any contractual or other arrangement other than the contract of carriage will only acquire rights under the contract of carriage if the passing of the negotiable transport document or negotiable electronic record was effected in pursuance of contractual or other arrangements made before such delivery of</p>				<p>person so entitled. He may, however, entrust them to a third party, and in that case he shall not be under any liability except for the exercise of reasonable care in the choice of such third party. The charges due under the consignment note and all other expenses shall remain chargeable against the goods.</p> <p>3. The carrier may sell the goods, without awaiting instructions from the person entitled to dispose of them, if the goods are perishable or their condition warrants such a course, or when the storage expenses would be out of proportion to the value of the goods. He may also proceed to the sale of the goods in other cases if after the expiry of a reasonable period he has not received from the person entitled to dispose of the goods instructions to the contrary which he may reasonably be required to carry out.</p> <p>4. If the goods have been sold pursuant to this article, the proceeds of sale, after deduction of the expenses chargeable against the goods, shall be placed at the disposal of the person entitled to dispose of</p>	<p>e) the fact that instructions requested do not reach him or do not reach him in time, d) the fact that he has taken a decision in accordance with article 20 § 1, without having asked for instructions, unless such costs were caused by his fault. The carrier may in particular recover the carriage charge applicable to the route followed and shall be allowed the transit periods applicable to such route.</p> <p>2. In the cases referred to in article 20 § 2 and article 21 § 1 the carrier may immediately unload the goods at the cost of the person entitled. Thereupon the carriage shall be deemed to be at an end. The carrier shall then be in charge of the goods on behalf of the person entitled. He may, however, entrust them to a third party, and shall then be responsible only for the exercise of reasonable care in the choice of such third party. The charges due under the contract of carriage and all other costs shall remain chargeable against the goods.</p> <p>3. The carrier may proceed to the sale of the goods, without</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>the goods, unless such holder at the time it became holder did not have or could not reasonably have had knowledge of such delivery.</p> <p>(e) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods, the carrier is entitled, without prejudice to any other remedies that a carrier may have against such controlling party or shipper, to use its rights under article 10.4.</p> <p><i>10.4.1(a)</i> If the goods have arrived at the place of destination and (i) the goods are not actually taken over by the consignee at the time and location mentioned in article 4.1.3 and no express or implied contract has been concluded between the carrier or the performing party and the consignee that succeeds to the contract of carriage; or</p> <p>(ii) the carrier is not allowed under applicable law or regulations to deliver the goods to the consignee, then the carrier is entitled to exercise the rights and remedies mentioned in paragraph (b).</p> <p>(b) Under the circumstances specified in paragraph (a), the carrier is entitled, at the</p>				<p>the goods. If these charges exceed the proceeds of sale, the carrier shall be entitled to the difference.</p> <p>5. The procedure in the case of sale shall be determined by the law or custom of the place where the goods are situated.</p>	<p>awaiting instructions from the person entitled, if this is justified by the perishable nature or the condition of the goods or if the costs of storage would be out of proportion to the value of the goods. In other cases he may also proceed to the sale of the goods if within a reasonable time he has not received from the person entitled instructions to the contrary which he may reasonably be required to carry out.</p> <p>4. If the goods have been sold, the proceeds of sale, after deduction of the costs chargeable against the goods, must be placed at the disposal of the person entitled. If the proceeds of sale are less than those costs, the consignee must pay the difference.</p> <p>5. The procedure in the case of sale shall be determined by the laws and prescriptions in force at, or by the custom of, the place where the goods are situated.</p> <p>6. If the consignee, in the case of circumstances preventing carriage or delivery, fails to give instructions within a reasonable time and if the circumstances</p>			
<p>preventing carriage or</p>								

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>risk and account of the person entitled to the goods, to exercise some or all of the following rights and remedies:</p> <p>(i) to store the goods at any suitable place;</p> <p>(ii) to unpack the goods if they are packed in containers, or to act otherwise in respect of the goods as, in the opinion of the carrier, circumstances reasonably may require; or</p> <p>(iii) to cause the goods to be sold in accordance with the practices, or the requirements under the law or regulations, of the place where the goods are located at the time.</p> <p>(c) If the goods are sold under clause (b)(iii), the carrier may deduct from the proceeds of the sale the amount necessary to (i) pay or reimburse any costs incurred in respect of the goods; and (ii) pay or reimburse the carrier any other amounts that are referred to in article 9.5(a) and that are due to the carrier.</p> <p>Subject to these deductions, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods.</p> <p><i>10.4.2</i> The carrier is only allowed to exercise the right referred to in article 10.4.1 after it has given notice to the person stated in the contract particulars as the person to be notified of the arrival of the</p>					<p>delivery cannot be eliminated in accordance with §§ 2 and 3, the carrier may return the goods to the consignor or, if it is justified, destroy them, at the cost of the consignor.</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>goods at the place of destination, if any, or to the consignee, or otherwise to the controlling party or the shipper that the goods have arrived at the place of destination.</p> <p>10.4.3 When exercising its rights referred to in article 10.4.1, the carrier or performing party acts as an agent of the person entitled to the goods, but without any liability for loss or damage to these goods, unless the loss or damage results from [a personal act or omission of the carrier done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result].</p>								

## CHAPTER 11 – RIGHT OF CONTROL

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 11-Right of control</i></p> <p>1. The right of control of the goods means the right under the contract of carriage to give the carrier instructions in respect of these goods during the period of its responsibility as stated in article 4.1.1. Such right to give the carrier instructions comprises rights to:</p> <p>(i) give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;</p> <p>(ii) demand delivery of the goods before their arrival at the place of destination;</p> <p>(iii) replace the consignee by any other person including the controlling party;</p> <p>(iv) agree with the carrier to a variation of the contract of carriage.</p> <p>2. (a) When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:</p> <p>(i) The shipper is the controlling party unless the shipper and consignee agree that another person is to be the controlling party and the shipper so notifies the carrier. The shipper and consignee may agree that the consignee is the controlling party.</p> <p>(ii) The controlling party</p>				<p><i>Article 12</i></p> <p>1. The sender has the right to dispose of the goods, in particular by asking the carrier to stop the goods in transit, to change the place at which delivery is to take place or to deliver the goods to a consignee other than the consignee indicated in the consignment note.</p> <p>2. This right shall cease to exist when the second copy of the consignment note is handed to the consignee or when the consignee exercises his right under article 13, paragraph 1, from that time onwards the carrier shall obey the orders of the consignee.</p> <p>3. The consignee shall, however, have the right of disposal from the time when the consignment note is drawn up, if the sender makes an entry to that effect in the consignment note.</p> <p>4. If in exercising his right of disposal the consignee has ordered the delivery of the goods to another person, that other person shall not be entitled to name other consignees.</p> <p>5. The exercise of the right of disposal shall be subject to the</p>	<p><i>Article 18-Right to dispose of the goods</i></p> <p>1. The consignee shall be entitled to dispose of the goods and to modify the contract of carriage by giving subsequent orders. He may in particular ask the carrier</p> <p>a) to discontinue the carriage of the goods;</p> <p>b) to delay the delivery of the goods;</p> <p>c) to deliver the goods to a consignee different from the one entered on the consignment note;</p> <p>d) to deliver the goods at a place other than the place of destination entered on the consignment note.</p> <p>2. The consignee's right to modify the contract of carriage shall, notwithstanding that he is in possession of the duplicate of the consignment note, be extinguished in cases where the consignee</p> <p>a) has taken possession of the consignment note;</p> <p>b) has accepted the goods;</p> <p>c) has asserted his rights in accordance with article 17 § 3;</p> <p>d) is entitled, in accordance with § 3, to give orders; from that time onwards, the carrier shall comply with the orders and instructions of the</p>	<p><i>Article 14-Holder of the right of disposal</i></p> <p>1. The shipper shall be authorized to dispose of the goods; in particular, he may require the carrier to discontinue the carriage of the goods, to change the place of delivery or to deliver the goods to a consignee other than the consignee indicated in the transport document.</p> <p>2. The shipper's right of disposal shall cease to exist once the consignee, following the arrival of the goods at the scheduled place of delivery, has requested delivery of the goods and,</p> <p>(a) Where carriage is under a consignment note, once the original has been handed over to the consignee;</p> <p>(b) Where carriage is under a bill of lading, once the shipper has relinquished all the originals in his possession by handing them over to another person.</p> <p>3. By an appropriate entry in the consignment note, the shipper may, when the consignment note is issued, waive his right of disposal to the consignee.</p>	<p><i>Article 12</i></p> <p>1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignee has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination originally designated, or by requiring it to be returned to the airport of departure.</p> <p>He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.</p> <p>2. If it is impossible to carry out the orders of the consignee the carrier must so inform him forthwith.</p> <p>3. If the carrier obeys the orders of the consignee for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be</p>	<p><i>Article 12-Right of Disposition of Cargo</i></p> <p>1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignee has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination originally designated, or by requiring it to be returned to the airport of departure.</p> <p>The consignee must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.</p> <p>2. If it is impossible to carry out the instructions of the consignee, the carrier must so inform the consignee forthwith.</p> <p>3. If the carrier carries out the instructions of the</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>is entitled to transfer the right of control to another person, upon which transfer the transferor loses its right of control. The transferor or the transferee shall notify the carrier of such transfer.</p> <p>(iii) When the controlling party exercises the right of control in accordance with article 11.1, it shall produce proper identification.</p> <p>(b) When a negotiable transport document is issued, the following rules apply:</p> <p>(i) The holder or, in the event that more than one original of that negotiable transport document is issued, the holder of all originals is the sole controlling party.</p> <p>(ii) The holder is entitled to transfer the right of control by passing that negotiable transport document to another person in accordance with article 12.1, upon which transfer the transferor loses its right of control. If more than one original of that document was issued, all originals must be passed in order to effect a transfer of the right of control.</p> <p>(iii) In order to exercise the right of control, the holder shall, if the carrier so requires, produce the negotiable transport document to</p>	<p>following conditions:</p> <p>(a) That the sender or, in the case referred to in paragraph 3 of this article, the consignee who wishes to exercise the right produces the first copy of the consignment note on which the new instructions to the carrier have been entered and indemnifies the carrier against all expenses, loss and damage involved in carrying out such instructions;</p> <p>(b) That the carrying out of such instructions is possible at the time when the instructions reach the person who is to carry them out and does not either interfere with the normal working of the carriers' undertaking or prejudice the senders or consignees of other consignments;</p> <p>(c) That the instructions do not result in a division of the provisions of paragraph 5 (b) of this article, the carrier cannot carry out the instructions which he receives, he shall immediately notify the person who gave him such instructions.</p> <p>7. A carrier who has not carried out the instructions given</p>	<p>consignee.</p> <p>3. The consignee shall have the right to modify the contract of carriage from the time when the consignment note is drawn up, unless the consignee indicates to the contrary on the consignment note.</p> <p>4. The consignee's right to modify the contract of carriage shall be extinguished in cases where he has taken possession of the consignment note;</p> <p>b) accepted the goods;</p> <p>c) asserted his rights in accordance with article 17 § 3;</p> <p>d) given instructions for delivery of the goods to another person in accordance with § 5 and when that person has asserted his rights in accordance with article 17 § 3.</p> <p>5. If the consignee has given instructions for delivery of the goods to another person, that person shall not be entitled to modify the contract of carriage.</p> <p><i>Article 19-Exercise of the right to dispose of the goods</i></p> <p>7. If the consignee or, in the case referred to in article 18 § 3, the consignee wishes to modify the contract of carriage by giving subsequent orders, he must produce to the carrier the duplicate</p>	<p><i>Article 15-Conditions for the exercise of the right of disposal</i></p> <p>The shipper or, in the case of article 14, paragraphs 2 and 3, the consignee, must, if he wishes to exercise his right of disposal:</p> <p>(a) Where a bill of lading is used, submit all originals prior to the arrival of the goods at the scheduled place of delivery;</p> <p>(b) Where a transport document other than a bill of lading is used, submit this document, which shall include the new instructions given to the carrier;</p> <p>(c) Reimburse the carrier for all the costs and damages entailed in carrying out such instructions;</p> <p>(d) Pay all the agreed freight in the event of the discharge of the goods before arrival at the scheduled place of delivery, unless the contract of carriage provides otherwise.</p>	<p>liable, without prejudice to his right of recovery from the consignee, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.</p> <p>4. The right conferred on the consignee begins in accordance with article 13.</p> <p>Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignee resumes his right of disposition.</p>	<p>consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignee, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.</p> <p>4. The right conferred on the consignee begins in accordance with article 13.</p> <p>Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignee resumes its right of disposition.</p>	<p>consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt.</p> <p>4. The right conferred on the consignee begins in accordance with article 13.</p> <p>Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignee resumes its right of disposition.</p>	<p>consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt.</p> <p>4. The right conferred on the consignee begins in accordance with article 13.</p> <p>Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignee resumes its right of disposition.</p>	<p>consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt.</p> <p>4. The right conferred on the consignee begins in accordance with article 13.</p> <p>Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignee resumes its right of disposition.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>the carrier. If more than one original of that document was issued, all originals shall be produced.</p> <p>(iv) Any instructions as referred to in article 11.1(ii), (iii), and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated on the negotiable transport document.</p> <p>(c) When a negotiable electronic record is issued:</p> <p>(i) The holder is the sole controlling party and is entitled to transfer the right of control to another person by passing the negotiable electronic record in accordance with the rules of procedure referred to in article 2.4, upon which transfer the transferor loses its right of control.</p> <p>(ii) In order to exercise the right of control, the holder shall, if the carrier so requires, demonstrate, in accordance with the rules of procedure referred to in article 2.4, that it is the holder.</p> <p>(iii) Any instructions as referred to in article 11.1, (ii), (iii), and (iv) given by the holder upon becoming effective in accordance with article 11.3 shall be stated in the electronic record.</p> <p>(d) Notwithstanding the provisions of article 12.4, a person, not being the shipper or</p>				<p>under the conditions provided for in this article or who has carried them out without requiring the first copy of the consignment note to be produced, shall be liable to the person entitled to make a claim for any loss or damage caused thereby:</p>	<p>of the consignment note on which the modifications have to be entered.</p> <p>2. The consignor or, in the case referred to in article 18 § 3, the consignee must compensate the carrier for the costs and the prejudice arising from the carrying out of subsequent modifications.</p> <p>3. The carrying out of the subsequent modifications must be possible, lawful and reasonable to require at the time when the orders reach the person who is to carry them out, and must in particular neither interfere with the normal working of the carrier's undertaking nor prejudice the consignors or consignees of other consignments.</p> <p>4. The subsequent modifications must not have the effect of splitting the consignment.</p> <p>5. When, by reason of the conditions provided for in § 3, the carrier cannot carry out the orders which he receives he shall immediately notify the person from whom the orders emanate.</p> <p>6. In the case of fault of the carrier he shall be liable for the consequences of failure to carry out an</p>			



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>the person referred to in article 7.7, that transferred the right of control without having exercised that right, shall upon such transfer be discharged from the liabilities imposed on the controlling party by the contract of carriage or by this instrument.</p> <p>3.(a) Subject to the provisions of paragraphs (b) and (c) of this article, if any instruction mentioned in article 11.1(i), (ii), or (iii) (i) can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;</p> <p>(ii) will not interfere with the normal operations of the carrier or a performing party; and</p> <p>(iii) would not cause any additional expense, loss, or damage to the carrier; the performing party, or any person interested in other goods carried on the same voyage, then the carrier shall execute the instruction. If it is reasonably expected that one or more of the conditions mentioned in clauses (1), (2), and (3) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.</p> <p>(b) In any event, the controlling party shall indemnify the carrier, performing parties, and any persons interested in</p>					<p>order or failure to carry it out properly. Nevertheless, any compensation payable shall not exceed that provided for in case of loss of the goods.</p> <p>7. If the carrier implements the consignor's subsequent modifications without requiring the production of the duplicate of the consignment note, the carrier shall be liable to the consignee for any loss or damage sustained by him if the duplicate has been passed on to the consignee.</p> <p>Nevertheless, any compensation payable shall not exceed that provided for in case of loss of the goods.</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>other goods carried on the same voyage against any additional expense, loss, or damage that may occur as a result of executing any instruction under this article.</p> <p>(c) If a carrier</p> <p>(i) reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and</p> <p>(ii) is nevertheless willing to execute the instruction,</p> <p>then the carrier is entitled to obtain security from the controlling party for the amount of the reasonably expected additional expense, loss, or damage.</p> <p>4. Goods that are delivered pursuant to an instruction in accordance with article 11.1(ii) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in article 10, are applicable to such goods.</p> <p>5. If during the period that the carrier holds the goods in its custody, the carrier reasonably requires information, instructions, or documents in addition to those referred to in article 7.3(a), it shall seek such information, instructions, or documents from the controlling party. If the carrier, after reasonable effort, is unable to identify and find the</p>								

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>controlling party, or the controlling party is unable to provide adequate information, instructions, or documents to the carrier, the obligation to do so shall be on the shipper or the person referred to in article 7.7.</p> <p>6. The provisions of articles 11.1 (ii) and (iii), and 11.3 may be varied by agreement between the parties. The parties may also restrict or exclude the transferability of the right of control referred to in article 11.2 (a) (ii). If a transport document or an electronic record is issued, any agreement referred to in this paragraph must be stated in the contract particulars.</p>								

CHAPTER 12 – TRANSFER OF RIGHTS

<p>INSTRUMENT</p>	<p>HAGUE-VISBY HAMBURG MULTIMODAL CMR COTIF-CIM 1999 CMNI WARSAW MONTREAL</p>
<p><i>Article 12-Transfer of rights</i></p>	
<p><i>12.1.1</i> If a negotiable transport document is issued, the holder is entitled to transfer the rights incorporated in such document by passing such document to another person,</p> <p>(i) if an order document, duly endorsed either to such other person or in blank, or,</p> <p>(ii) if a bearer document or a blank endorsed document, without endorsement, or,</p> <p>(iii) if a document made out to the order of a named party and the transfer is between the first holder and such named party, without endorsement.</p> <p><i>12.1.2.</i> If a negotiable electronic record is issued, its holder is entitled to transfer the rights incorporated in such electronic record, whether it be made out to order or to the order of a named party, by passing the electronic record in accordance with the rules of procedure referred to in article 2.4.</p> <p><i>12.2.1.</i> Without prejudice to the provisions of article 11.5, any holder that is not the shipper and that does not exercise any right under the contract of carriage, does not assume any liability under the contract of carriage solely by reason of becoming a holder.</p> <p><i>12.2.2.</i> Any holder that is not the shipper and that exercises any right under the contract of carriage, assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record.</p> <p><i>12.2.3.</i> Any holder that is not the shipper and that</p> <p>(i) under article 2.2 agrees with the carrier to replace a negotiable transport document by a negotiable electronic record or to replace a negotiable electronic record by a negotiable transport document, or</p> <p>(ii) under article 12.1 transfers its rights,</p> <p>does not exercise any right under the contract of carriage for the purpose of the articles 12.2.1 and 12.2.2.</p> <p><i>12.3.</i> The transfer of rights under a contract of carriage, pursuant to which no negotiable transport document or no negotiable electronic record is issued shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights. Such transfer of rights may be effected by means of electronic communication. A transfer of the right of control cannot be completed without a notification of such transfer to the carrier by the transferor or the transferee.</p> <p><i>12.4.</i> If the transfer of rights under a contract of carriage, pursuant to which no negotiable transport document or no negotiable electronic record has been issued, includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor and the transferee are jointly and severally liable in respect of such liabilities.</p>	
<p><i>There are no corresponding provisions in any other Transport Convention</i></p>	

## CHAPTER 13 – RIGHTS OF SUIT

INSTRUMENT	COTIF-CIM 1999
<p><i>Article 13- Rights of suit</i></p> <p>13.1 Without prejudice to articles 13.2 and 13.3, rights under the contract of carriage may be asserted against the carrier or a performing party only by:</p> <p>(i) the shipper;</p> <p>(ii) the consignee;</p> <p>(iii) any third party to which the shipper or the consignee has assigned its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage;</p> <p>(iv) any third party that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer.</p> <p>In case of any passing of rights of suit through assignment or subrogation as referred to above, the carrier and the Performing Party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this instrument.</p> <p>13.2 In the event that a negotiable transport document or negotiable electronic record is issued, the holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, without having to prove that it itself has suffered loss or damage. If such holder did not suffer the loss or damage itself, it is deemed to act on behalf of the party that suffered such loss or damage.</p> <p>13.3 In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is one of the persons referred to in article 13.1 without being the holder, such claimant must, in addition to its burden of proof that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer such loss or damage.</p>	<p><i>Article 43-Claims</i></p> <p>1. Claims relating to the contract of carriage must be addressed in writing to the carrier against whom an action may be brought.</p> <p>2. A claim may be made by persons who have the right to bring an action against the carrier.</p> <p>3. To make the claim the consignor must produce the duplicate of the consignment note. Failing this he must produce an authorisation from the consignee or furnish proof that the consignee has refused to accept the goods.</p> <p>4. To make the claim the consignee must produce the consignment note if it has been handed over to him.</p> <p>5. The consignment note, the duplicate and any other documents which the person entitled thinks fit to submit with the claim must be produced either in the original or as copies, the copies, where appropriate, duly certified if the carrier so requests.</p> <p>6. On settlement of the claim the carrier may require the production, in the original form, of the consignment note, the duplicate or the cash on delivery voucher so that they may be endorsed to the effect that settlement has been made.</p> <p><i>Article 44-Persons who may bring an action against the carrier</i></p> <p>1. Subject to §§ 3 and 4 actions based on the contract of carriage may be brought:</p> <p>a) by the consignor, until such time as the consignee has</p> <ol style="list-style-type: none"> <li>1. taken possession of the consignment note;</li> <li>2. accepted the goods, or</li> <li>3. asserted his rights pursuant to article 17 § 3 or article 18 § 3;</li> </ol> <p>b) by the consignee, from the time when he has</p> <ol style="list-style-type: none"> <li>1. taken possession of the consignment note;</li> <li>2. accepted the goods, or</li> <li>3. asserted his rights pursuant to article 17 § 3 or article 18 § 3.</li> </ol> <p>2. An action for the recovery of a sum paid pursuant to the contract of carriage may only be brought by the person who made the payment.</p> <p>4. An action in respect of cash on delivery payments may only be brought by the consignor.</p> <p>5. In order to bring an action the consignor must produce the duplicate of the consignment note. Failing this he must produce an authorisation from the consignee or furnish proof that the consignee has refused to accept the goods. If necessary, the consignor must prove the absence or the loss of the consignment note.</p> <p>6. In order to bring an action the consignee must produce the consignment note if it has been handed over to him.</p> <p><i>Article 45-Carriers against whom an action may be brought</i></p> <p>1. Subject to §§ 3 and 4 actions based on the contract of carriage may be brought only against the first carrier, the last carrier or the carrier having performed the part of the carriage on which the event giving rise to the proceedings occurred.</p> <p>2. When, in the case of carriage performed by successive carriers, the carrier who must deliver the goods is entered with his consent on the consignment note, an action may be brought against him in accordance with § 1 even if he has received neither the goods nor the consignment note.</p> <p>3. An action for the recovery of a sum paid pursuant to the contract of carriage may be brought against the carrier who has collected that sum or against the carrier on whose behalf it was collected.</p> <p>4. An action in respect of cash on delivery payments may be brought only against the carrier who has taken over the goods at the place of consignment.</p> <p>5. An action may be brought against a carrier other than those specified in §§ 1 to 4 when instituted by way of counter-claim or by way of exception in proceedings relating to a principal claim based on the same contract of carriage.</p> <p>6. To the extent that these Uniform Rules apply to the substitute carrier, an action may also be brought against him.</p> <p>7. If the plaintiff has a choice between several carriers, his right to choose shall be extinguished as soon as he brings an action against any one of them; this shall also apply if the plaintiff has a choice between one or more carriers and a substitute carrier.</p>

## CHAPTER 14 – TIME FOR SUIT

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 14-Time for suit</i>  <b>14.1</b> The carrier is discharged from all liability in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of one year. The shipper is discharged from all liability under chapter 7 of this instrument if judicial or arbitral proceedings have not been instituted within a period of one year.</p> <p><b>14.2</b> The period mentioned in article 14.1 commences on the day on which the carrier has completed delivery of the goods concerned or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.</p> <p><b>14.3</b> The person against whom a claim is made at any time during the running of the period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.</p> <p><b>14.4</b> An action for indemnity by a person held liable under this instrument may be instituted even after the expiration of the period mentioned in article 14.1 if the indemnity action is instituted within the</p>	<p><i>Article 3(6)</i>            Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.</p> <p>6bis. An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case.</p> <p>However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.</p>	<p><i>Article 20-Limitation of actions</i>  <b>1.</b> Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the limitation period commences is not included in the period.</p> <p><b>4.</b> The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.</p> <p><b>5.</b> An action for indemnity by a person held liable may be instituted even after the expiration of the</p>	<p><i>Article 25-Limitation of actions</i>  <b>1.</b> Any action relating to international multimodal transport under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. However, if notification in writing, stating the nature and main particulars of the claim, has not been given within six months after the day when the goods were delivered or, where the goods have not been delivered, after the day on which they should have been delivered, the action shall be time-barred at the expiry of this period.</p> <p><b>2.</b> The limitation period commences on the day after the multimodal transport operator has delivered the goods or part thereof or, where the goods have not been delivered, on the last day on which they should have been delivered.</p> <p><b>3.</b> The day on which the limitation period commences is not included in the period.</p> <p><b>4.</b> The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations.</p> <p><b>5.</b> An action for indemnity by a person held liable may be instituted even after the expiration of the</p>	<p><i>Article 32</i>  <b>1.</b> The period of limitation for an action arising out of carriage under this Convention shall be one year. Nevertheless, in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct, the period of limitation shall be three years. The period of limitation shall begin to run:</p> <p>(a) In the case of partial loss, damage or delay in delivery, from the date of delivery;</p> <p>(b) In the case of total loss, from the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from the date on which the goods were taken over by the carrier;</p> <p>(c) In all other cases, on the expiry of a period of three months after the making of the contract of carriage. The day on which the period of limitation begins to run shall not be included in the period.</p> <p><b>2.</b> A written claim</p>	<p><i>Article 47-Extinction of right of action</i>  <b>1.</b> Acceptance of the goods by the person entitled shall extinguish all rights of action against the carrier arising from the contract of carriage in case of partial loss, damage or exceeding of the transit period.</p> <p><b>2.</b> Nevertheless, the right of action shall not be extinguished:</p> <p>a) in case of partial loss or damage, if</p> <p>1. the loss or damage was ascertained in accordance with article 42 before the acceptance of the goods by the person entitled;</p> <p>2. the ascertainment which should have been carried out in accordance with article 42 was omitted solely through the fault of the carrier;</p> <p>b) in case of loss or damage which is not apparent whose existence is ascertained after acceptance of the goods by the person entitled, if</p> <p>1. asks for ascertainment in accordance with article 42 immediately after discovery of the loss or damage and not later than seven days after the acceptance</p>	<p><i>Article 24-Limitation of actions</i>  <b>1.</b> All actions arising out of a contract governed by this Convention shall be time-barred after one year commencing from the day when the goods were, or should have been, delivered to the consignee. The day on which the limitation period commences is not included in the period.</p> <p><b>2.</b> The person against whom an action is instituted, may, at any time during the limitation period extend that period by a declaration in writing to the injured party. This period may be further extended by another declaration or declarations.</p> <p><b>3.</b> The suspension and interruption of the limitation period are governed by the law of the State applicable to the contract of carriage. The filing of a claim during proceedings is accorded to the proportion of limited liability for all claims arising from an event having led to damage shall interrupt the limitation.</p> <p><b>4.</b> Any action for indemnity by a person held liable under this Convention may be instituted even after the expiry of the limitation period</p>	<p><i>Article 29</i>  <b>1.</b> The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.</p>	<p><i>Article 35-Limitation of Actions</i>  <b>1.</b> The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.</p> <p><b>2.</b> The method of calculating that period shall be determined by the law of the court seized of the case.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>later of (a) the time allowed by the law of the State where proceedings are instituted; or (b) 90 days commencing from the day when the person instituting the action for indemnity has either (i) settled the claim; or (ii) been served with process in the action against itself. /14.5 If the registered owner of a vessel defeats the presumption that it is the carrier under article 8.4.2, an action against the bareboat charterer may be instituted even after the expiration of the limitation period mentioned in article 14.1 if the action is instituted within the later of (a) the time allowed by the law of the State where proceedings are instituted; or (b) 90 days commencing from the day when the registered owner both (i) proves that the ship was under a bareboat charter at the time of the carriage; and (ii) adequately identifies the bareboat charterer.]</p>	<p>limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted. However, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.</p>	<p>time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations. 4. Provided that the provisions of another applicable international convention are not to the contrary, a recourse action for indemnity by a person held liable under this Convention may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed by the law of the State where proceedings are instituted; however, the time allowed shall not be less than 90 days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself.</p>	<p>shall suspend the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto. If a part of the claim is admitted the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply and of the return of the documents, shall rest with the party relying upon these facts. The running of the period of limitation shall not be suspended by further claims having the same object. 3. Subject to the provisions of paragraph 2 above, the extension of the period of limitation shall be governed by the law of the court or tribunal seized of the case. That law shall also govern the fresh accrual of rights of action. 4. A right of action which has become barred by lapse of time may not be exercised by way of counterclaim or set-off.</p>	<p>of the goods, and 2. in addition, proves that the loss or damage occurred between the time of taking over and the time of delivery; c) in cases where the transit period has been exceeded, if the person entitled has, within sixty days, asserted his rights against one of the carriers referred to in article 45 § 1; d) if the person entitled proves that the loss or damage results from an act or omission, done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result. 3. If the goods have been reconsigned in accordance with article 28 rights of action in case of partial loss or in case of damage, arising from one of the previous contracts of carriage, shall be extinguished as if there had been only a single contract of carriage. <b>Article 48-Limitation of actions</b> 1. The period of limitation for an action arising from the contract of carriage shall be one year. Nevertheless, the period of</p>	<p>provided for in paragraphs 1 and 2 of the present article, if proceedings are instituted within a period of 90 days commencing from the day on which the person instituting the action has settled the claim or has been served with process, or if proceedings are instituted within a longer period as provided by the law of the State where proceedings are instituted. 5. A right of action which has become barred by lapse of time may not be exercised by way of counter-claim or set-off.</p>			

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL	
					<p>limitation shall be two years in the case of an action</p> <p>a) to recover a cash on delivery payment collected by the carrier from the consignee;</p> <p>b) to recover the proceeds of a sale effected by the carrier;</p> <p>c) for loss or damage resulting from an act or omission done with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result;</p> <p>d) based on one of the contracts of carriage prior to the reassignment in the case provided for in article 28.</p> <p>2. The period of limitation shall run for actions</p> <p>a) for compensation for total loss, from the thirtieth day after expiry of the transit period;</p> <p>b) for compensation for partial loss, damage or exceeding of the transit period, from the day when delivery took place;</p> <p>c) in all other cases, from the day when the right of action may be exercised.</p> <p>The day indicated for the commencement of the period of limitation shall not be included in the</p>				



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
					<p>period.</p> <p>3. The period of limitation shall be suspended by a claim in writing in accordance with article 43 until the day that the carrier rejects the claim by notification in writing and returns the documents submitted with it. If part of the claim is admitted, the period of limitation shall start to run again in respect of the part of the claim still in dispute. The burden of proof of receipt of the claim or of the reply and of the return of the documents shall lie on the party who relies on those facts. The period of limitation shall not be suspended by further claims having the same object.</p> <p>4. A right of action which has become time-barred may not be exercised further, even by way of counter-claim or relied upon by way of exception.</p> <p>5. Otherwise, the suspension and interruption of periods of limitation shall be governed by national law.</p>			

## CHAPTER 15 – GENERAL AVERAGE

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 15-General average</i></p> <p>15.1 Nothing in this instrument prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.</p> <p>15.2 With the exception of the provision on time for suit, the provisions of this instrument relating to the liability of the carrier for loss or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.</p>		<p><i>Article 24-General average</i></p> <p>1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.</p> <p>2. With the exception of Article 20, the provisions of this Convention relating to the liability of the carrier for loss or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.</p>	<p><i>Article 29-General average</i></p> <p>1. Nothing in this Convention shall prevent the application of provisions in the multimodal transport contract or national law regarding the adjustment of general average, if and to the extent applicable.</p> <p>2. With the exception of article 25, the provisions of this Convention relating to the liability of the multimodal transport operator for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in general average and the liability of the multimodal transport operator to indemnify the consignee in respect of any such contribution made or any salvage paid.</p>			<p><i>Article 26-General average</i></p> <p>Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding the calculation of the amount of damages and contributions payable in the event of general average.</p>		

## CHAPTER 16 – OTHER CONVENTIONS

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><i>Article 16-Other Conventions</i></p> <p><b>16.1 This instrument does not modify the rights or obligations of the carrier, or the performing party provided for in international conventions or national law governing the limitation of liability relating to the operation of [seagoing] ships.</b></p> <p><b>16.2 No liability arises under the provisions of this instrument for any loss or damage to or delay in delivery of luggage for which the carrier is responsible under any convention or national law relating to the carriage of passengers and their luggage by sea.</b></p> <p><b>16.3 No liability arises under the provisions of this instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:</b></p> <p>(a) under either the Paris Convention of 29 July 1960, on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964, or the Vienna Convention of 21 May 1963, on Civil Liability for Nuclear Damage, or</p> <p>(b) by virtue of national law governing the</p>	<p><i>Article 8</i></p> <p>The provisions of this convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels.</p>	<p><i>Article 25-Other conventions</i></p> <p>1. This Convention does not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.</p> <p>2. The provisions of Articles 21 and 22 of this Convention do not prevent the application of the mandatory provisions of any other multilateral convention already in force at the date of this Convention relating to matters dealt with in the said Articles, provided that the dispute arises exclusively between parties having their principal place of business in States members of such other convention. However, this paragraph does not affect the application of paragraph 4 of Article 22 of this Convention.</p> <p>3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:</p> <p>(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as</p>	<p><i>Article 4-Regulation and control of multimodal transport</i></p> <p>1. This Convention shall not affect, or be incompatible with, the application of any international convention or national law relating to the regulation and control of transport operations.</p> <p>2. This Convention shall not affect the right of each State to regulate and control at the national level multimodal transport operations and multimodal transport operators, including the right to take measures relating to consultations, especially before the introduction of new technologies and services, between multimodal transport operators, shippers, shippers' organisations and appropriate national authorities on terms and conditions of service; licensing of multimodal transport operators; participation in transport; and all other steps in the national economic and commercial interest.</p> <p>3. The multimodal transport operator shall comply with the applicable law of the country in which he operates and with the provisions of this Convention.</p> <p><i>Article 30-Other Conventions</i></p> <p>1. This Convention does not modify the rights or</p>					<p><i>Article 55-Relationship with other Warsaw Conventions</i></p> <p>This Convention shall prevail over any rules which apply to international carriage by air:</p> <p>1. between States Parties to this Convention by virtue of those States commonly being Party to</p> <p>(a) The Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);</p> <p>(b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);</p> <p>(c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Warsaw Convention);</p> <p>(d) the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);</p> <p>(e) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);</p> <p>(f) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(g) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(h) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(i) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(j) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(k) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(l) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(m) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(n) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(o) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(p) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(q) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(r) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(s) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(t) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(u) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(v) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(w) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(x) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(y) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p> <p>(z) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 (hereinafter called the Warsaw Convention);</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p>liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.</p>		<p>amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or</p> <p>(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.</p> <p>4. No liability shall arise under the provisions of this Convention for any loss of or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.</p> <p>5. Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention.</p> <p><b>Article 31-Denunciation of other conventions</b></p> <p>1. Upon becoming a Contracting State to this Convention, any State party to the International Convention for the</p>	<p>duties provided for in the Brussels International Convention for the unification of certain rules relating to the limitation of the liability of owners of sea-going vessels of 25 August 1924, in the Brussels International Convention relating to the limitation of the liability of owners of seagoing ships of 10 October 1957; in the London Convention on limitation of liability for maritime claims of 19 November 1976; and in the Geneva Convention relating to the limitation of the liability of owners of inland navigation vessels (CLN) of 1 March 1973, including amendments to these Conventions, or national law relating to the limitation of liability of owners of sea-going ships and inland navigation vessels.</p> <p>2. The provisions of articles 26 and 27 of this Convention do not prevent the application of the mandatory provisions of any other international convention relating to matters dealt with in the said articles, provided that the dispute arises exclusively between parties having their principal place of business in States parties to such other convention.</p> <p>However, this paragraph does not affect the application of paragraph 3 of article 27 of this Convention.</p>					<p>Convention);</p> <p>(d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 Signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);</p> <p>(e) Additional Protocol Nos. 1 to 3 and Montreal Protocol No. 4 to amend the Warsaw Convention as amended by the Hague Protocol or the Warsaw Convention as amended by both The Hague Protocol and the Guatemala City Protocol Signed at Montreal on 25 September 1975 (hereinafter called the Montreal Protocols); or</p> <p>2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924 (1924 Convention) must notify the Government of Belgium as the depositary of the 1924 Convention of its denunciation of the said Convention with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.</p> <p>2. Upon the entry into force of this Convention under paragraph 1 of article 30, the depositary of this Convention must notify the Government of Belgium as the depositary of the 1924 Convention of the date of such entry into force, and of the names of the Contracting States in respect of which the Convention has entered into force.</p> <p>3. The provisions of paragraphs 1 and 2 of this Article apply correspondingly in respect of States parties to the Protocol signed on 23 February 1968 to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading signed at Brussels on 25 August 1924.</p> <p>4. Notwithstanding Article 2 of this Convention, for the purposes of paragraph 1 of this Article, a Contracting State may, if it deems it desirable, defer</p>	<p>3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:</p> <p>(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or</p> <p>(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.</p> <p>4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of</p>	<p>3. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:</p> <p>(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or amendments thereto; or</p> <p>(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.</p> <p>4. Carriage of goods such as carriage of goods in accordance with the Geneva Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road in article 2, or the Berne Convention of 7 February 1970 concerning the Carriage of Goods by Rail, article 2, shall not for States Parties to Conventions governing such carriage be considered as international multimodal transport within the meaning of article 1, paragraph 1, of</p>					



## CHAPTER 17 – LIMITS OF CONTRACTUAL FREEDOM

INSTRUMENT	HAGUE-VISBY Article 3(8)	HAMBURG Article 23- Contractual stipulations	MULTIMODAL Article 3-Mandatory application	CMR Article 40	COTIF-CIM 1999 Article 5-Mandatory law	CMNI Article 25-Nullity of contractual stipulations	WARSAW Article 23	MONTREAL Article 26-Invalidity of Contractual Provisions
Article 17-Limits of contractual freedom 17.1(a) Unless otherwise specified in this instrument, any contractual stipulation that derogates from the provisions of this instrument are null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [ , or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under the provisions of this instrument. (b) [Notwithstanding paragraph (a), the carrier or a performing party may increase its responsibilities and its obligations under this instrument.] (c) Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void. 17.2 Notwithstanding the provisions of chapters 5 and 6 of this instrument, both the carrier and any performing party may by the terms of the contract of carriage exclude or limit their liability for loss or damage to the goods if (a) the goods are live animals, or	Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability. Article 5 A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper. The provisions of this convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party which nullify any	Article 23- Contractual stipulations 1. Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance in favour of the carrier, or any similar clause, is null and void. 2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention. 3. Where a bill of lading or any other document evidencing the contract of carriage by sea is issued, it must contain a statement that the carriage is subject to the provisions of this Convention which nullify any	1. When a multimodal transport contract has been concluded which according to article 2 shall be governed by this Convention, the provisions of this Convention shall be mandatorily applicable to such contract. 2. Nothing in this Convention shall affect the right of the consignor to choose between multimodal transport and segmented transport. Article 28- Contractual stipulations 1. Any stipulation in a multimodal transport contract or multimodal transport document shall be null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance in favour of the carrier, or any similar clause, is null and void. 2. Notwithstanding the provisions of paragraph 1 of this article, a carrier may increase his responsibilities and obligations under this Convention.	Carriers shall be free to agree among themselves on provisions other than those laid down in articles 37 and 38. Article 41 1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract of carriage. Nevertheless, a carrier may assume a liability greater and burdensome than those provided for in these Uniform Rules.	Unless provided otherwise in these Uniform Rules, any stipulation which, directly or indirectly, would derogate from these Uniform Rules shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract of carriage. Nevertheless, a carrier may assume a liability greater and burdensome than those provided for in these Uniform Rules.	1. Subject to the provisions of article 20, paragraph 4, any contractual stipulation intended to exclude, limit or increase the liability, within the meaning of this Convention, of the carrier, the actual carrier or their servants or agents, shift the burden of proof or reduce the periods for claims or limitations referred to in articles 23 and 24 shall be null and void. Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is also null and void. 2. Notwithstanding paragraph 1 of the present article and without prejudice to article 21, contractual stipulations shall be authorized specifying that the carrier or the actual carrier is not responsible for losses arising from: (a) An act or omission by the master of the vessel, the pilot or any other person in the service of the vessel, pusher or tug during navigation or in the formation or dissolution of a	1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention. 2. Paragraph 1 of this article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried. Article 32 Any clause contained in the contract and all entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of goods arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place within one of	Article 26-Invalidity of Contractual Provisions Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention. Article 27-Freedom to Contract Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

<sup>1</sup>The chapter number, if any, to be determined in the course of discussions on the draft instrument.

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><b>(b) the character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic record is or is to be issued for the carriage of the goods.</b></p>	<p>they shall comply with the terms of this convention. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.</p> <p><i>Article 6</i></p> <p>Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such. Any agreement so</p>	<p>stipulation derogating therefrom to the detriment of the shipper or the consignee.</p> <p>4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the carrier must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery.</p> <p>The carrier must, in addition pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.</p>	<p>be null and void.</p> <p>2. Notwithstanding the provisions of paragraph 1 of this article, the multimodal transport operator may, with the agreement of the consignor, increase his responsibilities and obligations under this Convention.</p> <p>3. The multimodal transport document shall contain a statement that the international multimodal transport is subject to the provisions of this Convention which nullify any stipulation derogating therefrom to the detriment of the consignor or the consignee.</p> <p>4. Where the claimant in respect of the goods has incurred loss as a result of a stipulation which is null and void by virtue of the present article, or as a result of the omission of the statement referred to in paragraph 3 of this article, the multimodal transport operator must pay compensation to the extent required in order to give the claimant compensation in accordance with the provisions of this Convention for any loss of or damage to the goods as well as for delay in delivery. The multimodal transport</p>			<p>pushed or towed convey, provided that the carrier complied with the obligations set out for the crew in article 3, paragraph 3, unless the act or omission results from an intention to cause damage or from reckless conduct with the knowledge that such damage would probably result;</p> <p>(b) Fire or an explosion on board the vessel, where it is not possible to prove that the fire or explosion resulted from a fault of the carrier or the actual carrier or their servants or agents or a defect of the vessel;</p> <p>(c) The defects existing prior to the voyage of his vessel or of a rented or chartered vessel if he can prove that such defects could not have been detected prior to the start of the voyage despite due diligence.</p>	<p>the jurisdictions referred to in the first paragraph of article 28.</p> <p><i>Article 33</i></p> <p>Except as provided in paragraph 3 of article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.</p> <p><i>Article 34</i></p> <p>The provisions of articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.</p>	



INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>entered into shall have full legal effect. Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.</p> <p><i>Article 7</i></p> <p>Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea.</p>		<p>operator must, in addition, pay compensation for costs incurred by the claimant for the purpose of exercising his right, provided that costs incurred in the action where the foregoing provision is invoked are to be determined in accordance with the law of the State where proceedings are instituted.</p>					

## CHAPTER – JURISDICTION AND ARBITRATION

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
<p><b><u>NO PROVISIONS ARE INCLUDED YET</u></b></p>	<p><i>Article 21-Jurisidiction</i> 1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places: (a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or (b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or (c) The port of loading or the port of discharge; or (d) Any additional place designated for that purpose in the contract of carriage by sea. 2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the</p>	<p><i>Article 26-Jurisidiction</i> 1. In judicial proceedings relating to international multimodal transport under this Convention, the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places: (a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or (b) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or (c) The place of taking the goods in charge for international multimodal transport or the place of delivery; or (d) Any other place designated for that purpose in the multimodal transport contract and evidenced in the multimodal transport document. 2. No judicial proceedings relating to international multimodal transport under this Convention may be instituted in a place not specified in para-</p>	<p><i>Article 31</i> 1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory: (a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or (b) The place where the goods were taken over by the carrier or the place designated for delivery is situated. Other courts or tribunals may, not be seized. 2. Where an action based on these Uniform Rules is pending before a court or tribunal competent pursuant to § 1, or where in such litigation a judgment has been delivered by such a court or tribunal, no new action may be brought between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the State in which the new action is brought.</p>	<p><i>Article 46-Forum</i> 1. Actions based on these Uniform Rules may be brought before the courts or tribunals of Member States designated by agreement between the parties or before the State on whose territory a) the defendant has his domicile or habitual residence, his principal place of business or the branch or agency which concluded the contract of carriage, or b) the place where the goods were taken over by the carrier or the place designated for delivery is situated. Other courts or tribunals may, not be seized. 2. Where an action based on these Uniform Rules is pending before a court or tribunal competent pursuant to § 1, or where in such litigation a judgment has been delivered by such a court or tribunal, no new action may be brought between the same parties on the same grounds unless the judgment of the court or tribunal before which the first action was brought is not enforceable in the State in which the new action is brought.</p>	<p><i>Article 28</i> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of its principal place of business, where it has a place of business through which the contract has been made or before the court at the place of destination. 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. 3. For the purposes of</p>	<p><i>Article 33-Jurisidiction</i> 1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, where it has a place of business through which the contract has been made or before the court at the place of destination. 2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. 3. For the purposes of</p>		

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.</p> <p>(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.</p> <p>3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.</p> <p>4 (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same</p>	<p>graph 1 of this article. The provisions of this article do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.</p> <p>3. Notwithstanding the preceding provisions of this article, an agreement made by the parties after a claim has arisen, which designates the place where the plaintiff may institute an action, shall be effective.</p> <p>4. (a) Where an action has been instituted in accordance with the provisions of this article or where judgement in such an action has been delivered, no new action shall be instituted between the same parties on the same grounds unless the judgement in the first action is not enforceable in the country in which the new proceedings are instituted;</p> <p>(b) For the purposes of this article neither the institution of measures to obtain enforcement of a judgement nor the removal of an action to a different court within the same country shall be considered as the starting of a new action.</p> <p><b>Article 27-Arbitration</b></p> <p>1. Subject to the provisions of this article, parties may provide by</p>	<p>not enforceable in the country in which the fresh proceedings are brought.</p> <p>3. When a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.</p> <p>4. The provisions of paragraph 3 of this article shall apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.</p> <p>5. Security for costs shall not be required in proceedings arising out of carriage under this Convention from nationals of contracting countries resident or having their place of business in one of those countries.</p>	<p>not enforceable in the country in which the fresh proceedings are brought.</p> <p>3. When a judgement entered by a court or tribunal of a contracting country in any such action as is referred to in paragraph 1 of this article has become enforceable in that country, it shall also become enforceable in each of the other contracting States, as soon as the formalities required in the country concerned have been complied with. These formalities shall not permit the merits of the case to be re-opened.</p> <p>4. The provisions of paragraph 3 of this article shall apply to judgements after trial, judgements by default and settlements confirmed by an order of the court, but shall not apply to interim judgements or to awards of damages, in addition to costs against a plaintiff who wholly or partly fails in his action.</p> <p>5. Security for costs shall not be required in proceedings arising out of carriage under this Convention from nationals of contracting countries resident or having their place of business in one of those countries.</p>				<p>paragraph 2, (a) "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air; (b) "principal and permanent residence" means the one fixed and permanent abode of the passenger at the time of the accident.</p> <p>The nationality of the passenger shall not be the determining factor in this regard.</p> <p>4. Questions of procedure shall be governed by the law of the court seized of the case.</p> <p><b>Article 34-Arbitration</b></p> <p>1. Subject to the provisions of this article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.</p> <p>2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in article 33.</p> <p>3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.</p> <p>4. The provisions of paragraphs 2 and 3 of</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>grounds unless the judgement of the court before which the first action instituted is not enforceable in the country in which the new proceedings are instituted.</p> <p>(b) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;</p> <p>(c) For the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2 (a) of this article, is not to be considered as the starting of a new action.</p> <p>5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective.</p> <p><b>Article 22-Arbitration</b></p> <p>1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.</p> <p>2. Where a charter-</p>	<p>agreement evidenced in writing that any dispute that may arise relating to international multimodal transport under this Convention shall be referred to arbitration.</p> <p>2. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:</p> <p>(a) A place in a State within whose territory is situated:</p> <p>(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or</p> <p>(ii) The place where the multimodal transport contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or</p> <p>(iii) The place of taking the goods in charge for international multimodal transport or the place of delivery; or</p> <p>(b) Any other place designated for that purpose in the arbitration clause or agreement.</p> <p>3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.</p> <p>4. The provisions of paragraphs 2 and 3 of this article shall be deemed to be part of every arbitration clause</p>						<p>this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.</p>

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
	<p>party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.</p> <p>3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:</p> <p>(a) A place in a State within whose territory is situated:</p> <p>(i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or</p> <p>(ii) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or</p> <p>(iii) The port of loading or the port of discharge; or</p> <p>(b) Any place designated for that purpose in the arbitration clause or agreement.</p> <p>4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.</p>	<p>or agreement and any term of such clause or agreement which is inconsistent therewith shall be null and void.</p> <p>5. Nothing in this article shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the international multimodal transport has arisen.</p>						

INSTRUMENT	HAGUE-VISBY	HAMBURG	MULTIMODAL	CMR	COTIF-CIM 1999	CMNI	WARSAW	MONTREAL
		<p>5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.</p> <p>6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.</p>						

**G. Working paper submitted to the Working Group on Transport Law  
at its eleventh session: Preparation of a draft instrument on the  
carriage of goods [by sea]**

**(A/CN.9/WG.III/WP.28) [Original: English]**

**Compilation of replies to a questionnaire on door-to-door transport and additional comments  
by States and international organizations on the scope of the draft instrument**

**NOTE BY THE SECRETARIAT**

**CONTENTS**

	<i>Page</i>
INTRODUCTION .....	535
I. Replies to the questionnaire from non-governmental organizations.....	536
A. International Federation of Freight Forwarders (FIATA).....	536
B. Institute of Chartered Shipbrokers (ICS).....	537
C. International Chamber of Shipping (ICS).....	538
II. Comments from an intergovernmental organization in connection with the questionnaire .....	539
A. Andean Community (Bolivia, Ecuador, Colombia, Venezuela).....	539
B. Andean Community (Peru).....	546
III. Additional statements and contributions in connection with the preparation of the draft instrument .....	548
A. From States .....	548
Malaysia.....	548
B. From intergovernmental organizations.....	548
Organisation for Economic Co-operation and Development (OECD).....	548
C. From non-governmental organizations invited by the secretariat .....	550
1. Association of American Railroads (AAR).....	550
2. International Chamber of Commerce (ICC).....	551
3. International Group of Protection & Indemnity Clubs.....	552
4. International Road Transport Union (IRU).....	555
Annex Questionnaire.....	556

**INTRODUCTION**

1. In the context of the preparation of a draft international instrument on the international carriage of goods [by sea], an important issue to be discussed by the Working Group is the sphere of application of the draft instrument. That discussion commenced at the ninth session of the Working Group (A/CN.9/510, paras. 26-34), continued at its tenth session (A/CN.9/525, paras. 25-28), and is expected to be carried further at its eleventh session. In preparation for the continuation of that discussion, the secretariat, in August 2002, circulated to interested non-governmental organizations a short questionnaire intended to gather information regarding the practice of containerized transport and the utilization of door-to-door contracts by carriers. With a view to identifying precisely the needs and wishes of the international shipping community with respect to containerized door-to-door movements, that questionnaire was

addressed primarily to representatives of the industry involved in both the sea and the land leg aspects of door-to-door transport. The questionnaire was also circulated to States and to interested intergovernmental organizations for information. It is reproduced as an annex to this note.

2. Responses to the questionnaire received from non-governmental organizations are reproduced in section I below.

3. One intergovernmental organization submitted comments to the secretariat in connection with the questionnaire. These comments are reproduced in section II below.

4. Additional statements and contributions were submitted to the secretariat by States, intergovernmental and non-governmental organizations in connection with the preparation of the draft instrument. These statements and contributions are reproduced in section III below.

5. The responses, comments, statements and contributions referred to in paragraphs 2 to 4 above are reproduced in the form in which they were received by the secretariat.

## I. REPLIES TO THE QUESTIONNAIRE FROM NON-GOVERNMENTAL ORGANIZATIONS

### A. International Federation of Freight Forwarders (FIATA)

*[Original: English]*

1. Do you feel it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

*Whilst a single liability from door-to-door may be desirable at first glance, it does not appear feasible or realistic.*

2. If so why?

*Single liability from door-to-door would conflict with existing international and national unimodal law such as CIM and CMR in the land transport sector. CMR application is mandatory if place of loading and/or place of discharge are in a contracting State. Moreover CMR and CIM include provisions for land-sea transport which would further aggravate the situation in view of the question, which regime will apply for a transport operation that includes both sea and land transportation.*

*The shippers' and transport industry developed the UNCTAD/ICC Rules some ten years ago. They deal with the central liability of the transport and include a network liability system which prevails if loss or damage can be attributed to a particular stage of transport. The system of the Rules meets the reality of commercial practice if more than one mode of transport is involved. An unrestricted network liability system has proven successful and should be retained.*

*Any single liability regime from door-to-door would lead to disharmony of international transport law, rather than unification. An international maritime liability regime should therefore only cover port-to-port ocean transport and permit an intact network liability system that takes international and national transport law into account.*

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

*The characteristics of ocean carriage on one hand, and the different kinds of land transport on the other are too different from each other to be covered by the same law.*

4. Should all of the participants in door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and other be subject to the same liability regime as the ocean carrier?

*No, for the same reason as explained under 3.*

5. Should the participants in door-to-door carriage, such as stevedores, terminal operators, truckers, railroads, ware-

house and others be subject to direct claims by cargo interests or their underwriters under a single multimodal regime for damage caused by the particular participant?

*Whilst we do not advocate a single multimodal regime, we are of the view that claims should exclusively be made against the contracting party having entered into the contract of carriage or other contracts with the shipper (see also remarks under 9).*

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carriers?

*Involvement of a land carrier in sea transport is only perceivable if the land carrier who acts as carrier has concluded the contract of carriage with the shipper for a carriage including a sea portion (Art.2 CMR). In this capacity, the land carrier is, in principle, subjected to the regime applicable on the transport portion where loss or damage occurred. For land operators subjected to CIM (railway companies in border crossing transport), the CIM liability will, in a similar way, apply to the sea transport portion.*

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst the subcontractor's custody?

*There may be cases where a shipper deals with an impeccable carrier who subcontracts other parties for the performance of the contract of carriage. However, in view of the principle of freedom of contract in this respect, any shipper has a responsibility to his own organization to ensure that his contracting party is financially viable. It is not the purpose of a Convention to protect a shipper who is not prepared to protect himself.*

10. Please take this opportunity to indicate if you have any further comments or observations to the instrument as currently drafted by UNCITRAL.

*The UNCITRAL instrument should take the form of an international convention, where, however, only the core provisions referring to sea transport, including carriers liability for loss or damage relating to sea transport on a port-to-port basis, should be mandatory. More importantly, any interference with other international conventions or national law must be avoided. If the UNCITRAL Instrument should take the form of an international Convention that supersedes such law, the number of potential Contracting States may be diminished. It will inevitably be as unsuccessful as the 1980 Multimodal Convention.*

*As regards the proposal by Canada reflected in UNCITRAL document A/CN.9/WGIII/WP23, we are of the view that option 1 and 3 would contribute to disruption of international transport law, as each State would be able to ratify*



*a different scope of regime. The proviso under option 2 that it would be difficult to establish which law applies is in our view without merit, because this question is solved by the facts of the case. CMR will apply for international road carriage, CIM for international rail carriage, or, as the case may be, the applicable national law will apply.*

***Additional comments from FIATA***

*[Original: English]*

In consequence of recent discussions at our World Congress and the possibility that our position concerning certain aspects of these questions may not be as clear as we had hoped we would like to stress the following.

With reference to question 5 we wish to ensure that it is understood that while we acknowledge the MTO as liable under the terms of the contract of carriage issued by them, we DO support the right of cargo interests and their underwriters to initiate direct claims on any participants in the door-to-door move, should they wish to do so.

With reference to question 9 we also wish to add that the obvious benefit of such a process is that which currently exists, that being the reduction in needlessly drawing parties into a litigation where there is no doubt as to the party responsible, i.e. in whose care and custody the cargo was in at the time of the damage and consequent savings in litigation costs, and likely hastening of the entire process.

**B. Institute of Chartered Shipbrokers (ICS)**

*[Original: English]*

The Institute of Chartered Shipbrokers thanks UNCITRAL for the opportunity to comment on its questionnaire relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea and has pleasure in responding as follows:

1. Yes, it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overland leg.

2. The object of drafting a new instrument covering liability in respect of carriage of goods by sea must be to re-establish the international uniformity that has been lost during the last seventy years since the Hague Rules were defined. The original rules were drafted to cover all shipped under bills of lading. In effect all traffic not covered by a private charter party contract and in particular all 'liner cargoes'. It is a matter of fact that today a large majority of liner cargo moving in the mainstream world trade is shipped on combined transport bill of lading contracts. It would therefore seem inconsistent, in the context of uniformity, to exclude the through or multi-modal transport aspects of the movement from the instrument.

3. There is no reason why the same law should be applicable to the entire transport of the goods when it is possible to determine at what point in the combined transport any loss, damage or delay took place. This works perfectly well under most combined transport regimes at present. However, when it is not possible to determine where in the combined transport the loss took place, then maritime liability scheme should apply.

4. No, this complicates matters far too much. The underlying concept of door-to-door carriage is that a carrier contracts with the cargo owner to take responsibility for the whole of the door-to-door movement. What liability regimes apply between that carrier and its subcontractors are quite irrelevant to the cargo owner.

Many of those subcontractors, railroads, terminals and truckers for example are national operators who contract only to provide a domestic service. They are not concerned that the movement, from say port to factory, is part of an international through movement. Other subcontractors such as port terminals may have all or part of their trading conditions imposed by national statute.

It seems unreasonable as well as impractical that such subcontractors should be required to operate under two different liability regimes when providing the same service.

5. Certainly not. The cargo owner contracts with the carrier identified in the evidence of the bill of lading. The combined transport industry has created numerous methods of working that utilize both subcontract and joint operational working to secure maximum efficiencies. In almost all cases the subcontractor has no knowledge of the cargo owner, or need to know. Any demand for direct access for cargo claims seems to be a request for 'double indemnity'. In fact it might be considered that permitting the contract chain to be short circuited in this way is against the public interest, in so far as it might encourage 'unreliable' through transport operators if there is an alternative route for compensation in the event of that carrier's failure.

6. This is in part answered in 3 and 4 above. It is not necessary for this instrument to have any impact on CMR or other conventions. However there is another issue identified by the question which refers to 'the land carrier'. Many, if not most, international through transport carriers today are genuine multi-modal operators. They will be involved in sea, land and air services issuing combined transport bills of lading, CMR consignment notes or air waybills. It should be possible to draft a satisfactory wording to ensure that this instrument covers door-to-door transport where the sea leg is the main international movement but excludes an international movement where for example a ferry crossing is incidental to a door-to-door road or rail transport.

7. None, but it is important that the 'sea' regime applies to door-to-door transport as set out in 2 and 3 above. The adoption of this instrument should result in there being no need for a separate 'multi-modal liability convention'.

8. In practical operational terms there are few difficulties. The Hague and Hague-Visby rules have been very well tested in most jurisdictions and there is a substantial body of interpreting law. The piecemeal adoption of Hamburg rules is responsible for much of the current lack of uniformity and also leads to jurisdiction shopping. (e.g. when a Hague or Hague/Visby country is exporting to Hamburg country). Any new instrument must meet the reasonable requirements of the major international liner carriers, some twenty of whom probably account for more than three quarters of all bill of lading general cargo move-

ments. This includes the issues relating to Hague Rules 'exceptions' and particularly 'fault in navigation'.

The only other practical difficulty concerns the 'number of packages' issue and the per package limitation when applied to container traffic. Carriers have no way of knowing or checking the number of packages contained in FCL shipper loaded containers. It is therefore illogical that the per package limitation should apply to the container contents. A possible solution is that the 'package' limitation should not apply to FCL container movements and only the limitation based on weight should apply. Alternatively 'the container' is recognized as the package with a specific (higher) limitation applicable to 'container packages'

9. No! Again see 5 above. There will be a separate contract between the carrier and subcontractor which may operate under a very different liability regime, and which is different for perfectly valid reasons of that business. It may well also interfere with the proper application of 'Himalaya' clauses.

10. Clauses 4.2 and 4.3

The comments above support the inclusion of Clauses 4.2.1 and 4.2.2 in order to incorporate door-to-door transport.

The commentary relating to clause 4.3 highlights the misunderstandings that do arise in respect of these 'mixed contracts'. It is suggested that there is a case for incorporating in the definitions of the draft instrument the two terms that are widely used commercially throughout the international industry to distinguish carriage under Clause 4.2 (Combined Transport) and that under 4.3 (Through Transport). Their incorporation would lead to some rigour in their use.

Suggested definitions, which will need legal drafting, might be:

"Combined Transport Contract" is a contract of carriage under which a carrier, against payment of freight, undertakes to carry goods from an inland place of receipt by land and by sea to an inland place of delivery.

"Through Transport Contract" is a contract of carriage under which a carrier, against payment of freight, undertakes to carry goods by sea and/or land between two named places but in addition expressly agrees that, in respect of a specified part or parts of the transport of the goods, it will be acting as an agent arrange carriage by another carrier or carriers.

Clause 5.4

The inclusion of the duty to "keep" the ship seaworthy "during" the voyage introduces unnecessary uncertainties into the new instrument, which are already covered by the duty to care for the cargo.

Clause 6.1.2

The retention of exception for fault in 'navigation' is supported. 'Management' could be removed. The reasons are:

The purely pragmatic view that without retention there will be a much harder route to securing adoption of the draft

instrument. (e.g. the fate of the 'UNCTAD Multi-Modal Convention').

Problems with the 'half world of exemption under compulsory pilotage'.

Change in the spread of risk impacting upon insurance.

The need for new case law to distinguish 'fault in navigation' from 'perils of the sea'—did the former cause the latter or v.v.

Clause 6.4

Liability for delay should only apply when time for performance is expressly agreed.

Clause 8.4

It is strongly believed that owners with vessels on time charter should benefit from the same defence as those whose vessels are on bareboat charter. In both cases the merchant is contracting with a demise charterer. Why should the registered owner of a vessel be responsible for the cargo owners' contract with the demise operator when he has no way of knowing what measure of liability he may be accepting? This clause merely encourages cargo owners to take insufficient care when entering into contracts of carriage with speculative demise charter operators.

Inclusion of door-to-door transport.

While preparing this response a further questionnaire has been received from UNCTAD which it seems is preparing to revisit the matter of the UNCTAD Multi-modal Convention. Their questionnaire raises many of the same issues that are discussed in the context of this draft instrument. **It is considered most important that there is a single convention covering port-to-port and pier-to-pier transport.**

The Institute trusts these comments prove useful to the ongoing discussions on this issue and looks forward to providing UNCITRAL with further input as may be required.

### C. International Chamber of Shipping (ICS)

*[Original: English]*

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

Yes, a legal regime applicable to door-to-door transport would be helpful. We support the development of a "maritime plus" convention based on the draft instrument prepared by CMI for UNCITRAL ("the proposed instrument").

2. If so, why?

A large part of the containerized transport of goods is conducted on a door-to-door basis. There would be little added value in developing another regime for tackle-to-tackle or port-to-port shipments. It would be remiss to ignore door-to-door transport. Provided that carriage by sea is contemplated at some stage, the provisions of the proposed instrument should apply to the full scope of the carriage.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

No. A network liability system should apply. To the extent that damage can be localised, mode specific regimes should apply.

4. Should all the participants in the door-to-door carriage of cargo, including stevedores, terminal operators, truckers, railroads, warehouses and others, be subject to the same liability regime as the ocean carrier?

No. Truckers, railroads, etc. should be subject to mode specific rules and not the same liability regime as the carrier.

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouses and others be subject to direct claims by cargo interests or their underwriters under a single multimodal regime for damage caused by the particular participant?

Not by virtue of the proposed instrument. There should be no performing carrier liability under the proposed instrument. This would seem to be essential to avoid conflicts of law. In this connection, we note that the 1980 Multimodal Convention did not contain any provisions on performing carrier liability.

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

To the extent that existing conventions such as CMR, COTIF and Montreal apply to multimodal transport, they should be excluded from the proposed instrument.

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multimodal carriage?

A uniform liability regime would create a certain amount of predictability but litigation would still be necessary to establish liability in individual cases. In practice a uniform system would give rise to considerable extra costs. The claimant would first have to settle the claim with the MTO in accordance with the uniform rules. The MTO would then have to pursue a recourse claim against the subcontractor according to another set of rules applicable to the specific mode of transport. Thus two different sets of liability rules would be involved whenever claims were settled.

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

Although we are not aware of any significant problems, it would be of great assistance to the industry as a whole to have an international convention applicable to door-to-door carriage.

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

On the contrary, we perceive considerable disadvantages. Cargo interests have the right to proceed against their contractual counterpart. To allow claims to be made against e.g. the CMR subcontractor will promote litigation and give rise to conflicts of laws problems. Far better to channel claims to the contracting carrier, who would then have recourse rights against subcontractors.

10. Please take this opportunity to indicate if you have any further comments or observations in respect of the instrument as currently drafted by UNCITRAL.

ICS supports the instrument and in particular we welcome the proposed provisions concerning the period of responsibility, delivery and contractual freedom.

ICS strongly supports application of the proposed instrument to door-to-door maritime transport. The proposed instrument provides the commercial parties with flexibility in determining the scope of the contract, including the period of responsibility. Where tackle-to-tackle transport is agreed (as will often be the case in bulk trades), the responsibility of the carrier will not extend beyond tackle and the instrument will apply. However, where door-to-door transport (or any transport beyond tackle-to-tackle is agreed, a network liability system will apply. In cases where it is not possible to establish when the damage occurred (concealed damage), the instrument will apply.

It is of great importance that sensible provisions regarding delivery of cargo are included in the proposed instrument. This will be of great value to the industry.

The proposed instrument provides an opportunity to modernize the outdated approach of firm and inflexible regulation of contracts of carriage. In principle, ICS supports the development of provisions which would allow greater freedom to the contractual parties in recognition of the commercial realities, while at the same time safeguarding the interests of third parties.

## II. COMMENTS FROM AN INTERGOVERNMENTAL ORGANIZATION IN CONNECTION WITH THE QUESTIONNAIRE

### A. Andean Community (Bolivia, Ecuador, Colombia, Venezuela)

*[Original: Spanish]*

#### *Consolidated Replies to the UNCITRAL Questionnaire Andean Committee of Water Transport Authorities (CAATA)*

##### *General Secretariat of the Andean Community*

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

*Bolivia*

Yes, it would be appropriate, provided that a fair balance can be found that takes into account the different types of risk to which multimodal transport is subject.

*Colombia*

No. The single liability scheme should not differentiate between modes of transport.

*Ecuador*

Yes, it would be helpful to have a single scheme, but the Andean Community already has such a scheme through its multimodal legislation.

*Venezuela*

From analysis of the document "Transport Law" and the discussions which have been conducted within UNCITRAL, a clear possibility has emerged of transport law governing door-to-door operations which include other modes of transport, such as land or rail transport. However, there are well-founded opinions that the draft should not be endorsed in such terms: it is argued that the proposal has not been studied by land transport organizations, or that previous attempts have been made, without success, to reach agreement, or that door-to-door operations are currently governed by the UNCTAD/ICC (United Nations Conference on Trade and Development/International Chamber of Commerce) Rules for Multimodal Transport Documents.

As is well known, Venezuela is not a party to any of the international conventions on private maritime law currently in force in all the States with which Venezuela maintains maritime trade relations; accordingly, it is not a party to the Hague Rules or the Hamburg Rules.

This is not an obstacle to considering a liability scheme for the goods carrier which covers different modes of transport so as to avoid a proliferation of different legal regimes relating to liability.

2. If so, why?

*Bolivia*

Because this would give users a sufficient and clear idea of their rights and obligations when they order a transport service.

*Colombia*

No reply.

*Ecuador*

Because a single entity would be liable for the whole voyage and for all the modes of transport used during the voyage.

*Venezuela*

Because efforts are being made to harmonize contract

regimes covering liability for the carriage of goods by sea and how they relate to auxiliary operations which have not in the past been subject to international conventions.

The draft law states that its provisions are applicable to the place of receipt or delivery of the goods when it is in a Contracting State, irrespective of whether or not it is a port, so that door-to-door shipments are covered by the draft law. This will result in a general framework covering various modes of transport, thereby ensuring legal security, and is consistent with the proposal to apply the regime to international transport.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

*Bolivia*

This would be a good option, but would be very difficult to put into practice because the risks affecting maritime transport are more serious than those affecting land transport. There are more control mechanisms for land transport, whereas with regard to maritime transport there are many issues to be considered, including risks that cannot be anticipated.

*Colombia*

No. Each mode of transport should have its own liability regime.

*Ecuador*

Different regimes should be applicable to land transport and maritime transport, because each mode of transport has its own law.

*Venezuela*

The aim of this draft instrument on transport law is to find a way to replace the regime which comprises the Hague, Hague-Visby and Hamburg Rules with a regime that covers multimodal transport by land or by rail and the transshipment of goods so as to achieve uniformity of conventions and the regulations they lay down.

In the Andean Community, specifically in the Andean Committee of Water Transport Authorities (CAATA), Resolution CAATA No. XIX.EX-91 was adopted. This resolution establishes the Strategic Plan 2001-2005 for Water Transport in the Subregion, whose general objectives include the promotion, adaptation and harmonization of maritime law in the Andean context so as to facilitate the well-regulated development of water transport.

One of the objectives which the same resolution establishes is the revision and application of international conventions and practices regarding water transport, ports and other related services.

This confirms the need to conclude a single instrument which standardizes the law relating to the transport of goods by water.

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

*Bolivia*

No. The liabilities and risks for each operator are very different, as are the mechanisms for avoiding those risks; therefore, they cannot be treated on the same basis. For example, a warehouse and a shipping company have to cover completely different eventualities.

*Colombia*

No—only if the contract of carriage is covered by the multimodal system.

*Ecuador*

They should not be subject to the same liability regime as the ocean carrier.

*Venezuela*

Yes, in the interests of the legal uniformity of multimodal transport and with due regard to amplifying the rules in the draft in order to cover the liability not only of the carrier or of the performing parties but also of other persons which no longer qualify as performing carriers. This is indicated in the draft instrument: in cases where an action is brought against any person other than the carrier, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under the instrument, provided that the person proves that it acted within the scope of its contract, employment or agency.

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouses and others be subject to direct claims by cargo interests or their underwriters under a single multimodal regime for damage caused by the particular participant?

*Bolivia*

Yes, if the source of the damage is identified, it would be a good idea for users to be able to submit their claims directly. However, this is not the spirit on which multimodal service is based.

*Colombia*

Yes.

*Ecuador*

Yes, the participants in door-to-door carriage should be subject to a single multimodal transport regime.

*Venezuela*

Pursuant to the draft instrument, the period of responsibility of the carrier covers the time and location of receipt of the goods, which must correspond to the time agreed in

the contract of carriage or, in the absence of such a provision, the time [and location] when and where the carrier or the performing party actually takes custody of the goods.

The carrier is also obliged during the period of its responsibility to preserve and care for the goods properly and carefully. Accordingly, it must maintain the condition of the goods when loading, stowing, carrying and discharging them. This may mean that the different participants in door-to-door carriage bear responsibility in the same way as the carrier bears responsibility under the scheme presented in the draft instrument during the period when the goods are in their charge.

It follows that it would be possible to adopt a single regime which establishes parameters for direct claims to be made by cargo interests and their underwriters in view of the responsibility of the above.

6. In the event that existing conventions apply to land transport, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

*Bolivia*

The land carrier should be handled separately, as is currently the case. As stated above, the risks are not the same; therefore, the liability cannot be the same either. Even the insurance procedures are different.

*Colombia*

No. Each mode of transport should have its own liability regime. However, if a single door-to-door liability regime existed, it would be applicable to all modes of transport involved in the movement of a particular cargo; that is, from receipt of the cargo up to its delivery to the agreed location, which would be covered by the multimodal system.

*Ecuador*

Transport by road has its own liability legislation and cannot be subject to the liability regime for water transport.

*Venezuela*

It is necessary to distinguish between the single liability scheme applicable to door-to-door operations and the conventions which govern land transport.

The single liability scheme may be displaced only where an international convention has been adopted as law to regulate land transport and is applicable only to the land leg of a contract of carriage by sea if the losses or damage occur solely during the transport of the goods over land. This means that if the damage occurs during more than one leg of the carriage, or if it cannot be determined where

it occurred, the single liability regime will prevail during the whole door-to-door transit period.

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multimodal carriage?

*Bolivia*

If it were possible, the advantage would be that the user would have a simpler procedure and clearer responsibility for making a claim.

*Colombia*

The multimodal transport regime establishes that the multimodal transport operator assumes full liability from the time of receipt of the goods until the time of delivery to the consignee; therefore, in the event of any damage to or loss of the cargo, the only person required to answer to the consignee must be the multimodal transport operator which signed the relevant contract. Consequently, the advantage is considerable because only one operator is answerable to the consignee for any damage to or loss of the cargo.

*Ecuador*

The multimodal transport regime provides that the multimodal transport operator assumes full liability for the carriage and creates a single liability regime. This facilitates international carriage because any claim by the owner of the cargo is made to the multimodal transport operator, and the operator for its part has to submit the damage claim in respect of the mode of transport where the damage occurred and pursuant to its domestic law.

*Venezuela*

The advantage is that although there are some conventions which are applicable to land transport, such as the CMR Convention, many contracts of carriage by sea include a land leg. It would therefore be more practical to apply the single liability scheme to all the legs of door-to-door carriage, using a uniform and harmonized regime which would cover the different modes of transport.

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

*Bolivia*

The problem is that the user has to understand many procedures in order to make a claim and the operator has many options for finding a way to avoid liability.

*Colombia*

The impossibility of identifying at what time and in which mode of transport the damage or loss could have occurred.

*Ecuador*

The fact that the owner of the cargo has to make the

damage claim in respect of the mode of transport in which the damage occurred and under the liability regime applicable to that mode of transport.

*Venezuela*

The single liability scheme could become the basis for a new single global regime for the regulation of maritime transport in terms which would meet the requirements of trade and modern technology. This suggests that any new regime must cover all legs of carriage.

The single liability scheme must therefore be adapted to the realities of modern trade, cover the whole period in which the carrier has the goods in its custody, irrespective of whether they are in port or on land, and establish rules applicable to modes of transport complementary to those for the carriage of goods by sea.

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

*Bolivia*

This would be an advantage more for the operator than for the user because damage, whether or not it results from negligence, is caused by operators subcontracted to cover part of the carriage. That is to say, most damage is caused during handling of the cargo rather than during the carriage itself. However, it is important to bear in mind that the reliability and quality of service which an operator offers is dependent on the quality of the agents and subcontractors it chooses to provide the service.

*Colombia*

We see no advantage because generally neither the shipper nor the consignee has influence or is a party to the subcontract, and they would therefore be prevented by law from taking any action against the subcontractor.

*Ecuador*

No, because the multimodal transport operator assumes full responsibility and it is easier for the owner of the cargo to direct its claim against the multimodal transport operator than against any person in any mode of transport in the chain.

*Venezuela*

The advantage is that costs can be reduced and multiple claims avoided.

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.

*Bolivia*

No reply.

### Colombia

The UNCITRAL document should govern only door-to-door carriage by sea, bearing in mind that the liability regimes which it seeks to amalgamate and update are the Hague, Hague-Visby and Hamburg Rules.

It is important that there should be a single liability regime for carriage by sea.

UNCTAD is completing studies on unification of the rules for multimodal transport.

It should be specified precisely that the draft instrument is limited to “door-to-door” carriage, otherwise it would be necessary to regulate multimodal transport activity under the same instrument, if it were accepted that multimodal transport is equivalent to door-to-door transport. That would be a very lengthy and expensive task with far-reaching consequences, and to date there has been no success in achieving uniform rules, except in the Andean Community, which has community rules in this sphere.

Article 5.3 in the Spanish version, which reads “... *el transportista puede negarse a descargar, o puede descargar, destruir o ...*” (“... the carrier may decline to unload, or may unload, destroy, or ...”), should be amended to read “... *el transportista puede negarse a cargar, o puede descargar, destruir o ...*” (“... the carrier may decline to load, or may unload, destroy, or ...”).

With regard to article 6.3, “Liability of performing parties”, relevant notes should be added to make it clear that there is joint and several liability between the carrier, the performing parties and their agents.

If we manage to progress as far as article 15, “General average”, this provision should be deleted from the draft for the same reasons as have been indicated for article 6.1.2 (a). Moreover, since this is an agreement which does not fall into the category of public treaty, it would not be legally acceptable to implicitly elevate the instrument to such a category.

It should also be noted that the limitation period for instituting judicial proceedings against the ocean carrier should follow the lines of the Hamburg Rules—that is, a maximum period of two years for instituting any judicial proceedings.

### Ecuador

The UNCITRAL document should govern door-to-door carriage by sea, because the liability regime which is supposed to be applied—the Hague, Hague-Visby and Hamburg Rules—establishes liability only for carriage by sea, and also because the other modes of transport are governed by their own legal procedures.

The aim must be to establish a single liability regime bringing together all the existing ones, because any other situation creates legal uncertainty in international trade, as is currently the case.

To that end, the following recommendations have been formulated:

1. Scope of application.—The role of the carrier in the case of door-to-door carriage should be to assume full responsibility for the contract of carriage, since this is the only way the person responsible can be fully identified and accessible.

2. Liable subject.—The carrier should be severally liable with its agent, when the agent is involved in one of the legs of carriage. Commercial agents would be excluded from this liability.

3. Liability regime.—Insofar as nautical fault should be removed as one of the grounds for the liability of the carrier, the provision in the draft which allows nautical fault to be invoked as grounds for exception from liability should be deleted.

3.1 With regard to nautical fault and the work of the pilot, it is also recommended that cases of intervention by the pilot should not be admissible as an exception, since this would represent a form of nautical fault as an exception. Similarly, exoneration from liability should not be permitted either for the carrier or for the pilot.

3.2 In the event of fire, it should be clear that the carrier should assume liability, but the burden of proof should be transferred to the existence of causes outside its control.

3.3 The envisaged option of partial liability of the carrier—under which the carrier in principle bears total liability—should be maintained.

4. Limits of liability of the carrier.—With regard to the limitations of liability of the carrier, the draft sets out a proper framework, and the only point which should be analysed is whether the level of the limits is adequate. In this regard, it is proposed that the criteria established in the Hague-Visby Rules be maintained, but that the carrier be given the opportunity to opt for the legislation of the country of origin of the carriage if the level of the limit is greater.

5. Jurisdiction.—The draft contains no rules pertaining to jurisdiction. Rules should therefore be introduced to establish the competence of the courts and tribunals in the place of destination of the cargo.

6. Arbitration.—There appears to be an assumption that the arbitrators or arbitration bodies in the place of destination of the cargo should have jurisdiction, but that the parties should continue to have contractual freedom to allow a submission to arbitration, provided that such agreement is reached after the events which caused the dispute.

7. Electronic communication.—Provision clearly needs to be made for the fact that contracts of carriage by sea may also be concluded electronically, so that there is uniform regulation of contracts of carriage, whether the contracts are concluded in writing or by digital means. Similarly, it was suggested that the word “images” in the draft be

replaced with the phrase “means or records” to make it consistent with the correct international nomenclature.

7.1 It was also suggested that the characteristics of the electronic signature be registered with the competent bodies so as to ensure the legal security of documents issued electronically. In this respect, it should also be noted that the electronic signature of the electronic record should meet the requirements of confidentiality, integrity, authenticity and non-repudiation of the data message.

### *Conclusions*

(a) UNCITRAL and the International Maritime Committee have drafted a document on door-to-door carriage which explores how to replace port-to-port carriage and which determines liability for such carriage on the basis of both the Hague-Visby Rules and the Hamburg Rules, extends door-to-door transport to cover multimodal transport and brings together in a single instrument the rules for carriage of goods by sea, trans-shipments, where applicable, whether by land or by rail, including auxiliary operations in the transport chain during both loading and unloading, and electronic data transmission.

This draft is concerned with simplifying documentation and unifying the whole legal regime with regard to liability for the carriage of goods, which would obviously benefit external trade and result in a significant cost reduction. However, it should be borne in mind that such an extensive and comprehensive document will give rise to great debate before it is adopted, and also after adoption in order to secure ratification or accession, because it addresses many issues. This underscores the difficulty of achieving unification in all these areas by means of an international agreement.

(b) With regard to establishing more balanced and equitable spreading of risks and responsibilities between the carrier and the shipper, the new rules for the international carriage of goods should refer exclusively to revising the Hague-Visby Rules and the Hamburg Rules.

The United Nations Convention on International Multimodal Transport of Goods should then be revised to bring it into line with the current situation in maritime transport.

(c) International multimodal transport should be considered as such and should continue to be governed by the legislation of the Andean Community, which has provided a complementary legal framework.

### *Venezuela*

For the purposes of this work, account should be taken of the instruments which are currently in force in Venezuela and which apply to water transport: Decision No. 331, amended by Decision No. 393 of the Board of the Cartagena Agreement (Andean Community) on multimodal transport, which is applicable to international multimodal transport when the place of receipt or delivery of the goods is in a member State of the Andean Community. This Decision is based on the liability system set out in the Hamburg Rules, which is itself based on a presumption of

fault. However, when it has been determined that the damage occurred during the sea leg or on an inland waterway, a set of grounds for exoneration similar to those in the Hague Rules is applicable, but exoneration on the grounds of nautical fault or fire is excluded.

The draft establishes a liability regime which combines the regimes of the Hague Rules and the Hamburg Rules. In fact, article 5 of the draft imposes a series of obligations on the carrier, mainly related to the loading and carriage of the goods and delivery of them to their place of destination. They also relate to the care which must be taken with the cargo during the different legs of carriage and, lastly, the action taken by the carrier (“due diligence”) to provide a ship that is seaworthy.

It is noted that the obligations take an assertive form, as in the Hague Rules. The wording is similar, although perhaps a little clearer. We note that it has still not been decided whether the requirement to provide a seaworthy ship should apply only before and at the beginning of the voyage or whether the obligation continues to apply during the voyage.

We share the view that the obligation to provide a seaworthy ship should be maintained, as established in the Hague Rules; that is to say, it is an obligation that should be fulfilled before and at the beginning of the voyage. Despite the existence of the International Safety Management (ISM) Code and the safe shipping requirements, the obligation could be very difficult to enforce if it is imposed during the whole voyage by sea.

On the other hand, article 6 of the draft establishes a liability regime based on the presumption of fault of the carrier in the event of damage to, loss of or delay in delivery of the goods: the carrier is held liable unless it demonstrates that neither its own negligence nor that of the performing party caused the loss or damage (art. 6.1.1, option I (a)).

This part of the draft is based on article 5.1 of the Hamburg Rules, although the two rules are not identical.

However, the draft also sets out (art. 6.1.2) a series of circumstances which, if proved by the carrier, would establish the presumption of absence of fault on the carrier’s part and would discharge the carrier from liability. This set of 11 grounds for exoneration contains some minor departures from the set contained in the Hague Rules and we have no hesitation in agreeing with it.

It should be pointed out that the regime of the Hague Rules establishes the circumstances in question as grounds for exonerating the carrier from liability, whereas in the draft instrument they are seen as creating a presumption of absence of fault on the carrier’s part, as a direct exoneration.

We believe it would be appropriate to study in depth the legal implications of this change, especially as our new Maritime Trade Act (art. 206) is based on the Hague Rules, establishing that the circumstances it sets out are grounds for exoneration. The analysis should take into account the



fact that the draft establishes a number of obligations which the carrier must fulfil and a presumption of fault in the event of damage, loss or delay; and therefore the creation of a new opposite presumption in cases where the circumstances referred to in article 6.1.2 are proved seems too complex and difficult to apply in our legal system.

We would like to point out that in Venezuela, with regard to obligations of result, as covered by article 6.1.1, the carrier would be exonerated by providing proof of non-attributable extraneous cause, which is equivalent to providing proof of fulfilment of contractual obligations (art. 5 of the draft) and proof that the damage, loss or delay was due to one of the grounds for exoneration established by article 6.1.2 of the draft.

For these reasons, we believe that grounds for exoneration should not be regarded as presumptions in the carrier's favour, but as genuine cases of exoneration from liability.

The draft also contains an article in brackets (art. 6.1.2) which would establish direct exoneration (not as a presumption of absence of fault) on the grounds of nautical fault (default of the master, crew or pilot in the navigation or in the management of the ship) and the fire exception.

As indicated in the explanatory text, the proposal in brackets is a cause of major division between those in favour of one or other position.

In 1996 Venezuela, as a member of the Andean Community, opted to remove nautical fault and the fire exception as grounds for exoneration; this is set out in Decision No. 393, which takes precedence in the international sphere in cases relating to multimodal transport.

However, during consultations in the Venezuelan Association of Maritime Law, the Association expressed its support for including the nautical fault exception and the fire exception among the grounds for exonerating the carrier. In the light of this, we should consider in greater detail whether it would be appropriate to conclude an agreement which includes those exceptions; if such an agreement is adopted, Decision No. 393 should be amended to bring it into line with the agreement's provisions.

Article 6.1.4 of the draft is in brackets. It refers to cases in which damage, loss or delay is caused in part by the fault of the carrier and in part by an event for which the carrier should not be held liable, and is based on the assumption that the carrier would be liable only to the extent that its fault had contributed to the damage, loss or delay in delivery.

In our opinion, this provision should not be accepted because, in cases where the carrier fails to fulfil its obligation to carry and deliver the goods, it should be liable for all the damage caused. This is the system under our law.

It should be pointed out that this draft provision is based on article 5.7 of the Hamburg Rules, and that the inclusion of such a provision in those Rules is understandable because the liability regime which it establishes is so strict.

However, that is not the case with the draft instrument, which sets out a regime that is more flexible and favourable to the carrier's position.

### *Electronic commerce*

At the Assembly of the International Maritime Committee in Singapore, it was agreed that the International Subcommittee should work on drafting rules which would include principles and provisions to facilitate electronic commerce. The May preliminary draft was revised by the Working Group on Electronic Commerce and the draft instrument incorporates the provisions recommended by the Group.

The draft instrument should apply to all contracts of carriage, including those which are concluded electronically. To achieve this goal, the draft is medium-neutral and technology-neutral. This means that it should be adaptable to all types of system, not only those based on a registry, such as the Bill of Lading for Europe (BOLERO). It should apply to systems operating in a closed environment (such as an intranet), as well as to those operating in an open environment (such as the Internet). Care should also be taken to ensure that the draft instrument is not limited to the technology currently in use, bearing in mind that technology evolves rapidly and that what seems impossible today is probably already being planned by computer system (software) programmers.

One of the aims of the draft instrument is to remove the "paper obstacle" to electronic transactions by adopting the relevant principles of the UNCITRAL Model Law on Electronic Commerce of 1996.

One way of achieving this aim is simply to define the word "document" in such a way as to include information recorded or archived in any medium. This would cover information kept in electronic form as if it were in writing on paper. Some people think that this is the best solution, but since there still exists a widespread feeling that "document" means paper, different terms have been used to facilitate the conclusion of contracts by electronic means or the conclusion of contracts evidenced by messages communicated electronically. The expression "electronic record" has been chosen as a relatively neutral one. "Contract particulars"<sup>1</sup> is regarded as an appropriate expression which can easily be applied to the special conditions set out in a transport document or an electronic record.

Chapter 2 contains general rules relating to consent. This means, firstly, consent to issue and use an electronic record and, secondly, when a transport document is issued, consent communicated or expressed electronically to exchange information and notices such as those covered by articles 6.9.1 and 6.9.2. There is also an article covering cases in which the parties wish to opt by a particular means to replace an electronic record with a paper document or vice

<sup>1</sup>The term "contract particulars" has been translated as "*condiciones del contrato*", although it can also be translated as "*clausulado del contrato*", "*cláusulas específicas del contrato*" or "*cláusulas especiales del contrato*".

versa. This is permitted only if there is mutual consent and under strict conditions. This problem is mentioned in the CMI Rules for Electronic Bills of Lading. Lastly, chapter 2 contains rules of procedure which must be agreed and included in the contract particulars that appear in a negotiable electronic record. On this point there is no generally established custom, uniformity or predominant system. Such rules are therefore necessary in order to ensure that there are no misunderstandings concerning either the transfer of electronic records or the action necessary in order to obtain delivery as the holder of an electronic record.

The draft instrument adopts the proposal that negotiability can be achieved and effected electronically. The concept of exclusive control of the electronic record should be consistent with the concept of negotiability. It is certainly just as consistent as the physical possession of a piece of paper. This provision would therefore put electronic records on an equal footing with transport documents, and has been introduced solely for that reason; it would also put negotiable transport documents on an equal footing with electronic records. It was appreciated that different interpretations of negotiability in different jurisdictions might make it impossible to determine whether an electronic record could currently be seen in all jurisdictions as capable of covering what should be understood as effective negotiability. However, in view of the rapid national and international advance of electronic commerce and of laws on electronic commerce which seek to introduce parity between electronic media and paper, it was considered that the rules were acceptable.

One of the arguments and ideas considered was that negotiable documents were no longer necessary, whether on paper or in the form of an electronic record, and that in any case the central focus should be on the transfer of rights (the right to obtain delivery or the right of control) in a contract of carriage without documentation. With regard to the first point, this view is based on the fact that the financing of air transport in any form is hampered by the use of air waybills. The popularity of sea waybills<sup>2</sup> was also mentioned. Nevertheless, there are certainly many markets where negotiable documents are used. The draft instrument must ensure that nothing prevents the use of electronic records to evidence such contracts of carriage in the future. The instrument also clearly establishes that the transfer of rights in contracts of carriage may be done electronically.

These rules are consistent with the UNCITRAL Model Laws on Electronic Commerce (1996) and Electronic Signatures (2001), which, to some extent, provided the basis for the Venezuelan Act on Data Messages and Digital Signatures. Only if the validity of documents transmitted electronically is recognized will it be possible to overcome the legal obstacles to implementing electronic commerce in countries where records are traditionally kept in writing, such as Venezuela. Venezuela therefore approves the rules on electronic commerce contained in the draft instrument.

<sup>2</sup>This term has been left in the original English because it is difficult to define the terms "air waybill" and "sea waybill". They could, however, be translated respectively as "non-negotiable air and maritime transport documents".

## B. Andean Community (Peru)

[Original: English]

We acknowledge receipt of the questionnaire prepared by the International Trade Law Commission of the United Nations? UNCITRAL—regarding the draft instrument that would govern the international carriage of goods.

Moreover, as the Peruvian General Direction of Aquatic Transportation we will point out our views on the matter on each of the questions.

1. Do you feel that it will be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

Considering that door-to-door shipments are increasing fast and this will probably be the predominant form of transportation in the near future, we consider it will be desirable and helpful to have a single liability scheme. However, we believe that the project involves issues covered by several conventions which have not been yet approved by many countries. Thus, a consensus is almost a utopia.

2. If so, why?

As previously stated, we consider that the draft instrument proposed is too ambitious and too many conventions are being put in one instrument alone. This will mean that it will be almost impossible that countries will approve it.

As a matter of fact the draft covers issues regarding the responsibility of ship owners for goods carried on vessels, which are actually regulated principally by Hague, Hague-Visby and Hamburg Rules. Just on this issue there is no consensus in our country and/or within the Andean Pact.

Likewise, the draft covers new issues which were not included in the above mentioned rules, as for example electronic bills of lading and general average.

Moreover, a liability regimes for a door-to-door transportation involves the inclusion of a regime for land transportation which is usually regulated by local law.

We will suggest to follow Professor William Tetley's Two Track approach (<http://tetley.law.mcgill.ca/unctad>): a) A fast track involving a new port-to-port convention which could be a mixture between the Hague-Visby and Hamburg rules and trying to maintain the balance between shippers and carriers. This will cover the sea leg being governed by international law; and, b) A slow track, which will involve the most controversial issues and be optional to the states covering the land transportation and that is usually governed by local law.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

Yes. A unique international law governing the entire transport of the goods is highly desirable, as this will bring certainty of law, promote commerce, judgements could be enriched by several jurisprudence, lower legal costs, etc.

However, as mentioned in the previous paragraphs, the draft is too ambitious and some issues like land transport of goods is usually governed by local law. Thus, convincing countries not to apply their local laws will probably make the convention unreachable. However, the possibility that claimants and/or defendants be able to choose the jurisdiction and applicable law shall remain open.

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

Not necessarily. There are certain risks which are inherent to sea transportation which are not applicable to land transportation and vice versa. Accordingly, liability should not be measured using the same ruler.

However, liability issues like calculation of indemnity amounts could be applicable to all of them and a consensus on these points could bring more commerce due to the certainty of law. At least on some aspects—lower legal costs, and knowledge of problems of similar or identical nature solved in other countries. This will allow that users to be more confident in using the system.

5. Should the participants in door-to-door carriage such as the stevedores, terminal operators, truckers, railroads, warehouses and others be subject to direct claims by cargo interests or their underwriters under a single multi-modal regime for damage caused by the particular participant?

Yes. However, this shall remain as an option of the claimant and not be compulsory. The claimant shall have the option to choose whether to make its claim directly to the carrier and the latter claim against the subcontractor in subrogation-, to the subcontractor if the damage/loss is clearly under the period that goods were under the subcontractor's liability or to both of them.

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

It is desirable for the land carrier to be subject to the same liability regime as the ocean carrier, although some of their risks may not be shared. However, as stated having all in one convention is unlikely to be approved by the majority of countries the conventions for the moment should remain independent. The two track approach suggested could help achieve this.

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multi-modal carriage?

The main and obvious advantage would be that the regime will be simpler to understand by its many users. This will provide better understanding and developments of law, lower legal costs. As consequence this will bring confidence on the system and development of commerce in general.

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

In countries as ours mainly confusion and awareness by cargo interests of the applicable laws, liability regimes, which make it difficult for the users to collect or sue the carriers. However, this is not the only problem; local judges are not specialized in maritime and/or transportation matters and do not follow in approved international conventions. This brings even more confusion not only to cargo interest but also to carriers, making trading and commerce more expensive due to the uncertainty.

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

Yes. This could probably reduce costs, making commerce more effective. If subcontractors could be sued for damages or loss that occurred whilst in their custody, first they will have the opportunity to find alternative dispute resolution methods to settle the claims, which could be convenient for all the parties without them having to be sued once the carrier's liability is established by a court of competent jurisdiction or an arbitration tribunal. This will evidently reduce legal costs.

Likewise, cargo interest or underwriter in some cases could consider more convenient to sue locally, rather than having to sue an overseas company. As the chain of claims will be smaller, higher indemnities which could benefit all at the end of the day could be obtained due to lower costs and fewer trials and negotiations.

However, as stated before, this shall remain as an option of the claimant.

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.

We agree that this will be a good and desirable document. However, we believe that it will be unrealistic to consider reaching a success as many countries would not be able to ratify it. Taking out some difficult issues will allow achieving the success of the convention whilst more conversations are necessary to reach the desirable one. Therefore, we believe that a two-track approach shall be followed.

### III. ADDITIONAL STATEMENTS AND CONTRIBUTIONS IN CONNECTION WITH THE PREPARATION OF THE DRAFT INSTRUMENT

#### A. From States

##### *Malaysia*

*[Original: English]*

Please note that the comments are not conclusive as Malaysia has yet to receive some of the other relevant documents.

i) Port-to-port transport operations (international carriage of goods by sea) **cannot** be equated and expanded to door-to-door transport operations. They are different and have to be dealt with separately taking into account the different status and land transport regimes and legislation of various countries, particularly the non-members. Due cognizance must be given to the possible dangers of extending maritime transport rules to land transport, more so to those of the developing countries.

ii) In view of the rather limited numbers of countries being members, the intention of the international instrument being prepared to be possibly considered as an international treaty is rather premature and unreasonable and perhaps at best it could be proposed as an international convention by the United Nations.

#### B. From intergovernmental organizations

##### *Organisation for Economic Co-operation and Development (OECD)*

*[Original: English]*

##### *Background*

The Workshop on Cargo Liability was organized by the Maritime Transport Committee to assist in the modernization of current regimes and to bring some additional clarity on steps that may be taken in order to bring about a new regime that may be more widely acceptable to both governments and industry. It was hoped that this effort from the OECD would not result in further proliferation of regimes, but rather that it would encourage a convergence of views to further harmonize international practices.

The approach taken in preparation for the Workshop was to commission a consultant to analyse a range of existing regimes, and identify those issues where there is still considerable disagreement amongst the various parties affected by these regimes. The consultant's document, which formed the basis of the discussion at the Workshop, is available on the Maritime Transport Committee's web site at: <http://www.oecd.org/dsti/sti/transport/sea/index.htm>

##### *The Workshop*

The MTC's Workshop was held on 25-26 January 2001, and brought together approximately 120 participants from governments and industry from OECD countries. A number of international intergovernmental agencies with an interest in cargo liability issues were also represented.

The Workshop was chaired by Mr Alfred Popp, Senior General Counsel in the Canadian Department of Justice. Mr Popp is currently also the Chairman of the Legal Committee of the IMO.

Participants at the Workshop, while obviously representing their governments and organizations, were invited to participate and speak in a personal capacity. This was because the Workshop was simply an avenue for exchanging views on the issues identified by the consultant, in order to establish whether there might be some common ground or convergence that may offer an avenue to a future diplomatic conference to resolve some of these hitherto divisive issues.

The individual views of participants have not been recorded, and all statements were made on a non-attributable basis. Similarly, the outputs from the Workshop do not necessarily reflect the views of either the MTC's member governments, nor of the industry representatives present.

However, the points covered in this report on the Workshop are offered to interested parties, be they governments, industry, or international organizations that may in the future consider hosting or participating in diplomatic conferences to review cargo liability, as representing the end result of deliberations between these parties.

While these outcomes are not binding on any party, they may nevertheless offer some guidance as to the policy outcome that may be necessary to maximize the formulation of a more comprehensive, and generally acceptable form of cargo liability regime. If nothing else, they may offer guidance on alternative texts that may in the end represent acceptable compromise solutions.

##### *Matters where the Workshop found general agreement:*

##### *Issue A: Loss due to delay*

It was noted that this had traditionally been a divisive issue. However, there was agreement that delays should be covered by a new regime where timing of delivery is subject to special contractual conditions. In addition, thought might be given to including provisions for delays at large.

##### *Issue B: Application to different transport documents*

Any new regime should cover not only traditional bills of lading, but also other non-negotiable contracts of carriage, but excluding charter parties.

##### *Issue C: Application to electronic or other transactions*

A new regime should be fully compatible with modern electronic commerce, including the Internet.

##### *Issue D: Recognition of performing and contracting carriers*

On balance there was support for including the notion of the performing carrier in a new regime, while at the same time not giving up the principle of making claims upon the contracting carrier, nor allowing the contracting carrier to

avoid liability by virtue of having subcontracted the carriage to another carrier.

However, there were concerns that the definition of performing carrier contained in the CMI draft may be too broad, and the Hamburg Rules definition may provide a better basis.

*Issue E: Application to live animals and deck cargoes*

*Live animals*

The strong majority of speakers were against inclusion of live animals in a new regime because of the specialized nature of the cargo. However, it was recognized that there was need for further consultations with both carriers and shippers of live animals.

*Deck cargo*

Deck cargo should be covered without special provision in the case of containerized cargo, thus following today's business practices. Non-containerized cargo should be covered subject to the clarification of the carriers' and shippers' duties and rights along the lines of the Hamburg Rules.

*Issue F: Application of regime to both inbound and outbound cargoes*

There was very strong support for the proposal that goods bound for a contracting state should be covered even if the port of origin is in a non-contracting state.

*Issue K: Documentation*

Participants noted that this is a technical issue for consideration by experts, and that the only relevant policy issue is that information regarding vessel and cargo contained in such documentation must be totally reliable. Some comments made under Item I may be also relevant here.

*Issue L: Period of notice to notify loss or damage*

This was recognized as a technical issue which could only be resolved through discussion with practitioners to ensure that any limitations reflect modern business practice.

However, within the general view there was considerable support for tight limitations, although some felt that the Hague-Visby 3-day limit in cases where damage was not apparent should be extended.

*Issue M: Timebar limits on initiation of legal proceedings*

Again, there was considerable support for a tight limitation period as in Hague-Visby, but with appropriate provisions for recourse action and consideration of provisions covering suspension and interruption of those limitations.

*Issue N: Explicit provisions for arbitration or other forms of dispute settlement*

A new regime should make provision for parties to agree to settle disputes by arbitration or other forms of dispute resolution.

*Issue O: Forums in which proceedings can be brought*

There was very strong support for a specific list of forums, or rules for selecting a forum, to be available to the claimant, along the lines of those provided for in the Hamburg Rules, although these could be relatively tightly defined in order to minimize forum shopping.

However, any list should be carefully scrutinized to ensure it was appropriate to multimodal journeys if the new convention extends coverage to them.

*Matters where the Workshop found convergence but not general agreement::*

*Issues G and H: Extent of coverage of regime, including multimodal legs*

The most general consensus was that the new regime should take as its first priority the improvement of the regime governing the maritime leg of the journey.

However, it was also generally recognized that under modern business practice multimodal journeys are becoming more important. Therefore, how the new maritime regime could be made to fit in with other modes of transport should be further studied.

Any such extensions should fully recognize and address possible conflicts that may arise with other international conventions or national laws.

The possibility of addressing this issue by providing a "default" liability regime where there is uncertainty as to which regime should apply, ought not to be ignored.

*Issue I: Allocation of responsibilities between carriers and shippers*

There was substantial agreement that the criteria proposed by the consultant formed a useful basis on which to judge the allocation of responsibilities. These criteria were:

a) It must be conducive to the public policy aims of member governments (e.g. on trade facilitation, maritime safety, etc).

b) It should have the prospect of early acceptance and uniform implementation worldwide and especially by the world's main trading and shipowning nations.

c) It should be as clear and as certain in its interpretation as possible.

d) It should provide for an efficient and economical distribution of insured risk.

e) It should make for convergence with the cargo liability regimes in force for other transport modes.

There was also substantial agreement that there should be a balanced allocation of responsibilities which recognizes the rights and obligation of both carriers and shippers.

The thrust of the discussion indicated that with this balance the removal of nautical fault and other exemptions could receive support, although some notes of strong caution were sounded about the possible effects of its removal.

There was clear recognition that a balanced allocation of rights and obligations of both carriers and shippers was important also in the light of maritime safety and sustainability, especially with respect to the prevention of accidents.

There was also substantial evidence to suggest that a more stringent allocation of responsibility along the lines of the Hamburg provisions may in the end receive support, perhaps with a listing of specific defences.

In all cases there should be counterbalancing obligations on shippers to ensure there was an adequate duty of disclosure:

a) On special features of the goods that are relevant to their handling and carriage—in particular any dangerous qualities and any special precautions appropriate; and

b) As required by the shipment's documentation in accordance with legal and administrative requirements, and as necessary for delivery of the cargo to consignee in accordance with the contract of carriage.

Shippers should be liable for any damage or expense caused to the carrier or others:

— By their failure to meet these obligations, or

— By the goods themselves, if due to the shippers' fault or neglect.

Some careful attention should also be given to the burden of proof.

#### *Issue J: Monetary limits*

The matter of monetary limits is one that can only be resolved by a diplomatic conference.

Before considering new monetary limits it would be advisable for the sponsoring agency, as part of preparatory work for a diplomatic conference, to commission an independent study on the changes in the value of money since the limits were fixed in the Hague-Visby Rules.

During the course of discussion, a suggestion that "package" limits should be removed received little support, but it was recognized that this could be reconsidered if a new regime was extended to cover multimodal legs.

There was also strong support for the proposition that there should be a provision included in a new regime for the review of limits by "a tacit amendment procedure", perhaps by drawing from existing provisions in other related conventions.

#### *Additional matter*

During the course of the Workshop, the issue that freedom of contract should be a feature of any new convention

received strong support from industry representatives. However, those government representatives that spoke tended to reflect the view that the unification of international transport law could be effective in providing a minimum or basic standard only if the provisions contained in these conventions were mandatory. Freedom of contract might however be restricted only in cases where general conditions were used.

### **C. From non-governmental organizations invited by the secretariat**

#### **1. Association of American Railroads (AAR)**

*[Original: English]*

#### *Comments on behalf of the association of American Railroads<sup>3</sup> relating to the preliminary draft instrument on the carriage of goods by sea*

On 16 September 2002, the Working Group on Transport Law established by the United Nations Commission on International Trade Law (UNCITRAL) will meet to review the Preliminary Draft Instrument on the Carriage of Goods by Sea (Draft Instrument). The proposed Draft Instrument would serve to make substantial changes with respect to laws involving the carriage of goods by sea: and presently contemplates, in part, that its application extend to the inland portion of transportation subject to a contract for carriage by sea.

The U.S. and Canadian railroad members of the AAR have serious concerns over the application of the Draft Instrument to rail transportation. There is already an existing and well-established system in the U.S. and Canada which governs the liability of rail carriers for loss and damage to goods transported and the rights and obligations of both the rail carrier and the shipper. This system was promulgated by legislation and developed through litigation and regulatory agency action interpreting and applying the legislation.

Fundamental to the system in the U.S. and Canada as it relates to rail transportation in connection with a movement by sea is the right of each ocean carrier to enter into an agreement with the rail carrier that allows the ocean carrier to choose the level of protection it needs and desires for its cargo. (Also central to that system is that rail carriers compete with each other over the terms and conditions offered to each ocean carrier.) In that regard, the rail carrier has privity of contract only with the ocean carrier when transporting containers having a prior or subsequent movement by sea.

Original legislation setting forth the rail carriers' obligations with respect to loss and damage of cargo codified common law rules that a rail carrier was a "common carrier" and, as such, was liable for the full actual loss caused by it as a result of loss, damage or delay in the trans-

<sup>3</sup>The Association of American Railroads (AAR) is an association of railroads which includes among its members all of the large freight railroads in Canada, the United States and Mexico as well as passenger railroads that operate the U.S. intercity passenger trains and that provide commuter rail service.

portation of property.<sup>4</sup> Under the system applicable in the U.S. and Canada, as common carriers, railroads were required to transport commodities tendered to them upon reasonable demand. In addition, based upon the legislation in the U.S. and Canada, common law as well as state law remedies and causes of action such as negligence, fraud, negligent misrepresentation, bailment, and deceptive trade practices, have been consistently held to be preempted by federal case law.

Subsequent legislation in the U.S. and Canada provided the railroads with the opportunity to enter into contractual arrangements with shippers which could alter the rail carriers' otherwise statutory common carrier obligations. Parties to a transportation contract could negotiate terms relating to liability which, for example, could provide for shorter terms for filing claims and for lesser liability than would otherwise be required by statute. To the extent that a rail carrier contracts to move cargo under a transportation contract, the liability of the rail carrier (which may, as an alternative, be full "common carrier" liability) is established by the contract between the railroad and the ocean carrier.

As a result, the U.S. and Canadian railroads' practice today is to have transportation contracts with ocean carriers called "circulars" that vary by carrier, but generally establish liability limitations, set forth affirmative defences, and include provisions addressing unlocated loss and damage filing procedures, and the offering of alternative full "common carrier" liability terms. Other terms are set forth which may include those affecting liability, privity of contract, prohibited commodities and equipment, and shipper requirements. Also customarily included in railroad circulars governing transportation of containers having a prior or subsequent movement by sea are terms incorporating limitations on liability set forth in the transportation contract or bill of lading between the ocean carrier and the shipper. Intermodal shippers (i.e. ocean carriers) currently have the ability to accept the provisions of these "circulars" or to enter into an agreement that has its own distinct rules and rate quotations to address their individual needs.

A critical feature of the contractual relationship, whether in the context of a circular or an individual contract, is that a claim for loss or damage can be brought against the railroads only by ocean carriers because the railroads do not have privity of contract with any other party in the transportation chain, including the shipper. This contractual relationship also provides for venue and jurisdiction terms which restrict suits for damage against the rail carrier in foreign jurisdictions. The end result is that the U.S. and Canada already have in place a uniform and well understood system of handling rail freight loss and damage claims which meet the needs of the parties involved.<sup>5</sup>

<sup>4</sup>Common carrier liability provisions in the U.S. (the "Carmack Amendment") are found at 49 U.S.C. § 11706 and in Canada in the Railway Traffic Liability Regulations.

<sup>5</sup>It should be noted that with respect to U.S. rail transportation, the U.S. Supreme Court has recognized that a primary purpose of the Carmack Amendment (i.e. the statute providing the underpinning upon which the system of liability for loss and damage to transported goods is based) was to relieve shippers of the burden of searching for the responsible carrier from among those in the transportation chain. (*Reider v. Thomson*, 339 U.S. 113 (1950).)

The Draft Instrument would, however, significantly and adversely alter the current system affecting the U.S. and Canadian rail carriers' liability for loss and damage for goods having a prior or subsequent movement by sea. Specifically, Section 4.2.1 would extend the scope of the treaty to the inland portion of a sea movement and Section 6.3.2, which includes a railroad as a "performing party", would subject railroads to the liability terms standardized by the Draft Instrument. As a result, the U.S. and Canadian rail carriers would be required to accede to more onerous liability terms with no identifiable offsetting benefits.

Terms of the Draft Instrument would adversely modify the current system applicable to U.S. and Canadian railroads. These adverse changes would, in part, limit the rail carriers' ability and right to negotiate or offer individual contract terms including, for example, those relating to liability limitations on a per-package or per-container basis as an alternative to full common carrier liability (Section 6.7.1), weaken or eliminate requirements for privity of contract with the ocean carrier (Section 1.5), open land carriers to litigation in foreign jurisdictions (Article 17), restrict the participants' ability to govern their liability as a "performing party" (Section 6.3.1), and modify responsibility for blocking and bracing (Section 6.3.1(b)(ix)).

Accordingly, the U.S. and Canadian railroad members of the AAR strongly oppose the scope of the Draft Instrument as presently written. Consistent with the concern raised by the United Nations Economic Commission for Europe and the United Nations Conference on Trade and Development in their comments on the Draft Instrument (UNCITRAL document *A/CN.9/WG.III/WP.21/Add.1*), expansion of the scope of the Draft Instrument beyond port-to-port transportation should not be undertaken without a thorough review and the resolution of all the issues involved with such an expansion of scope.

It is the position of the U.S. and Canadian railroad members of the AAR that an Instrument relating to liability for goods transported by sea should take into account the issues of concern to the U.S. and Canadian railroads and be drafted to clearly and distinctly avoid adversely affecting: (1) the current contractual arrangements between ocean carriers and rail carriers with respect to the inland portion of a movement of goods also transported by sea, and (2) the rights and responsibilities of the parties to such contractual arrangements. The Draft Instrument's scope should therefore not be extended to apply to the land portion of any cargo transportation to the extent it adversely affects the current liability system applicable to U.S. and Canadian railroads.

## 2. *International Chamber of Commerce (ICC)*

*[Original: English]*

*Comments submitted by the Commission on Transport and Logistics of the International Chamber of Commerce on the United Nations Commission on International Trade Law (UNCITRAL) draft instrument on transport law*

The International Chamber of Commerce (ICC) believes that trade by sea would be facilitated by a uniform, inter-

national ocean cargo liability regime, updated to take into account modern developments in transportation and logistics. ICC notes that a Working Group of the United Nations Commission on International Trade Law (UNCITRAL) is now considering a draft instrument on transport law, which includes provisions that comprehensively address issues relating to ocean cargo liability. ICC commends this effort, and looks forward to contributing to this initiative, which is driven by a desire for greater uniformity of ocean cargo liability regimes.

ICC's Commission on Transport and Logistics represents all segments of the international transport industry, including shippers, vessel operators, freight forwarders, carriers and insurers in over 130 countries. ICC aims to promote an open international trade and investment system and the market economy worldwide. ICC also facilitates trade by providing arbitration services and by developing voluntary rules such as the ICC Incoterms, the ICC UCP 500 and, together with UNCTAD, the UNCTAD/ICC Rules for Multimodal Transport Documents.

A variety of regimes currently govern liability for cargo loss or damage that occurs during international ocean carriage. The most prominent among those regimes are the "Hague Rules" of 1924 and the "Hague-Visby" rules, which were adopted in 1968. Other cargo liability regimes include the Hamburg rules and the Scandinavian Maritime Codes. In general, however, none of these regimes takes full account of modern developments in international trade such as containerization, multimodal transport, just-in-time delivery and e-commerce.

ICC believes efforts by UNCITRAL to develop principles for a new international cargo liability regime are desirable and commendable. Because the issue of cargo liability regimes for maritime transport is by its very nature an international issue, any new standard in the area should entail substantive consultations with all relevant industry representatives.

In developing a new, uniform international ocean transportation cargo liability regime, ICC's Transport Commission supports a regime that would:

Contribute to the harmonization of liability regimes for door-to-door and maritime transport;

Update and clarify the burdens of proof for all parties and defences of a carrier or intermediary against whom a claim is made;

Permit parties entering into customized ocean transportation contracts to agree to depart from the requirements of the international ocean transportation cargo liability regime;

Allow for adjustment of the Hague-Visby liability limits over time;

Establish procedures and provide clarity of rights and obligations regarding cargo liability to minimize the burden on international trade resulting from excessive litigation; and

Adopt modern and appropriate provisions governing other matters of importance for liability in the interna-

tional transportation of goods, including forum selection, qualifying clauses by carriers, shipper obligations and others.

### 3. *International Group of Protection & Indemnity Clubs*

*[Original: English]*

#### *Submission of the International Group of P&I Clubs*

1. The International Group of P&I Clubs (IG) is comprised of thirteen P&I Clubs that between them insure some 90 per cent of the world's ocean-going tonnage. The Clubs are non-profit making mutual organizations. That is the member shipowners insure one another on an indemnity basis against a variety of third party liabilities relating to the use and operation of ships, including liability for loss of and damage to cargo.

#### 2. Scope of application

(a) UNCITRAL was established with the general mandate of furthering the harmonization and unification of international trade law. Its initiative in seeking to develop a new convention that will govern the international carriage of goods involving carriage by sea is broadly welcomed by the maritime industry having regard to the proliferation of international conventions and domestic legislation in force in different jurisdictions, governing this mode of carriage. Lack of uniformity inevitably detracts from commercial and legal certainty, which is important to all parties engaged in the international carriage of goods.

(b) UNCITRAL is intending to devote a part of the eleventh session of Working Group III to a discussion on the scope of the Draft Instrument that is presently under consideration by the Working Group.

(c) Traditionally sea carriers contracted tackle-to-tackle, their responsibility under relevant maritime conventions being limited to the sea carriage, although they were free to assume responsibility for ancillary movements of the goods prior to loading and post discharge, normally within the confines of the loading and discharge ports. Current commercial and insurance practice as well as existing maritime conventions is generally structured to provide for this traditional type of carriage. However, although the majority of bulk and break bulk cargoes are still moved in this way and continue to predominate in tonnage terms, containerized cargo which now accounts for a very high percentage of cargo movements, is frequently carried on a door-to-door/multi-modal basis, that is carried by more than one mode of transport but under a single contract.

(d) The Rules of IG Clubs provide that liability will be excluded, should the carrier contract for sea carriage on terms less favourable than the Hague/Hague Visby Rules. However Clubs will also provide cover in respect of liabilities incurred under a door-to-door contract involving a sea leg, under which the shipowner assumes responsibility for the whole of the carriage, including that performed by some mode of transport other than the entered vessel e.g. road or rail. Such cover is however subject to the contract



first being approved by the Club, which will normally only occur if the member contracts on terms no less favourable than any legislation compulsorily applicable to such other mode of transport, e.g. CMR. A shipowner is required to preserve his rights of recourse against other parties involved in the performance of legs, other than the sea leg.

(e) If door-to-door carriage were excluded any new convention would in the IG's view be of little assistance to the industry, merely resulting in a further convention of restricted application in an area of international law which is overburdened with competing legislation, creating further disharmony. In such circumstances it seems to the IG that it would be unlikely to attract widespread support from States.

(f) If the Instrument extends to door-to-door transport the question arises whether it should operate on a uniform or network basis, particularly in relation to its liability regime. (The IG is in agreement with the great majority of delegates that the liability regime should be fault based, as is provided for in the draft Instrument). In the former the Instrument's provisions on liability would operate throughout the carriage, that is during both the sea and inland leg(s) of the carriage irrespective of the mode of transport employed. In the latter the instrument would be displaced by any international convention compulsorily applicable to the inland leg(s), generally a uni-modal convention.

(g) Chapter 4.2.1 of the draft Instrument provides for the operation of what is described as a limited network system, that is restricted to the operation of mandatory provisions of any compulsorily applicable international convention, relating to the carrier's liability, limitation of liability and time limits. The IG as it has previously indicated agrees with this approach for the following reasons:

- (1) As stated above containerised cargo now accounts for a very high percentage of cargo movements. Currently the great majority of carriers offering a door-to-door service (multi-modal operators (MTO)), whether shipowners, NVOCCs or freight forwarders, operate under contracts of carriage providing for a network system. In this regard it should be noted that the UNCTAD/ICC Rules for Multimodal Transport Documents which came into effect on the 1 January 1992 and which apply a network system, have gained wide acceptance within the industry and are in common use in relation to door-to-door carriage contracts. A recent Study carried out on behalf of the EC in relation to multi-modal transport indicated that 95 per cent of EU shippers surveyed, reported a loss rate of less than 0.1 per cent of cargo movements, of which less than 1 per cent led to litigation. The IG estimates that of those matters that do lead to litigation, 80-90 per cent settle prior to a hearing. Whilst accepting that the percentage loss rate might be marginally higher in certain other parts of the world, in the IG's opinion these statistics support the view that the network system has proved both practical and effective and is widely understood.
- (2) Adopting a network rather than a uniform system would preserve the integrity of existing uni-modal

conventions and by doing so reduce possible areas of conflict. This would in turn enhance the likelihood of the Instrument gaining widespread support.

- (3) The costs of resolving a claim brought by cargo interests under a contract subject to a uniform liability system are likely to be greater than if brought under a contract subject to a network system. In the former case an MTO would have to settle with cargo interests on the basis of the uniform regime and then seek to recover from a subcontractor who performed the inland leg, under a different uni-modal regime. In the latter case one regime would be applicable to both the claim and recourse action reducing the possible areas of dispute and thus costs.
- (4) Existing uni-modal regimes have been shaped to meet the particular risks associated with the carriage of goods by particular modes of transport. Multi-modal transport involves carriage by different modes of transport. So far as it is both practical and achievable in the context of a single contract governing the whole movement, it would seem sensible to have each mode of transport governed to the limited extent imposed by uni-modal conventions familiar to cargo interests and carriers.

### 3. Allocation of risk

The primary purpose of international carriage conventions is not only to promote international uniformity but also to ensure an acceptable and fair balance of rights and liabilities and thus allocation of risk between the parties to the carriage contract. The IG believe that it is most important that the Working Group should not lose sight of this principle in the course of its initial deliberations on the draft Instrument. The Working Group is and has been considering the provisions of the Instrument on an article-by-article basis, in particular those articles relating to the carrier's rights, liabilities and responsibilities that have quite correctly been described as the heart of the Instrument. The IG believes that in considering these articles individually rather than as a whole, the Working Group is in danger of overlooking the principle and accordingly of preserving an equitable allocation of risk between carrier and cargo interests. It is worth noting that at its ninth session the Working Group agreed that it would commence its work on the Instrument 'by a broad exchange of views regarding the general policy reflected in the draft Instrument rather than focussing initially on an article by article analysis of the draft Instrument'.

Having said this we would make the following comments.

Carriage of goods contracts are essentially a matter of private law rather than public law and are not 'consumer' contracts in the accepted sense of that term. In the modern era, in virtually all cases the carriage contract is made between commercial parties of similar bargaining strength, although as has been pointed out large volume shippers today exercise considerable bargaining power.

It is perhaps worth noting that if the carrier is exposed to greater liability under the instrument when compared to the Hague/Hague-Visby Rules by reason of the elimination of defences and the imposition of greater obligations and responsibilities, his indemnity cover will prove more expensive. Such increase in cost would be passed on to cargo interests by way of higher freight rates. The IG therefore believes it unlikely that by imposing a more onerous liability system, there would be an overall saving on the total costs of the carriage. It is more likely that the shift in allocation of risk between the parties and their respective insurers would merely be accompanied by a redistribution between them of the costs of the carriage.

#### 4. Obligations of the carrier

##### (a) Extension of carrier's obligation to exercise due diligence

A majority of delegates to date has supported the extension of the carrier's obligation to exercise due diligence in relation to the vessel's seaworthiness, to the whole of the voyage and the elimination of the 'nautical fault' defence. As the IG has previously pointed out the adoption of the one and the elimination of the other would in the IG's view substantially affect the allocation of risk between carrier and cargo interests or more correctly their insurers, by imposing a greater risk on the carrier and thus an increased share of the overall costs of the carriage of goods.

Furthermore the attempt to impose a due diligence obligation throughout the voyage ignores the practical problems involved. It is extremely difficult for a shipowner to determine whether his ship is seaworthy when it is in the middle of the ocean. If it is decided that it is not seaworthy the shipowner will be faced with the dilemma of whether to immediately divert the ship to a port of refuge or repair port, which may be a considerable distance away thereby delaying the voyage, even though in some cases the vessel may be only a day from her destination. It is submitted that the requirement under Art. 3 Rule 2 to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods..." provides sufficient continuing responsibility.

##### (b) Elimination of nautical fault defence

It has been suggested by a number of delegates that the nautical fault defence is out of step with modern thought and international carriage conventions relating to other modes of transport and does not reflect the technological advances and administrative developments that have taken place in relation to ships and their equipment. We believe that it is misleading to compare sea transport with other forms of transport. Cargo quantities and values (and therefore frequently claims) are much greater, transit times are longer and the carriage is subject to many more factors over which the carrier has no control. Furthermore even though sophisticated navigational aids are now in place on most ships, the master and other senior officers are faced with a greatly increased workload, partly resulting from increased legislation and inspections. Further, a master is often called upon to make immediate and difficult decisions with limited information quite possibly in the face of competing

interests, which if loss or damage occur are likely to be closely scrutinised with the benefit of hindsight.

It is perhaps worth noting that in an analysis of major claims (that is claims exceeding US\$ 100,000) arising between 1987 and 1997 conducted by one of the largest Clubs in the International Group, it was found that cargo claims represented 40 per cent of all major claims and Deck Officer Error, which in the main relates to error in the navigation or management of the ship, was the principal cause of 25 per cent of all major claims.

#### 5. Maintaining a balance of rights and liabilities if nautical fault defence is eliminated and due diligence is extended throughout the voyage

If nevertheless it is decided that the due diligence obligation should be extended and that the nautical fault defence should be eliminated, the IG believes in order to maintain a degree of balance between carrier and cargo interests the provisions of Article 6 should reflect the following:

##### (a) 6.1.2 Nautical fault defence and fire

- (i) The onus of proving loss or damage due to negligent navigation or management of the vessel should lie with cargo interests.
- (ii) The nautical fault defence should be retained in relation to pilot error. The carrier in voluntary as well as compulsory pilotage areas must engage a pilot in whose selection he has no choice. Furthermore it would be a bold master who would override the navigational decisions of a pilot, when the pilot is on board precisely because of his local knowledge of the area. Pilot error was found to be the principal cause of 5 per cent of all major claims in the analysis of major claims referred to above.
- (iii) Fire should be retained as a defence unless caused by the actual fault or privity of the carrier. This is particularly relevant in the context of cargoes that are susceptible to spontaneous combustion.

##### (b) 6.1.4 Apportionment of liability

If loss or damage is caused in part by an event for which the carrier is liable and in part by an event for which he is not, the burden of proof should be shared between carrier and cargo as proposed in the second alternative appearing under Chapter 6.1.4. This proposal is equitable and reflects the concept of achieving a balance between the parties.

##### (c) 6.4 Delay

If a carrier is to be made liable for delay such liability should be restricted to contracts where a time for delivery has been expressly agreed between the parties. It is a purely commercial matter similar to the general requirement in other forms of commercial contract of expressly making time of the essence if imposing liability for delay. The International Group has pointed out above that sea carriage is subject to many more factors beyond the carrier's control than carriage by air, road, rail and inland waterways, all of which could have a bearing on passage time.

*(d)* 6.7 Limits of liability

The IG believe that the Hague-Visby limits represent a fair measure of compensation particularly when measured against the comparative decline in freight rates since their introduction. It agrees with the suggestion that a limitation review procedure should be incorporated in the draft Instrument. It is worth noting that the NIT League and the World Shipping Council which represent between them a very substantial sector of the industry support the Hague-Visby limits subject to incorporating a review procedure.

*(e)* 6.8 Loss of right to limit liability

The carrier's loss of the right to limit should be restricted to instances of the carrier's personal act or omission done with intent or done recklessly and with knowledge that such loss would probably result, as provided for in the draft Instrument and should not be expanded to include the act or omission of his servants or agents. This is the test normally found in international transport conventions.

*Conclusion*

In conclusion the International Group submits that it is premature to consider changes to the individual articles in the draft Instrument before establishing a framework for an equitable balance of rights and liabilities between carrier and cargo interests.

**4. International Road Transport Union (IRU)**

*[Original: English, French]*

*Drawing up of a new convention on the carriage of goods by sea and extending this convention to door-to-door transport operations*

1. The International Road Transport Union (IRU) considers that the status of contractual liability of sea carriers is catastrophic.

The only clear provisions in this field are established by EUROTUNNEL and by shipping lines recorded on the COTIF list and operated by the railways, since those shipping lines are subject to the binding liability regime foreseen by the COTIF Convention. As for other sea carriers, their contractual liability is subject to a multitude of legal systems.

The Hague Rules or Hague-Visby Rules are not binding as long as no bill of lading has been issued. In principle, no such bill of lading is ever issued for intra-European transport operations.

Furthermore, the uniform application of these Rules is a fiction!

They are a vivid proof of failure in the process to harmonize transport law and commercial law. Indeed, if only looking at European countries and those of the Maghreb and of the Near East, one has to observe that:

- the Hague Rules are accepted by Algeria, Germany, Ireland, Israel, Monaco, Portugal, Romania, Turkey and Yugoslavia,

- the Visby Rules are accepted by Denmark, Finland, Greece, Italy, the Netherlands, Sweden and the UK (by accepting the Visby Rules, these countries have denounced the Hague Rules),

- the Hague-Visby Rules are accepted by Belgium, Croatia, Egypt, France, Lebanon, Poland, Spain and Syria,

- the Hamburg Rules are accepted by Egypt, Lebanon, Morocco, Romania and Turkey,

- Estonia, Latvia, Lithuania, Russia and the Ukraine have not subscribed to any of the above-mentioned legal instruments.

It follows therefrom that:

- sea transport operations between Algeria, Germany, Ireland, Israel, Monaco, Portugal, Romania, Turkey and Yugoslavia on the one hand, and Denmark, Finland, Greece, Italy, the Netherlands, Sweden and the UK on the other, are not subject to any joint international legal instrument, but rather governed by the sometimes little-known and dissimilar liability rules and limitations set by the national legislation of each country mentioned and, within this legal framework, by the rules set by shipping companies,

- sea transport operations between Estonia, Latvia, Lithuania, Russia and the Ukraine on the one hand, and all other countries on the other, are not subject to any joint international legal instrument, but rather governed by the little-known and dissimilar liability rules and limitations set by the national legislation of each country mentioned and, within this legal framework, by the rules set by shipping companies,

- sea transport operations between Egypt, Lebanon, Romania, Turkey and Morocco are exclusively subject to the Hamburg Rules, which is positive since these Rules are better suited to the needs of shippers,

- sea transport operations between Algeria, Germany, Ireland, Israel, Monaco, Portugal, Romania, Turkey and Yugoslavia are exclusively subject to the Hague Rules (however, in its Commercial Code, Germany has altered the liability limits foreseen by the Hague Rules by replacing them with those of the Visby Rules).

Furthermore, the Hague Rules and Hague-Visby Rules do not apply:

- to the transport of containers and road vehicles on deck (a frequent occurrence). Therefore, sea carriers accept no liability for the goods loaded into such containers or onto such trucks.

- to the transport of containers and road vehicles stowed in the ship's hold, but for which a Sea Waybill was issued instead of a Bill of Lading. Indeed, bills of lading are never issued for transport operations between European countries, even at the shipper's request.

In such cases, sea carriers may deviate from or alter the Hague Rules or the Hague-Visby Rules, which they are

indeed prone to do. They thus subject their own liability to haphazard rules, rejecting the full application of the Hague Rules or Hague-Visby Rules, and selecting the latter's provisions which suit their own purposes while rejecting others. In practice, a container or truck, whether loaded or unloaded, is considered as a single package and the compensation payable by the sea carrier does not exceed SDR 666.67 per container or truck, goods included.

2. Given the above, the IRU is of the opinion that one should avoid multiplying international conventions on the contract of carriage by sea. The legal chaos caused by the implementation of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules cannot be solved by yet another legal instrument, whose planned provisions may lead, if not to summary dismissal, at least to intense and never-ending discussions between the 27 countries having already acceded to the Hamburg Rules, the 24 countries having accepted the Hague-Visby Rules and the 44 countries still adhering to the old Hague Rules.

This opinion seems all the more commanding in the case in point since it concerns the work carried out by a mere thirty countries represented within UNCITRAL.

3. In our opinion, UNCITRAL would do better to use its prestige to have the various States accede to the Hamburg Rules, for which UNCITRAL claims authorship and must also ensure follow-up. The road transport industry is particularly interested in these Rules whose provisions – contrary to the Hague Rules and Hague-Visby Rules – apply to any transport document issued by sea carriers and serve to avoid the many exception clauses inserted into the various sea waybills issued by sea transport operators based on the Hague Rules and Hague-Visby Rules.

4. As for extending the future convention on the contract of carriage by sea to operations preceding or following the

sea transport operation, it should be noted that such a legal instrument would merely be a multimodal convention in disguise.

There is no reason to think that such a new legal instrument would have a greater chance of being accepted than the 1980 Convention on Multimodal Transport. The major differences between legal cultures and mentalities already observed at the time, added to the irreconcilable interests of the various continents, are no cause for optimism.

Furthermore, it would be foolish to extend to non-sea transport a new liability regime foreseen for sea transport which has yet failed to prove its worth for the very mode for which it appears to have been specifically designed, and whose chances of eliminating the chaos prevailing in sea transport already appear very thin, judging from the discussions held during previous sessions of UNCITRAL.

5. The IRU takes this opportunity to inform UNCITRAL that, when trucks carrying goods or containers are transported by sea, the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road), by virtue of its article 2, also applies to the sea leg should any loss, damage or delay in delivery occur during the sea carriage, unless a bill of lading was issued. Given that such a bill of lading is virtually never drawn up for goods and containers loaded onto trucks, road transport operations including a sea leg remain subject to the CMR Convention, whose provisions foresee a liability limit of SDR 8.33 per kilo of gross weight short. In the event of a delay resulting from the sea transport operation, the road carrier shall pay compensation for such damage not exceeding the carriage charges.

The IRU is committed to extending the liability limits set by the CMR Convention to all multimodal transport operations performed by road carriers.

## ANNEX

### Questionnaire

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

2. If so, why?

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouse and others be subject to direct claims by cargo interests or their underwriters under a single multi-modal regime for damage caused by the particular participant?

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods

by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multi-modal carriage?

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.

**H. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]: General remarks on the sphere of application of the draft instrument**

**(A/CN.9/WG.III/WP.29) [Original: English]**

**NOTE BY THE SECRETARIAT**

**CONTENTS**

	<i>Paragraphs</i>
Introduction .....	1-9
I. Current industry position and desirability of a door-to-door regime .....	10-42
A. Current relevant trade practices .....	12-16
B. The trade realities: Weight and value of trade using door-to-door contracts .....	17-19
C. Current maritime contracts .....	20-23
D. Extent of current door-to-door practice .....	24-26
E. Industry desire for a single door-to-door contract .....	27-34
F. Industry desire for more than a liability regime .....	35-36
G. Positions of different industry players .....	37-40
H. Current accommodation of door-to-door contracts .....	41
I. Problems in respect of door-to-door contracts that are not addressed by contractual or legal regimes .....	42
II. Current regimes and feasibility of door-to-door coverage and, in particular, of the network approach .....	43-110
A. The scope and period of application of each of the transport conventions .....	48-61
1. The Draft Instrument .....	48-53
2. CMR .....	54-55
3. COTIF-CIM .....	56-58
4. CMNI .....	59
5. Warsaw Convention .....	60
6. Montreal Convention .....	61
B. Possible application of competing conventions in respect of claims of the shipper or consignee against the door-to-door carrier .....	62-71
1. CMR .....	62-64
2. COTIF-CIM .....	65-68
3. CMNI .....	69-70
4. Warsaw and Montreal Conventions .....	71
C. Possible application of competing conventions on issues outside of carrier's liability, limitation of liability, and time for suit .....	72-105
1. Obligations and liability of the shipper for damage caused by the goods .....	73-78
2. Obligations of the shipper to furnish information .....	79-84
3. Transport documents .....	85-89
4. Freight .....	90-92
5. Right of control .....	93-99
6. Delivery of the goods .....	100-104
7. Transfer of rights .....	105
D. Possible application of competing conventions in respect of recourse actions of the door-to-door carrier against a performing carrier .....	106-107
E. Possible application of competing conventions in respect of claims of the shipper or consignee against the performing carrier .....	108-110

	<i>Paragraphs</i>
III. Advantages and disadvantages of general door-to-door coverage and of the Draft Instrument's network system . . . . .	111-118
IV. Differences between non-maritime and maritime approaches to the carriage of goods . . . . .	119-124
V. Proposed solutions . . . . .	125-185
A. Convention or Model Rules? . . . . .	126-129
B. Fast-track and slow-track approaches . . . . .	130-131
C. Options that preserve the network principle . . . . .	132-153
1. "Unimodal Plus" approach . . . . .	133-137
2. The Canadian proposal . . . . .	138-149
a) Option 1 . . . . .	139-140
b) Option 2 . . . . .	141-143
c) Option 3 . . . . .	144-149
3. The Swedish proposal . . . . .	150-153
D. The Italian proposal . . . . .	154-158
E. Options based on the treatment of performing parties . . . . .	159-185
1. Option 1 – Basic principles . . . . .	166
2. Option 1 – Commentary on the basic principles . . . . .	167-176
3. Option 2 – Basic principle . . . . .	177
4. Option 2 – Commentary on the basic principle . . . . .	178-180
5. Option 3 – Basic principle . . . . .	181
6. Option 3 – Commentary on the basic principle . . . . .	182-185

## INTRODUCTION

1. In 2001, at its thirty-fourth session, the Commission decided that the scope of the work in relation to Transport Law should include issues of liability. It also decided that the considerations in the Working Group should initially cover port-to-port transport operations; however, the Working Group would be free to study the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations and, depending on the results of those studies, recommend to the Commission an appropriate extension of the Working Group's mandate.<sup>1</sup>

2. At its ninth session, the Working Group on Transport Law devoted much attention to the issue of whether the period of responsibility of the carrier pursuant to the Draft Instrument (Preliminary Draft Instrument on the Carriage of Goods by Sea, A/CN.9/WG.III/WP.21) should be restricted to port-to-port transport operations or whether, if the contract of carriage also included land carriage before and/or after the sea carriage, the Draft Instrument should cover the entirety of the contract (i.e. the door-to-door concept). Upon conclusion of the exchange of views, the Working Group considered that it would be useful for it to continue its discussions of the Draft Instrument under the provisional working assumption that it would cover door-to-door transport operations (A/CN.9/510, paragraphs 26-32).

3. At its thirty-fifth session, in 2002, the Commission, after discussion, approved the working assumption that the

Draft Instrument should cover door-to-door transport operations, subject to further consideration of the scope of application of the Draft Instrument after the Working Group had considered the substantive provisions of the Draft Instrument and come to a more complete understanding of their functioning in a door-to-door context.<sup>2</sup>

4. At its tenth session, the Working Group deferred its consideration of the article in the Draft Instrument on the period of responsibility to the next session due to the absence of sufficient time (A/CN.9/525, paragraphs 27 and 123). However, it was agreed that the secretariat would prepare a background paper discussing the advantages and disadvantages of the port-to-port versus the door-to-door approach, particularly in light of current and future industry needs and practice.

5. This background paper accordingly addresses the desirability and feasibility of dealing with door-to-door transport operations in the Draft Instrument.

6. In this paper, reference is made at various points to the following international instruments:

(a) the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, and Protocol of Signature, Brussels 1924 (the Hague Rules);

(b) the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels 1924 as amended by the 1968 and 1979 Protocols (the Hague-Visby Rules);

<sup>1</sup>*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 345.*

<sup>2</sup>*Ibid., Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 224.*

(c) the United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules);

(d) the United Nations Convention on International Multimodal Transport of Goods, Geneva, 24 May 1980 (the Multimodal Convention);

(e) the Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol (the CMR);

(f) the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways, 2000 (the CMNI);

(g) the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, Appendix B to the Convention Concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (the COTIF-CIM 1999);

(h) the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the Protocol signed at The Hague on 28 September 1955 and by the Protocol No. 4 signed at Montreal on 25 September 1975 (the Warsaw Convention); and

(i) the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (the Montreal Convention).

7. The Draft Instrument is intended to govern “contracts of carriage”, in which, under article 3.1, the place of receipt and the place of delivery are in different States, and which satisfy certain additional conditions. Article 1.5 defines a “contract of carriage” as “a contract under which a carrier, against the payment of freight, undertakes to carry goods wholly or partly by sea from one place to another.” Article 1.1 also defines the “carrier” by reference to the contract of carriage, and article 1.19 defines the “shipper” in similar fashion.

8. Thus, the Draft Instrument follows a contractual approach. It applies to a certain type of contract with specific economic and operational characteristics. This type of contract involves the carriage of goods wholly or partly by sea, which in current practice frequently calls for door-to-door carriage. This means that the goods may be carried not only by seagoing ships, but also by other modes of transport preceding and/or subsequent to the sea carriage. The Draft Instrument’s proposed application to door-to-door contracts of carriage has been described as a “maritime plus” approach, since the common factor for the application of the Draft Instrument is a sea leg.

9. Whether or not a door-to-door approach is ultimately retained, it may be noted that neither the contractual approach nor the Draft Instrument’s proposed door-to-door scope of application (in which ancillary modes of carriage are to some extent covered by an otherwise unimodal convention) is unique. Most of the existing international transport conventions follow the contractual approach, to a greater or lesser degree, and several of them also apply to ancillary modes of carriage. For example, the Warsaw and Montreal Conventions address ancillary pick-up and delivery services, and the CMR addresses the case in which a road vehicle is carried on a ship or a rail car. More directly

to the point, the COTIF-CIM calls for the application of the rail rules in cases in which road or inland waterway carriage supplements rail carriage, and the CMNI addresses cases in which sea carriage and inland waterway carriage are combined. The scope of application of these other international transport conventions is considered in greater detail in section II below, following an examination of the current industry position, and the desirability of a door-to-door regime for contracts of carriage set forth in section I. Section III of the following discussion notes some of the advantages and disadvantages of a door-to-door approach, and of the network system in particular. In section IV of the paper, some of the differences between non-maritime and maritime approaches to the carriage of goods are examined, and, finally, section V sets out general and more specific solution that may be considered by the Working Group.

## I. CURRENT INDUSTRY POSITION AND DESIRABILITY OF A DOOR-TO-DOOR REGIME

10. In order for the Working Group to decide whether it is desirable to extend the scope of the Draft Instrument to cover door-to-door transport operations, it is necessary to provide some background on the way in which the industry currently operates. The following section sets out nine specific issues that are particularly relevant in this regard: (1) the current relevant trade practices in the maritime transport of goods; (2) the trade realities of maritime transport, particularly the proportions in weight and value of the trade that are in the form of door-to-door contracts; (3) how the industry is dealing with maritime contracts today; (4) to what extent the current trade practice is door-to-door; (5) to what extent industry is requesting a single contract for door-to-door carriage of goods; (6) the extent to which industry is requesting more than a liability regime, for example, whether industry is asking for the inclusion of certain provisions in contracts and documents; (7) the positions of different industry players on the issues of extending the scope of the Draft Instrument to door-to-door coverage; (8) how current practice in the maritime shipping industry is accommodating door-to-door contracts, to the extent that they exist; and (9) any problems that arise in industry with respect to door-to-door contracts that are not currently addressed by contractual or legal regimes.

11. The following section of this paper discusses these matters and provides background information to them in as complete a fashion as possible. However, it must be noted that the statistical information available in order to address these issues was very limited. The information obtained in order to provide the background for these issues was generalised, but based on very broad experience regarding current industry practice.

### A. Current relevant trade practices

12. Current trade practices differ as between the so-called “bulk” trades and the general cargo trades. The bulk trades are further divided in the “wet” and “dry” bulk trades. Carriage of goods in the general cargo trades—apart from

the carriage of forest products, steel, vehicles on specialized car/vehicle-carrying ships, and project cargo<sup>3</sup>—is almost completely containerized, at least with respect to carriage between ports that are equipped to handle such containers. The wet bulk trades relate predominantly to the carriage of oil and its derivatives, and of chemicals.

13. In addition to the above distinctions, there is the refrigerated, or so-called “reefer” trade, which is further divided into the reefer ship trade, where the entire holds of the vessel are temperature-controlled, and the reefer container trade, where temperature control is limited to individual containers. For the purposes of this paper, the whole-ship trade is categorized as dry bulk, while the reefer container trade is treated as containerized transport.

14. In general, the bulk trades are conducted on the basis of charter parties, under which ships are engaged either on a time or on a voyage basis. Bills of lading are then often issued for the carriage of the various cargoes carried under the charter party. The nature of the cargoes carried usually dictates the period of the ship’s responsibility for the cargo. As such, almost without exception, the period of the ship’s responsibility for the cargo from loading to discharge is often referred to as “tackle-to-tackle” in the dry bulk trades and as “ship’s manifold to ship’s manifold” in the wet bulk trades.

15. The general cargo trades—primarily, the container trades—are predominantly conducted on the basis of bills of lading or comparable documents, which may or may not be transferable or negotiable.

16. Because goods in containers can be transferred from one means of conveyance to another without being unloaded from the container, the practice in the container trades is for the goods to be received for carriage and delivered after carriage at a location that is physically removed from the ship’s side. This location may be the shipper’s factory or the consignee’s warehouse, or an inland depot or a terminal within the port area. Generally speaking, it is therefore primarily in the container trades that the possibility of door-to-door transport exists.

#### **B. The trade realities: weight and value of trade using door-to-door contracts**

17. Container liner operators have been unable to provide precise information concerning the proportions in weight and value of trade involving door-to-door contracts. From their perspective, the value of the commodities within the containers is not a key financial parameter. Indeed, the liner operator usually has no means of knowing the value of the goods, nor is it necessary that such information be declared to the carrier. From the perspective of cargo interests, information such as the value of the goods is often commercially sensitive. The weight of a container, on the

other hand, is a very important factor in the loading and stowage of a container ship, but it is not information that needs to be recorded or collated for other purposes.

18. Having noted the above, a particularly reliable source of information may be found in the data collected by the Maritime Administration of the Department of Transportation of the United States of America, and published as the “U.S. Foreign Waterborne Transportation Statistics”<sup>4</sup>. These data show that the container liner industry carried 68% of the value of all U.S. foreign waterborne cargo in 2001, namely, a value of US\$490 billion out of a total of US\$720 billion. Further, it has been estimated that at least 75 to 80% of the containers in U.S. trade were carried on a door-to-door basis. From a global perspective, world port container throughput reached 225.3 million moves in 2000,<sup>5</sup> principally between Asia, Europe and North America, however there were significant flows within all regions. World seaborne trade is expected to double from 1997 to 2006 to around 1 billion tons,<sup>6</sup> and most of this containerized cargo will involve multiple modes of transport in a door-to-door carriage.

19. The overall tonnage of dry bulk cargo (which is rarely carried on a door-to-door basis) is estimated to be roughly twice the tonnage of containerized cargo (which is regularly carried on a door-to-door basis). The total value of the cargo carried in containers is nevertheless significantly higher than that of the dry bulk cargo. One explanation for this result is the high proportion of relatively valuable consumer goods carried in containers. The freight-to-weight ratio of containerized cargo is thought to be about 15 times that of dry bulk cargo.

#### **C. Current maritime contracts**

20. The contracts in use today in the carriage of goods by sea depend upon the particular trade in issue. While contracts on a tackle-to-tackle or manifold-to-manifold basis dominate the bulk trades, bills of lading on a tackle-to-tackle basis have virtually disappeared from the general cargo trades (save for those non-containerised commodities to which reference has already been made). This reflects the reality that, in the container trades, the hand-over between cargo and carrier takes place away from the ship’s side. The container trades are therefore conducted on the basis of either port-to-port or door-to-door bills of lading, or some combination of the two. In fact, receipt or delivery of cargo on a port-to-port basis takes place at a container terminal situated within the port area, often referred to as a “container yard” (CY). Strictly speaking, such traffic should be described as “terminal-to-terminal” and, indeed, some carriers expressly accept responsibility to and from these points.

21. Alternatively, receipt and delivery of cargo may take place at some inland point, which may be near to, or far away from, the port. This inland point may be referred to as a “container freight station” (CFS). They are also often

<sup>3</sup>Project cargo may be described as goods and materials in non-standard packages moved by non-standard methods to or from non-standard destinations. Due to the project nature of the cargo, it is often highly time-sensitive, and significant losses can result in terms of the overall project if materials arrive late, incomplete or damaged at their ultimate destination.

<sup>4</sup>Published electronically at [http://www.marad.dot.gov/marad\\_statistics](http://www.marad.dot.gov/marad_statistics)

<sup>5</sup>Containerization International Yearbooks.

<sup>6</sup>UNCTAD Review of Maritime Transport, 1997, 13.



referred to as “depots,” or more particularly as “inland container depots” (ICDs). Many container freight stations and inland container depots have facilities for customs clearance, and they are usually operated by the carriers or their subcontractors, rather than by the cargo interests.

22. Depot-to-depot traffic is not the same as door-to-door traffic. The “doors” referred to in the door-to-door description belong not to the carrier but to the cargo interests. In an export shipment, for example, cargo may be handed over to the carrier at the point of manufacture—the shipper’s “door”—and, for import cargo, the carrier may deliver it at a warehouse or even some point of distribution—the consignee’s “door.” Within this matrix, various combinations are also possible, such as port-to-door and door-to-port, all of which are included in the general door-to-door category in the discussion below in paragraphs 24 to 26.

23. It is important to note this distinction between depot-to-depot transport and door-to-door transport. Since depot-to-depot carriage refers to carriers rather than to cargo interests, a depot-to-depot scope of application in the new instrument would not provide consignors of goods with the ability to contract for the movement of their containers from door-to-door under a single contract.

#### D. Extent of current door-to-door practice

24. The extent of the current maritime trade practice that is door-to-door is, of course, relevant primarily with respect to the container trades. The figures discussed below will include both pure door-to-door traffic and the door-to-port and port-to-door variants discussed above in paragraph 22. It is, however, very difficult to generalize, as conditions vary from one trade lane to another. In addition, figures may vary from carrier to carrier. Some carriers, having extended their operations into forwarding and logistics services, issue a higher proportion of door-to-door bills. Other carriers are content to concentrate upon port-to-port services, leaving it to the cargo interests and their freight forwarders and logistics providers to handle the inland transport.

25. Of the 60 million containers carried worldwide in the year 2000, container liner operators carried 50% of them on a multimodal basis. Some countries report a higher percentage: for example, in the United States of America, 75 to 80% of container carriage is on a multimodal basis. As between the individual container liner operators, these figures vary. Thus, one major liner operator estimated the worldwide figure to be 25%, while the figure in other geographical areas, such as in the United States trades, was estimated to be 40 to 50%. In the Asian trades, the dominant mode for the liner operator is port-to-port; the same applies to the Australasian, the Indian subcontinent, the African, and the Latin American trades. Europe is more mixed. In the UK, the trade is 50% door-to-door, particularly on the import side, whereas, in Germany, Austria, and Switzerland, the door-to-door proportion for container liner operators drops to around 25%.

26. Freight forwarders may reduce the estimated door-to-door proportion in the container trades when the question is considered solely from the perspective of the container liner operators, but they in fact raise the propor-

tion significantly when the question is considered from the perspective of the ultimate customer. When a freight forwarder acts as a non-vessel operating carrier (NVO) it will almost always contract on a door-to-door basis. Accordingly, the proportion of door-to-door shipments is significantly higher from the cargo interests’ perspective than it is from the perspective of the container liner operators. In many cases, the container liner operator will carry the cargo on behalf of an NVO on a port-to-port basis, but the NVO will have contracted with the cargo owner on a door-to-door basis.

#### E. Industry desire for a single door-to-door contract

27. The question of the desire of industry for a single door-to-door contract for the entire carriage depends less upon the intellectual tidiness of a single contract than upon the interplay of market forces. Whether the inland carriage is handled by the ocean carrier or by its customer will depend largely upon two things: the service that the customer requires and the price that is charged. For example, a major shipper that wants empty containers available for loading on a round-the-clock basis will not contract with a carrier whose focus is on port-to-port operations, nor will a merchant contract for carrier haulage if it believes that it can arrange inland transport more cheaply by using its own contractors. For this reason, major shippers will require carriers submitting tenders for door-to-door traffic to break down the cost estimates sector by sector.

28. As a result, the container trades have been conducted for a decade or more on the basis of so-called “combined transport” bills of lading, which can be used for both port-to-port and door-to-door traffic. The COMBICONBILL form,<sup>7</sup> a combined transport bill of lading adopted by the Baltic and International Maritime Council (BIMCO) originally in 1971, and updated in 1995, offers a useful illustration of the type of form used by many container liner operators.

29. Under the COMBICONBILL form, the carrier accepts responsibility in accordance with clauses 9, 10, and 11. Clause 9 provides:

“(1) The Carrier shall be liable for loss of or damage to the goods occurring between the time when he receives the goods into his charge and the time of delivery.

“(2) The Carrier shall be responsible for the acts and omissions of any person of whose services he makes use for the performance of the contract of carriage evidenced by this Bill of Lading.

“(3) The Carrier shall, however, be relieved of liability for any loss or damage if such loss or damage arose or resulted from:

- (a) The wrongful act or neglect of the Merchant.
- (b) Compliance with the Instructions of the person entitled to give them.

<sup>7</sup>Published electronically at <http://www.bimco.dk/BIMCO%20Documents/bl.asp>.

(c) The lack of, or defective conditions of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed.

(d) Handling, loading, stowage or unloading of the goods by or on behalf of the Merchant.

(e) Inherent vice of the goods.

(f) Insufficiency or inadequacy of marks or numbers on the goods, covering, or unit loads.

(g) Strikes or lock-outs or stoppages or restraints of labour from whatever cause whether partial or general.

(h) Any cause or event which the Carrier could not avoid and the consequence whereof he could not prevent by the exercise of reasonable diligence.”

30. Clause 10(3) limits compensation to two Special Drawing Rights, or SDRs, per kilo of gross weight of the goods lost or damaged (except in the U.S. trade, where the limitation amount is \$500 per package pursuant to clause 24).

31. Clause 11 then introduces the classic “network” principle in respect of any loss or damage identified as having occurred during a specific stage of the transport, giving precedence to any mandatory convention or national law that would have applied to the contract had a separate contract been made between carrier and cargo interests for that specific leg of the journey. In the case of carriage of goods by sea, the Hague-Visby Rules apply when no mandatory international convention or national law is applicable under clause 11(1). The clause is worded as follows:

“(1) Notwithstanding anything provided for in Clauses 9 and 10 of this Bill of Lading, if it can be proved where the loss or damage occurred, the Carrier and the Merchant shall, as to the liability of the Carrier, be entitled to require such liability to be determined by the provisions contained in any international convention or national law, which provisions:

(a) cannot be departed from by private contract, to the detriment of the claimant, and

(b) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued if such international convention or national law shall apply.

“(2) Insofar as there is no mandatory law applying to carriage by sea by virtue of the provisions of subclause 11(1), the liability of the Carrier in respect of any carriage by sea shall be determined by the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd 1968—The Hague/Visby Rules. ...”

32. Since the introduction of the United Nations Conference on Trade and Development/International Chamber of Commerce Rules for Multimodal Transport Documents (UNCTAD/ICC Rules) in 1992, BIMCO has developed a new form of Multimodal Bill of Lading, under

the trade name MULTIDOC 95.<sup>8</sup> Under this form, as under the COMBICONBILL, the multimodal transport operator (MTO) is responsible for the goods from the time it takes charge of the goods until the time of their delivery but the extent of the liability is expressed differently. Clause 10(b) of MULTIDOC 95 provides:

“Subject to the defenses set forth in Clauses 11 and 12, the MTO shall be liable for loss of or damage to the Goods as well as for delay in Delivery, if the occurrence which caused the loss, damage or delay in Delivery took place while the Goods were in his charge as defined in subclause 10(a), unless the MTO proves that no fault or neglect of his own, his servants or agents or any other person referred to in subclause 10(c) has caused or contributed to the loss damage or delay in Delivery. ...”

Clause 11 then applies the Hague-Visby Rules in relation to loss or damage arising during carriage by water. Clause 12 provides for the Hague-Visby limits of liability to apply except when the Carriage of Goods by Sea Act of the United States of America applies.

33. There is an increasing tendency for a freight forwarder or logistics provider to issue a door-to-door bill of lading in its own name, thus acting as an NVOC. NVOCs often contract on the International Federation of Freight Forwarders Associations (FIATA) multimodal bill of lading form. This form also incorporates the UNCTAD/ICC Rules of 1992 and the “network” principle. The NVOC may then take a port-to-port (or a door-to-door) bill of lading from the container liner operator, under which it or an affiliate will be both the shipper and the consignee.

34. In sum, the transport industry has responded to the strong demand for door-to-door carriage with a variety of contract forms, and these forms are regularly used. Although it is impossible to quantify precisely how often a shipper requests a single contract door-to-door, it is known to be at least a majority of the time.

#### **F. Industry desire for more than a liability regime**

35. There is an increasing tendency worldwide, for cargo interests to seek from their carriers more than just a liability regime. Cargo interests particularly want practical and commercial provisions, covering the frequency of service, the ports to be served directly (i.e. without transshipment), the availability of empty containers, penalties for late deliveries, and guarantees of rates. In some countries, such as the United States of America, these arrangements are now predominantly embodied in what are called “service contracts”. An additional advantage of service contracts is that the rates agreed in them remain confidential to the parties. The use of service contracts appears to be increasing: for example, approximately 80 to 85% of container traffic in the United States is now thought to move under these arrangements.

<sup>8</sup>Published electronically at <http://www.bimco.dk/BIMCO%20Documents/bl.asp>.

36. In other parts of the world, agreements between shippers and carriers vary in form and are generally less formal. These contracts tend to be called “ocean transportation contracts.” Overall, the trend toward ocean transportation contracts is increasing worldwide, and their the focus is on commercial content, such as provisions on the frequency of service, price, timeliness, and the like.

### G. Positions of different industry players<sup>9</sup>

37. The increasing trend toward ocean transportation contracts is evidence that both cargo interests and carriers see benefits in their use, particularly in stabilising the relationships between the parties. But on other issues, the parties are divided. Some major multinational shippers have been putting carriers under pressure to change their standard bill of lading terms. The demands tend to focus on:

(a) the amount of the package limitation (currently 666.67 SDRs per package or 2 SDRs per kilo in general, and US\$500 per package or unit in the U.S. trades); and

(b) the Hague Rules defenses, particularly that of error in the navigation or management of the ship.

38. The cargo interests are asking for increased limits of liability, up to the full value of the goods, and that the carrier accept liability for any loss or damage arising from its fault or that of its subcontractors. In general, the carriers are resisting these demands. When these demands have been met, the carriers have had to buy additional liability insurance, the cost of which they then seek to pass on to the shippers. Shippers may be willing to meet this cost, because the administrative convenience and potential savings could outweigh it.

39. On the carrier side, a few principal issues have been identified as problematic under the contracts of carriage presently in use. These include the following:

(a) There is no obligation upon the cargo interests under the present contracts, or under the general law, to take delivery of the cargo when the carrier tenders delivery at the contractual destination. In view of the speed inherent in container operations, delay by cargo interests in taking delivery of cargo usually leads to additional cost and inconvenience. Carriers therefore see a need for provisions along the lines of those in articles 10.1 and 10.3 of the Draft Instrument.

(b) The carriers’ rights with respect to the goods are now regulated, if at all, by the provisions of the bills of lading and by applicable national law. Carriers feel that it would be beneficial to have an agreed international regime governing the circumstances in which the carrier could

exercise rights over the goods (including the right to sell them when necessary). The Draft Instrument addresses these issues in articles 9.5 and 10.4.

(c) Existing conventions provide little guidance on the cargo interests’ obligations to the carriers, including liability for damages caused by the cargo. Provisions addressing these issues on a uniform and predictable basis would be very valuable.

(d) The carriers’ rights with respect to qualifying the description of the goods vary from jurisdiction to jurisdiction, and are unclear in many jurisdictions. For example, when can a carrier qualify a bill of lading description with the statement “shipper’s load and count”? The answer is often unclear, and clear guidance would avoid many problems.

(e) Jurisdiction is now governed in part by the terms of the bill of lading and by the law of the court seized of the case. This can give rise to conflict. The addition to the Draft Instrument of provisions regarding jurisdiction would be welcomed.

40. In addition to these more general concerns, other specific issues are important to carriers in particular markets. For example, in the U.S. trade, the right to limit liability is of particular importance to carriers. It is thus important to carriers in the U.S. trade that the Draft Instrument contains a provision carefully defining when the package limitation may be broken.

### H. Current accommodation of door-to-door contracts

41. In view of the multiplicity of conflicting regimes, both between different modes of transport and, in the case of carriage by sea, within the same mode, it is not surprising that the transport industry has developed its own pragmatic solutions (some of which have been described above in paragraphs 27 to 34). Views differ as to how well these pragmatic solutions are working. While international trade continues to function despite the lack of uniformity, there are also well-recognized defects in the system that could be corrected with a uniform regime (see above, paragraphs 37 to 40, and below, paragraph 42).

#### I. Problems in respect of door-to-door contracts that are not addressed by contractual or legal regimes

42. Some of the major problems in current use of door-to-door contracts were outlined above with respect to section G, but this is not an exhaustive list. Both carriers and cargo interests agree, for example, that the legal regime should facilitate future developments in electronic commerce, which may also include the question of which party is in control of the goods during carriage in cases where no (paper) document is issued. There is also agreement that current contractual and legal regimes are inadequate to resolve a number of other issues that arise in conjunction with the bill of lading or other transport document, including issues relating to the legal effect of the document, the rights that arise under the document, and how these rights may be transferred.

<sup>9</sup>See also A/CN.9/WG.III/WP.28 for a compilation of responses from industry representatives to the questionnaire circulated by the secretariat and additional comments regarding the scope of the Draft Instrument, as well as Annexes I and II to the Report of the Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002) (A/CN.9/525). Also, see the recent report by the UNCTAD secretariat, “Multimodal Transport: The Feasibility of an International Legal Instrument”, UNCTAD/SDTETLB/2003/1, a summary of which is available for the information of the Working Group as A/CN.9/WG.III/WP.30.

## II. CURRENT REGIMES AND FEASIBILITY OF DOOR-TO-DOOR COVERAGE AND, IN PARTICULAR, OF THE NETWORK APPROACH<sup>10</sup>

43. The principal difficulty in achieving door-to-door coverage with a new international convention is the prior existence of potentially conflicting national laws and international conventions that already govern various segments of the door-to-door carriage. It is likely that some of these potential conflicts would be resolved by the very creation of a new regime: presumably a State's decision to ratify any new convention would include the decision to supersede the Hague, Hague-Visby, or Hamburg Rules, as the case may be.<sup>11</sup> Other existing regimes, however, are more problematic, and any consideration of the feasibility of dealing with door-to-door transport operations must consider possible conflicts between the Draft Instrument and other existing regimes.

44. The one non-maritime transport convention in force with world-wide application is the Warsaw Convention (which was amended by the 1955 Hague Protocol and by the 1975 Montreal Protocol No. 4), governing carriage by air. In addition, reference may be had to the Montreal Convention 1999, which also governs carriage by air, although that Convention is not yet in force. However, it should be noted that the combination of sea transport and air transport is not a common form of door-to-door transport.

45. There are a number of regional conventions relating to road, rail, and inland waterway transportation. Predominantly in Europe, the CMR regulates carriage by road, the COTIF-CIM regulates carriage by rail, and the CMNI regulates carriage by inland waterway. Two regional multimodal regimes exist in South America (for the Andean Community<sup>12</sup> and Mercosur<sup>13</sup>), and it appears that there will soon be an ASEAN Framework Agreement on Multimodal Transport for its ten members in Asia. In addition, a number of States have national laws that address one or more modes of transport.

46. The following discussion will address potential conflicts between the Draft Instrument and five other conventions. The Warsaw and Montreal Conventions are included as non-maritime transport conventions with worldwide application. The predominantly European transport conventions are included because they are long-established and affect a large number of countries, including a number of non-European countries that have ratified, for example, the CMR.

<sup>10</sup>A comparative table has been prepared by Professor Berlingieri of the Italian delegation (A/CN.9/WG.III/WP.27). The table compares provisions of the Draft Instrument with other maritime texts such as the Hague-Visby Rules, the Hamburg Rules, and the Multimodal Convention, as well as other conventions in the fields of road, rail and air transport such as the CMR, CMNI, COTIF-CIM 1999, the Warsaw Convention, and the Montreal Convention.

<sup>11</sup>In light of this likelihood, the relevant provisions of the Hague, Hague-Visby and Hamburg Rules, as well as those of the Multimodal Convention, will be outlined in footnotes to the text that follows.

<sup>12</sup>Decision 331, Multimodal Transportation.

<sup>13</sup>International Multimodal Transport Agreement between Mercosur States Parties, Decision No. 15/94, Signed in Ouro Preto, 17 December 1994.

47. The analysis of the possible conflicts begins with a description of the scope and period of application of each instrument under consideration. The possible conflict of conventions will then be considered, first, in respect of claims of the shipper or consignee against the contracting carrier (the "door-to-door carrier"); next, with respect to the recourse action of the door-to-door carrier against the carrier to whom the door-to-door carrier has entrusted the performance of one or more legs of the carriage (the "performing carrier"); and, finally, regarding claims of the shipper or consignee against the performing carrier.

### A. The scope and period of application of each of the transport conventions

#### 1. The Draft Instrument

48. Pursuant to articles 3.1 and 4.1.1, the provisions of the Draft Instrument apply from the time when the carrier has received the goods until the time when the goods are delivered to the consignee if the parties have entered into a "contract of carriage" (which is limited to a contract performed wholly or partly by sea) in which the place of receipt and the place of delivery are in different States and one of them is in a Contracting State. They also apply if the contract of carriage provides that the provisions of the Draft Instrument (or the law of any State giving effect to them) are to govern the contract.<sup>14</sup>

<sup>14</sup>Pursuant to articles 10 and 1(e), the Hague Rules apply from the time when the goods are loaded on to the time they are discharged from the ship, or for tackle-to-tackle carriage, provided that a bill of lading is issued in any of the Contracting States. Matters outside of liability issues are dealt with only to a limited extent.

Pursuant to articles 10 and 1(e), the Hague-Visby Rules apply from the time when the goods are loaded on to the time they are discharged from the ship, or for tackle-to-tackle carriage, provided that a bill of lading is issued relating to "the carriage of goods between ports in two different States if: (a) such bill of lading is issued in a Contracting State, or (b) the carriage is from a port in a Contracting State, or the contract contained in or evidenced by the bill of lading provides that the rules of this Convention" are to govern the contract. With regard to liability issues, the Hague-Visby Rules deal with matters other than liability issues only to a limited extent.

Pursuant to articles 2, 4 and 1, the Hamburg Rules cover the period during which the carrier is in charge of the goods at the port of loading, during the carriage, and at the port of discharge, or for port-to-port carriage, provided that the parties have entered into a contract for carriage by sea (limited to the sea portion of carriage even where the contract involves another means of carriage) between two different States in which the port of loading or discharge is in a Contracting State, or where the bill of lading or other document evidencing the contract of carriage is issued in a Contracting State. The Hamburg Rules also apply if the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of the convention are to govern the contract. Note that the Hamburg Rules include a conflict of conventions provision at article 25.5: "Nothing contained in this Convention prevents a Contracting State from applying any other international convention which is already in force at the date of this Convention and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than transport by sea. This provision also applies to any subsequent revision or amendment of such international convention." Matters other than liability issues receive somewhat more attention than they do in the Hague-Visby Rules.

Pursuant to articles 2, 4 and 1, the Multimodal Convention covers the period from the time the multimodal transport operator takes charge of the goods to the time of their delivery, and applies to all contracts of multimodal transport, i.e. where the carriage is conducted by at least two different modes of transport under a single multimodal contract, provided that the carriage is international and the place for taking charge of the

49. Pursuant to articles 6.3.1 and 6.3.3, the provisions of the Draft Instrument apply (at least in so far as the responsibilities and liabilities imposed on the carrier and its rights and immunities are concerned) to all “performing parties” (as defined in article 1.17) and, therefore, to all subcarriers in respect of any action brought against them by the shipper or consignee (although this broad coverage must be considered in conjunction with article 4.2.1, which is discussed in the next paragraph). The Draft Instrument’s provisions do not apply to the recourse action of the contracting carrier against the subcarrier (unless the contract between those two parties is also a “contract of carriage” that includes the carriage of goods by sea).

50. If loss, damage, or delay occur solely before the goods are loaded on or after they are discharged from the vessel, then article 4.2.1 specifies that the mandatory provisions of other applicable conventions prevail over those of the Draft Instrument, but only to the extent that they regulate the carrier’s liability, limitation of liability, and rights of suit.<sup>15</sup>

51. Article 4.2.1 thus provides a minimal network system in order to deal with the fact that the great majority of contracts of carriage by sea include land carriage aspects, and that provision must be made for this relationship. The Draft Instrument is only displaced where a convention that constitutes mandatory law for inland carriage is applicable to the inland leg of a contract for carriage by sea, and it is clear that the loss or damage in question occurred solely in the course of the inland carriage.

52. The essence of such a network system is that the provisions mandatorily applicable to inland transport apply directly to the contractual relationship between the carrier on the one hand and the shipper or consignee on the other. If the inland transport has been subcontracted by the carrier, the mandatory provisions also apply to the relation between carrier and subcarrier. But in respect of the first relationship, the provisions of the Draft Instrument may supplement the provisions mandatorily applicable to the inland transport; whereas as between carrier and subcarrier the inland provisions alone are relevant (supplemented as necessary by any applicable national law).

53. It should also be noted that the proposed limited network system in the Draft Instrument only applies to provisions directly relating to the liability of the carrier, including limitation and time for suit. Provisions in other conventions that may indirectly affect liability, such as jurisdiction provisions, should not be affected. Also many

---

goods or for delivery of the goods is in a Contracting State. The definition of multimodal transport in article 1.1 expressly excludes pick-up and delivery services performed under a unimodal transport contract. Further, article 30.4 provides that carriage to which article 2 of the CMR applies (i.e. road vehicle carriage on a ship or a train) or to which article 2 of the Berne Convention of 17 February 1970 concerning the carriage of goods by rail applies (i.e. the 'listed' road or shipping services complementary to railway services) will not be regarded as multimodal carriage under the Multimodal Convention. The Multimodal Convention deals only to a limited extent with provisions other than those regarding the carrier's liability.

<sup>15</sup>See A/CN.9/WG.III/WP.21, paras. 49 to 55. See also the proposal by Italy at A/CN.9/WG.III/WP.25.

other legal provisions mandatorily applicable to inland transport are not intended to be replaced by the Draft Instrument because they are directed specifically to inland transport rather than to a contract involving carriage by sea. For example, the requirements of the CMR relating to the consignment note may apply between carrier and subcarrier, but their application to the main contract of carriage regulated by the Draft Instrument would be inconsistent with the document (or electronic record) required by the Draft Instrument for the whole journey.

## 2. CMR

54. Article 1 of the CMR provides that the Convention applies to every contract for the carriage of goods by road in vehicles for reward when the place of taking over of the goods and the place of delivery are situated in two different countries of which at least one is a contracting country.

55. Article 2(1) then provides that where the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterways, or air and the goods are not unloaded from the vehicle, the Convention applies except in case it is proved that any loss, damage, or delay that occurs during the carriage by other means of transport was not caused by an act or omission of the carrier by road.

## 3. COTIF-CIM

56. Article 1.1 of COTIF-CIM 1980 provides that the Uniform Rules apply to all consignments of goods for carriage under a through consignment note made out for a route over the territories of at least two States and exclusively over lines and services included in the list provided for in articles 3 and 10 of COTIF-CIM. Article 2.2 of COTIF-CIM 1980 provides that the COTIF-CIM may also be applied to international through traffic using, in addition to services on railway lines, land and sea services and inland waterways. Special rules in respect of liability relating to rail-sea traffic are set out in article 48 of COTIF-CIM.

57. Article 1.1 of COTIF-CIM 1999 (not yet in force) provides that the Uniform Rules apply to every contract of carriage of goods by rail when the place of taking over of the goods and the place designated for delivery are situated in two different Member States. Article 1.4 then provides that when international carriage, being the subject of a single contract of carriage, includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, the Uniform Rules apply if the carriage by sea or by inland waterway is performed on services included in the list of services provided for in Article 24.1 of the Convention. Such listing is not required for the application of COTIF-CIM 1999 to national road or inland waterway carriage that supplements international rail carriage and is included in the contract of carriage.

58. The issuance of a consignment note is no longer a condition for the application of the Uniform Rules under COTIF-CIM 1999. Article 6.2 explicitly provides that the absence, irregularity, or loss of the consignment note does not affect the existence or validity of the contract.

#### 4. CMNI

59. Article 1 of the CMNI defines the contract of carriage as the contract whereby the carrier undertakes to carry goods by inland waterways. Article 2(2) then provides that when carriage by sea and inland waterway is performed by the same vessel, without transshipment, the CMNI Convention applies except when a “marine bill of lading” has been issued or the distance travelled by sea is greater than that travelled by inland waterway.

#### 5. Warsaw Convention

60. Article 1.1 provides that the Convention applies to all international carriage of persons, baggage, or cargo performed by aircraft for reward, and to gratuitous carriage performed by an air transport undertaking. Article 1.2 then provides that international carriage means any carriage in which the place of departure and the place of destination, “whether or not there be a break in the carriage or a transshipment,” are situated within the territories of two High Contracting Parties. Contrary to the CMR, carriage by different modes of transport is expressly regulated by the Warsaw Convention, which provides in article 31.1:

“In the case of combined carriage performed partly by air and partly by another mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of article 18, apply only to the carriage by air, provided that carriage by air falls within the terms of article 1.”

#### 6. Montreal Convention

61. The Montreal Convention does not change substantially the Warsaw Convention system: article 1.1 and 1.2 are identical, and article 31.1 of the Warsaw Convention became article 38.1 of the Montreal Convention. New, however, is the legal fiction that sanctions the existing practice, at least in Europe, where much of the carriage of goods by air (intended by the agreement between the parties to be carried by air) is actually performed by road. Article 18.4 provides that such carriage, made without the consent of the consignor, is deemed to be within the period of carriage by air.

### **B. Possible application of competing conventions in respect of claims of the shipper or consignee against the door-to-door carrier**

#### 1. CMR

62. It might be argued that a door-to-door contract of carriage pursuant to the Draft Instrument would not be subject to the CMR because it is not a “contract for the carriage of goods by road” and because the place of taking over of the goods and the place of delivery are not related to a specific contract of carriage by road, but rather to the door-to-door contract. The taking over occurs at the place where and the time when the carrier (or a performing carrier) takes over the goods. Delivery occurs at the time when and the place where the carrier (or a performing carrier) delivers the goods to the consignee. If there are two road legs, one before and one after the sea leg, then the taking over and delivery are not related to the same road leg. If

there is only one road leg, for example before the sea leg, then delivery is wholly unrelated to a carriage by road. However, it has also been argued quite strongly that the road leg of a door-to-door contract of carriage would be subject to the CMR (see below, paragraphs 115 and 116).

63. It may also be argued that the reference in article 1(1) of the CMR to the place of taking over and the place of delivery should not be read as a reference to the places that the contract specifies for the taking over and delivery by the carrier in its capacity as an international road carrier. If the road carriage is followed by sea carriage, then there is no delivery at the end of the road carriage, for the goods remain in the carrier’s custody until delivery to the consignee at the final destination. In a door-to-door contract from Munich to Montreal via Rotterdam, for example, Rotterdam cannot be qualified as the place of delivery under that main contract of carriage. It will be the place of delivery only under the subcontract between the door-to-door carrier and the performing carrier that performed the road carriage. The subcontract would thus be subject to the CMR, but the main door-to-door contract would not. Again, however, strong arguments to the contrary have also been made (see below, paragraphs 115 and 116).

64. If the contrary view were to prevail, it would be necessary to determine whether a provision such as that in article 4.2.1 of the Draft Instrument would avoid the conflict. It is thought that this would probably not be the case, because:

(a) in respect of loss, damage, or delay occurring partly during the road leg and partly at sea, while the burden of proof would in any event be on the claimant, the CMR would not prevail over the Draft Instrument;

(b) in respect of loss, damage, or delay to goods carried by sea on a road vehicle, there are conflicting provisions in the CMR and in the Draft Instrument: pursuant to article 2(1) of the CMR, its provisions apply except if the loss, damage, or delay occurs during the carriage by the other means of transport and is not caused by an act or omission of the road carrier, while under article 4.2.1 of the Draft Instrument its provisions would apply; and

(c) the CMR includes mandatory provisions other than those on the carrier’s liability, limitation of liability, and time for suit in respect of which article 4.2.1 of the Draft Instrument operates (see below, paragraphs 74, 80, 86, 96 and 101).

#### 2. COTIF-CIM

65. COTIF-CIM in its 1980 version, which is now in force, applies only to contracts of carriage entered into by railways covered by a through consignment note (article 1). Since a consignment note is not issued under the main door-to-door contract of carriage, the provisions of COTIF-CIM 1980 would therefore not be applicable to the door-to-door contract of carriage covered by the Draft Instrument and consequently no conflict is conceivable.

66. The 1999 version of COTIF-CIM instead provides (article 6.2), similarly to the CMR (article 4), that the absence, irregularity, or loss of the consignment note does

not affect the existence or validity of the contract, which remains subject to COTIF-CIM. It is therefore necessary to determine whether COTIF-CIM, in its 1999 version, would apply to the main door-to-door contract of carriage covered by the Draft Instrument if one of the legs of that carriage is performed by rail between places situated in two different COTIF-CIM States. The relevant provision of COTIF-CIM 1999 is article 1.4, which provides:

“When international carriage being the subject of a single contract of carriage includes carriage by sea or transfrontier carriage by inland waterway as a supplement to carriage by rail, these Uniform Rules shall apply if the carriage by sea or inland waterway is performed on services included in the list of services provided for in Article 24.1 of the Convention.”

67. The first condition is, therefore, that the carriage by sea must be a “supplement” to the carriage by rail. It is thought that this condition materialises where the contract is made between the consignor and a railway and that, therefore, COTIF-CIM does not apply where the contracting carrier is not a railway. A potential conflict between the Draft Instrument and COTIF-CIM would thus be conceivable only if the door-to-door “carrier,” as defined in article 1.1 of the Draft Instrument, is a railway.

68. Even in such a rather unlikely case, the carriage by sea would need to be included in the list of services provided for in article 24.1 of COTIF-CIM in order for there to be competing coverage over the main door-to-door contract between the Draft Instrument and the COTIF-CIM.

### 3. CMNI

69. Carriage by different modes of transport, and more specifically by inland waterway and by sea, is regulated pursuant to the CMNI only when it is performed by the same vessel, without transshipment. Article 2(2) provides that in such a case the CMNI applies except where a “marine bill of lading” has been issued or the distance travelled by sea is greater than that travelled by inland waterway. Therefore, because normally both these conditions will apply in the case of a door-to-door carriage under the Draft Instrument, the CMNI would generally not apply to that main contract of carriage.

70. The case of a contract of carriage by sea and by inland waterway with transshipment of the goods from the seagoing vessel to the inland waterway vessel or vice versa is not specifically addressed. It is thought that such a contract is not covered by the definition of “contract of carriage” in article 1(1) of the CMNI, where reference is made to a contract whereby a carrier undertakes to carry goods by inland waterways. If this view is correct, the CMNI would again apply only to the subcontractual relation between the door-to-door carrier and the carrier that performed the carriage by inland waterway.

### 4. Warsaw and Montreal Conventions

71. The “combined carriage” mentioned in article 31.1 of the Warsaw Convention and article 38.1 of the Montreal Convention must be a carriage performed by two different

modes of transport under one single contract. Insofar as the air carriage is concerned, however, the only requirement is that it fall within the terms of article 1, meaning that the place of departure and the place of destination are situated within the territories of two High Contracting Parties (or States Parties, in the case of the Montreal Convention). Because these places are the places of departure and of destination of the carriage by air, the Warsaw Convention would apply to the air leg of a main door-to-door contract made by a sea carrier (assuming, of course, that the air carriage is performed between two High Contracting Parties). The position would be the same under the new 1999 Montreal Convention.

### C. Possible application of competing conventions on issues outside of carrier’s liability, limitation of liability and time for suit

72. Under article 4.2.1 of the Draft Instrument, the network system is limited to the subjects of the carrier’s liability, limitation of liability, and time for suit. In all other areas covered by the Draft Instrument, its provisions apply irrespective of any different provisions that may exist in other applicable conventions. A non-exhaustive review of such provisions in other transport conventions follows. This review will cover the provisions relating to: (1) the obligations and liability of the shipper for damage caused by the goods; (2) the obligations of the shipper to furnish information; (3) transport documents; (4) freight; (5) the right of control; (6) delivery of the goods; and (7) the transfer of rights. Such a review would, of course, become material if another transport convention were held to apply to a door-to-door contract of carriage covered by the Draft Instrument.

#### 1. Obligations and liability of the shipper for damage caused by the goods

73. Article 7.1 of the Draft Instrument requires the shipper to deliver the goods ready for carriage and in such condition that they will withstand the intended carriage. Article 7.6 provides that the shipper is liable to the carrier for any loss, damage, or injury caused by the goods and for a breach of its obligations under article 7.1 unless the shipper proves that the loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequences of which it was unable to prevent.

74. The CMR has two distinct provisions, one in respect of the defective packaging of the goods in general (article 10) and one in respect of dangerous goods the nature of which the shipper has failed to indicate together with the precautions to be taken (article 22). The shipper is liable if the defect or the dangerous nature of the goods is not known to the carrier.

75. COTIF-CIM article 14 provides that the consignor is liable to the carrier for any loss, damage, and costs due to the absence of, or defects in, packing, unless the defect is apparent and the carrier has not made any reservation.

76. The CMNI, following the CMR, also provides for two separate obligations of the shipper. The first relates to all goods and is to the effect that, if the nature of the goods

so requires, the shipper must properly pack and mark the goods (article 6.3). The second one is to the effect that if dangerous or polluting goods are to be carried, the shipper must inform the carrier of the danger or of the risk of pollution inherent in the goods and of the precautions to be taken. The CMNI then provides at article 8.1 that the shipper is strictly liable to the carrier for its failure to provide information in respect of dangerous goods. Nothing is said in respect of the breach of the general obligation to properly pack and mark the goods, but it is thought that such a breach would entail a similar liability.

77. The Warsaw and Montreal Conventions have no specific provision in respect of damage caused by the improper packing or marking of the goods.

78. In sum, the obligations and liability of the shipper in respect of the condition of the goods under the Draft Instrument differ from those under the other transport conventions, and there seems to be no problem of competing application. However, it is possible that the contrary conclusion may be reached if, for example, the analysis of the application of the CMR set out in paragraphs 62 and 63 above is found to be inaccurate (see paragraphs 115 and 116 below).

## 2. *Obligations of the shipper to furnish information*

79. Article 7.3 of the Draft Instrument requires the shipper to provide the carrier with the information, instructions, and documents reasonably necessary for (a) the handling and carriage of the goods; (b) compliance with rules and regulations in connection with the intended carriage; and (c) compilation of the contract particulars and issuance of the transport documents. Article 7.5 provides that the shipper is liable for any loss or damage caused by its failure to comply with the above obligations.

80. Under CMR article 7.1, the sender is responsible for all expenses, loss, or damage sustained by the carrier by reason of the inaccuracy of the particulars furnished by him in compliance with article 6. Under article 11, the sender must attach to the consignment note the documents necessary for customs or other formalities, and is liable to the carrier for any loss or damage caused by its failure to comply with this obligation.

81. The COTIF-CIM provisions are similar to those of CMR. Article 8.1 provides that the consignor shall be responsible for all costs, loss, or damage sustained by the carrier by reason of the entries made by the consignor in the consignment note being incomplete or incorrect or by reason of the consignor's omitting the entries prescribed by the Regulations concerning the International Carriage of Goods by Rail.

82. CMNI article 6.2 requires the shipper to furnish the carrier with particulars concerning the goods and instructions concerning the customs or administrative regulations applicable to the goods, as well as with information relating to the dangerous character of the goods. Article 8 then provides that the shipper is strictly liable for all damages and costs incurred by the carrier as a consequence of the shipper's failure to comply with its obligations.

83. Article 10(1) of the Warsaw and Montreal Conventions provides that the consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it in the air waybill but, as for the corresponding provision of the CMR, this does not imply an obligation to provide such particulars or statements. Article 10(2) then provides that the consignor must indemnify the carrier against all damages suffered by it or by any other person to whom the carrier is liable by reason of the irregularity, incorrectness, or incompleteness of the information supplied.

84. Although the difference between the provisions of the Draft Instrument and those of the other transport conventions may not be very significant, nevertheless the provisions are not identical. The Working Group may wish to discuss whether absolute uniformity should be realised in respect of the obligations of the shipper. In this regard, a solution similar to that envisaged in article 4.2.1 for the carrier's liability, limitation of liability, and time for suit could be considered by the Working Group.

## 3. *Transport documents*

85. Whereas the transport documents and electronic records regulated by the Draft Instrument cover the whole door-to-door transport, the transport documents regulated by the unimodal transport conventions under consideration each cover, as a general rule, only the segment of carriage by means of that particular mode of transport. The consequence appears to be that a conflict cannot arise, because each unimodal convention will continue to govern the document issued by the subcarrier that subcontracts to perform a specific non-maritime leg of the transport.

86. Under the CMR, the problem would not arise if, as previously stated (see above, paragraphs 62 and 63), the CMR applies only to subcontracts entered into by road carriers. But even if this was not the case, and the CMR was held to apply to the main door-to-door transport contract, the problem of conflicting documents should still not arise. It is true that if the shipper were to request a consignment note under CMR article 4, it could conflict with the contract for the main door-to-door carriage, and that if a consignment note were issued under the overall contract for the door-to-door carriage, it could defeat the purpose of that main contract. In practice, however, the shipper in a door-to-door contract involving a maritime leg is unlikely to make such a request. The consignment note could cover only the leg of the road carriage that precedes or follows the sea carriage. At the end of a road leg that *precedes* the sea carriage, the shipper has neither the right to take, nor the interest in taking, delivery of the goods, thus the shipper would not request a consignment note for this particular road leg. At the commencement of a road leg *subsequent* to the sea carriage, the shipper could not obtain the issuance of a consignment note, since the shipper does not have the goods in its possession, as would be required for such an issuance. Of course, the CMR provisions, including those on consignment notes, would continue their full application in respect of the subcontract between the door-to-door carrier and the road carrier. However, it has also been suggested that while the above analysis will largely hold true, it may be possible to envisage a case



where, for example, a door-to-door contract from Munich to Montreal via Rotterdam could involve a road carrier who will issue a consignment note.

87. Under COTIF-CIM, the position is similar to that under CMR. The door-to-door carrier would issue a transport document covering the entire door-to-door carriage, rather than a consignment note for the rail leg, as prescribed by article 6 of COTIF-CIM. Again, there are practical purposes for this. If the railway leg precedes the sea leg, the door-to-door carrier does not undertake to deliver the goods to the consignor at the end of the rail leg, but rather to carry them to the final destination. If the railway leg follows the sea carriage, the carrier will not take over the goods from the consignor at the start of the rail leg. Thus, there would be no legal or practical basis for the door-to-door carrier to issue a separate consignment note for the rail leg of the carriage. Again, however, the consignment note would instead be drawn up for the railway subcarriage between the door-to-door carrier and the railway.

88. Pursuant to the CMNI, a distinction must be made between (1) the carriage of goods on a seagoing vessel with subsequent transshipment on another vessel performing the carriage by inland waterways and (2) the carriage of goods by sea and on inland waterways without transshipment. In the case of transshipment, the CMNI provisions on transport documents will apply to the subcontract between the door-to-door carrier and the inland carrier, while the provisions of the Draft Instrument will apply in respect of the transport document or electronic record to be issued by the door-to-door carrier in respect of the overall carriage. In the case where there is not transshipment, only the provisions of the Draft Instrument will apply. It is thought that the reference in article 2(1)(a) of CMNI to “marine bill of lading” must be interpreted as covering any transport document issued in connection with the carriage of goods by sea.

89. For the reasons stated in respect of CMR, and because the provisions of the Warsaw and Montreal Conventions governing the issuance of a transport document are not mandatory, by agreeing to enter into a door-to-door contract the shipper impliedly waives the right to obtain a separate document for a single leg of the carriage.<sup>16</sup>

#### 4. Freight

90. Neither the CMR nor the Warsaw and Montreal Conventions contain a provision on freight.

91. In COTIF-CIM, article 10.1 provides that, unless otherwise agreed, the costs (the carriage charge, incidental costs, customs duties and other costs incurred) must be paid by the consignor. Article 10.2 then provides that if the costs are payable by the consignee and the consignee has not taken possession of the consignment note nor asserted the

right to take delivery, the consignor remains liable to pay the freight. The provisions of the Draft Instrument do not seem to conflict with those of COTIF-CIM.

92. Article 6.1 of CMNI provides only that the shipper shall be required to pay the amounts due under the contract. Therefore no conflict is conceivable.

#### 5. Right of control

93. In the Draft Instrument, the subject of the right of control of the goods is dealt with in some detail in Chapter 11. The “right of control” is defined as the right under the contract of carriage to give instructions to the carrier in respect of the goods during the period of its responsibility. Some of the possible instructions are specified in article 11.1. The rules on identification of the controlling party and on the transfer of the right of control are then set out in article 11.2 according to whether a negotiable transport document or a negotiable electronic record has been issued. There follow in article 11.3 provisions regulating the obligation of the carrier to execute the instructions of the controlling party and its limits. Article 11.4 deals with the effect of the delivery of the goods in the place indicated by the controlling party and article 11.5 deals with the right of the carrier to obtain instructions from the controlling party. Finally, article 11.6 specifies which of the preceding provisions may be varied by agreement, thereby impliedly indicating those that instead are mandatory.

94. Because some of the unimodal transport conventions have provisions on the right of the shipper or other controlling party to give instructions to the carrier, the issue of whether there could be competing application between the Draft Instrument and those conventions in this regard must be examined.

95. In order that the person entitled to exercise the right of control may invoke the provisions of any of the unimodal transport conventions instead of those of the Draft Instrument, it would be necessary that such person prove that at the time of the exercise of the right of control, the conditions for the application of a transport convention exist. This would require proof that the goods are in the custody of a road carrier, a rail carrier, an air carrier, or an inland navigation carrier.

96. The exercise of the right of control under CMR, called a “right of disposal,” is subject, pursuant to article 12(5)(a), to the production by the sender or the consignee of the first copy of the consignment note. As discussed above in paragraph 86, with respect to the overall door-to-door transport, neither the sender nor the consignee would likely be in possession of the consignment note. Thus the provisions of the CMR would not likely apply to the main door-to-door carriage, and they would probably only apply to the subcontract between the door-to-door carrier and the road carrier.

97. Under COTIF-CIM, the exercise of the “right of disposal” is subject, pursuant to article 19.1, to the production of the duplicate of the consignment note. Again, the same analysis applies as with respect to the CMR.

<sup>16</sup>Article 4 of both conventions, in fact, after having stated in paragraph 1 that an air waybill shall be delivered, provides in paragraph 2 that any other means which would preserve a record of the carriage to be performed may be substituted for delivery of an air waybill, but the Warsaw Convention makes this subject to the consent of the consignor.

98. Article 14 of CMNI grants the shipper the right of disposal of the goods and its right ceases when, following the arrival of the goods at the destination, the consignee has requested delivery. Under article 15, the exercise of the right of disposal of the goods is conditional on the shipper's or consignee's (a) submitting all originals of the bill of lading, if a bill of lading had been issued, or the other transport document that may have been issued; (b) reimbursing to the carrier all costs and damages; and (c) paying the agreed freight in case of discharge of the goods prior to arrival at the agreed place of delivery. Again, for the reasons noted above under the section on transport documents (see paragraph 88) with respect to the CMNI, no conflict with the Draft Instrument is conceivable if the carrier by inland waterway is a subcontractor.

99. Article 12(1) of the Warsaw and Montreal Conventions grants a very wide right of disposal of the cargo to the consignor, subject to its obligation to reimburse any expense incurred by the carrier. If the air carrier is a subcontractor, however, then the door-to-door carrier will be the Warsaw and Montreal Conventions' "consignor." Because the original shipper will not be the "consignor," no conflict with the Draft Instrument and the overall door-to-door contract of carriage can arise, and the provisions of the Warsaw and Montreal Conventions will apply to the subcontract between the door-to-door carrier and the air carrier.

#### 6. Delivery of the goods

100. The Draft Instrument contains express provisions on delivery. Article 10.1 provides that if after arrival of the goods at destination the consignee exercises any of its rights under the contract of carriage, then it is obliged to accept delivery. If it leaves the goods in the custody of the carrier, the carrier will act as the agent of the consignee. Article 10.2 provides that, on request of the carrier or of the performing party that delivers the goods, the consignee shall confirm delivery in the manner that is customary at the place of destination. Article 10.3.1 regulates delivery if no negotiable transport document or electronic record has been issued and provides that the controlling party shall advise the carrier of the name of the consignee prior to or upon the arrival of the goods at the place of destination and that the carrier shall deliver the goods upon the consignee's production of proper identification. Article 10.3.2(a) regulates delivery when a negotiable transport document or electronic record has been issued. It provides that delivery is effected against surrender of one original of the transport document or, if a negotiable electronic record has been issued, upon the holder thereof demonstrating that it is actually the holder. Article 10.3.2(b)-(e) regulates the situation in which the holder does not claim delivery and the consequences of the carrier's delivering the goods upon the instructions of the controlling party or of the shipper and of the carrier's delivering the goods without the surrender of the negotiable transport document or without the demonstration that the holder of the negotiable electronic document is actually the holder. Article 10.4.1 then sets out the rights of the carrier in case the goods after arrival at destination are not taken over by the consignee or the carrier is not allowed to deliver them to the consignee. Finally, complementary provisions are set out in articles 10.4.2 and 10.4.3.

101. Pursuant to CMR article 13(1), the consignee is entitled to obtain delivery of the goods against surrender of the first copy of the consignment note. For the same reasons stated above in respect of the right of disposal (see above, paragraph 96), this provision cannot apply to the overall door-to-door transport. There are, however, two situations in which delivery may take place without production of the first copy of the consignment note. Article 15(1) provides that when circumstances prevent delivery of the goods after their arrival at destination, the carrier must ask the sender for instructions. This seems to imply that the sender may give instructions without being in possession of the first copy of the consignment note. It further provides that if the consignee refuses the goods, then the sender is entitled to dispose of them without being obliged to produce the first copy of the consignment note. However, the CMR provisions would not compete with the Draft Instrument for application to the overall door-to-door contract of carriage because the sender for the road leg either preceding or following the carriage by sea, is the door-to-door carrier who subcontracts the performance of the carriage by road, and not the consignee. As such, the Draft Instrument would apply to the overall door-to-door carriage and the CMR would apply to the subcontract for the road leg. Again, however, the opposite conclusion may be reached if the analysis of the CMR set out in paragraphs 62 and 63 is found to be inaccurate (see paragraphs 115 and 116 below).

102. Under article 17 of COTIF-CIM, it would appear that the consignee named in the consignment note is entitled to obtain delivery without the surrender of the duplicate of the consignment note. This, however, does not seem to give rise to any potential conflict with the Draft Instrument, for in respect of the railway leg preceding the carriage by sea, the consignor will be the door-to-door carrier or its agent and the person named as consignee in the note will be either the door-to-door carrier itself or its agent at the place where the railway leg terminates. The position will be similar in respect of the railway leg subsequent to the sea leg. Thus the COTIF-CIM will apply to the subcontract for the railway leg, while the Draft Instrument will apply to the overall door-to-door contract.

103. Pursuant to CMNI article 13(2), if bills of lading have been issued, the goods must be delivered in exchange for one original bill of lading. Therefore, whenever the carrier by inland waterway is a subcarrier, the bills of lading that it issued will be in the possession of the door-to-door carrier, which will be the shipper. The situation would be similar if a non-negotiable transport document were issued, because under article 11(5)(b) it must indicate the name of the consignee, which will be the door-to-door carrier or its agent. No conflict between the provisions of CMNI and those of the Draft Instrument should therefore arise, and the Draft Instrument will apply to the overall door-to-door contract of carriage.

104. Although this is not expressly stated in article 13 of the Warsaw and Montreal Conventions, the right of the consignee to obtain delivery of the cargo is conditional on the production of the air waybill. This is impliedly provided by article 6 of the Warsaw Convention and article 7 of the Montreal Convention, pursuant to which one of the

three original parts of the air waybill must be marked “for the consignee.” If the air carrier is a subcarrier, the three originals of the air waybill will be handed over to the door-to-door carrier and, therefore, the provisions of the Warsaw and Montreal Conventions would not apply in respect of the shipper, who would not be a party to the contract of carriage by air. Again, only the rules on delivery in the Draft Instrument will apply to the overall door-to-door carriage.

### *7. Transfer of rights*

105. A conflict between the provisions of the Draft Instrument in Chapter 12 and those of the other transport conventions does not appear to be possible. The rules set out in the Draft Instrument for the case in which a negotiable transport document or a negotiable electronic record is issued relate to a contract and to parties different from those in respect of which the relevant rules of the other unimodal transport conventions are applicable. No rule is contained in the Draft Instrument for the case in which no negotiable transport document or electronic record is issued. Article 12.3 instead provides that the transfer of rights in such a case shall be effected in accordance with the national law applicable to the contract of carriage and that law obviously includes the rules of any convention that has been given the force of law.

#### **D. Possible application of competing conventions in respect of recourse actions of the door-to-door carrier against a performing carrier**

106. A conflict in this regard could arise only if the contract of carriage between the door-to-door carrier and the performing carrier by a mode other than sea were governed by the Draft Instrument. It is thought, however, that this is not the case, for articles 6.3.1 and 6.3.3 govern the liability of performing parties vis-à-vis only the shipper and the consignee.

107. In any event, it would not be advisable to make the contract between the door-to-door carrier and the performing carrier subject to the provisions of the Draft Instrument. A clear conflict of conventions would arise given the application of the unimodal transport conventions to each of the subcontracted transport legs. In addition, the performing carrier could be wholly unaware of the fact that it is agreeing to provide transport services within the ambit of a door-to-door contract, which is subject to a specific set of uniform rules.

#### **E. Possible application of competing conventions in respect of claims of the shipper or consignee against the performing carrier**

108. There is no privity of contract between the shipper or the consignee and the performing carrier. As such, there is no basis for a claim by the shipper or the consignee against the performing carrier under the existing unimodal transport conventions unless the relevant convention so provides, or if an action may be pursued in tort or delict.

109. This is probably the case for COTIF-CIM 1980 (article 51) and COTIF-CIM 1999 (article 41) but not for the

CMR and CMNI because, similarly to the Hague-Visby Rules (article 4 bis) and the Hamburg Rules (article 7), they provide for the application of their provisions only to the servants and agents of the carrier, but not to independent contractors (CMR article 28; CMNI articles 17.3 and 22).

110. As regards the Warsaw and Montreal Conventions, it is thought that article 24.2 and article 29, respectively, pursuant to which any action, whether in contract or in tort or otherwise, can be brought only subject to the provisions of the convention, applies only to actions against the air carrier. This view is confirmed by the fact that actions brought against the servants or agents of the air carrier are regulated by article 25 and article 30, respectively.

### **III. ADVANTAGES AND DISADVANTAGES OF GENERAL DOOR-TO-DOOR COVERAGE AND OF THE DRAFT INSTRUMENT'S NETWORK SYSTEM**

111. The overall advantage of any door-to-door coverage is, of course, that it would provide consignors of goods in international trade with the ability to contract for the movement of their containers from door-to-door smoothly, seamlessly and at a predictable cost, regardless of the mode of transport used. Despite the increase in multimodal transportation worldwide, consignors prefer to deal with only one party under one contract, rather than engaging in a series of contracts with various carriers. It has been noted above that the container trade to which the door-to-door system is most relevant represents an impressive proportion of both the value and the quantity of maritime trade, and that in the absence of unified rules governing door-to-door contracts, industry has filled the vacuum with rules of its own. Still, a unified and predictable system of rules would greatly reduce the uncertainty and expense involved in litigating which contract terms or convention terms apply to a given case.

112. In addition to the general advantages of any door-to-door system outlined above, it has been suggested that some of the existing unimodal transport conventions contain gaps that are filled by the Draft Instrument. For example, the CMR does not apply if the road carrier fails to collect the goods, and the convention fails to define “take over”. The Draft Instrument appears to fill these gaps. Further, the CMR does not provide for an extension of the time for suit, except to say, at article 32.3 that it should be governed by the *lex fori*. The Draft Instrument does allow for such an extension (article 14.3). However, it has been suggested that it is unclear whether the CMR provision is considered to be mandatory, and thus there would be competing provisions applicable to this aspect of the overall contract of carriage.

113. In a similar vein, it has been suggested that the issue of title to sue is not apparently within the scope of article 4.2.1 of the Draft Instrument, and both the Draft Instrument and the CMR make provision for title to sue. While it may be that the provisions of the Draft Instrument would prevail, it does not appear in some quarters to be clear enough.

114. It has been suggested that one disadvantage of the network system set out in article 4.2.1 of the Draft Instrument is that it is still necessary to establish when, and of course, during which mode of transport, the loss occurred, and whether any of the laws in force govern the situation mandatorily. However, it should be noted that one of the benefits of a single door-to-door instrument is that it provides a solution for progressive damage during transport, and it is not necessary to detect the cause of damage once it has been established that the damage was caused during custody. However, it is possible that this clarity is attenuated somewhat in the situation where there is a combination of modes of transport as, for example, if a trailer being towed on a ferry were damaged by hitting a bulkhead.

115. Other criticisms have been made of the uncertain parameters of precisely where coverage by the Draft Instrument would end, and where coverage by other unimodal conventions would begin. As noted above, it has been argued that since the CMR covers only a contract of carriage of goods by road and not by sea, the CMR would not apply to the overall contract for door-to-door transport envisaged by the Draft Instrument, even during the road leg. However, despite the discussion above in paragraphs 62 and 63, it has strongly been suggested that in order for the CMR to govern a given contract of carriage, it is irrelevant whether a land leg follows or precedes a sea leg. Similarly, it has been suggested that the importance or distance of the land leg in comparison with the other legs of the carriage is irrelevant in determining whether the CMR will govern the contract of carriage. Further, it has been suggested that the scope of the CMR is not limited to contracts for the carriage of goods *exclusively* by road, or even *predominantly* by road, since pursuant to article 1.1, the CMR shall apply to every “contract for the carriage of goods by road (emphasis added)”, and not to every contract of carriage of goods by road.

116. In addition, it has been suggested that the argument that the CMR will not conflict with the Draft Instrument based upon the place of taking over of the goods is not entirely clear either. It has been argued that this is too literal an interpretation of “taking over”, and that the context of the CMR is such that a carrier may become liable even though it does not take over the goods in a physical sense. Moreover, it is suggested that article 1.1 of the CMR is a unilateral conflicts rule, and that what is important about the “taking over” is that it marks the beginning of contract performance that must begin in one country and end in another.

117. Another potential problem with the network system is said to be that the liability limit varies according to the applicable regime. These limits vary markedly from the maritime to the non-maritime context: the CMR limit is 8.33 SDRs per kilogram, the COTIF-CIM limit is 17 SDRs per kilogram, as are the Montreal and Warsaw Conventions, while the Hague-Visby limit is only 2 SDRs per kilogram or 666.67 SDRs per package, and the Hamburg limit is 2.5 SDRs per kilogram or 835 SDRs per package. While the rate for the Draft Instrument has not yet been established, and it is likely that the maritime limit will be increased, it remains uncertain how far up from the traditional 2 SDRs the liability limit will rise.<sup>17</sup> One

further aspect that the Working Group may wish to note in this regard is that the liability limit would have to be increased from the established minimum levels in order to allow the regime to be incorporated into unimodal sub-contracts, if desired. One obstacle to this, however, may be that the CMR in article 41 states that a carrier’s liability can be neither increased nor decreased. Ultimately, however, some would argue that uniform limits for all stages of carriage in a multimodal regime are inappropriate, and should be left to national and regional policy decision-makers.

118. One other issue that has been raised with respect to the door-to-door approach in general is concern that the regime should operate in harmony with the regimes governing other international contracts, such as contracts of sale. While it is seen as positive that the mandatory aspects of the Draft Instrument are tackle-to-tackle, since this matches the passing of risk under a FOB contract, a note of caution is raised with respect to the extension of coverage to door-to-door. It is suggested that any door-to-door extension should be matched by changes to the contract of sale regime.

#### IV. DIFFERENCES BETWEEN NON-MARITIME AND MARITIME APPROACHES TO THE CARRIAGE OF GOODS

119. One general criticism that has been levelled at the door-to-door approach has been that it could be seen to represent the application of a maritime regime to other modes of carriage.

120. An important difference between non-maritime and maritime approaches to the carriage of goods is with respect to certain aspects of proof and presumptions regarding responsibility. “Special risks” are triggers that presume fault on the part of the consignor, and which are a distinctive and important feature of the CMR and the COTIF-CIM. The Draft Instrument, however, may be read as establishing a regime that presumes negligence on the part of the carrier.

121. In addition, some aspects of the Draft Instrument are obviously not intended to cover ancillary carriage of goods by other modes. For example, the carrier’s defence for perils of the sea in article 6.1.3(xi) is clearly inappropriate in the context of other means of carriage. Nor does the maritime carrier’s defence of fire in article 6.1.2(b) of the Draft Instrument translate easily to non-maritime modes.

122. Similarly, the carrier’s responsibility for the state of the vehicle being used varies dramatically depending on the mode of carriage. The Draft Instrument requires due diligence to make the ship seaworthy (article 5.4), and the

<sup>17</sup>However, it should be noted that the limitation on liability for low-weight, high-value packages may be higher when calculated on a per package basis rather than on a per kilogram basis. For example, if laptop computers are individually packaged in containers, a liability limit based on 8.33 SDRs per kilogram would certainly be lower than one based on 666.67 SDRs per package.

carrier is excused with respect to latent defects in the ship not discoverable by due diligence (article 6.1.3(viii)), but the underlying duty is still barely one level higher than that of reasonable care. In contrast, the CMR level of duty with respect to the vehicle is one of the utmost diligence, while the Montreal Convention holds the air carrier to a strict duty with fewer defences than the maritime carrier (article 18.1 and 18.2).

123. Other, more general issues may arise with respect to differences in the “drafting culture” of non-maritime regimes. For example, the Draft Instrument is quite detailed, more along the lines of the Hague and Hague-Visby Rules than the less specific and more recent Hamburg Rules. The trend with respect to non-maritime regimes appears to be toward less, rather than greater detail, as, for example, with the Montreal Convention and the new COTIF-CIM. In addition, the Draft Instrument currently contains the familiar, and much-litigated, Hague Rules due diligence obligation of seaworthiness (article 5.4(a)), as well as the exceptions (article 6.1.3), although they are cast in the Draft Instrument as presumptions of absence of fault rather than as exonerations. This is in contrast with harmonization efforts in carriage of goods conventions since 1950, which have largely sought to avoid words or phrases drawn from national law in order to avoid tempting national courts to interpret them in a known and national way and thus thwart the harmonization efforts.

124. The above discussion would seem to indicate that an overall disadvantage of a door-to-door approach, including the network system set out in the Draft Instrument, is that it could entail the application of a maritime instrument in certain circumstances to other modes of carriage. However, a review of the criticisms may indicate to the Working Group that most, if not all, of these problems may be attenuated through careful drafting.

## V. PROPOSED SOLUTIONS

125. The paragraphs below outline a variety of options for consideration by the Working Group. Some of the proposed solutions represent more general suggestions regarding the approach that might be taken by the Working Group, while others present very specific drafting solutions. Although they are considered below under separate headings, the various options outlined are not intended to be mutually exclusive, nor it is suggested that they are necessarily incompatible with each other. The Working Group may wish to consider these options separately, or in combination with each other.

### A. Convention or Model Rules?

126. It would be possible to introduce a new international maritime regime by means of a convention, a restatement or by way of a set of model contractual rules. The best means of ensuring the application of a unified system would come by way of an international convention. However, the convention approach has resulted in limited success in recent years, as witnessed by the results garnered by the Multimodal Convention and the Hamburg Rules.

127. Further, it has been suggested that the more detailed the draft and the greater the number of States attempting to reach agreement, the lower is the likelihood of concluding the successful negotiation of an international convention. In addition, conventions may be seen as less flexible, and difficult to change and adapt to new and changing circumstances. Some would argue that reaching agreement on an international instrument might be more easily achieved at a regional, rather than a universal level. While this might be the case, regional development of regimes in this area will only serve to contribute to the current uncertainty, and will most certainly fail to meet the goal of a unified and predictable system for the worldwide carriage of goods by sea.

128. The UNCTAD/ICC Rules came into effect in January of 1992, and it has been suggested that they are becoming increasingly popular. These Rules combine a uniform system with a network system. Their liability provisions are uniform and rather similar in effect to those of the Hague-Visby Rules. In respect of limitation of liability, the UNCTAD/ICC Rules provide for a network system: the limits of the otherwise mandatory applicable convention or national law apply. It would be possible to adopt a new maritime convention that would cover port-to-port carriage of goods, and pair it with model contractual rules that would cover any modes of transport ancillary to the maritime carriage. Clearly, the adoption of model rules rather than a convention would be faster than the adoption and entry into force of a convention. Presumably, this would also hold true when comparing the adoption of a combined convention/model rules with the adoption of a single convention for door-to-door carriage. However, one clear disadvantage of adopting contractual rules rather than a convention is, of course, that rules do not carry the status of mandatory law, and thus would be less likely to achieve a unified approach. In addition, such contractual rules could come into conflict with the mandatory provisions of certain conventions.

129. Study in the area of multimodal regimes is continuing. The United Nations Economic Commission for Europe (UNECE) has been studying the possibility of reconciling and harmonizing the liability regimes for multimodal transport, and UNCTAD is continuing to study the feasibility of a full multimodal regime.<sup>18</sup> The tidiest resolution to the current disharmony would seem to be reaching agreement on a widely-acceptable multimodal convention, however, attempts at the creation of such a system have not been successful to date. As such, one other possibility could be to await the outcome of these studies, and to allow the international carriage of goods by sea to be governed in the interim by the existing maritime conventions along with the UNCTAD/ICC Rules for the ancillary transport, and the other contractual regimes established by industry. However, this approach would provide little in the way of harmonization and clarity, and there is no indication that work will actually begin on a new multimodal convention. This option does not seem attractive, since it merely reflects the current state of affairs in the industry, which is exerting growing pressure for immediate improvements to the legal regime in this area.

<sup>18</sup>See the UNCTAD Report, “Multimodal Transport: The Feasibility of an International Legal Instrument,” *supra*, note 9.

## B. Fast-track and slow-track approaches

130. Another possible approach was suggested by one of the respondents to questionnaire circulated by the secretariat in 2002.<sup>19</sup> The option suggested was to approach the issue of reform of the legal regime governing the carriage of goods in two stages. The first stage would be a fast-track approach, under which a new port-to-port convention would be negotiated which would cover the sea leg of carriage only. A second slow-track approach would be used to deal with the more controversial issues, such matters concerning the land leg of the carriage. It was further suggested that this second slow track could be made optional for contracting States.

131. The advantage to this option is clearly the greater speed with which a fast-track instrument limited to port-to-port carriage might be concluded. However, there is no guarantee that the adoption of such an instrument would be significantly faster. Further, postponing the thorny issues in this fashion might be insufficient to provide a resolution to matters that have become quite pressing for industry, nor would it provide the harmonization sought.

## C. Options that preserve the network principle

132. While the network solution set out in article 4.2.1 of the Draft Instrument could present a viable means forward for a door-to-door convention, variations on the approach set out in the Draft Instrument, as well as other options may be possible. The following sections set out several possible options that involve the network approach.

### 1. A “unimodal plus” approach

133. This proposed approach attempts to serve as a long-term solution to the multimodal problem, and would work in concert with the network system set out in article 4.2.1 of the Draft Instrument. In order to alleviate any uncertainty with respect to perceived conflicts between the scope of the Draft Instrument and the unimodal transport conventions, adjustments could be made to the scope of application provisions of each of the unimodal conventions in order to clarify that they apply to a certain type of contract, which is defined by reference to one or more modes of transport.

134. In effect, the “maritime plus” approach, wherein the Draft Instrument’s proposed application would cover the door-to-door carriage of goods transported wholly or partly by sea (see above, paragraph 8), could be replicated in respect of other modes of transport. In effect, each unimodal convention would be expanded to include any other type of carriage that precedes or is subsequent to the specific mode of carriage that is the subject of that particular unimodal transport convention. Because the scope of application of various unimodal conventions would overlap, the “unimodal plus” approach requires that each unimodal convention contains a similar conflict of convention provision.

135. Such an extension of scope of the unimodal conventions would mean that a multimodal carriage could be covered by one of possibly several conventions, and that parties would be required to choose which convention

would apply to the entire carriage. In practice, the market would regulate the choice. If the consignor requested a quotation for multimodal transport from a European rail carrier, it would likely receive a quotation offered under the conditions to which such rail carrier was accustomed, i.e. the COTIF-CIM. Similarly, a European road carrier would be likely to provide a quotation under the conditions of the CMR. For enhanced clarity, each unimodal convention would also have to include a conflict of convention provision.

136. One advantage of this overall scheme is that a single contract and a single set of conditions would apply to the entire carriage. Further, it would be possible for forwarders to offer alternative sets of rules for intermodal carriage, at a different prices, thus allowing the market to govern the conditions over time.

137. The disadvantage of an overall “unimodal plus” system is that it would require the amendment of each of the existing unimodal transport conventions. Moreover, such changes would have to be made in concert, and would have to include a similar conflict of convention provision. This would inevitably take time and would slow down the progress in respect of the work on the Draft Instrument. As a consequence, even if the Working Group were to pursue such a “unimodal plus” system, a provision along the lines of draft article 4.2.1 would have to be retained in the interim. In a later stage (e.g. by additional protocol), draft article 4.2.1 could be replaced with a new conflict of convention provision that would take into account the application of other conventions to the sea leg of an international carriage.

### 2. The Canadian proposal

138. In preparation for the tenth session of the Working Group in September 2002, a proposal was submitted by the Government of Canada (A/CN.9/WG.III.WP.23) concerning the scope and structure of the Draft Instrument. In light of the discussion held at the ninth session of the Working Group regarding the scope of application of the Draft Instrument on a door-to-door or on a port-to-port basis, three options were presented as alternatives.

#### (a) Option 1

139. The first option would be to continue to work on the existing Draft Instrument, including draft article 4.2.1, but to add a reservation that would enable contracting States to decide whether or not to implement this article and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea.

140. One of the advantages of this option would be that it would advance the objective of restoring uniformity of law in the marine mode, and that it would establish uniformity in other ancillary modes of carriage. At the same time, contracting States that do not share the goal of uniform rules for door-to-door transit could still be part of the new marine regime, with the possibility of revoking the reservation in the future to apply the Draft Instrument on a door-to-door basis. An additional advantage of this option is that since the reservation would be declared at the time of ratification, there would be no confusion as to which

<sup>19</sup>See A/CN.9/WG.III/WP.28, page 27.

contracting States apply all provisions of the instrument and which States reserved on the application of the instrument to inland carriage under draft article 4.2.1.

(b) *Option 2*

141. The second option presented was to continue to work on the existing Draft Instrument, including draft article 4.2.1, but to insert the phrase “or national law” after the phrase “international convention” in draft paragraph 4.2.1.

142. Again, the advantage of this option is that it would allow for the establishment of uniformity during maritime transport, while leaving the rules for the ancillary modes of carriage to national law for those contracting States that so prefer. One disadvantage of this option is that since there would be no record of any declaration, it could be more difficult to establish what law applies in a particular contracting State.

143. It was also suggested that in both Option 1 and 2, draft article 4.2.1. could also be subject to further elaboration regarding liability for non-localized damages.

(c) *Option 3*

144. The third option in this proposal would be to revise the existing Draft Instrument in a manner that would establish four separate chapters. Chapter 1 would deal with definitions and all provisions common to Chapters 2, 3 and 4. Chapter 2 would contain provisions governing the carriage of goods by sea on a port-to-port basis.

145. Chapter 3 would contain provisions governing the carriage of goods by sea *and* by other modes before or after carriage by sea, i.e. on a door-to-door basis. There could be two basic models for establishing the door-to-door coverage. The first possible model would be a uniform system, which would establish a single regime that would apply equally to all modes of transport involved in the door-to-door carriage. The second possible model would be a network system, which would be the same as the uniform system, but it would contain provisions that would displace the uniform system where an international convention was applicable to the inland leg of a contract for carriage of goods by sea, and it was clear that the loss or damage occurred solely in the course of that inland carriage.

146. Chapter 4 would contain the final clauses and reservations, including a provision for *express* reservations for Chapter 2, for those contracting States that wish to implement the new instrument for multimodal carriage of goods on a door-to-door basis; or for Chapter 3, for those contracting States that wish to implement the new instrument only for the carriage of goods by sea on a port-to-port basis.

147. This third option would, again, have the advantage of harmonizing international law for carriage of goods by accommodating both the port-to-port and door-to-door approaches in Chapter 2 and Chapter 3, respectively. A further advantage of this option is that it would be clear which contracting States adhere to the marine regime in Chapter 2 and which contracting States adhere to the multimodal regime in Chapter 3.

148. An additional advantage of this option is that it would improve the prospects of long-term uniformity since contracting States adhering only to Chapter 2 could join Chapter 3 by simply revoking their reservation on the latter. This could be an important improvement over the system presented in Option 1: it would add a further layer of uniformity in the event that a contracting State revoked its reservation, since the provisions in Chapter 3 would automatically apply. Moreover, the automatic application of the Chapter 3 provisions would avoid confusion if the contracting State revoking its reservation had adopted other regional conventions on the carriage of goods.

149. A further potential advantage of this third option is that if it were decided to adopt a network system (as opposed to a uniform system) in Chapter 3, the marine regime in that Chapter could be identical to Chapter 2, thus achieving the widest possible uniformity of law in the marine mode. In addition, adopting a network system in Chapter 3 would enable the simplification of the third option as follows: Chapter 1 could contain the definitions and all of the provisions common to Chapters 2, 3 and 4; Chapter 2 could contain the provisions governing the carriage of goods by sea, i.e. on a port-to-port basis; Chapter 3 could contain the provisions governing the carriage of goods by other ancillary modes before or after the sea carriage, i.e. door-to-door transport; and Chapter 4 could contain the final clauses and reservations, including a provision for express reservation for Chapter 3 for those contracting States that wish to implement the new instrument only for the port-to-port carriage of goods by sea.

### 3. *The Swedish Proposal*

150. Should the Working Group decide that the Draft Instrument should cover door-to-door transport, the Swedish proposal (A/CN.9/WG.III/WP.26) aims to better adapt the text of the Draft Instrument to existing international conventions, as well as to existing national mandatory liability regimes, particularly with respect to road and rail carriage. According to the Government of Sweden, the existing text in the Draft Instrument would, if adopted, create a conflict with the CMR and COTIF-CIM. It is noted that in many European countries, the liability regime in the Draft Instrument would also conflict with national mandatory liability regimes that are adapted to the existing regimes set out in the CMR and COTIF-CIM.

151. In order to solve these problems, the Government of Sweden proposed that the text in draft article 3.1 be changed to clarify that the Draft Instrument will only be applicable where the transport agreement is truly a contract for carriage by sea and not a contract for carriage by road or rail, where the truck or the wagon is transported by ferry during the sea leg. It is suggested that as the text stands, both the Draft Instrument and the CMR or COTIF-CIM regimes, respectively, would be applicable in the latter situation. According to the Government of Sweden, this would create a conflict between the conventions.

152. In draft article 4.2.1, an inclusion of an exception for national liability regimes is proposed. The reason for this is to avoid conflicts between the Draft Instrument and national mandatory liability regimes. In many CMR and

COTIF-CIM countries, the national liability regimes for these modes of transport are adapted to the corresponding international conventions. If the existing rule in draft article 4.2.1 is adopted, it could require these countries to enact a third liability regime for the carriage of goods by road and rail. This third liability regime would differ from the existing liability regimes that (unlike the Draft Instrument) are built on strict liability.

153. The Government of Sweden also suggested that it was important to adapt the liability regime of the Draft Instrument to the existing regimes for carriage of goods by road and rail in order to create a true multimodal convention. Therefore, the Government of Sweden proposed changes to the provisions in the Draft Instrument on the calculation of compensation, as well as the inclusion of a provision on non-located damages. In order to protect the shipper of the goods, it was proposed that the carrier will only be entitled to make use of the highest limitation level in the national or international mandatory liability regime that governs the transport. It is suggested that the reason for having a rather low limitation level in sea carriage is not relevant in this case, and that non-located damages usually involves rather small amounts of goods and are normally detected at the place of delivery.

#### D. The Italian proposal

154. After the tenth session of the Working Group in September 2002, a proposal was submitted by the Government of Italy (A/CN.9/WG.III/WP.25). Italy suggested that the ideal solution would be to have a uniform set of rules applicable throughout the carriage, rather than a network system, even if limited in scope, because, it was suggested, the network system creates uncertainty. The Draft Instrument, however, should apply only to the contract between the shipper and the carrier while the recourse action, if any, of the carrier against the performing carrier should remain subject to the specific rules applicable to the particular transport mode, be it carriage by sea, by road or railway. The Draft Instrument should not apply to claims of the shipper against the performing carrier, for this would again give rise to uncertainty, albeit in a different context: in this case, the uncertainty would affect the performing carrier, who may not even know what rules apply to the contract between the carrier and the shipper, since the performing carrier is not a party to that contract.

155. The application of the Draft Instrument to the claims of the shipper against the performing carrier could, moreover, entail a conflict between the Draft Instrument and the transport convention applicable to the transport performed by the performing carrier.

156. Under this proposal, it is suggested that it would be necessary to restrict the definition of "performing party" to persons other than performing carriers and to add a definition of "performing carrier". This change could be achieved by adding to the present definition at paragraph 1.17 of the Draft Instrument, after the words "Performing party means a person other than the carrier" the words "and the performing carrier(s)" and by adding the following new definition:

"'Performing carrier' means a person that at the request of the carrier performs in whole or in part the carriage of the goods either by sea or by [another mode] [rail or road]."

157. In order, however, to avoid possible actions in tort of the shipper against the performing carrier, it could be provided that the action of the shipper against the performing carrier is subject to the rules that would apply if the action against the performing carrier were brought by the carrier. If this principle is accepted, the Working Group may wish to consider what legal technique could be used in order to achieve that result: for example, a legal subrogation of the shipper into the rights of the carrier against the performing carrier.

158. In line with paragraphs 62 to 71 above, the Italian proposal examines the provisions of other transport conventions (CMR, COTIF-CIM and CMNI) with a view to determining whether a conflict with the Draft Instrument would arise, and a negative conclusion is reached.

#### E. Options based on the treatment of performing parties

159. It has been suggested that the basic principle underlying this set of options is that the Draft Instrument should be a convention that would apply door-to-door as between the parties to the contract of carriage, i.e. that the "carrier" (as defined in article 1.1 of the Draft Instrument) is liable to the other party to the contract of carriage on the Draft Instrument's uniform terms (not on a "network" basis) from the receipt of the goods (under draft article 4.1.2) to the delivery of the goods (under draft article 4.1.3) (the "door-to-door period").

160. While achieving full door-to-door coverage might not be feasible at the current time, it is suggested under this set of options that at least as between the immediate parties to the contract of carriage the Draft Instrument should apply uniformly and on a door-to-door basis. This is particularly the case if the new Convention is intended to encourage the door-to-door application of a unified regime, to the maximum extent possible. The advantage of making the contracting carrier liable on the same terms from receipt to delivery is that it offers predictability to the contracting parties: the cargo interests know that, as a minimum, they will have a cause of action on the Draft Instrument's terms against the party that undertook to perform the carriage, and the contracting carrier knows in advance the terms on which it will be liable to the cargo interests.

161. It has been suggested that the intention of the network system of liability was not to implement it with respect to the contracting carrier, but rather to provide rules in the event of a conflict between the new Convention and pre-existing unimodal conventions, such as those on road and rail carriage (CMR and COTIF-CIM). Potential conflict is of particular concern with respect to performing parties' liability (to the extent that the relevant performing parties may be, for example, European road or rail carriers). This issue is discussed in paragraphs 166 to 176 and 181 to 185 below. Another potential conflict of concern is the arrangement between the contracting door-to-door car-



rier and a unimodal carrier. However, this concern would seem to be outside of the scope of the Draft Instrument, since the arrangement would not qualify as a "contract of carriage" in the absence of a sea leg.

162. There should be no conflict between the Draft Instrument and either CMR or COTIF-CIM with respect to the liability of the contracting door-to-door carrier. Although it is argued that segments of a door-to-door movement might fall within the scope of CMR or COTIF-CIM (or both), as a whole, the door-to-door contract of carriage (which by definition in article 1.5 the Draft Instrument includes carriage by sea) would not generally be subject to either CMR or COTIF-CIM.

163. Furthermore, the application of the network principle might not be limited to potentially conflicting unimodal transport conventions. Some contracting States may wish to preserve their own domestic law with respect to domestic land carriage. In such cases, the network principle could operate to further complicate the issue of which law is applicable to the various segments of the door-to-door movement.

164. In addition, while the higher weight-based liability limits of other regimes for the carriage of goods generally provide for a greater recovery than traditional maritime regimes, there is no guarantee that domestic laws would do the same. In fact, some national laws might permit a land carrier to avoid all liability by contract. Thus, if and to the extent that draft article 4.2.1 would preserve such national laws, such a network principle could permit the contracting carrier to avoid all liability for the land segment of the carriage, and leave the cargo owner with no recovery.

165. It has been suggested that the following options may provide a way to preserve the possibility of higher recovery for a cargo claimant (when the loss or damage occurred during the period of application of some other law with a higher limitation amount) that does not involve including in the Draft Instrument Convention a mandatory network system applicable to the parties to the contract of carriage.

### 1. Option 1—Basic Principles

166. The basic principles of this Option 1 are as follows:

(a) A "performing party" (broadly defined, as suggested in A/CN.9/WG.III/WP.21, paragraph 14 following draft article 1.17 of the Draft Instrument defining "performing party") is subject to the responsibilities and liabilities imposed on the carrier under the Draft Instrument, and entitled to the carrier's rights and immunities provided by the Draft Instrument:

- (i) during the period in which it has custody of the goods; and
- (ii) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage;

unless, at the time of its ratification of the Draft Instrument, the Contracting State in which the relevant event occurs opted out of coverage for the relevant performing party.

(b) A Contracting State may not opt out of coverage with respect to:

- (i) ocean carriers;
- (ii) performing parties to the extent that they have custody of the goods during the port-to-port period of an ocean carriage; or
- (iii) performing parties to the extent that they participate in the performance of any of the activities contemplated by the contract of carriage during the port-to-port period of an ocean carriage.

(c) With respect to:

the period (if any) after the receipt of the goods (under draft article 4.1.2) but before the goods arrive at the port of loading (the "door-to-port period"); and

the period (if any) after the goods have been removed from the port of discharge but before delivery of the goods (under draft article 4.1.3) (the "port-to-door period"),

a Contracting State, with respect to the performance of a contract of carriage within its territory, may opt out of coverage for:

- (i) all performing parties; or
- (ii) specified types of performing parties (e.g. all rail carriers; all motor carriers; all performing parties that do not physically perform any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods); or
- (iii) specified types of performing parties under specified circumstances (e.g. motor carriers to the extent that they are governed by CMR; motor carriers to the extent that they are governed by a specified national law applicable to motor carriers).

(d) The Draft Instrument pre-empts all other causes of action (whether founded in contract, in tort, or otherwise) against (i) the carrier, and (ii) all performing parties that are subject to the Draft Instrument (i.e. all performing parties with respect to which the relevant contracting State has not opted out of coverage). To the extent that a performing party is not subject to the Draft Instrument, its potential liability is governed by whatever law would have applied in the absence of the Draft Instrument. The Draft Instrument does not pre-empt whatever law would otherwise apply.

### 2. Option 1—Commentary on the basic principles

167. Under principle 1(a) in paragraph 166 above, all performing parties are presumptively subject to the new Convention. This is consistent with the fundamental point that the application of the Convention should be as close to "door-to-door" as it is possible to achieve. To the extent that this coverage is too broad, however, principle 1(a) permits a Contracting State to opt out of coverage for inland performing parties that it does not wish to subject to the new Convention. Thus the new Convention would be door-to-door except in those specific cases in which there is a strong governmental interest in restricting its application.

168. Principles 1(b) and 1(c) clarify a Contracting State's ability to opt out of coverage. Under principle 1(b), a Contracting State may not opt out of coverage for the core maritime parties that operate in the port-to-port segment. To allow a reduction in the scope of coverage below port-to-port for the core maritime parties would represent a step backwards from the current regime.

169. As a practical matter, principle 1(b) ensures that at least ocean carriers and those that operate in the port area, such as stevedores and terminal operators, would be fully subject to the new Convention.

170. Under principle 1(c), a Contracting State may opt out of coverage for some or all of the performing parties within its territory. The form of opting out would depend on the rationale for the Contracting State's decision to opt out. For example, if a Contracting State concluded that a cargo claimant would have no direct cause of action against a performing party under existing law and that it would be unwise to recognize a new cause of action under the Convention when none had existed in the past, then the State could opt out under principle 1(c)(i). In that State, then, no performing parties would be liable under the Convention.

171. Alternatively, if a Contracting State concluded that it did not wish to subject a particular industry (such as railroads) to the Convention, then it could opt out under principle 1(c)(ii). In that State, the industry would continue to operate as it had in the past, and the Convention would have no impact on it.

172. If a Contracting State preferred the narrow definition of "performing party" contained in article 1.17 of the current Draft Instrument, then it could also opt out under principle 1(c)(ii), excluding the application of the Convention with respect to "all performing parties that do not physically perform any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods."

173. Finally, contracting States that wish to preserve the application of unimodal transport regimes like the CMR and COTIF-CIM, and other States that wish to preserve the application of their domestic laws, could opt out under principle 1(c)(iii).

174. Principle 1(d) clarifies the effect of opting out. Under principle 1(d), a class of performing parties would be either within the Convention or outside of the Convention. Performing parties that are within the Convention would be part of the overall compromise that must be made under the regime. They would be subject to liability under the Convention but would be fully protected by its exclusions and limitations, including the automatic "Himalaya"<sup>20</sup> protection.

<sup>20</sup>Automatic 'Himalaya' protection" refers to the type of protection provided by article 6.3.3 of the Draft Instrument, whereby a performing party receives the protection customarily provided by an effective Himalaya clause without the necessity of including a Himalaya clause in the bill of lading. A Himalaya clause in a bill of lading extends to specified third parties the benefit of the exemptions, limitations, defences and immunities of the carrier under the bill of lading.

175. Performing parties outside of the Convention would not participate in the compromise, and the Convention would not affect them. They would not be subject to liability under the Convention and they would not be protected by it. Their liability would remain as it is under current law. To the extent that current law (or domestic law other than the Convention) permits a performing party to claim protection under a Himalaya clause, the Convention would not deny that protection, but nor would it grant automatic protection (as article 6.3.3 of the current Draft Instrument does).

176. The disadvantage of this option is one that could be raised with respect to any regime with less than complete door-to-door coverage: if certain performing parties are outside of the coverage of the convention, then they can be sued under whatever law would otherwise be applicable (unless the Convention bans suits against performing parties altogether, as discussed in Option 2). The result could be a confusing overlay of inconsistent liability regimes and a multiplicity of suits.

### 3. Option 2—Basic principle

177. The basic principle of Option 2 is that all suits by cargo interests for cargo damage are subject to the terms of the Draft Instrument and can only be brought against the Contracting Carrier. There is no opting out provision in Option 2.

### 4. Option 2—Commentary on the basic principle

178. This option would make suit under the terms of the Draft Instrument the exclusive remedy of a cargo interest against the contracting carrier. Moreover, it would prohibit suits by the cargo interest against the performing party (whether under the Draft Instrument, by contract, by tort, or otherwise). It would then be up to the contracting carrier to collect from the performing party, an action that may or may not be within the scope of the Instrument.

179. There are several advantages to the approach in Option 2. First, shippers are commercial parties who can select the contracting carrier that meets their cargo damage requirements, and consignees can also provide for the same in sales agreements. Second, it is the contracting carrier that offers the service, hires subcontractors and is in the best position to handle claims. Third, there is typically no knowledge of or reliance upon specific performing parties by the shippers. In addition, this approach makes clear in advance what liability regime will apply as well as who will handle a claim and be responsible for resolving suits so all parties can plan accordingly. Further, the approach in Option 2 may avoid complicated litigation and multiple defendants. Finally, this option provides predictability so that parties can negotiate transport terms knowing which rules will apply to dispute resolution.

180. The disadvantage of the approach in Option 2 is that it would eliminate suits (whether under the Draft

Instrument, in tort, or otherwise) against the performing party that actually caused the damage. If the contracting carrier is insolvent or amenable to suit only in a jurisdiction that is inconvenient to the cargo interest, that interest may be left with no real remedy. Moreover, it would limit the cargo interest's recovery to the Draft Instrument's liability limits, even if another legal regime that would otherwise be applicable would allow a higher recovery.

### 5. Option 3—Basic principle

181. Like Option 1, Option 3 would allow a State to opt out of the new convention with respect to certain performing parties. The basic principle of Option 3 is that suits under the Draft Instrument will be the exclusive remedy available to a cargo interest against the carrier for cargo damage during door-to-door transport. In addition, no suit could be brought against a performing party for such damage unless at the time of the ratification a State indicates that it is preserving whatever causes of action would otherwise apply. (A State could opt out for certain performing parties, as described under Option 1, see above, paragraphs 166 to 176.)

### 6. Option 3—Commentary on the basic principle

182. Option 3 combines aspects of Options 1 and 2. It reverses the default presumption of Option 1, and expands it to include the presumption (which in Option 2 is an outright prohibition) that no suits are allowed by cargo interests against the performing party.

183. The purpose of Option 3 is to make claims against the contracting carrier under the Draft Instrument the general rule. Similarly, the presumption would be that all suits by the cargo interest against performing parties would be prohibited. A country could opt out of the prohibition to permit suits against all or some performing parties in accordance with domestic law or multilateral agreements.

184. The advantage of the approach in Option 3 is that it would encourage a maximally uniform system, while allowing flexibility for countries with other law applicable to the land portions of the journey.

185. However, the disadvantage of Option 3 is that a country that as a matter of policy does not favour elimination of such causes of action might not want a presumption in favour of this built into the Convention.

## I. Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instrument on the carriage of goods [by sea]. Information document provided by the United Nations Conference on Trade and Development (UNCTAD)

(A/CN.9/WG.III/WP.30 [Original: English])

### NOTE BY THE SECRETARIAT

In preparation for the eleventh session of Working Group III (Transport Law), during which the Working Group is expected to proceed with its reading of the draft instrument contained in document A/CN.9/WG.III/WP.21, the secretariat of the United Nations Conference on Trade and Development (UNCTAD), on 16 January 2003, submitted the text of a document entitled "Multimodal transport: the feasibility of an international instrument—*Overview and discussion of responses to the UNCTAD questionnaire on Multimodal Transport Regulation and issues arising for further consideration*". That document is reproduced as an annex to this note in the form in which it was received by the secretariat. It summarizes the text of a report published by the UNCTAD secretariat in English only under the title "Multimodal transport: the feasibility of an international instrument" (UNCTAD/SDTE/TLB/2003/1).

### ANNEX

#### Multimodal Transport: The feasibility of an international legal instrument

*Overview and discussion of responses to the UNCTAD questionnaire on Multimodal Transport Regulation and issues arising for further consideration*

1. In view of the continuous growth of multimodal transportation and against a background of an increasingly complex and fragmented legal framework at the international level,<sup>1</sup> the UNCTAD secretariat conducted a study on the feasibility of establishing a new international instrument on multimodal trans-

port. In order to ascertain the views of all interested parties, both public and private, a questionnaire was prepared by the UNCTAD secretariat and circulated widely. The questionnaire was sent to all Governments and intergovernmental and non-governmental organizations, including all relevant industry associations, as well as to some experts on the subject (TDN 932(2) SITE).

2. The secretariat received a total of 109 replies to the questionnaire, 60 from the Governments of both developed and devel-

<sup>1</sup>See UNCTAD Report *Implementation of Multimodal Transport Rules* and accompanying comparative table, UNCTAD/SDTE/TLB/2 and Add.1, available on the UNCTAD website.

oping countries and 49 from industry representatives and others. Replies received from industry representatives reflect the views of virtually all interested parties. They include the views of operators of transport services (maritime, road and rail), freight forwarders, providers of logistics services and terminal operators, liability insurers, cargo insurers as well as shippers and users of transport services.

3. A report, which sets out in some detail the views and opinions expressed in the responses to the questionnaire, has since been completed by the UNCTAD secretariat (*Multimodal Transport: The Feasibility of an International Legal Instrument*, UNCTAD/SDTE/TLB/2003/1) and is available on the UNCTAD website.<sup>2</sup>

4. As the views and opinions expressed in the context of the questionnaire may be of assistance to the UNCITRAL Working Group on Transport Law, in its deliberations on the scope of application of the proposed Draft Instrument, this document is being submitted for consideration. Due to restrictions of space, this document only reproduces parts C.IV and C.V of the UNCTAD Report (“Overview and discussion of responses” and “Issues arising for further consideration”), together with a table presenting a breakdown of responses received.<sup>3</sup> For a more detailed reflection of currently held views and opinions, the full UNCTAD Report may be consulted.

## OVERVIEW AND DISCUSSION OF RESPONSES TO THE UNCTAD QUESTIONNAIRE ON MULTIMODAL TRANSPORT REGULATION

5. In this part, the main results of the questionnaire, detailed in part C.III of UNCTAD Report *Multimodal Transport: The Feasibility of an International Legal Instrument* (UNCTAD/SDTE/TLB/2003/1), are summarized and discussed.

### 1. Assessment of status quo and desirability of international instrument

6. A large majority of respondents (83%), both among Governments and non-governmental and industry representatives, consider the present legal framework unsatisfactory, with a clear majority (76%) considering the present system not to be cost-effective. The vast majority of respondents across the board (92%) consider an international instrument to govern liability arising from multimodal transport to be desirable and virtually all (98%) indicated they would support any concerted efforts made in this direction.

7. In practice, it is clear that the level of support would depend on the content and features of any possible new instrument. However, the general assessment of the status quo suggests that there is both a demand for a more detailed debate and willingness to further engage in an exchange of views.

### 2. Suitability of different approaches

8. As regards the most suitable approach, which might be adopted, views are, to a certain extent, divided. However, around

two thirds of respondents from both Governments and non-governmental quarters (65%) appear to prefer a new international instrument to govern multimodal transport or a revision of the 1980 MT Convention. In further discussions considering this approach, the views expressed on why the 1980 MT Convention did not attract sufficient ratifications to enter into force should be of some interest. Several central issues have emerged from the responses, in particular that the 1980 MT Convention, at least at the time, may not have appeared attractive enough to shippers interests while at the same time containing elements which carrier interests found not acceptable. A number of respondents expressed their support for a new legally binding instrument based on rules which are currently used in commercial contracts, namely the UNCTAD/ICC Rules.

9. A minority of respondents (13%), representative mainly of parts of the maritime transport industry, appeared to favour the extension of an international sea-carriage regime to all contracts for multimodal transport involving a sea-leg and some respondents expressly stated their support for the proposed Draft Instrument on Transport Law, which adopts this approach.<sup>4</sup> Another minority of respondents (13%), representative mainly of parts of the road transport industry, considered the extension of an international road-carriage regime to all contracts for multimodal transport involving a road-leg to be the most appropriate approach.

10. Overall, the responses indicate that—with the important exception of the maritime transport industry—there appears to be only limited support for the approach adopted in the Draft Instrument on Transport Law. Accordingly, there is significant scope for the exploration of other options in consultation with all interested parties in transport.

### 3. Important features and key elements of any possible international instrument

11. The following picture emerges from the responses:

#### 3.1 Delay

12. The vast majority of respondents (90%) think any instrument governing multimodal transport should address the issue of delayed delivery, albeit some believe that liability for delay should only arise in certain circumstances and should be limited at a level equivalent to the freight or a multiple thereof.

#### 3.2 ‘Uniform, ‘network’ or ‘modified’ liability system

13. As regards the type of liability system, which may be most appropriate, views are, as may be expected, divided, with just under half of all respondents (48%) expressing support for a uniform liability system and, among the remainder of respondents, broadly equal numbers expressing support for a network liability system (28%) or for a modified liability system (24%).

14. Among those favouring a network or a modified liability system, a majority (59%) believes only the limitation provisions should vary depending on the unimodal stage where loss, damage or delay occurs. This view appears to be particularly prevalent among respondents representing Governments. Others, particu-

<sup>2</sup><http://www.unctad.org>. The UNCTAD Report *Multimodal Transport: The Feasibility of an International Legal Instrument* (UNCTAD/SDTE/TLB/2003/1) is also available on the UNCITRAL website ([www.uncitral.org](http://www.uncitral.org)).

<sup>3</sup>The text of parts C.IV and C.V has remained unchanged, but response rates have been included, as appropriate. The table reproduces the individual questions contained in the questionnaire in abbreviated form. Percentage values have been rounded to the nearest full unit.

<sup>4</sup>UNCITRAL document A/CN.9/WG.III/WP.21. Under the Draft Instrument, as currently proposed, the substantively maritime liability regime would be applicable to a wide range of claims arising from contracts for multimodal transportation involving a sea leg, in particular (a) in cases where loss cannot be localized; (b) in cases where loss was attributable to a land or air leg of transport but no international unimodal convention applied. See Articles 1.5 and 4.2.1 Draft Instrument. See also UNCTAD commentary, footnote 5, below.

## Breakdown of responses to UNCTAD questionnaire on Multimodal Transport Regulation

1. (a) Do you think that the existing legal framework is satisfactory? (b) Do you think that it is cost-effective?	Yes 17% 24%	No 83% 76%
2. What in your view, are the reasons why the 1980 MT Convention did not attract sufficient ratifications to enter into force?	N/A	
3. Do you think that an international instrument governing liability arising from multimodal transportation would be desirable?	Yes 92%	No 8%
4. If so, which of the following approaches do you consider the most appropriate? (a) New international instrument to govern multimodal transport; (b) Revision of the 1980 MT Convention; (c) Extension of a sea-carriage liability regime to all MT contracts involving a sea leg; (d) Extension of a road-carriage liability regime to all MT contracts involving a road leg; (e) Other.	(a) 39% (b) 26% (c) 13% (d) 13% (e) 9%	
5. If concerted efforts were made towards the development of a new international instrument, would you support these efforts?	Yes 98%	No 2%
6. Should any possible instrument governing multimodal transportation cover liability for delay?	Yes 90%	No 10%
7. Which of the following liability systems would you think is most appropriate in any instrument governing MT: (a) Uniform system (b) Network system (c) Modified system	(a) 48% (b) 28% (c) 24%	
8. If you have expressed a preference for 7(b) or (c), which types of provisions should vary: (a) Only the provisions on limitation of liability; (b) Other types of provisions.	(a) 59% (b) 41%	
9. Should liability for loss, damage or delay under any international instrument be: (a) (i) Fault-based: liability only in case of fault (ii) Strict: liability irrespective of fault. (b) In any event, liability should be subject to certain exceptions.	(i) 53% (ii) 47%	
10. Please express any views you may have on the question of monetary limitation of carrier's/MTO's liability.	Yes 85%	No 15%
11. Should any international instrument governing MT be in the form of: (a) A convention which applies on a mandatory basis and provides mandatory rules on liability; (b) A convention which applies on a non-mandatory basis, but provides mandatory rules on liability; (c) Other.	N/A	
12. Under existing laws and regulations on MT the contracting carrier/MTO is responsible throughout the entire transport. Should any international instrument governing multimodal transport: (a) Adopt the same approach; (b) Allow the contracting carrier/MTO to contract out of certain parts of the transport or out of certain functions related to the performance of the contract by including a clause to this effect in the transport document (or electronic equivalent).	(a) 58% (b) 35% (c) 7%	
13. Which international convention(s) governing liability in the field of carriage of goods by sea, land and air have been ratified or acceded to by your country?	N/A	

larly among non-governmental respondents, believe that matters like basis of liability or exceptions to liability and time for suit should vary.

15. Early agreement on the most appropriate type of liability system, including the extent to which liability rules should be uniform, would clearly be central to the prospect of success of any discussions on a new international instrument.

### 3.3 Limitation of liability

16. Closely linked to the question of the appropriate type of liability system is the issue of limitation of liability on which, again, views are at this stage divided.

17. Overall, a majority of respondents provided comments supportive of or accepting the need for limitation of liability. However, the responses reflect a broad variety of views on the issue. A considerable number, both among governmental and industry respondents, question the whole idea of limitation of liability whereas others, particularly those representing the maritime and freight-forwarding industry, emphasize the desirability of limitation of liability in line with unimodal conventions, in particular due to the continued relevance of unimodal conventions in the context of recourse actions by multimodal carriers against unimodal subcontracting carriers.

18. In relation to the various possible monetary levels of limitation mentioned, it is noticeable that those concerned with or representing the interests of sea carriers tend to advocate lower limitation amounts than most other respondents.

19. Limitation of liability is clearly a central issue, as views on limitation appear to both affect and be influenced by views on the nature and type of liability system. Although in negotiations for any international convention the issue of limitation of liability traditionally arises at a relatively late stage in the proceedings—once agreement on substantive rules has been achieved—it may be that some earlier principled discussions on possible levels of limitation would benefit constructive debate on other central issues.

### 3.4 Basis of liability

20. Both among Governments and among other respondents, broadly equal numbers expressed support for (a) a fault-based liability system (53%) and (b) a strict liability system (47%). However, a clear majority across the board (85%) considered that certain exceptions to liability should apply in any event.

### 3.5 Mandatory or non-mandatory?

21. Overall, a majority of all respondents (58%) considered that any international instrument should be in the form of a convention, which applies on a mandatory basis and provides mandatory liability rules.

22. However, a sizeable minority (35%) considered that a non-mandatory convention, which could be contracted into or out of but provided mandatory liability rules overriding any conflicting contractual terms, would be appropriate. This suggests that it may be worthwhile to explore in more detail the advantages and disadvantages of possible non-mandatory options for an international instrument.

### 3.6 Contracting carrier's responsibility throughout the multimodal transaction

23. A clear majority of respondents from all quarters (76%) considered that any international instrument governing multimodal transportation should adopt the same approach as existing

statutory and contractual multimodal liability regimes by providing for continuing responsibility of the contracting carrier/MTO throughout the entire transport.

24. In particular, the responses indicate that the use of standard clauses in a transport document (or electronic equivalent) to limit the scope of contract and thus the contracting carrier's responsibility and liability is generally not considered to be acceptable.

25. In this respect, the responses may be of particular relevance to any further consideration of provisions in the Draft Instrument on Transport Law under the auspices of UNCITRAL. As has been pointed out by UNCTAD in its commentary,<sup>5</sup> Articles 5.2.2 and 4.3 of the Draft Instrument, as proposed, would arguably allow a contracting carrier to disclaim liability arising out of (a) certain functions (e.g. stowage, loading, discharge) and (b) certain parts (stages) of the contract performed by another party. In its current form, the Draft Instrument does not preclude the use of standard terms to this effect in the transport document (or electronic equivalent) and thus does not safeguard against abusive practice. As a result, a shipper might engage a carrier to transport its goods from door-to-door against the payment of freight and find that the carrier, under terms of contract issued in standard form by the carrier, was not responsible throughout all stages of the transport and/or for all aspects of the transportation. This situation would not conform to the legitimate expectations of transport users, who in many cases arrange with one party for the transportation of goods from door-to-door so as to ensure that one party will be responsible throughout all stages of the transaction. Responses to the UNCTAD questionnaire suggest strong opposition across the board to any change in approach along the lines currently proposed in the Draft Instrument.

### Issues arising for further consideration

26. The main aim of the UNCTAD questionnaire was to take a step towards establishing the feasibility of a new international multimodal liability regime, in particular, the desirability in principle of international regulation, the acceptability of potential solutions and approaches and the willingness of all interested parties, both public and private, to pursue this matter further.

27. The large number of responses to the questionnaire and the detail, in many cases, of the comments provided by public and private parties across a broad spectrum suggests that there is a general willingness to engage in an exchange of views on future regulation of liability for multimodal transport. This is encouraging, given the continuous growth of multimodal transportation against a background of an increasingly fragmented and complex legal framework at the international level. Both users and providers of transport services as well as Governments and other interested parties clearly recognize that the existing legal framework is not satisfactory and that, in principle, an international instrument would be desirable. However, views on how the aim of achieving uniform international regulation may be accomplished are divided, partly as a result of conflicting interests, partly due to the perceived difficulty in agreeing a workable compromise, which would provide clear benefits as compared with the existing legal framework.

28. The apparently broad divide in opinion on closely linked key issues, such as type of liability system (uniform, network or

<sup>5</sup>Available as part of the background documentation for the UNCITRAL Working Group on Transport Law in all UN languages (UNCITRAL document A/CN.9/WG.III/WP.21/Add.1). The *UNCTAD commentary*, with the text of the Draft Instrument integrated for ease of reference, is also available on the [www.unctad.org](http://www.unctad.org) website (UNCTAD/SDTE/TLB/4).

modified), basis of liability (strict or fault-based) and, importantly, limitation of liability may be seen as an obstacle to the development of a successful international instrument. However, it may equally be seen as a reflection of the fact that—despite the expansion of multimodal transportation and a proliferation of national multimodal liability regimes—there has, in recent times, been little focused debate, involving all interested parties at the global level.

29. The need for increased dialogue on controversial matters as well as on potential ways forward is illustrated by the fact that some possible options, which have tentatively been suggested by a number of respondents have yet to be explored in any international forum.

30. For instance, several respondents indicated support for the development of a binding international liability regime based on commercially accepted contractual solutions, i.e. the UNCTAD/ICC Rules. The UNCTAD/ICC Rules share significant characteristics with the 1980 MT Convention in that both operate a modified liability system, which (entirely or to an extent) retains the network-approach in relation to limitation of liability. However, while the 1980 MT Convention has not generated much support within the transport industry, the UNCTAD/ICC Rules have clearly been quite successful and have been adopted by FIATA in their FBL 92 and by BIMCO in Multidoc 95. As proposals for a legally binding international instrument building on the UNCTAD/ICC Rules as a basis for negotiations have not yet been considered in any international forum, their further exploration may be worthwhile.

31. An altogether different approach to liability regulation for international multimodal transport lies in proposals for the devel-

opment of a non-mandatory regime, which provides uniform and high levels of liability. Proponents of this approach argue that such a non-mandatory regime would, as a matter of commercial decision-making, appear an attractive proposition to both shippers who are interested in a simple and cost-effective regime and to carriers who wish to offer such a regime as part of their service. A non-mandatory solution of this kind has not yet been considered in any international forum<sup>6</sup> and may also be worth investigating.

32. Although it would be presumptuous to try to foreshadow the substance and development of any further detailed discussions involving all interested parties, it appears that there is significant interest in further constructive debate. In order to facilitate and support this process, it would seem that the convening of an informal international forum under the auspices of UNCTAD, together with other interested UN organizations, such as UNCITRAL and UNECE, would be both appropriate and timely. The forum would enable frank discussion of controversial key issues highlighted in this report and serve as a platform at which priorities and potentially attractive ways forward may be explored more fully by all interested public and private parties. While, clearly, there is at present much controversy regarding the best approach that might be pursued in relation to several key issues, certain areas of consensus have also emerged. These, it is hoped, will serve as a basis for constructive and fruitful discussion of possible regulation of multimodal transportation.

---

<sup>6</sup>For a European study discussing this approach, see *Intermodal Transportation and Carrier Liability*, Luxembourg, Office for Official Publications of the European Communities, 1999.





## V. ELECTRONIC COMMERCE

### A. Report of the Working Group IV (Electronic Commerce) on the work of its fortieth session (Vienna, 14-18 October 2002)

(A/CN.9/527) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction: previous deliberations of the Working Group.....	1-13
II. Organization of the session .....	14-20
III. Summary of deliberations and decisions .....	21-23
IV. Legal barriers to the development of electronic commerce in international instruments relating to international trade .....	24-71
A. International trade and development .....	31-48
B. Transport and communications instruments .....	49-68
1. Customs matters .....	49-50
2. Road traffic .....	51-62
3. Transport by rail .....	63
4. Water transport .....	64-66
5. Multimodal transport .....	67-68
C. Commercial arbitration .....	69-71
V. Electronic contracting: provisions for a draft convention .....	72-126

#### I. INTRODUCTION: PREVIOUS DELIBERATIONS OF THE WORKING GROUP

1. At its thirty-third session, in 2000, the Commission held a preliminary exchange of views on proposals for future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible. The first dealt with electronic contracting, considered from the perspective of the United Nations Convention on Contracts for the International Sale of Goods (the “United Nations Sales Convention”);<sup>1</sup> the second was online dispute settlement; and the third topic was dematerialization of documents of title, in particular in the transport industry.

2. The Commission welcomed the proposal to study further the desirability and feasibility of undertaking future work in respect of those topics. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by

the Commission at its thirty-fourth session (Vienna, 25 June-13 July 2001). It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.<sup>2</sup> The Working Group considered those proposals at its thirty-eighth session, in 2001, on the basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89), dematerialization of documents of title (A/CN.9/WG.IV/WP.90) and electronic contracting (A/CN.9/WG.IV/WP.91).

3. The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the secretariat should be entrusted with the preparation of the necessary studies con-

<sup>1</sup>United Nations, *Treaty Series*, vol. 1489, No. 25567, p. 3.

<sup>2</sup>*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 384-388.

cerning three other topics considered by the Working Group, namely: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration,<sup>3</sup> as well as the UNCITRAL Arbitration Rules,<sup>4</sup> to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

4. At the thirty-fourth session of the Commission, in 2001, there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. The views varied, however, as regards the relative priority to be assigned to the topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. It was said that references to “writing”, “signature”, “document” and other similar provisions in existing uniform law conventions and trade agreements already created legal obstacles and generated uncertainty in international transactions conducted by electronic means. Efforts to remove those obstacles should not be delayed or neglected by attaching higher priority to issues of electronic contracting.

5. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.<sup>5</sup>

6. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission’s deliberations, was that the Working Group on Electronic Commerce should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of the work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assump-

tion made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Sales Convention (A/CN.9/484, para. 95), and without unduly interfering with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (A/CN.9/484, para. 102).

7. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.<sup>6</sup>

8. At its thirty-ninth session, the Working Group considered a note by the secretariat discussing selected issues on electronic contracting. That note also contained, as its annex I, an initial draft tentatively entitled “Preliminary Draft Convention on [International] Contracts Concluded or Evidenced by Data Messages” (A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

9. The Working Group began its deliberation by considering the form and scope of the preliminary draft convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone a discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by first taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention with a discussion on draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) at its fortieth session. The Working Group requested the secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its fortieth session.

<sup>3</sup>Ibid., *Fortieth Session, Supplement No. 17* (A/40/17), annex I.

<sup>4</sup>Ibid., *Thirty-first Session, Supplement No. 17* (A/31/17, Chap. V, sect. C).

<sup>5</sup>Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 293.

<sup>6</sup>Ibid., para. 295.

10. At that session, the Working Group was also informed of the progress that had been made by the secretariat in connection with the survey of possible legal obstacles to electronic commerce in existing trade-related instruments. The Working Group was informed that the secretariat had begun the work by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The secretariat had identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communications under those treaties. The preliminary conclusions reached by the secretariat in relation to those treaties were set out in a note by the secretariat (A/CN.9/WG.IV/WP.94) that was submitted to the Working Group at its thirty-ninth session, in March 2002.

11. The Working Group took note of the progress that had been made by the secretariat in connection with the survey, but did not have sufficient time to consider the preliminary conclusions of the survey. The Working Group requested the secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group took note of a statement stressing the importance that the survey being conducted by the secretariat should reflect trade-related instruments emanating from the various geographical regions represented on the Commission. For that purpose, the Working Group requested the secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the secretariat.

12. The Commission considered the Working Group's report at its thirty-fifth session, in 2002. The Commission noted with appreciation that the Working Group had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the Working Group for the progress made in that regard. However, it also took note of the varying views that were expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible interna-

tional instrument dealing with selected issues on electronic contracting until its forty-first session (New York, 5-9 May 2003).<sup>7</sup>

13. As regards the Working Group's consideration of possible legal obstacles to electronic commerce that may result from trade-related international instruments, the Commission reiterated its support for the efforts of the Working Group and the secretariat in that respect. The Commission requested the Working Group to devote most of its time at its fortieth session, in October 2002, to a substantive discussion of various issues that had been raised in the secretariat's initial survey (A/CN.9/WG.IV/WP.94).<sup>8</sup>

## II. ORGANIZATION OF THE SESSION

14. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its fortieth session in Vienna from 14 to 18 October 2002. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Russian Federation, Singapore, Spain, Sudan, Thailand and United States of America.

15. The session was attended by observers from the following States: Algeria, Australia, Bahrain, Belgium, Denmark, Indonesia, Ireland, Lebanon, Norway, Peru, Philippines, Poland, Qatar, Republic of Korea, Senegal, Slovakia, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Ukraine, Venezuela and Yemen.

16. The session was also attended by observers from the following international organizations: (a) organizations of the United Nations system: United Nations Conference on Trade and Development (UNCTAD), United Nations Industrial Development Organization and World Intellectual Property Organization (WIPO); (b) intergovernmental organizations: Asian Clearing Union and Commonwealth secretariat, European Commission; (c) non-governmental organizations invited by the Commission: Centre for International Legal Studies, International Chamber of Commerce, Moot Alumni Association and Nordic Industrial Fund.

17. The Working Group elected the following officers:

*Chairman:* Jeffrey Chan Wah Teck (Singapore)

*Rapporteur:* Ligia González (Mexico)

18. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.IV/WP.97); (b) the note by the secretariat referred to in paragraph 10 above (A/CN.9/WG.IV/WP.94); (c) a note by the secretariat transmitting comments on the survey that were

<sup>7</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 206 (for the dates of the future sessions of the Working Group, see paras. 296 (d) and 297 (d)).

<sup>8</sup>Ibid., para. 207.

received from member and observer States, from inter-governmental organizations and international non-governmental organizations (A/CN.9/WG.IV/WP.98 and Add.1-4) in response to a circular communication issued by the secretariat pursuant to the Working Group's request (see para. 11 above); and (d) the notes by the secretariat referred to in paragraph 8 above (A/CN.9/WG.IV/WP.95 and A/CN.9/WG.IV/WP.96).

19. The following background documents were also made available to the Working Group: (a) report of the Working Group on Electronic Commerce on the work of its thirty-ninth session (A/CN.9/509); (b) note by the secretariat on legal barriers to the development of electronic commerce in international instruments relating to international trade (A/CN.9/WG.IV/WP.89); and (c) proposal by France on legal aspects of electronic commerce (A/CN.9/WG.IV/WP.93).

20. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Legal barriers to the development of electronic commerce in international instruments relating to international trade.
4. Electronic contracting: provisions for a draft convention.
5. Other business.
6. Adoption of the report.

### III. SUMMARY OF DELIBERATIONS AND DECISIONS

21. The Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the analysis and endorsed the recommendations that had been made by the secretariat (see A/CN.9/WG.IV/WP.94, paras. 24-71). The Working Group agreed to recommend that the secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Working Group invited member States to assist the secretariat in that task by identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

22. The Working Group reviewed the preliminary draft convention contained in annex I of the note by the secretariat (A/CN.9/WG.IV/WP.95). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in section V below (see paras. 72-126). The secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the

Working Group at its forty-first session, scheduled to take place in New York from 5 to 9 May 2003.

23. The Working Group began its deliberation by a general discussion on the scope of the preliminary draft convention (see paras. 72-81 below). The Working Group proceeded to consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) (see paras. 82-126). The Working Group requested the secretariat to prepare a revised text of the preliminary draft convention for consideration by the Working Group at its forty-first session.

### IV. LEGAL BARRIERS TO THE DEVELOPMENT OF ELECTRONIC COMMERCE IN INTERNATIONAL INSTRUMENTS RELATING TO INTERNATIONAL TRADE

24. The Working Group was reminded that the topic under consideration originated from a proposal, which had been considered by the Working Group at its thirty-eighth session, in 2001, for the formulation of an interpretative agreement, in simplified form, for the purpose of specifying and supplementing the definition of the terms "writing", "signature" and "document" in all existing and future international instruments, irrespective of their legal status. At that time, however, the Working Group had felt that, prior to recommending a specific course of action to the Commission, it should consider the nature and context of such possible barriers to electronic commerce, which should be identified in a comprehensive and detailed survey of international trade-related instruments to be carried out by the secretariat (A/CN.9/484, para. 86).

25. The Working Group was informed that, as a starting point, the secretariat had limited its survey of possible barriers to electronic commerce in existing trade-related conventions to international conventions and agreements that were deposited with the Secretary-General. The Working Group was advised that the secretariat had sought the views of some 60 intergovernmental and international non-governmental organizations, pursuant to a request by the Working Group, at its thirty-ninth session, in 2002, as to whether they wished additional instruments to be included in the secretariat's survey. The replies that had been received by the secretariat, as well as the views of Governments on the topic in general, were reflected in a note by the secretariat (A/CN.9/WG.IV/WP.98 and Add.1-4).

#### *General comments*

26. There was strong support for the idea that the Working Group's review of existing trade-related instruments should not be limited to identifying possible obstacles to electronic commerce and formulating proposals for removing them. Equally important, it was said, would be a consideration of action that might be needed to facilitate electronic transactions in the areas covered by those instruments. While there were no objections to that proposal, it was pointed out that the consideration of measures to facilitate electronic commerce should focus on rules of private

law that applied to commercial transactions and not on general measures to facilitate trade among States, as it was generally felt that issues of trade policy were not within the mandate of the Working Group.

27. A concern was raised with respect to possible duplication of effort, given the work on electronic commerce issues being conducted in other international bodies, such as the World Trade Organization (WTO), the Asia Pacific Economic Cooperation and the Organisation for Economic Cooperation and Development. The Working Group was informed that a number of international bodies had undertaken work on electronic commerce issues at the request of their members and that such issues ranged from private law issues to taxation, privacy matters and consumer protection issues. In most cases, such work did not overlap with the work of the Commission. In the instances where there might exist aspects of common interest, coordination of efforts and consistency of approach might be ensured by contemplating the provision by the Working Group of expert advice and assistance on specific questions upon request by the concerned organizations. Such advice and assistance might take the form, for instance, of responding to queries from other international bodies, holding joint meetings or preparing comments on draft instruments of other bodies at their request. The secretariat was requested, within the constraints of resources, to prepare reports on the activities of other international bodies in the area of electronic commerce.

28. The Working Group held an extensive discussion on the relationship between its work concerning removal of barriers to electronic commerce in existing international conventions and the preparation of a draft convention on electronic contracting. The Working Group was mindful of the Commission's recommendation that the Working Group's consideration of possible barriers to the development of electronic commerce in existing international instruments should be carried out simultaneously with other topics on the Working Group's work programme, including, in particular, a possible draft convention on electronic contracting and issues related to the transferability of rights in an electronic environment.

29. It was observed that the preliminary conclusions of the survey contained in the note by the secretariat (A/CN.9/WG.IV/WP.94) showed that all legal instruments surveyed fell into the following few categories with respect to their potential for raising barriers to electronic commerce:

(a) A large group of instruments appeared to raise no issues and require no action;

(b) A second group of surveyed instruments appeared to raise issues that could not be solved by the simple principle of electronic equivalent, because, for example, they implied notions of "location", "dispatch and receipt of an offer" or similar notions that required a more complex adaptation to the electronic environment. Such issues, it was noted, were among those covered by the draft convention on electronic contracting (see A/CN.9/WG.IV/WP.95, annex I) or should fall within the scope of other projects under consideration by the Working Group, such as transfer of rights in tangible goods or other rights by electronic means, or online dispute settlement systems;

(c) A third group of surveyed instruments appeared to raise issues of a trade policy nature that would be outside the area of work of UNCITRAL;

(d) A last group of instruments included two instruments relating to international transport by sea and by road that, in all likelihood, might require some specific adaptation provisions.

30. The Working Group agreed to consider the survey that had been prepared by the secretariat with a view to ascertaining whether the issues had been correctly identified by the secretariat, whether there were additional matters to be considered and what action, if any, should be recommended in respect of each instrument. The Working Group also agreed that the question of the form of any instrument to be prepared to address those issues should be left for an appropriate time, after consultations had been conducted on the questions of public international law raised by the topic under consideration. Lastly, the Working Group agreed that it should attempt to identify the common elements between removing legal barriers to electronic commerce in existing instruments and a possible international convention on electronic contracting.

#### A. International trade and development

##### *Convention on Transit Trade of Land-locked States (New York, 8 July 1965)*<sup>9</sup>

31. The Working Group noted that the provisions of the Convention were of a trade policy nature. They were addressed to States and did not establish rules directly applicable to private law transactions. Furthermore, the extent to which electronic communications might be substituted for paper-based documents for the purposes of the Convention was largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form.

32. In the light of the above, the Working Group agreed that no action should be recommended in respect of the Convention.

##### *Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)*<sup>10</sup>

33. The Working Group noted that the provisions in the Convention that could give rise to uncertainties in connection with electronic commerce could be grouped into four main categories. The first category contained those provisions which contemplated notices or declarations that might be exchanged by the parties, with an implicit subset of that category being the timing of the notice. The second category of provisions consisted of those which expressly contemplated written notices or communications and included definitions of "writing", while the third category comprised those provisions which referred to the time and

<sup>9</sup>United Nations, *Treaty Series*, vol. 597, No. 8641, p. 3.

<sup>10</sup>*Ibid.*, vol. 1511, No. 26119, p. 1.

place of the formation of the contract and included such important issues as the time and scope of the contract. Finally, the fourth category contained those provisions which referred to an existing undertaking or agreement between the parties.

34. The Working Group noted that the analysis of the Convention and its Protocol had served as a model for the analysis of other conventions in the secretariat's survey and that analyses of similar concepts in later portions of the survey referred back to the earlier analysis of the Convention. The Working Group was mindful, in particular, of the close relationship between the Convention and the United Nations Sales Convention and that discussion of the legal barriers to electronic commerce in one instrument would necessarily have implications for the other.

35. It was noted that there were two main issues evident in the Convention: the question of the validity of communications in the contractual context and the question of the time and place of dispatch and receipt of such communication. In that regard, it was suggested that those issues were germane to the types of issues being proposed for consideration under the draft new instrument on electronic contracting, so that the substantive solution developed in connection with that new instrument should, at least conceptually, be the same for addressing issues raised under the Convention.

36. As regards the appropriate source of substantive rules to address those issues, support was expressed for the suggestion that reliance ought to be placed on the solutions offered in the UNCITRAL Model Law on Electronic Commerce. Another view, however, was that developing rules to deal with the issues raised under the Convention might require going beyond a simple transposition of the criteria of functional equivalence contained in the Model Law. Issues related to the manner in which notifications or declarations were deemed to be made, it was said, were examples of matters not directly covered by the provisions of the Model Law.

37. The Working Group took note of the view that the Model Law might not always offer the means for resolving legal barriers to electronic commerce in international trade, since the Model Law was intended to deal with obstacles in national law. The Working Group was open to the idea that removal of legal barriers to electronic commerce in existing international instruments might require consideration of matters not covered in the Model Law or even a forward-looking development of principles laid down in the Model Law. Nevertheless, the Working Group was mindful of the fact that the Model Law had become a widely adopted model for domestic laws on electronic commerce throughout the world. It was noted that the body of national jurisprudence arising from the enactment of domestic provisions based upon the Model Law was developing a certain uniform approach to issues of electronic commerce.

38. Having considered those general views, the Working Group noted that there was a general agreement as to the types of issues that arose under the Convention that

required consideration by the Working Group (see para. 29 above). The Working Group took the view that it was preferable to hold a discussion on the appropriate solution for those issues in the context of its consideration of the draft convention on electronic contracting, to the extent that the issues were common. It was noted, in that connection, that the Working Group, at its thirty-ninth session, had agreed that an instrument on electronic contracting should be expanded beyond issues related to the formation of contracts so as to cover more broadly the uses of electronic means of communications in the context of commercial transactions (A/CN.9/509, para. 36).

*United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)*

39. The Working Group was of the view that the issues that had been identified in connection with the Convention on the Limitation Period in the International Sale of Goods were also present in the context of the United Nations Sales Convention. In addition to those general issues, the United Nations Sales Conventions gave rise to two particular sets of issues, namely, whether certain intangible goods could be regarded as being covered by the Convention and what acts constituted performance of a sales contract in respect of those goods.

40. Before turning to those specific issues, the Working Group reverted to its initial discussion of issues related to the use of electronic communications for the purpose of exchanging notices or declarations relating to the sales contract, an issue that arose under the United Nations Sales Convention in the same manner as it arose under the Convention on the Limitation Period in the International Sale of Goods. The Working Group considered in particular the question as to whether notices or declarations so exchanged should always have legal effect, even if the addressee did not expect to receive communications in electronic form or had not expressly agreed to receive communications in electronic form.

41. The discussion within the Working Group was focused on two alternative approaches to the use of electronic means of notification and declaration with respect to specific contracts, one requiring a positive agreement of the addressee to the use of electronic communications (the "opt-in" approach) and the other assuming such an agreement, unless otherwise stated by the addressee (the "opt-out" approach). Support was expressed for the "opt-in" approach, which was said to provide a solid basis that prior consent existed for electronic communication for notification and declarations.

42. However, it was suggested that an "opt-in" approach would create legal barriers to electronic commerce rather than remove them. It was noted that the more remote a party to a contract might be, the more difficult it might be for it to receive prior notices and declaration expeditiously concerning the form in which further dealing had to be conducted. It was suggested, in that connection, that the "opt-out" approach would provide greater legal certainty, since there would be less risk that a declaration or notification within the framework of an existing contract would be challenged by a party solely on the basis that there was

no evidence of that party's agreement to the use of electronic messages. It was also suggested that the United Nations Sales Convention, by recognizing the importance of trade usages in interpreting the parties' will, highlighted the importance of having regard to the prior dealings and the course of conduct between the parties when determining whether they had acquiesced in the use of electronic communications.

43. The Working Group noted that there were two distinct issues being discussed, which might need to be separated in future considerations. The first issue was a discussion of the medium for effecting a declaration under the Convention and other international instruments, while the second was an examination of an appropriate rule for deciding when the notification had reached the person that it was intended to reach. Both issues, it was eventually agreed, deserved further consideration by the Working Group in the context of its deliberations in the draft convention on electronic contracting, which was regarded as an appropriate opportunity to formulate policy choices in that regard.

44. As regards the two sets of specific issues raised by the Convention, the Working Group was of the view those issues were not related to the means of communications used by the parties to conclude a sales contract, but to the very scope of application of the Convention. It was pointed out that the United Nations Sales Convention was commonly understood as not covering a variety of transactions currently made online other than sales of movable tangible goods in the traditional sense. The Working Group was of the view that the development of uniform rules on transactions involving such intangible goods, however desirable it might be, might entail a revision of the scope of application of the Convention or at least a constructive interpretation of its scope of application. That result, it was felt, could not be achieved by means of the draft convention on electronic contracting and would probably require specific consideration in the context of the Convention. Nevertheless, as the issues were logically associated with the discussions on the proposed scope of application of the draft convention on electronic contracting, the Working Group agreed to take note of the issue and revert, at an appropriate stage, to the question of whether an expansion of the scope of application of the United Nations Sales Convention should be recommended.

*United Nations Convention on International Bills of Exchange and International Promissory Notes*  
(New York, 9 December 1988)<sup>11</sup>

45. In view of the particular nature of the issues raised by electronic substitutes for negotiable instruments, it was felt that a comprehensive new legal framework might be required in order to allow for the international use of data messages in lieu of paper-based negotiable instruments. The Working Group was of the view that developing such a comprehensive legal framework might go beyond the scope of its efforts to remove obstacles to electronic commerce in existing instruments related to international trade. Furthermore, the Working Group noted that financial mar-

kets and other business circles had not yet reached the level of development on the practical use of electronic alternatives to paper-based negotiable instruments that could justify the formulation of uniform rules.

46. The Working Group agreed that the specific requirements for such a comprehensive legal framework deserved further analysis, but that it might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means, at an appropriate stage.

*United Nations Convention on the Liability of Operators of Transport Terminals in International Trade*  
(Vienna, 17 April 1991)<sup>12</sup>

47. The Working Group considered that the types of issues of electronic contracting raised under the Convention might best be addressed in the context of its deliberations on the development of an international instrument dealing with some issues of electronic contracting.

*United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*  
(New York, 11 December 1995)<sup>13</sup>

48. The Working Group was of the view that the Convention, being flexible as to the form of the guarantee undertaking and expressly providing for undertakings being in form other than paper, did not create obstacles to the use of electronic means of communications as an alternative to the issuance and exchange of paper-based documents and that therefore no particular action with regard to the Convention was needed.

## B. Transport and communications instruments

### 1. Customs matters

*International Convention to Facilitate the Importation of Commercial Samples and Advertising Material* (Geneva, 7 November 1952);<sup>14</sup> *Customs Convention on Containers* (Geneva, 18 May 1956);<sup>15</sup> *Customs Convention on Containers, 1972* (Geneva, 1 December 1972);<sup>16</sup> *Customs Convention on the International Transport of Goods under Cover of TIR Carnets* (Geneva, 15 January 1959);<sup>17</sup> *Customs Convention on the International Transport of Goods under Cover of TIR Carnets* (Geneva, 14 November 1975);<sup>18</sup> *European Convention on Customs Treatment of Pallets used in International Transport* (Geneva, 9 December 1960);<sup>19</sup> *International Convention on the Harmonization of Frontier Controls of Goods* (Geneva,

<sup>12</sup>A/CONF.152/13.

<sup>13</sup>A/50/640 and Corr.1, annex.

<sup>14</sup>United Nations, *Treaty Series*, vol. 221, No. 3010, p. 255.

<sup>15</sup>Ibid., vol. 338, No. 4834, p. 103.

<sup>16</sup>Ibid., vol. 988, No. 14449, p. 43.

<sup>17</sup>Ibid., vol. 348, No. 4996, p. 13, and vol. 481, p. 598.

<sup>18</sup>Ibid., vol. 1079, No. 16510, p. 89.

<sup>19</sup>Ibid., vol. 429, No. 6200, p. 211.

<sup>11</sup>General Assembly resolution 43/165, annex.

21 October 1982);<sup>20</sup> *Convention on Customs Treatment of Pool Containers used in International Transport* (Geneva, 21 January 1994)<sup>21</sup>

49. The Working Group was generally of the view that, with the possible exception of the Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975), the above Conventions were of a trade policy nature, being addressed to States and without establishing rules directly relevant for private law transactions. Furthermore, the Working Group noted that the extent to which electronic communications might be substituted for paper-based documents for the purposes of those Conventions was largely dependent upon the capability and readiness of public authorities in the contracting parties to those Conventions to process such documents in electronic form.

50. The Working Group was therefore of the view that further study on issues related to electronic commerce under those Conventions should be more appropriately carried out by other international organizations, such as WTO, the Customs Cooperation Council (also known as the World Customs Organization), the Economic Commission for Europe (ECE) and other regional organizations. Any study by the Working Group of issues related to customs conventions should only be considered if any of those organizations invited the views of the Working Group on specific issues falling within its area of expertise, such as legal issues concerning the interplay between specific customs conventions and various contract documents that might be concluded electronically (for example, electronic letters of credit or seaway bills).

## 2. Road traffic

*Convention on Road Traffic*  
(Geneva, 19 September 1949)<sup>22</sup>

51. The Working Group noted that the purpose of the Convention was to harmonize the rules governing road traffic among contracting States, ensure their compliance in order to facilitate international road traffic and increase road safety. The provisions of the Convention were felt to deal essentially with road safety and traffic control issues and did not establish rules directly relevant for private law transactions. The Working Group was of the view that no action was required in respect of the Convention.

*Convention on Road Traffic*  
(Vienna, 8 November 1968)<sup>23</sup>

52. The Working Group noted that the purpose of the Convention was to facilitate international road traffic and to increase road safety through the adoption of uniform traffic rules. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

*General Agreement on Economic Regulations for International Road Transport and (a) Additional Protocol; and (b) Protocol of Signature*  
(Geneva, 17 March 1954)<sup>24</sup>

53. The Working Group noted that the purpose of the General Agreement was to favour the development of the international carriage of passengers and goods by road by establishing a common regime for international road transport. The Working Group was of the view that the General Agreement did not contain any provisions that might be directly relevant to electronic commerce.

*Convention on the Contract for the International Carriage of Goods by Road* (Geneva, 19 May 1956)  
*and Protocol thereto* (Geneva, 5 July 1978)<sup>25</sup>

54. The Working Group was of the view that a number of provisions in the Convention were of special relevance for the use of electronic communications, in particular those concerning the instrument of the contract of carriage (consignment note). The Working Group concurred with the secretariat's assessment of the possible legal difficulties involved with electronic substitutes for the consignment note, in particular as regards the interplay between the consignment note and disposal of the goods.

55. The Working Group noted, however, that the ECE Working Party on Road Transport was currently considering proposals for amending the Convention so as to expressly allow for the use of data messages in connection with international road carriage. The Working Group welcomed those efforts and affirmed its readiness to assist the ECE Working Party on Road Transport in any manner that the Working Party might deem appropriate, for instance by offering comments or suggestions in connection with any instrument that the Working Party might wish to bring to the attention of the Working Group.

*Convention on the Taxation of Road Vehicles Engaged in International Goods Transport*  
(Geneva, 14 December 1956)<sup>26</sup>

56. The Working Group noted that the purpose of the Convention was to exempt from taxes and charges vehicles that are registered in the territory of one of the contracting parties and are temporarily imported in the course of international goods transport into the territory of another contracting party, under certain stipulated conditions. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

*Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport*  
(Geneva, 14 December 1956)<sup>27</sup>

57. The Working Group noted that the purpose of the Convention was to facilitate the taxation of road vehicles

<sup>20</sup>Ibid., vol. 1409, No. 23538, p. 3.

<sup>21</sup>ECE/TRANS/106.

<sup>22</sup>United Nations, *Treaty Series*, vol. 125, No. 1671, p. 3.

<sup>23</sup>Ibid., vol. 1042, No. 15705, p. 17.

<sup>24</sup>E/ECE/186 (E/ECE/TRANS/460).

<sup>25</sup>United Nations, *Treaty Series*, vol. 399, No. 5742, p. 189.

<sup>26</sup>Ibid., vol. 436, No. 6292, p. 115.

<sup>27</sup>Ibid., vol. 436, No. 6293, p. 131.



transporting persons and their baggage between countries for remuneration or other considerations. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

*European Agreement concerning the International Carriage of Dangerous Goods by Road (Geneva, 30 September 1957) and (a) Protocol amending article 14, paragraph 3; and (b) Protocol amending article 1 (a), article 14, paragraph 1, and article 14, paragraph 3*<sup>28</sup>

58. The Working Group noted that the purpose of the Agreement was to increase the safety of international transport of dangerous goods by road, with the use of prohibitive or regulatory measures. The Working Group was of the view that the Agreement Convention did not contain any provisions that might be directly relevant to electronic commerce.

*Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (Geneva, 1 September 1970)*<sup>29</sup>

59. The Working Group noted that, despite their significance for international trade, the substantive provisions of the Convention were essentially of a health and sanitary nature. They were addressed to States and did not establish rules directly relevant for private law transactions. Furthermore, the extent to which electronic communications might be substituted for paper-based documents for the purposes of the Convention was largely dependent upon the capability and readiness of public authorities in the contracting parties to the Convention to process such documents in electronic form. The Working Group was therefore of the view that no action was required in respect of the Convention.

*European Agreement concerning the Work of Crews of Vehicles Engaged in International Road Transport (Geneva, 1 July 1970)*<sup>30</sup>

60. The Working Group noted that the provisions of the Agreement dealt essentially with social matters and issues related to work safety and did not establish rules directly relevant for private law transactions. The Working Group was therefore of the view that no action was required in respect of the Agreement.

*European Agreement supplementing the Convention on Road Traffic opened for Signature at Vienna on 8 November 1968 (Geneva, 1 May 1971)*<sup>31</sup>

61. The Working Group noted that the purpose of the Agreement was to harmonize rules governing road traffic in Europe, ensure their compliance in order to facilitate international road traffic and increase road safety. The Working Group was of the view that the Agreement did

not contain any provisions that might be directly relevant to electronic commerce.

*Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Geneva, 1 March 1973) and Protocol thereto*<sup>32</sup>

62. The Working Group noted that the particular nature of the issues raised by electronic substitutes for transferable instruments might require a comprehensive new legal framework in order to allow for the international use of data messages in lieu of the paper-based transport documents envisaged by the Convention. Developing rules to achieve that result, however, was felt to go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. That circumstance, and the limited geographic scope of the Convention led the Working Group to take the view that no action should be recommended in respect of the Convention.

### 3. Transport by rail

*International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail (Geneva, 10 January 1952)*<sup>33</sup>

63. The Working Group noted that the purpose of the Convention was to ensure an effective and efficient examination at designated stations for goods carried by rail crossing frontiers. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

### 4. Water transport

*Convention relating to the Limitation of the Liability of Owners of Inland Navigation Vessels and Protocol thereto (Geneva, 1 March 1973)*<sup>34</sup>

64. The Working Group noted that the purpose of the Convention was to enable owners and crew members of inland navigation vessels to limit their liability, either contractually or extra-contractually, by constituting a limitation fund in accordance with the provisions of the Convention. The Working Group was of the view that the Convention did not contain any provisions that might be directly relevant to electronic commerce.

*United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978)*<sup>35</sup>

65. The Working Group noted that electronic substitutes for bills of lading and, to a lesser extent, electronic substitutes of other transport documents gave rise to a number of particular issues that might require specific solutions. Thus, those issues were felt to go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instru-

<sup>28</sup>Ibid., vol. 619, No. 8940, p. 77.

<sup>29</sup>Ibid., vol. 1028, No. 15121, p. 121.

<sup>30</sup>Ibid., vol. 993, No. 14533, p. 143.

<sup>31</sup>Ibid., vol. 1137, No. 17847, p. 369.

<sup>32</sup>Ibid., vol. 1774, No. 30887, p. 109.

<sup>33</sup>Ibid., vol. 163, No. 2139, p. 27, and vol. 328, p. 319.

<sup>34</sup>ECE/TRANS/3.

<sup>35</sup>United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

ments. The Working Group noted that electronic substitutes for maritime transport documents were one of the various issues at present under consideration by Working Group III (Transport Law). The Working Group was of the view that the work of Working Group III should be allowed to proceed without interference, but affirmed its readiness to offer its comments on that work at an appropriate stage.

*International Convention on Maritime Liens and Mortgages (Geneva, 6 May 1993)*<sup>36</sup>

66. The Working Group noted the particular nature of the issues raised by electronic registry systems in the Convention. The Working Group was of the view that an analysis of the specific requirements for the functioning of electronic registration systems under the Convention might best be undertaken in the course of the Working Group's consideration of legal issues related to the transfer of rights, in particular, rights in tangible goods, by electronic means, in cooperation with the United Nations Conference on Trade and Development and the International Maritime Organization, if those organizations wished that such joint work be undertaken.

**5. Multimodal transport**

*United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980)*<sup>37</sup>

67. The Working Group noted that the consideration of the particular issues involved in electronic substitutes for multimodal transport documents could go beyond the scope of the Working Group's efforts to remove obstacles to electronic commerce in existing international trade-related instruments. The Working Group was of the view that the secretariat should be requested to consult with UNCTAD and to inform the Working Group, at an appropriate stage, on any joint work that might be undertaken in connection with those matters.

*European Agreement on Important International Combined Transport Lines and Related Installations and Protocol thereto (Geneva, 1 February 1991)*<sup>38</sup>

68. The Working Group noted that the purpose of the Convention was to facilitate the operation of combined transport services and infrastructures necessary for their efficient operation in Europe. The Working Group was of the view that none of the provisions in the Convention would be directly relevant to electronic commerce.

**C. Commercial arbitration**

*Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)*<sup>39</sup>

69. The Working Group noted that the potentially problematic provisions in the Convention fell into the follow-

ing three categories: (a) provisions requiring a written form of the arbitration agreement; (b) provisions requiring the submission of "original" documents; and (c) provisions that contemplated notices or declarations that might be exchanged by the parties.

70. The Working Group took note of the work being undertaken by Working Group II (Arbitration) in connection with the written form of the arbitration agreement under article II of the Convention and related issues.

*European Convention on International Commercial Arbitration (Geneva, 21 April 1961)*<sup>40</sup>

71. The Working Group took note of the fact that ECE was currently considering a revision of the Convention and agreed that issues relating to coordination of work with ECE should best be left for the Working Group II (Arbitration).

**V. ELECTRONIC CONTRACTING: PROVISIONS FOR A DRAFT CONVENTION**

*General comments*

72. The Working Group noted that, at its thirty-ninth session, held in New York from 11 to 15 March 2002, it had begun its deliberation on the preliminary draft convention by holding a general exchange of views on the form and scope of the instrument (see A/CN.9/509, paras. 18-40). At that time, the Working Group had agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group had then proceeded with its deliberations by firstly taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion of draft article 15 (A/CN.9/509, paras. 122-125). The Working Group had agreed, at that time, that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation), at its fortieth session.

73. At the current session, the Working Group decided to resume its deliberations on the preliminary draft convention by holding a general discussion on the scope of the Convention and proceeding to consider those matters which had not been the subject of an initial debate at its previous session.

74. The Working Group noted that when it had first considered the possibility of further work on electronic commerce after the adoption of the Model Law on Electronic

<sup>36</sup>A/CONF.162/7.

<sup>37</sup>TD/MT/CONF/16.

<sup>38</sup>United Nations, *Treaty Series*, vol. 1746, No. 30382, p. 3.

<sup>39</sup>*Ibid.*, vol. 330, No. 4739, p. 3.

<sup>40</sup>*Ibid.*, vol. 484, No. 7041, p. 349.

Signatures, it had contemplated, among other issues, a topic broadly referred to as “electronic contracting”. Although the Working Group had not, on that occasion, spent much time on defining the issues to be touched upon, it had then been generally felt that one of those issues was formation of contracts in an electronic environment.

75. Consistent with that initial understanding, the draft preliminary convention submitted to the Working Group included essentially three types of provisions: those dealing with the sphere of application of the instrument, which followed other UNCITRAL conventions closely, those concerning the formation of contracts and a limited number of provisions dealing with specific rights and obligations of the parties in the context of contract formation by electronic means.

76. The Working Group was reminded, in that connection, of the concerns that had been expressed at its thirty-ninth session concerning the risk of establishing a duality of regimes for contract formation: a uniform regime for electronic contracts under the new instrument and a different, not harmonized regime, for contract formation by any other means, except for the very few types of contract that were already currently covered by uniform law, such as sales contracts falling under the United Nations Sales Convention.

77. It was pointed out that the question of the scope of the preliminary draft convention involved two different elements, namely, which transactions should be covered and how they should be covered. In that connection, the view was expressed that it might be useful for the Working Group to consider extending the scope of the preliminary draft convention to issues beyond contract formation, so as to include also the use of electronic messages in connection with the performance or termination of contracts. Moreover, the Working Group was invited to consider dealing not only with electronic contracts or contract-related communications, but also addressing other transactions conducted electronically, subject to specific exclusions that the Working Group might deem appropriate. With regard to the second element under consideration, namely, the question of how to cover those transactions, it was suggested that the Working Group should focus only on the issues raised by the use of electronic communications in the context of those transactions, leaving aspects of substantive law to other regimes such as the United Nations Sales Convention.

78. While no fundamental objections were raised to the proposal of extending the scope of the draft instrument beyond contracts, the Working Group heard expressions of concern that broadening the scope of the preliminary draft convention beyond a contractual context at such an early stage might be premature, as the Working Group had not yet reached a sufficient level of consensus on the substantive matters to be dealt with in the new instrument. That particular proposal, it was generally felt, should be reserved for consideration at a later stage of the process.

79. There was, however, general agreement that limiting the scope of the new instrument only to formation of con-

tracts by electronic means was an excessively narrow approach and that, as agreed at the Working Group’s thirty-ninth session, the new instrument should at least deal with certain issues of contract performance (A/CN.9/509, paras. 35 and 36).

80. The Working Group proceeded to consider the question of whether and to what extent the new instrument should address substantive issues of contract law or whether it should limit itself to the technicalities of contract formation and performance in an electronic environment. The Working Group was reminded of its earlier discussions concerning article 8 of the preliminary draft convention, which provided minimal substantive rules on the moment of contract formation inspired by the United Nations Sales Convention (A/CN.9/509, paras. 66-73). That discussion, it was said, was illustrative of the difficulties faced by the Working Group, as the views had then been divided between those opposing any substantive rules on formation to avoid a duality of regimes and those favouring at least a minimal set of rules, so as to render the provisions of the new instrument self-contained.

81. The Working Group held an extensive exchange of views on the matter. The prevailing view within the Working Group was that the new instrument should not attempt to develop uniform rules for substantive contractual issues that were not specifically related to electronic commerce or to the use of electronic communications in the context of commercial transactions. The Working Group took note, however, of the widely shared view that a strict separation between mechanical and substantive issues in the context of electronic commerce was not always feasible or desirable. The purpose of the Working Group’s efforts, it was said, was to develop a new instrument that offered practical solutions to issues related to the use of electronic means of communication for commercial contracting. Where substantive rules were needed beyond the mere reaffirmation of the principle of functional equivalence in order to ensure the effectiveness of electronic communications for transactional purposes, the Working Group should not hesitate to formulate substantive rules. Location of parties, validity of data messages, receipt and dispatch of data messages, among other issues, were mentioned as examples of the interplay between mechanical and substantive rules. The Working Group agreed that those considerations should be borne in mind as it proceeded with its work.

## Article 2. Exclusions

82. The text of the draft article, as considered by the Working Group, read as follows:

“This Convention does not apply to the following contracts:

“(a) Contracts concluded for personal, family or household purposes;

“(b) Contracts granting limited use of intellectual property rights;

“(c) [Other exclusions, such as real estate transactions, to be added by the Working Group.]”

*Subparagraph (a)*

83. The Working Group noted that subparagraph (a) was based on the approach generally taken toward the exclusion of consumers in UNCITRAL instruments. It was noted, in particular, that the language of the exclusion was drawn from article 2, subparagraph (a), of the United Nations Sales Convention, since it was language that had been tested in practice and had proved to be workable.

84. The Working Group held an extensive discussion on the desirability of excluding consumer transactions from the scope of application of the draft preliminary convention. Among the arguments put forward for such an exclusion, for which there was strong support, was the concern that issues of consumer protection varied greatly between legal systems, which was a reason why consumer transactions had thus far been systematically excluded from the field of application of UNCITRAL instruments. Moreover, UNCITRAL had consistently kept its focus on business or commercial transactions, leaving other organizations to deal with consumer issues, to the extent that such issues lent themselves to international harmonization. It was noted that, while divergences in consumer law with respect to contracts have caused problems for businesses around the world and businesses could well benefit from a harmonization, such a task would be unlikely to succeed. The countervailing view, for which there were also expressions of strong support, was that nothing in the text of the draft preliminary convention affected the protection of consumers, a matter that would continue to be governed by domestic law, often having the nature of public policy. An outright exclusion of consumer transactions from the new instrument, however, was felt to be neither desirable nor necessary, as there was no reason to deprive consumers from the benefits of legal certainty and facilitation of contract formation that might be provided by the new instrument. In any event, it was said, it would be premature to make a final decision on such exclusion before the Working Group had considered more fully the substantive provisions of the draft preliminary convention.

85. Having considered the various views that had been expressed, the Working Group reaffirmed its understanding that the new instrument should not deal with consumer protection issues. The Working Group also agreed that, in keeping with the established practice of UNCITRAL in that respect, the preliminary draft convention should exclude consumer transactions from its scope of application, but that the Working Group might reconsider the need for such an exclusion once it had advanced its consideration of the substantive provisions of the preliminary draft convention.

86. Subject to that general understanding, the Working Group proceeded to consider the formulation used for the exclusion. It was pointed out that the draft subparagraph did not reproduce the entire provision on the exclusion of consumers in the United Nations Sales Convention. According to its article 2, subparagraph (a), the latter did not apply to sales of goods bought for personal, family or household use, "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use". That provision was regarded as important to ensure legal

certainty, otherwise the applicability of the United Nations Sales Convention would depend entirely on the seller's ability to ascertain the purpose for which the buyer had bought the goods. Thus, the consumer purpose of a sales contract could not be held against the seller, for the purpose of excluding the applicability of the Convention, if the seller did not know or could not have been expected to know (for instance, having regard to the number or nature of items bought) that the goods were being bought for personal, family or household use. It followed from those provisions that the drafters of the United Nations Sales Convention assumed that there might be situations where a sales contract would fall under the Convention, despite the fact of it having been entered into by a consumer. The legal certainty gained with the provision appeared to have outweighed the risk of covering transactions intended to have been excluded. It was observed, moreover, that, as indicated in the commentary on the draft Convention on Contracts for the International Sale of Goods, which had been prepared at the time by the secretariat (A/CONF.97/5), article 2, subparagraph (a), of the United Nations Sales Convention was based on the assumption that consumer transactions were international transactions only in "relatively few cases".<sup>41</sup>

87. It was said, however, that if a new instrument on electronic contracting should exclude consumer transactions, the formulation of article 2, subparagraph (a), of the United Nations Sales Convention might be problematic, as the ease of access afforded by open communication systems not available at the time of the preparation of the Convention, such as the Internet, greatly increased the likelihood of consumers purchasing goods from sellers established abroad.

88. The Working Group recognized that the greater likelihood of consumers becoming parties to international contracts was a matter that required careful attention in the formulation of an exclusion of consumer transactions from the draft preliminary convention. However, questions were raised as to whether the choice made in subparagraph (a) of draft article 2 was correct, since the simple deletion of the additional elements that were contained in the corresponding provision of the United Nations Sales Convention made the applicability of the new instrument solely dependent upon the purpose of a transaction, a circumstance that might not be easily ascertained by the seller at the moment of the negotiation of the contract. It was therefore suggested that the additional language found in the United Nations Sales Convention should be restored in draft article 2 (a) in square brackets, in order for it to be considered in the future.

89. An alternative approach, which the secretariat was also requested to take into account when preparing a revised draft of the provision, was to define the scope of the transactions covered by the preliminary draft convention in a manner that made it clear that the instrument applied to commercial transactions and not to contracts

<sup>41</sup>*Official Records of the United Nations Conference on Contracts for the International Sale of Goods: documents of the Conference and summary records of the plenary meetings and of the meetings of the Main Committee* (United Nations publication, Sales No. E.81.IV.3), p. 16.

entered into by consumers and that nothing in the new instruments affected any rules of law intended for the protection of consumers, as had been done in footnote \*\* to article 1 of the UNCITRAL Model Law on Electronic Commerce.

*Subparagraph (b)*

90. The Working Group was reminded that the subparagraph originated in a preliminary discussion of issues of electronic commerce that had taken place at the thirty-eighth session of the Working Group with respect to the scope of application of the United Nations Sales Convention. At that time, the Working Group had noted that licensing of intellectual property rights was generally outside the scope of the Convention, which had been conceived for the sale of tangible goods. It had been noted, however, that with the passage of time and the evolution of technology, it had on occasion become difficult to establish a clear delineation between licensing and sales contracts, as was the case in transactions involving some of the so-called “virtual goods” (A/CN.9/484, paras. 116 and 117). In the interest of ensuring the greatest possible consistency between the new instrument and the United Nations Sales Convention, the draft preliminary convention, it was noted, excluded transactions involving the limited grant of intellectual property rights.

91. The Working Group heard expressions of general support for not dealing with licensing arrangements in the new instrument. It was suggested that industry sectors immediately concerned with transactions involving intellectual property rights had developed their own contracting practices and that all efforts should be made to avoid interference therewith. Failure to do so at the current preliminary stage of the examination of the draft preliminary convention might undermine the development of the new instrument. In effect, it was noted that many other international and commercial bodies had attempted in a general way to define the intersections between intellectual property rights, contractual rights and traditional sales law and that such attempts had been controversial and unsuccessful.

92. There was sympathy within the Working Group for those arguments. However, it was felt that it would be wise to pursue the examination of the remainder of the draft preliminary convention first and to return to the exclusions in draft article 2 at a later time. In that regard, it was suggested that if including the subject of subparagraph (b) in the scope of the instrument proved to create difficulties to progress on the draft instrument, appropriate exclusions could be made at a later stage. Support was expressed for that position, in particular given the lack of certainty regarding whether the draft instrument would cover substantive aspects of contract law.

93. Having considered those views, the Working Group decided that it might be useful to revert to the question of excluding intellectual property rights from the draft instruments at a later stage, possibly at its forty-first session. The Working Group agreed that it would be useful at that juncture to reserve sufficient time for an exchange of views with the various organizations having an interest in this matter, such as WPO, the International Organization for

Standardization and relevant non-governmental organizations, such as citizens’ interest organizations. It also noted that, in deciding upon the exceptions to the convention, it might be necessary to distinguish between various types of intellectual property and that a broad exchange of views with different interests in the area would be of assistance in that regard.

*Subparagraph (c)*

94. With respect to its consideration of additional exclusions to be proposed to the draft convention under subparagraph (c), the Working Group agreed that suggested exclusions should not take the form of a recital of exclusions from domestic laws on electronic commerce, but that they should represent considered views on subject areas best left outside of the scope of such an international commercial instrument.

95. Various suggestions were made regarding possible exceptions to the scope of the draft convention, including contracts creating rights in real estate, those involving courts or public authorities and those on suretyship, family law or the law of succession. Those transactions were said to be appropriate cases for exclusions as they were not ordinarily the subject of international trade. Additional suggestions were made to exclude certain existing financial services markets with well-established rules, including payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets, while possibly including general procurement activities of banks and loan activities, in order not to interfere with established practices of electronic contracting in those industries.

96. Caution was expressed concerning the exclusion of matters that could in the future develop international commercial dimensions. It was suggested that one method of accommodating concerns regarding specific exceptions would be to allow for States to make reservations with respect to certain subject areas. However, it was also suggested that such an approach was unsatisfactory in that it would detract from the general effort of harmonization.

97. Another suggested approach was to achieve a limitation of the scope of application of the convention by a positive determination of the matters it covered as being essentially international commercial transactions, which could be made in article 1 of the draft instrument. In response to that proposal it was observed, however, that reference to the “commercial” nature of a transaction might not be feasible in an international uniform instrument, the understanding of that term varied greatly among legal systems.

98. The Working Group decided that the matter of exclusions should be reconsidered at a later stage, following examination of the substantive parts of the draft preliminary convention. The secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of the provision, possibly including appropriate variants. In order to clarify the exceptional nature of subparagraph (c), it was suggested that the phrase “to be added” should be changed to “could be added”.

### Article 3. *Matters not governed by this Convention*

99. The text of the draft article, as considered by the Working Group, read as follows:

“This Convention governs only the formation of contracts concluded or evidenced by data messages. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

“(a) The validity of the contract or of any of its provisions or of any usage;

“(b) The rights and obligations of the parties arising out of the contract or of any of its provisions or of any usage;

“(c) The effect which the contract may have on the ownership of rights created or transferred by the contract.”

100. The Working Group noted that the draft article had been included so as to make it clear that the preliminary draft convention was not concerned with substantive issues arising out of the contract, which, for all other purposes, remained subject to its governing law. However, having regard to its previous deliberations on the scope of the preliminary draft convention (see paras. 77-81), the Working Group was of the view that at least the *chapeau* of the draft article would need to be substantially reformulated. A revised version of the draft article, it was suggested, should make it clear that the new instrument dealt only with the possible formal or substantial problems created by the use of electronic means of communication in connection with the various aspects of contracting including formation, notices and termination of contracts (or commercial transactions in general, if the Working Group eventually preferred to use such a criterion to define the scope of application of the instrument). The draft article should further make it clear that the new instrument was aimed at facilitating electronic contracting and was not intended to introduce new formal or substantial legal requirements concerning contracts or commercial transactions in general, nor to modify any such existing requirements.

101. There was general agreement within the Working Group that the draft article needed to be reformulated so as to reflect the Working Group’s decision that the new instrument should not be limited only to the use of electronic communications for the purpose of contract formation. Reservations were expressed, however, concerning the use of the word “transactions”, since that term was not uniformly understood and might be given an excessively broad interpretation, covering even actions taken in connection with situations not involving any economic value or commercial interest. The Working Group took note of those reservations but accepted the suggestion that, at such an early stage of its deliberations, it was not desirable to exclude particular options for formulations that might be used in defining the scope of application of the new instrument.

102. The Working Group proceeded to consider the nature of limitations to the substantive field of application of the preliminary draft convention. There was general agreement

that, in the interest of avoiding a duality of legal regimes, depending on whether a contract was negotiated through electronic means or otherwise, provisions on substantive matters that went beyond setting the criteria for the functional equivalence for electronic communications should be limited to those which dealt with situations particularly relevant for electronic commerce or the use of electronic means of communication. In that connection, it was suggested that the phrase “except as otherwise expressly provided in this Convention” in the *chapeau* of the draft article was misleading and should not appear in a revised draft, as the preliminary draft convention was in any event not intended to deal with the types of matters referred to in the draft article.

103. At that juncture, however, the attention of the Working Group was drawn to the possible relationship between issues of validity and issues related to the rights and obligations of the parties and other provisions of the preliminary draft convention. One such example was the positive affirmation that use of data messages in the context of contract formation should not by itself constitute grounds for the invalidity of the contract under draft article 12, paragraph 2. Another example was the question of whether the new instrument should provide possible legal consequences for the failure by a party to make contract terms available under draft article 15, an issue that still remained to be considered by the Working Group. The Working Group agreed that the relationship between the matters excluded under article 3 and the substantive provisions found elsewhere in the draft preliminary convention should be carefully considered by the Working Group at a future session, once a consensus had emerged on the nature of substantive provisions to be included in the text.

104. The Working Group was reminded of the importance of ensuring consistency between draft articles 1 and 3, which both set the parameters of the field of application of the preliminary draft convention. In that connection, the Working Group reiterated its understanding that the preliminary draft convention should avoid using the phrase such as “contracts concluded or evidenced by data messages” (draft article 1) or “formation of contracts concluded or evidenced by data messages” (draft article 3). Moreover, the Working Group agreed that it could consider at a future session a simplified version of draft article 3 that would only refer to matters excluded from the scope of the preliminary draft convention.

### Article 4. *Party autonomy*

105. The text of the draft article, as considered by the Working Group, read as follows:

“The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.”

106. There was strong support within the Working Group for a provision reaffirming the principle of party autonomy. Not only had that principle been traditionally recognized in various UNCITRAL texts, but it was also a

fundamental principle of commercial law in most legal systems. It was also suggested, in that connection, that recognizing the principle of party autonomy might possibly reduce the need for exclusions under draft article 2 on the grounds that certain business sectors had already established satisfactory practices for dealing with electronic contracting.

107. Without prejudice to the general validity of the rule reflected in the draft article in the context of the preliminary draft convention, the Working Group proceeded to consider whether there might be situations where party autonomy could be limited or even excluded in favour of mandatory rules.

108. As regards the general principle of non-discrimination under draft article 10, paragraph 2, it was noted that parties should not be forced to accept contractual offers or acceptances of offers by electronic means if they did not want to. It was therefore appropriate to allow the parties to exclude that possibility by means of a prior agreement. The same reasoning might also apply to the acceptance of electronic signatures under draft article 13, paragraph 3. In connection with the latter provision, however, the view was also expressed that party autonomy should not be allowed to go as far as relaxing statutory requirements on signature in favour of methods of authentication that provided a lesser degree of reliability than electronic signatures, which was the minimum standard recognized by the preliminary draft convention. Generally, it was said, party autonomy did not mean that the new instrument should empower the parties to set aside statutory requirements on form or authentication of contracts and transactions.

109. The Working Group took note of views to the effect that, depending on the provisions to be included in chapters II and III of the preliminary draft convention, the Working Group might need at a later stage to consider whether or not it should formulate exceptions to the principle of party autonomy. Possible provisions in respect of which the scope for party autonomy might be limited included, for example, provisions requiring the parties to offer means for correcting input errors (draft article 12) or to make available records of the contract terms (draft article 15). In the example of draft article 12, it was said, a duty to offer means for correcting input errors was predicated on the assumption that electronic transactions offered a greater potential for those errors than in paper-based transactions. If the Working Group eventually followed that assumption, the new instrument might include substantive rules to protect those more easily in error. The nature of such a provision, however, if adopted, might also vary from a compulsory rule or to a simple recommendation without sanctions.

110. Having considered the various views that were expressed on the matter and reaffirming its general support for the principle of party autonomy, the Working Group decided that the provision should be retained and that the issue of possible exclusions or limitations to the draft article should be considered at a later stage, in the light of the Working Group's decision on the substantive provisions of the draft preliminary convention.

## Article 5. Definitions

111. The text of the draft article, as considered by the Working Group, read as follows:

“For the purposes of this Convention:

“(a) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“(b) ‘Electronic data interchange (EDI)’ means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

“(c) ‘Originator’ of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

“(d) ‘Addressee’ of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

“(e) ‘Automated computer system’ means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person at each time an action is initiated or a response is generated by the system.

“(f) ‘Information system’ means a system for generating, sending, receiving, storing or otherwise processing data messages;

“(g) ‘Offeror’ means a natural person or legal entity that offers goods or services;

“(h) ‘Offeree’ means a natural person or legal entity that receives or retrieves an offer of goods or services;

### Variant A

“[(i) ‘Signature’ includes any method used for identifying the originator of a message and indicating that the information contained in the message is attributable to the originator;]

### Variant B

“[(i) ‘Electronic signature’ means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the person holding the signature creation data in relation to the data message and indicate that person’s approval of the information contained in the data message;]

### Variant A

“[(j) ‘Place of business’ means any place of operations where a person carries out a non-transitory activity with human means and goods or services;]

*Variant B*

“[(j) ‘Place of business’ means the place where a party pursues an economic activity through a stable establishment for an indefinite period;]

“(k) ‘Person’ and ‘party’ include natural persons and legal entities;

“[(l) Other definitions that the Working Group may wish to add.]”

*General comments*

112. The Working Group noted that the number and nature of the definitions depended to a large extent on decisions that the Working Group would need to take in the future concerning substantive provisions of the preliminary draft convention. There was therefore general agreement with the proposal that the list of definitions could be retained in its current form. Nevertheless, the Working Group decided that it would be useful to advance its deliberations to review the definition of terms in the draft article 5, bearing in mind that a final decision should await the outcome of the discussions on the remainder of the draft convention.

*“Automated computer system” and “Information system”*

113. Questions were asked on the difference between an “automated computer system” in subparagraph (e) and an “information system” in subparagraph (f). The distinction was said to be unclear, in particular in some of the language versions of the preliminary draft convention. In response, it was explained that the notion of “automated computer system”, which was also used in draft article 12, referred essentially to a system for automatic negotiation and conclusion of contracts without involvement of a person, at least on one of the ends of the negotiation chain. An “information system”, in turn, was a term already used in the UNCITRAL Model Law on Electronic Commerce and referred to a system used for generating, sending, receiving and storing data messages, a notion that was particularly important in connection with the transmission and reception of data messages. An automated computer system might be part of an information system, but that need not necessarily be the case. It was noted, however, that those terms might need to be better aligned in a future draft.

114. Clarification was also sought of the terms “review and intervention” in draft subparagraph (e). It was noted that, while the language could be clarified in a future draft, the definition was intended to exclude the situation where the computer system was not completely automated, in that it would not complete its task without the intervention of a natural person in the system in order to intercept a message or to review and approve its content.

*“Offeror” and “offeree”; “originator” and “addressee”*

115. Questions were raised as to the need for definitions of “offeror” and “offeree”. In particular, it was suggested that both terms might be subsumed in the broader definitions of “originator” and “addressee”. In response, it was observed that the terms “offeror” and “offeree” were used in draft articles 8 and 9 in a context in which they might not easily be

replaced with the words “originator” or “addressee”. It was suggested that although those terms might not be needed if draft articles 8 and 9 were not kept in the final text, it might be preferable, for the time being, to retain them.

*“Signature” and “electronic signature”*

116. The Working Group considered questions regarding the difference between “signature” and “electronic signature” in draft paragraph 5 (i), variants A and B. It was pointed out, in response, that variant A was intended to provide a general definition of signatures, while variant B, drawn from article 2 (a) of the UNCITRAL Model Law on Electronic Signatures, was intended to include a more specific requirement for the recognition of electronic signatures.

117. Reservations were expressed concerning the use of a definition of “signature”, which was not contained in either of the UNCITRAL Model Laws, in particular as it might be more appropriate to leave such a definition for domestic law. Furthermore, the relationship between the definitions was said to be unclear, as they were not strictly speaking mutually exclusive, as long as “electronic signatures” could be regarded as a subset of “signatures”.

118. Concern was also expressed regarding the relationship between the definitions of “electronic signature”, “data message” in subparagraph (a), which included also information in the form of telegrams, telexes or teletypes, each of which resulted in a paper document. An electronic signature, it was said, could not possibly be attached to paper documents. In response, it was noted that the central element in the definition of data messages was the notion of “information”, rather than the form in which the message was received. However, it was agreed that the interplay between the two definitions might need to be looked at more closely, so as to avoid the erroneous impression that the draft contemplated an electronic signature, which was defined as “data in electronic form”, appearing in the paper printout of a telegram, telex or teletype.

119. Despite those observations, and in accordance with its general approach to the draft article, there was support for the retention of both variants A and B.

*“Place of business”*

120. It was noted that the proposed definition of “place of business” in variant A reflected the essential elements of the notions of “place of business”, as understood in international commercial practice, and “establishment”, as used in article 2, subparagraph (f), of the UNCITRAL Model Law on Cross-Border Insolvency. The proposed definition appeared within square brackets in view of the fact that, although having repeatedly used the concept of “place of business” in its various instruments, thus far the Commission had not defined such concept.

121. In response to a query concerning the meaning of the words “indefinite period” in variant B, it was explained that the language was meant to exclude only the temporary provision of goods or services out of a specific location, without requiring, however, that the company providing those goods or services be established indefinitely at that place.



122. The view was expressed that the desirability of a definition of place of business should be carefully considered by the Working Group at a later stage in view of the fact that such a definition was not made in the United Nations Sales Convention, which left the matter to domestic law. The Working Group was reminded of the risk of establishing a duality regime for contracts negotiated through electronic means and other contracts.

#### **Article 6. Interpretation**

123. The text of the draft article, as considered by the Working Group, read as follows:

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

“2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”

124. The Working Group noted that the principles reflected in the draft article had appeared in most of the UNCITRAL texts, and that its formulation mirrored article

7 of the United Nations Sales Convention. The provision was meant to facilitate uniform interpretation of the provisions in uniform instruments on commercial law. It was further emphasized that there had been a practice in private law treaties to provide self-contained rules of interpretation, without which the reader would be referred to general rules of public international law on the interpretation of treaties that might not be entirely suitable for the interpretation of private law provisions.

125. The view was expressed that similar formulations in other instruments had been incorrectly understood as allowing immediate referral to the applicable law pursuant to the rules on conflict of laws of the forum State for the interpretation of a Convention without regard to the conflict of laws rules contained in the Convention itself. The Working Group took note of that concern.

126. The Working Group agreed that the questions arising from article 6 stemmed mainly from the closing phrase in draft article 6, paragraph 2, “by virtue of the rules of private international law”. While some were of the view that the phrase should be deleted, it was noted that deletion could cause problems in interpretation later, given the common use of similar language in other instruments. The Working Group decided that the phrase should be placed in square brackets in a future draft of article 6.

### **B. Working paper submitted to the Working Group on Electronic Commerce at its fortieth session: Legal barriers to the development of electronic commerce in international instruments relating to international trade: Compilation of comments by Governments and international organizations**

(A/CN.9/WG.IV/WP.98 and Add.1-4) [Original: English]

#### **A/CN.9/WG.IV/WP.98**

#### **CONTENTS**

	<i>Page</i>
I. Introduction .....	602
II. Compilation of comments .....	602
A. States .....	602
1. Austria .....	602
2. Italy .....	602
3. Oman .....	604
B. Intergovernmental organizations .....	604
1. International Civil Aviation Organization .....	604
2. International Maritime Organization .....	605
3. United Nations Educational, Scientific and Cultural Organization .....	605
4. World Intellectual Property Organization .....	605
5. World Customs Organization .....	605
6. Council of Europe .....	606
7. Latin American Integration Association .....	606
C. International non-governmental organizations .....	607
1. International Federation of Freight Forwarders Associations .....	607

## I. INTRODUCTION

1. The Working Group on Electronic Commerce considered proposals for removing obstacles to electronic commerce in existing international conventions at its thirty-eighth session, in March 2001, on the basis of a note by the secretariat (A/CN.9/WG.IV/WP.89). The Working Group agreed to recommend to the Commission the preparation of an appropriate international instrument or instruments to remove those legal barriers to the use of electronic commerce that might result from international trade law instruments. The Working Group also agreed to recommend to the Commission that the secretariat should carry out a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments. The Commission endorsed that recommendation, along with other recommendations for future work, at its thirty-fourth session, in 2001.<sup>1</sup>

2. The secretariat began the survey by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The secretariat identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communications under those treaties. The preliminary conclusions reached by the secretariat in relation to those treaties are set out in a note by the secretariat (A/CN.9/WG.IV/WP.94) that was submitted to the Working Group at its thirty-ninth session, in March 2002.

3. At that session, the Working Group took note of the progress that had been made by the secretariat in connection with the survey but did not have sufficient time to consider the secretariat's preliminary conclusions. The Working Group requested the secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group further requested the secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the secretariat.

4. By note verbale of 11 April 2002 and letters of 22 and 29 April 2002, the Secretary-General forwarded the survey, which appears in the annex to document A/CN.9/WG.IV/WP.94, to States and to 13 intergovernmental and 12 international non-governmental organizations that are invited to attend the meetings of the Commission and its working groups as observers. The secretariat requested States and those organizations to review the survey and submit their comments thereon for consideration by the Working Group. The present document reproduces the first comments received by the secretariat.

<sup>1</sup>Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 17 and corrigendum (A/56/17 and Corr.3), paras. 291-293.

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. Furthermore, with a view to ensuring the broadest possible basis of consultations, the secretariat continues to seek the views of other intergovernmental and international non-governmental organizations beyond the group of organizations initially addressed by the secretariat.

## II. COMPILATION OF COMMENTS

### A. States

#### 1. Austria

*[Original: English]  
[19 June 2002]*

1. Austria shares the view that the issues related to electronic contracting identified in the instruments analysed, as far as they do not go beyond the scope of the Working Group's efforts, can best be addressed in the context of its deliberations on the development of an international instrument dealing with electronic contracting and of its consideration of legal issues related to the transfer of rights.

2. As a result, there seems to be no need for an "omnibus convention", which would address these issues specifically for adapting the instruments to an electronic environment.

#### 2. Italy

*[Original: English]  
[1 July 2002]*

1. The Italian delegation wishes first of all to express its appreciation to the secretariat for having issued document A/CN.9/WG.IV/WP.94, with such a high-quality survey of international legal instruments annexed to it. In making the comments that follow, the Italian delegation will also refer to the preceding document (A/CN.9/WG.IV/WP.89) with an enclosed advisory opinion prepared by Professor Geneviève Burdeau at the request of the secretariat.

2. The underlying concern is that existing international legal instruments making reference to "writing", "signature" and "document" may not allow for their electronic equivalents and that this may constitute a barrier to the development of electronic commerce and a disadvantage in relation to traditional commerce practice.

3. The secretariat approached the issue, very appropriately, in two ways. With its document A/CN.9/WG.IV/WP.94, it conducted a survey of international legal instruments deposited with the Secretary-General, with the aim of identifying possible legal barriers to the development of electronic commerce. With its preceding document A/CN.9/WG.IV/WP.89, it distributed an advisory opinion by Ms. Burdeau suggesting that, at the initiative of UNCITRAL, an interpretative agreement be concluded, in simplified form, for the purpose of specifying and supplementing the definition of the terms "writing", "signature" and "document" in all existing and future international instruments, irrespective of their legal status, and that this

agreement be reinforced by a General Assembly resolution as well as recommendations by the Organisation for Economic Cooperation and Development and the World Trade Organization (WTO) General Council, among others. The French delegation, by its note annexed to document A/CN.9/WG.IV/WP.93, basically endorsed this suggestion, recommending, however, that, instead of an agreement that would interpret, modify or amend existing treaties, a new agreement be concluded, providing for electronic equivalents.

4. In the opinion of the Italian delegation, the survey contained in document A/CN.9/WG.IV/WP.94 is of fundamental importance to place in its proper context the suggestion for an omnibus agreement along the lines indicated in the advisory opinion by Professor Burdeau or in the note by the French delegation. When we look at the above survey, we see that all legal instruments surveyed fall into the following few categories with respect to their potential for raising barriers to electronic commerce.

5. A large group of instruments, according to the secretariat, raise no issue and require no action. This applies to instruments identified in document A/CN.9/WG.IV/WP.94 as: I,15; II,A,9; II,A,13; II,A,14; II,B,1; II,B,19; II,B,8; II,B,12; II,B,13; II,B,14; II,B,22; II,B,21; II,B,23; II,C,2; II,D,1; II,E,2.

6. A second group of surveyed instruments, according to the secretariat, raises issues that cannot be solved by the simple principle of electronic equivalent, because, for example, they imply notions of "location", "dispatch and receipt of an offer" or similar notions that require a more complex adaptation to the electronic environment. Such issues, indeed, are among those covered by the draft convention on electronic contracting (document A/CN.9/WG.IV/WP.95) or should be covered by other conventions that are being considered by the UNCITRAL Working Group on Electronic Commerce, such as the convention on transfer of rights (on tangible or intangible goods) by electronic means, or the convention on online dispute settlement systems. This is the case of the instruments identified in document A/CN.9/WG.IV/WP.94 as: I,7; I,10; I,12; I,13; II,B,26; II,D,3; II,D,4; II,E,1; III,1; III,2.

7. A third group of surveyed instruments, according to the secretariat, raises issues of a trade policy nature. The relevant instruments are addressed to States and are not applicable to private law transactions. For these issues, rather than an UNCITRAL-sponsored omnibus agreement of the type envisaged in document A/CN.9/WG.IV/WP.89, the appropriate action, if any, should come, according to the secretariat, from other international organizations, mainly WTO. This is the case of the instruments identified in document A/CN.9/WG.IV/WP.94 as: I,3; II,A,5; II,A,15; II,A,17; II,A,18.

8. Finally, the secretariat identifies two instruments relating to international transport (II,A,16 and II,B,11) that, in all likelihood, would require some special adaptation provisions.

9. What is striking in this connection is the absence, among the international legal instruments surveyed, of an

instrument for which the proposed omnibus agreement would reach its intended general purpose. All the surveyed legal instruments, in one way or another, seem to require either no action or a very specific action that could not be confined to the mere establishment of the principle of the electronic equivalent, whenever the terms "writing", "signature" and "document" are used. This should by no means lead to the conclusion that an omnibus agreement of the type envisaged in document A/CN.9/WG.IV/WP.89 would be useless; simply, the conclusion appears to be that the need for such an agreement is rather residual and that, in addition, caution should be exercised for those cases where the mere application of the principle of electronic equivalent would either not reach the intended purposes or be inconsistent with other provisions of the instrument, which, for example, clearly refer only to a physical document (one might think of an instrument providing for the keeping of a document in a safe, which would be applicable only to a physical document, or a printed copy of an electronic document).

10. Given the above, the Italian delegation suggests first of all that the UNCITRAL Working Group on Electronic Commerce completes its work not only in connection with the convention on electronic contracting but also in the other areas identified, such as the electronic transfer of rights in tangible goods, electronic transfer of intangible rights and online dispute settlement systems. Upon completion of this work, the Italian delegation maintains that the bulk of the problems intended to be solved with the omnibus protocol envisaged in document A/CN.9/WG.IV/WP.89 will have already been solved in a more appropriate way.

11. Having said that, the Italian delegation feels that establishing in an international agreement the principle that "the use of the terms 'writing', 'signature' and 'document' in international legal instruments should extend to their electronic equivalent" is something that should be done. However, any such agreement in this respect should be qualified with the condition that the electronic equivalent principle should apply only whenever feasible and whenever not inconsistent with other provisions of the legal instrument in question. It should, in other words, constitute a kind of agreement in principle, aimed at engendering a practice and an *opinio juris* that could result in the emergence of a new customary rule allowing for electronic equivalents in the context of international trade (see para. 10 of the note by the French delegation, document A/CN.9/WG.IV/WP.93).

12. Along these lines, whether or not this agreement is called "interpretative" or otherwise does not make much difference. The Italian delegation agrees, however, that UNCITRAL is the proper forum for drawing up such an agreement and suggests that it be simply included, by way of an additional article to the existing text discussed at the thirty-ninth session of the Working Group, in the draft convention on electronic contracting presently under consideration. It may constitute a provision that would slightly exceed the scope of the draft convention, but this risk would be outweighed by many other practical advantages, including that of a simpler approach and a probably easier approval process.

### 3. Oman

[Original: Arabic]  
[11 April 2002]

1. As a next phase, emphasis should be placed on the need to examine the texts of treaties deposited with regional entities, such as the League of Arab States, the Gulf Cooperation Council, WTO, the World Intellectual Property Organization (WIPO) and other international entities.

2. The United Nations Commission on International Trade Law, through its Working Group, should consider the possible inclusion of certain trade operations into the UNCITRAL Model Law on Electronic Commerce, such as contracts for the international sale of goods, transport of passengers, carriage of goods, insurance operations, bank guarantees and standby letters of credit and other relevant items. The Model Law should not be limited to the transport of goods but should rather cover all that the Working Group may deem appropriate for inclusion in the Model Law, such as maritime liens and mortgages and recognition of the documentary form of arbitration agreements. Such operations should be introduced into the text of the Model Law rather than being incorporated into several international treaties. As a result, any State can be able to enact legislation for electronic commerce, making use of the commercial operations contained in the Model Law.

3. The existing disagreement on electronic sales in the context of the international sale of goods should be resolved and thus the word "goods" should cover intangible things, such as patent rights, trademarks, know-how and purchase through digital loading etc; sufficient identification of movable material goods, tangible or intangible; and solving the problematic swing in the extent to which goods are considered tangible or intangible, such as downloading musical or film digital files from the purchase site directly.

## B. Intergovernmental organizations

### 1. International Civil Aviation Organization

[Original: English]  
[3 June 2002]

1. The International Civil Aviation Organization (ICAO) considers the survey that is being conducted by UNCITRAL very useful and wishes to submit for consideration for inclusion in the survey a number of legal instruments in the field of international air transport. The following instruments would appear to lend themselves for consideration in this respect:

(a) Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Second International Air Law Conference, Warsaw, 1929). This instrument requires, *inter alia*, the delivery of a passenger ticket (article 3), mentions the requirement of a luggage ticket to be made out in duplicate (article 4) and addresses in articles 5 to 16 the nature, content and function of the air consignment note. Further, article 26, paragraph 3, mentions that a complaint must be made "in writing". (These examples, as well as the ones

to follow below, are given for illustrative purposes and are not necessarily exhaustive);

(b) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, signed at The Hague on 28 September 1955 (Doc 7632). This instrument also contains a number of provisions dealing with the required contents of air transport documents (see for example articles III, IV and V to IX) and article XI, substituting article 22 of the Warsaw Convention, contains a reference to the air carrier having provided "in writing" an offer for the settlement of a claim;

(c) Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (Doc 8181). In light of article IV of this instrument, it may be useful to include the Convention in the survey;

(d) Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975 (Doc 9146). Article II of this instrument, amending article 22 of the Hague Protocol, contains a reference to an offer to be made to the plaintiff "in writing";

(e) Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as Amended by the Protocol done at The Hague on 28 September 1955, signed at Montreal on 25 September 1975 (Doc 9148). With respect to the carriage of cargo, this instrument provides, *inter alia*, for the substitution of the delivery of the air waybill, with the consent of the consignor, by "any other means" which would preserve a record of the carriage to be performed. If such other means are used, and if requested by the consignor, the carrier shall deliver to the consignor a "receipt" for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means (see article III, amending article 5 of the Warsaw/Hague provisions). Article 6, as amended by the Protocol, contains a number of references to the "signing" of the air waybill, and article 12 contains a reference to the "production" of the part of the air waybill or the receipt for the cargo.

(f) Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal on 28 May 1999 (Doc 9740). Article 3 of this instrument describes the format and contents of the various air transport documents and contains references to a "written statement", a "baggage identification tag" and a "written notice". This instrument essentially incorporates in articles 4 to 16 the respective provisions of Montreal Protocol No. 4, with some minor modifications. Article 31, paragraph 3, contains a reference to the requirement of a complaint to be made "in writing" and further requires in article 34, paragraph 1, that an arbitration agreement be made "in writing".

## 2. International Maritime Organization

[Original: English]  
[14 May 2002]

1. The International Maritime Organization (IMO) believes that one IMO instrument may be relevant to UNCITRAL's survey.

2. The Convention on Facilitation of International Maritime Traffic, 1965 (FAL) is intended, as expressed in the preamble to the Convention, "to facilitate maritime traffic by simplifying and reducing to a minimum the formalities, documentary requirements and procedures on the arrival, stay and departure of ships engaged in international voyages." The FAL Convention now has 91 State-parties. Part C of section C of the annex to this Convention contains recommended practices and standards concerning "electronic data-processing techniques".

## 3. United Nations Educational, Scientific and Cultural Organization

[Original: English]  
[30 May 2002]

The instruments for which the United Nations Educational, Scientific and Cultural Organization (UNESCO) acts as depositary cover the fields of education, science, culture and communication, and none of them appear to come within the scope of international trade instruments, as mentioned in the letter from the UNCITRAL secretariat.

## 4. World Intellectual Property Organization

[Original: English]  
[28 May 2002]

1. The World Intellectual Property Organization (WIPO) has a longstanding tradition of collaboration with UNCITRAL. The work conducted by UNCITRAL is held in the highest regard by WIPO, and some of the instruments that have resulted from that work are deemed to be part of the most significant achievements by an organization of the United Nations system in the commercial and digital arenas. With regard to the mandate of WIPO, particular reference is made in this regard to the accomplishments of UNCITRAL in the area of commercial arbitration and electronic commerce.

2. In our age, technological developments, including information technology and the Internet, arguably are the primary driving factors behind the evolution of the intellectual property system. At the same time, the intellectual property system is the principal legal framework relied upon by the creators of these new technologies as a means of reaping rewards for their investments. In light of this close and inseparable relationship between modern technologies and intellectual property, one of the critical tasks of the WIPO member States and the secretariat is to monitor, on an ongoing basis, the treaties administered by WIPO to determine whether their provisions remain in line with technological developments, including the Internet, and to propose amendments to these instruments should the need arise.

3. Specifically with regard to any requirements in the WIPO-administered treaties with respect to "writing", "sig-

natures" and "documents", significant work already has been and continues to be undertaken by WIPO with a view to facilitating, at the international level, the electronic filing of patent and trademark applications. Particular reference can be made in this regard to certain provisions of the Patent Law Treaty (PLT), the Trademark Law Treaty (TLT) and the Patent Cooperation Treaty (PCT) (with regard to the latter, the Standard for the Electronic Filing and Processing of International Applications).

4. Considering, therefore, that the work contemplated in the letter from UNCITRAL, to a large degree, is already under way at WIPO in respect of the treaties that the Organization administers, it is felt that it would not be opportune to repeat this process within a different institution, especially because a proper appreciation of the relevant provisions of the WIPO treaties, as well as the changes that might be required to them, requires a thorough understanding of the practices of national intellectual property offices and their interaction with the international patent and trademark system. Furthermore, the WIPO secretariat would be concerned that duplication of efforts in different institutions might lead to confusion and inconsistent results.

5. Notwithstanding the above, the WIPO secretariat is fully prepared to assist UNCITRAL in its work in a manner that is both helpful and avoids these potential difficulties. To that end, the WIPO secretariat proposes to organize, at a mutually convenient place and time, a briefing session for the benefit of the UNCITRAL secretariat so that it may familiarize itself with the work of WIPO aimed at updating its treaties with a view to their application in the digital environment.

## 5. World Customs Organization

[Original: English]  
[10 June 2002]

1. The World Customs Organization (WCO) is thankful for the invitation to contribute to the UNCITRAL comprehensive survey concerning possible legal barriers to the development of electronic commerce in international instruments.

2. WCO adopted in 2001 the Baku Declaration on e-commerce, which requested customs services to apply a comprehensive e-commerce strategy by:

(a) Simplifying customs processes and requirements while achieving higher levels of compliance and security which, in turn, will reduce burdens on trade and achieve lower compliance costs;

(b) Developing seamless international trade transactions and associated standardized processes and data flows that can be used successfully across the WCO membership and that build on the WCO Customs Data Model and the revised Kyoto Convention;

(c) Ensuring that the use of e-commerce enables customs administrations to identify and manage risk at a much earlier stage and improve the targeting of resources to the highest risk areas;

(d) Placing greater reliance on the use of commercial data to fulfil customs requirements;

(e) Ensuring secure, accessible requirements and the availability of reliable IT systems that are user-friendly and are capable of recycling information;

(f) Exploiting the potential to improve the exchange of information and intelligence between member administrations and, in particular, to build on the Unique Consignment Reference (UCR) number concept for end-to-end international trade transaction audit trails;

(g) Developing closer relations with other government agencies involved in international trade in order to facilitate the seamless transfer of international trade data (single window concept) and to exchange risk intelligence at both national and international levels;

(h) Ensuring that all relevant international trade rules are updated so that the electronic functional equivalents of “documents” and “signatures” are legally valid;

(i) Ensuring that all levels of staff are provided with the necessary training to build up the skills required to operate in a fully automated electronic environment.

3. It can be noted from this development that WCO very much welcomes this opportunity to provide UNCITRAL with details about some of its instruments, which it would like to request to have included in the UNCITRAL survey:

(a) International Convention on the simplification and harmonization of customs procedures as amended (revised Kyoto Convention); signed on 26 June 1999, not yet entered into force (10 of the required 40 signatories);

(b) Convention on temporary admission (Istanbul Convention); signed on 26 June 1990, entered into force on 27 November 1993; 38 Contracting Parties;

(c) Customs Convention on the ATA carnet for the temporary admission of goods; entered into force on 30 July 1963, 62 Contracting Parties;

(d) Recommendation of the Customs Cooperation Council (CCC, now WCO) concerning customs requirements regarding commercial invoices, signed on 16 May 1979;

(e) Recommendation of the Customs Cooperation Council concerning the transmission and authentication of customs information which is processed by computer, signed on 16 June 1981.

4. The secretariat of WCO is very interested in ongoing cooperation with UNCITRAL and looks forward to receiving a copy of the final results in due course.

## 6. Council of Europe

[Original: English]  
[24 June 2002]

1. The Council of Europe has considered the undertaking of UNCITRAL to identify and remove the possible legal barriers to electronic commerce resulting from international trade law instruments and the survey that the secretariat of UNCITRAL is now carrying out to identify such relevant international trade law instruments with great attention and interest.

2. The secretariat of the Council of Europe would like to inform the UNCITRAL secretariat that the Council of Europe Convention on information and Legal Cooperation concerning “Information Society Services” (ETS 180) enables to enlarge the application of the European Union Directive EC/98/34 (as modified by Directive EC/98/48) to those member States of the Council of Europe that are not members of the European Union. This Convention, open to signature in Moscow in October 2001, aims at setting up a legal information and cooperation system in the area of new communication services following the example of Directive 98/48/EC, which will enable participating States to be aware of and provides comments on draft legislation on “Information Society Services”. These new services, called “Information Society Services” are in fact activities of an interactive nature provided online, normally for a remuneration. This Council of Europe Convention, together with the Directive, should be reflected in the UNCITRAL survey, as an important tool to develop and facilitate international trade beyond the European Union area and between the latter and those member States of the Council of Europe that are not members of the European Union.

3. Moreover, the Council of Europe would like to draw the attention of UNCITRAL to the work of the Council of Europe in the field of personal data protection, which is carried out on the basis of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981 (ETS 108). This work has resulted in a number of recommendations and reports that may have implications for electronic commerce. In particular, the “Model contract to ensure equivalent data protection in the context of transborder data flows” (available on the Internet site of the Council of Europe at <http://www.coe.int>), which was jointly prepared with the European Commission and the International Chamber of Commerce in 1992 and is currently being updated, lays down contractual clauses aiming at personal data protection in contracts involving transborder data flows to countries that do not ensure adequate protection of personal data.

## 7. Latin American Integration Association

[Original: Spanish]  
[17 May 2002]

The General Secretariat of the Latin American Integration Association (ALADI) has undertaken studies on the current situation and perspectives of electronic commerce in the 12 member States of the Association, which, among other things, contain chapters analysing the legal and regulatory framework for electronic commerce in the region. The studies on electronic commerce can be found (in Spanish and Portuguese) on the ALADI web site ([www.aladi.org](http://www.aladi.org)) under the links “Portal comercio electrónico (electronic commerce portal)—Estudios e informes (studies and reports)—Organismos internacionales (international organizations)—ALADI”. The above-mentioned page, in particular the link “Normativa (rules)”, also contains information on laws and regulations relating to electronic commerce in the member States of ALADI.

## C. International non-governmental organizations

### 1. International Federation of Freight Forwarders Associations

*[Original: English]*

*[24 April 2002]*

The International Federation of Freight Forwarders Associations (FIATA) suggests that the following international conventions be added:

(a) Air transport: Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Warsaw Convention), amended by Montreal Protocol No. 4, and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention 1999);

(b) Rail transport: Convention concerning international carriage by rail (COTIF).

## A/CN.9/WG.IV/WP.98/Add.1

### ADDENDUM

#### CONTENTS

	<i>Page</i>
II. Compilation of comments .....	.607
A. States .....	.607
1. Lithuania .....	.607
2. Niger .....	.607
B. Intergovernmental organizations .....	.608
1. European Commission .....	.608
C. International non-governmental organizations .....	.608
1. International Chamber of Commerce .....	.608

## II. COMPILATION OF COMMENTS

### A. States

#### 1. Lithuania

*[Original: English]*

*[22 July 2002]*

1. The Government of Lithuania expresses its appreciation to the work carried out by the UNCITRAL secretariat in conducting the survey of possible legal barriers to the development of electronic commerce in international instruments.

2. In the view of the Government of Lithuania the methodology used by the UNCITRAL secretariat in the conduct of the survey is appropriate to the project designated by the Working Group. However, the Government believes that it would be meaningful to include in the survey references to the reservations that were made by States to appropriate international instruments if the reservations could create obstacles to electronic commerce (for example, nine States declared, in accordance with articles 12 and 96 of the United Nations Convention on Contracts for the International Sale of Goods, that any provision of article 11, article 29 or Part II of the Convention that allows a contract of sale or its modification or termination by

agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing would not apply where any party had its place of business in its territory).

3. Another item suggested for future work would be conducting a survey that might encompass an analysis of the UNCITRAL model laws and preliminary conclusions as to the types of provisions that might create obstacles to electronic commerce.

#### 2. Niger

*[Original: French]*

*[11 July 2002]*

1. Niger welcomes the work of UNCITRAL to develop uniform rules on electronic signatures and its efforts to ensure that notions of “writing”, “signature” and “document” in international trade instruments are understood in a manner that accommodates their electronic equivalents. However, Niger considers it desirable for UNCITRAL to take appropriate measures to take care of the concerns of less developed countries in connection with the following conventions, as follows:

(a) The Convention on Transit Trade of Land-locked States (New York, 8 July 1965) served as a basis to pro-

mote international transport between land-locked States and coastal States, in particular in Africa. Thus, consideration of problems related to electronic commerce should take into account the interests of those States by associating, in one way or another, the experts of the States concerned;

(b) The Customs Convention on the International Transport of Goods under Cover of TIR Carnets (Geneva, 14 November 1975) covers the deciding and multiple function of the TIR carnet (controls, means of evidence etc.) for the facilitation of traffic, in particular in Western Africa. Thus, the analysis should be continued and expanded to include African countries.

2. Similar comments could be made in connection with other conventions, in particular the Convention on the Contract for the International Carriage of Goods by Road (Geneva, 19 May 1956) and Protocol thereto (Geneva, 5 July 1978), in view of the role of the consignment note in international trade by road in our region.

## B. Intergovernmental organizations

### 1. European Commission

[Original: English]  
[16 July 2002]

The Information Society Directorate-General of the European Commission understands that the scope of the survey focuses on international trade instruments that might contain legal barriers to electronic commerce. Having consulted with other Directorate-Generals in the European Commission, the European Commission is able to inform UNCITRAL that, since the Commission is not a depository for international instruments, it has no additional treaties to add to the inventory. Furthermore, it would appear that legislation of the European Union does not fall within the scope of the UNCITRAL survey.

## C. International non-governmental organizations

### 1. International Chamber of Commerce

[Original: English]  
[18 July 2002]

1. The International Chamber of Commerce (ICC) appreciates the opportunity to provide substantive input to UNCITRAL on the proposed project on barriers to electronic commerce in existing international trade-related instruments. ICC members are interested in providing substantive business experiences which hopefully will be useful to UNCITRAL.

2. ICC plans to provide more in-depth comments regarding the proposed projects, including ongoing work on contract formation, prior to the UNCITRAL meetings in October. The following are general comments of ICC on the "omnibus convention" project:

(a) ICC supports this work to the extent that the revision of writing requirements in international conventions would remove barriers to trade. However, ICC thinks it would be very important to define the work clearly, since business has come to rely on the wording of many international conventions;

(b) ICC believes that it would be premature for UNCITRAL to try to determine the form of the work product at this juncture (i.e. interpretation, convention, guidelines or model laws) and instead urges UNCITRAL to pursue the necessary groundwork on the issues which in turn will provide guidance in determining the appropriate form the work product should take in the future. In general, the ICC perspective is that the work product should supplement rather than re-open existing legislation or conventions;

(c) ICC thinks that UNCITRAL should only begin the drafting process after comprehensive research and an in-depth expert analysis on the issues have been carried out.

## A/CN.9/WG.IV/WP./Add.2

### Compilation of comments by Governments and international organizations

#### ADDENDUM

#### CONTENTS

	<i>Page</i>
II. Compilation of comments .....	609
States .....	609
Belgium .....	609



## II. COMPILATION OF COMMENTS

### A. States

#### *Belgium*

*[Original: French]*

1. The comments of the Belgian delegation are essentially limited to the international conventions with regard to which the survey proposes that issues arising from their application in the context of electronic commerce be addressed during the deliberations of the Working Group on Electronic Commerce on the development of an international instrument dealing with certain issues relating to electronic contracting. The conventions concerned are the following: the Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and the Protocol amending it (Vienna, 11 April 1980), the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980), the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991), the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (Geneva, 1 March 1973) and the Protocol to it, the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 31 March 1978) and the United Nations Convention on International Multimodal Transport of Goods (Geneva, 24 May 1980).

2. The Belgian delegation wonders whether its understanding is correct that the proposal referred to above presupposes that a future international convention on electronic contracting would, of itself, enable the difficulties arising from the application of the aforementioned conventions in the context of electronic commerce to be resolved without those conventions being amended. Such an approach would differ from that proposed in document A/CN.9/WG.IV/WP.89, namely, the drafting of an interpretative agreement in a simplified form. Given the rules of treaty law, particularly those relating to the application of successive treaties, it is not clear how the mere juxtaposition of a new convention would enable the problems raised by previous conventions to be resolved.

3. As to whether, in substance, the provisions of the draft convention on electronic contracting, as considered by the Working Group on Electronic Commerce at its thirty-ninth session (see A/CN.9/WG.IV/WP.95), would enable the difficulties identified in the survey to be resolved, three points should perhaps be underlined.

4. Firstly, difficulties arising from the provisions for the exchange by parties of notifications, declarations or communications might be encountered only if the draft, in particular article 10, permitted the use of electronic data not just at the stage of contract formation proper but also in the performance of the contract.

5. Secondly, and more specifically, the difficulties arising from the United Nations Convention on Contracts for the International Sale of Goods, particularly the issue of the applicability of the Convention to sales of “virtual goods”, seem to be of a different nature. They are not related as such to the use of electronic data in the context of a contract, but arise merely from the definition of the scope of the Convention, which is limited to sales of “goods”, a term that has generally been interpreted as designating tangible movable goods and that might therefore exclude virtual goods. If that were the case, this Convention could be made applicable to sales of virtual goods, where appropriate, only through a modification of its scope and not simply through application of the draft convention’s rules on electronic contracting.

6. Thirdly, as regards the difficulties linked to certain form requirements, particularly those relating to the existence of a writing or a document, resolution of those difficulties by means of the draft convention would presuppose, whatever the circumstances, a clear specification of the distinction established in article 6, paragraph 2, between, on the one hand, matters settled in the convention and, on the other, matters governed by but not settled in it, which, in the absence of application of general principles, must be settled by the law applicable by virtue of the rules of private international law. If, in this context, article 13 of the draft, relating to form requirements, were to be interpreted as leaving the issue of form requirements to the applicable law, this draft might prove to be of no help in relation to the difficulties mentioned. This would be all the more incomprehensible given that article 10 affirms the principle of the validity of a contract concluded electronically, unless it is to be understood that article 13, contrary to article 10, covers only the issue of proof of the contract and not its validity, which would hardly seem desirable.

7. Overall, the Belgian delegation can support the conclusions on the other conventions considered in the survey, which suggest that some of the conventions should be considered in other forums. However, it would be necessary to ensure that any solutions that might emerge were consistent. This is particularly true with regard to the Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956, the object of which is very similar to that of the Convention on the Contract for the International Carriage of Passengers and Luggage by Road of 1 March 1973, and with regard to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 and the European Convention on International Commercial Arbitration of 21 April 1961, which raise some of the same issues as those covered by the draft convention on electronic contracting. Moreover, it can be seen that the difficulties raised by electronic substitutes for bills of lading and other transport documents in the context of the United Nations Convention on the Carriage of Goods by Sea of 31 March 1978 might also be covered by the future work of the Working Group on Electronic Commerce on legal issues related to the transfer of rights, particularly rights in tangible goods, by electronic means.

## A/CN.9/WG.IV/WP98.Add.3

## ADDENDUM

## CONTENTS

	<i>Page</i>
II. Compilation of comments .....	610
A. States .....	610
1. United States of America .....	610
B. Intergovernmental organizations .....	611
1. International Monetary Fund .....	611
2. Asian Development Bank .....	611

## II. COMPILATION OF COMMENTS

## A. States

1. *United States of America*

*[Original: English]*  
*[7 August 2002]*

1. The United States of America welcomes the opportunity to comment on document A/CN.9/WG.IV/WP.94, and supports the conclusion of the Commission at its thirty-fifth session that the next meeting of the Working Group should concentrate on that paper and the issues raised therein.

2. An examination of existing conventions will enable the Working Group to determine the extent to which additional language, interpretations or both may be necessary to facilitate their application to transactions involving electronic commerce. A distinction may need to be made between general issues applicable to a wide range of transactional settings, issues dependent on specialized commercial practices, and issues that need to await further development of electronic commerce practices before rules are formulated.

3. The United States agrees with those who counsel that the form of any legal texts emanating from work on A/CN.9/WG.IV/WP.94 does not have to be resolved at this stage, and notes that it has been suggested that the Working Group's review, in itself, could have significant value as guidance for transacting parties or other organizations. One possibility already discussed in the secretariat's materials is a type of "omnibus protocol". Such a protocol could provide either new provisions or agreed interpretations of existing international texts, applicable between States parties to the protocol *inter se*, and possibly only as to each instrument specified by a State party.

4. The United States also concurs with the views at the thirty-fifth session that the current draft text on formation of contracts (A/CN.9/WG.IV/WP.95, annex I), which was discussed by the Working Group at its last session, now needs a more detailed review of crossover issues in sales and contract law. The United States believes that this can proceed concurrently through the preparation of studies, meetings of expert groups and other means. It has been

suggested that a future treaty on contract formation might end up being folded into a protocol based on A/CN.9/WG.IV/WP.94.

5. As to work at the next Working Group session based on the working paper, the long list of conventions might appear daunting. The United States would suggest that the Working Group's first effort might be limited to commercial law treaties formulated by UNCITRAL, which are conveniently set out in the first group of conventions in the working paper. That would permit a manageable group of conventions and issues, clearly within the jurisdiction of the Commission, which can then be expanded to other international instruments as work proceeds.

6. Four of the texts prepared by UNCITRAL that are mentioned in A/CN.9/WG.IV/WP.94 are the Convention on the Limitation Period in the International Sale of Goods (New York, 1974); the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995); and the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). In the context of those four, the United States believes that the need to differentiate between specialized practices will become clear. For example, the definition of terms such as "writing" in the UNCITRAL Model Law on Electronic Commerce might work for the Sales and Limitations Conventions, but possibly not at this stage for negotiable instruments or guarantees, since recent indications are that standard practices for electronic negotiables and other instruments are still in formative stages within the banking and import-export communities, and their applications in commerce are still limited.

7. The Working Group might also consider joint efforts with Working Group III (Transport Law), which could include the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991), since each may be working on transferability of rights in tangibles through electronic commerce. Joint work might also be considered on transfer of rights in intangible assets, such as payment rights, which will be relevant to other Working Groups, such as Working Group VI (Security Interests).

8. Finally, the first group of treaties in the working paper also includes the Convention on Transit Trade of Land-locked States. The secretariat has correctly pointed out that that convention, and a number of others in the working paper, essentially deals with public law matters. The United States believes that the Working Group should consider whether to extend its work to some conventions in that category, assuming the originating bodies believe that the Commission's focus on their products would be feasible and appropriate.

9. After examining the above, the United States would suggest that regional texts might be selectively taken up in the same manner, assuming an appropriate balance between geographic regions as to those instruments. There are, for example, in the western hemisphere, private and public law conventions prepared by the Organization of American States, as well as texts of subregional bodies, such as the Common Market of the Southern Cone, the Andean Community, the Caribbean Community, the North American Free Trade Agreement and others. The United States anticipates similar recommendations from delegations in the other regions.

10. In closing, as a working matter, the United States would suggest that both the issues involved and the types of treaties might usefully be grouped into "baskets", so that commonality among issues in different conventions could be compared, which in turn may contribute to appropriate rules or guidance.

11. Outside the particular conventions, the Working Group may wish to consider whether general electronic commerce enabling rules should be promoted, by reference to or setting out provisions of the UNCITRAL Model Law on Electronic Commerce in a separate chapter of such a protocol, so that States may agree to apply those rules in whole or in part. Promoting a common baseline may have substantial value, and the already wide application of these particular rules may justify this approach.

12. The United States looks forward to participating in the Working Group's examination of the issues that electronic commerce presents and the opportunity to enhance that commerce for all regions.

## B. Intergovernmental organizations

### 1. International Monetary Fund

*[Original: English]  
[19 August 2002]*

1. The International Monetary Fund does not act, on a regular or ad hoc basis, as a depositary for international legal instruments. For that reason, there are no instruments deposited with the Fund that can be included in the UNCITRAL survey. Similarly, the Fund does not keep track of legal instruments deposited with its member countries and is not in a position to advise UNCITRAL of any that may create legal barriers to the use of electronic commerce internationally.

2. The Fund is very keen on extending the good working relationship between the United Nations and the Fund to the area of electronic commerce. While not submitting any comments on the preliminary conclusions, the Fund would like to stay informed on an ongoing basis of the progress being made and will gladly provide expert views on issues relevant to the Fund's activities and mandate.

### 2. Asian Development Bank

*[Original: English]  
[8 August 2002]*

1. The Asian Development Bank thanks the secretariat for its letter concerning the work of UNCITRAL in the area of electronic commerce and inquiring whether the Asian Development Bank might have international trade instruments in respect of which the Bank or its member States act as depositaries that it would wish to be included in the survey being conducted by the secretariat.

2. The Asian Development Bank appreciates very much the significance of the work that UNCITRAL is undertaking in this important area. At this point, however, the Bank does not have any such instruments to which the secretariat's letter refers.

## A/CN.9/WG.IV/WP.98/Add.4

### CONTENTS

	<i>Page</i>
Compilation of comments .....	.612
A. States .....	.612
Switzerland .....	.612
B. Intergovernmental organizations .....	.612
Organisation for Economic Cooperation and Development .....	.612

## II. COMPILATION OF COMMENTS

### A. States

#### *Switzerland*

*[Original: English/French]  
[3 October 2002]*

1. The Swiss delegation shares the view taken by the secretariat in its conclusions of document A/CN.9/WG.IV/WP.94. It therefore believes that, rather than creating a new instrument in form of an omnibus agreement, an “omnibus clause” should be included in the conventions in elaboration in the different areas concerned by the proposed agreement, such as electronic contracting, transport law, transfer of rights and arbitration.

2. The main objective of the proposed omnibus agreement, the equal treatment of writing and its electronic equivalents in the context of commercial transactions, is one of the subject matters of the draft convention on certain issues of electronic contracting. Article 13 of the draft provides that, in the national legislation of the member States, the terms “in writing” and “signature” are deemed to allow for electronic equivalents. This rule could, by way of an “omnibus clause”, be extended to certain international instruments dealing with electronic commerce.

3. However, there are barriers to electronic transactions that are not considered by the mentioned draft convention, for example the one addressed by Article 5 of the UNCITRAL Model Law on Electronic Commerce of 1996, which lays down the general principle that a communication cannot be denied legal effect on the grounds that it is in the form of a data message. This principle would be of importance in the present context, especially for notifications and declarations made under the Convention on the Limitation Period in the International Sale of Goods or the Convention on Contracts for the International Sale of Goods or for communications made under the Convention on the Liability of Operators of Transport Terminals in International Trade (see p. 6 ff. and 10 f. of document A/CN.9/WG.IV/WP.94). The Swiss delegation therefore feels that a provision enacting this principle with regard to national legislation’s should be added to the draft convention on electronic contracting and supplemented by an “omnibus clause” extending its scope to certain international conventions and agreements.

4. What the draft convention does cover is the question at what time and at what place a communication in electronic form is deemed to have been pronounced or received (Art. 11). Here one could also extend the scope of the given rule to certain international instruments.

5. The Swiss delegation also shares the view of the secretariat that the questions arising in connection with electronic substitution of transport papers or (other) negotiable instruments or in connection with arbitration are of particular nature and require an in-depth analysis for which the meetings held by the Working Group or other bodies on the topics transfer of rights through electronic means, transport law and arbitration would be the proper forums.

6. The Swiss delegation endorses the Belgian position (document A/CN.9/WG.IV/WP.98/Add.2) whereas the difficulties arising in connection with “virtual goods” under the Convention on Contracts for the International Sale of Goods are not related as such to the use of electronic data in the context of a contract and arise merely from the definition of the scope of the convention. The issue should therefore be discussed at the occasion of a possible revision of that convention.

7. As to the nature of a possible omnibus agreement or the “omnibus clauses” to be incorporated in other instruments dealing with issues of electronic commerce, two different conceptions have been presented to the Working Group. The study by Professor Burdeau (annex to document A/CN.9/WG.IV/WP.89) considers an interpretative agreement to be sufficient to eliminate the barriers for electronic commerce in existing treaties. The French delegation (document A/CN.9/WG.IV/WP.93) in contrast doesn’t even seem to see any necessity for an interpretative agreement and proposes that the new instrument should be limited to a supplementary agreement, allowing for electronic equivalents without interpreting, modifying or amending the existing treaties. In the view of the Swiss delegation the question whether an amendment or simply a completion of existing treaties is needed cannot be decided a priori. To answer it one would have to look at the involved treaties individually and interpret them pursuant to their own interpretation rules. Such a review can lead to three different results: (1) The treaty allows for electronic equivalents; (2) The treaty does not allow for electronic equivalents and (3) The treaty does not cover the issue. In the first case no action has to be taken; in the second case the treaty has to be amended and in the third case it is enough to adopt supplementary provisions in a new instrument. This means that, to be sure that it is effective in relationship to all the envisaged instruments (and be considered that way by the national courts), the omnibus agreement should take into account the possibility that it might imply an amendment of some of the instruments and therefore observe the form of a revision. This might be of relevance where an international instrument lays down special rules for its revision and its member States are not identical with the ones of the omnibus agreement. The Swiss delegation does not see the possibility of getting around the necessity of a revision by choosing the form of an authentic interpretation. Changing the rules for the interpretation of an instrument means amending it and therefore has to be treated as a revision.

### B. Intergovernmental organizations

#### *Organisation for Economic Cooperation and Development*

*[Original: English]  
[11 September 2002]*

1. The Organisation for Economic Cooperation and Development (OECD) is happy to confirm that according to its analysis the OECD has no instrument falling within the scope of UNCITRAL’s survey.

2. OECD points out that it certainly has instruments in the domain of electronic commerce, but these are clearly

not intended to constitute legal barriers to the use of electronic commerce.

3. The OECD instruments usually take the form of recommendations which are not legally binding, but which represent the political will of member countries.

4. Examples of recommendations relevant to electronic commerce are those on privacy (1980), cryptography policy (1997), consumer protection (1999) and security of information systems (2002), the texts of which are posted on the OECD web site (see <http://www.oecd.org/legal>).

### C. Report of Working Group IV (Electronic Commerce) on the work of its forty-first session\* (New York, 5-9 May 2003)

(A/CN.9/528) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction: previous deliberations of the Working Group .....	1-15
II. Organization of the session .....	16-22
III. Summary of deliberations and decisions .....	23-25
IV. Electronic contracting: provisions for a draft convention .....	26-151
General comments .....	26-31
Article 1. Scope of application .....	32-48
Article 2. Exclusions .....	49-64
Article 3. Matters not governed by this Convention .....	65-69
Article 4. Party autonomy .....	70-75
Article 5. Definitions .....	76-77
Article 6. Interpretation .....	78-80
Article 7. Location of the parties .....	81-93
Article 8. Use of data messages in contract formation .....	94-108
Article 9. Invitations to make offers. ....	109-120
Article 10. Other uses of data messages in international [transactions] [in connection with international contracts] .....	121-131
Article 11. Time and place of dispatch and receipt of data messages .....	132-151

#### I. INTRODUCTION: PREVIOUS DELIBERATIONS OF THE WORKING GROUP

1. At its thirty-third session, in 2000, the United Nations Commission on International Trade Law (UNCITRAL) held a preliminary exchange of views on proposals for future work in the field of electronic commerce. Three topics were suggested as indicating possible areas where work by the Commission would be desirable and feasible: electronic contracting, considered from the perspective of the United Nations Sales Convention on Contracts for the International Sale of Goods (the "United Nations Sales Convention");<sup>1</sup> online dispute settlement; dematerialization of documents of title, in particular in the transport industry.

2. The Commission welcomed the proposal to study further the desirability and feasibility of undertaking future work on those topics. The Commission generally agreed that, upon completing the preparation of the Model Law on Electronic Signatures, the Working Group would be expected to examine, at its thirty-eighth session, some or all of the above-mentioned topics, as well as any additional topic, with a view to making more specific proposals for future work by the Commission at its thirty-fourth session, in 2001. It was agreed that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.<sup>2</sup> The Working Group considered those proposals at its thirty-eighth session, in 2001, on the

\*The present report could not be submitted earlier owing to the late dates of the session of the Working Group.

<sup>1</sup>United Nations, *Treaty Series*, vol. 1489, No. 25567.

<sup>2</sup>*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 384-388.

basis of a set of notes dealing with a possible convention to remove obstacles to electronic commerce in existing international conventions (A/CN.9/WG.IV/WP.89); dematerialization of documents of title (A/CN.9/WG.IV/WP.90); and electronic contracting (A/CN.9/WG.IV/WP.91).

3. The Working Group held an extensive discussion on issues related to electronic contracting (A/CN.9/484, paras. 94-127). The Working Group concluded its deliberations on future work by recommending to the Commission that work towards the preparation of an international instrument dealing with certain issues in electronic contracting be started on a priority basis. At the same time, it was agreed to recommend to the Commission that the secretariat be entrusted with the preparation of the necessary studies concerning three other topics considered by the Working Group: (a) a comprehensive survey of possible legal barriers to the development of electronic commerce in international instruments; (b) a further study of the issues related to transfer of rights, in particular, rights in tangible goods, by electronic means and mechanisms for publicizing and keeping a record of acts of transfer or the creation of security interests in such goods; and (c) a study discussing the UNCITRAL Model Law on International Commercial Arbitration, as well as the UNCITRAL Arbitration Rules, to assess their appropriateness for meeting the specific needs of online arbitration (A/CN.9/484, para. 134).

4. At the thirty-fourth session of the Commission, in 2001, there was wide support for the recommendations made by the Working Group, which were found to constitute a sound basis for future work by the Commission. Views varied, however, as regards the relative priority to be assigned to the different topics. One line of thought was that a project aimed at removing obstacles to electronic commerce in existing instruments should have priority over the other topics, in particular over the preparation of a new international instrument dealing with electronic contracting. It was said that references to "writing", "signature", "document" and other similar provisions in existing uniform law conventions and trade agreements had already created legal obstacles and generated uncertainty in international transactions conducted by electronic means. Efforts to remove those obstacles should not be delayed or neglected by attaching higher priority to issues of electronic contracting.

5. The prevailing view, however, was in favour of the order of priority that had been recommended by the Working Group. It was pointed out, in that connection, that the preparation of an international instrument dealing with issues of electronic contracting and the consideration of appropriate ways for removing obstacles to electronic commerce in existing uniform law conventions and trade agreements were not mutually exclusive. The Commission was reminded of the common understanding reached at its thirty-third session that work to be carried out by the Working Group could involve consideration of several topics in parallel as well as preliminary discussion of the contents of possible uniform rules on certain aspects of the above-mentioned topics.<sup>3</sup>

6. There were also differing views regarding the scope of future work on electronic contracting, as well as the appropriate moment to begin such work. Pursuant to one view, the work should be limited to contracts for the sale of tangible goods. The opposite view, which prevailed in the course of the Commission's deliberations, was that the Working Group on Electronic Commerce should be given a broad mandate to deal with issues of electronic contracting, without narrowing the scope of the work from the outset. It was understood, however, that consumer transactions and contracts granting limited use of intellectual property rights would not be dealt with by the Working Group. The Commission took note of the preliminary working assumption made by the Working Group that the form of the instrument to be prepared could be that of a stand-alone convention dealing broadly with the issues of contract formation in electronic commerce (A/CN.9/484, para. 124), without creating any negative interference with the well-established regime of the United Nations Sales Convention (A/CN.9/484, para. 95), and without interfering unduly with the law of contract formation in general. Broad support was given to the idea expressed in the context of the thirty-eighth session of the Working Group that, to the extent possible, the treatment of Internet-based sales transactions should not differ from the treatment given to sales transactions conducted by more traditional means (A/CN.9/484, para. 102).

7. As regards the timing of the work to be undertaken by the Working Group, there was support for commencing consideration of future work without delay during the third quarter of 2001. However, strong views were expressed that it would be preferable for the Working Group to wait until the first quarter of 2002, so as to afford States sufficient time to hold internal consultations. The Commission accepted that suggestion and decided that the first meeting of the Working Group on issues of electronic contracting should take place in the first quarter of 2002.<sup>4</sup>

8. At its thirty-ninth session, the Working Group considered a note by the secretariat discussing selected issues on electronic contracting, which contained in its annex I an initial draft tentatively entitled "Preliminary draft Convention on [International] Contracts Concluded or Evidenced by Data Messages" (A/CN.9/WG.IV/WP.95). The Working Group further considered a note by the secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

9. The Working Group began its deliberations by considering the form and scope of the preliminary draft convention (see A/CN.9/509, paras. 18-40). The Working Group agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group decided to proceed with its deliberations by first taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65).

<sup>3</sup>Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), para. 293.

<sup>4</sup>Ibid., para. 295.

After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention with a discussion of draft article 15 (A/CN.9/509, paras. 122-125). The Working Group agreed that it should consider articles 2-4, dealing with the sphere of application of the draft convention, and articles 5 (Definitions) and 6 (Interpretation), at its fortieth session. The Working Group requested the secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions, for consideration by the Working Group at its fortieth session.

10. At its fortieth session, the Working Group was also informed of the progress that had been made by the secretariat in connection with the survey of possible legal obstacles to electronic commerce in existing trade-related instruments. The Working Group was informed that the secretariat had begun the work by identifying and reviewing trade-relevant instruments from among the large number of multilateral treaties that were deposited with the Secretary-General. The secretariat had identified 33 treaties as being potentially relevant for the survey and analysed possible issues that might arise from the use of electronic means of communications under those treaties. The preliminary conclusions reached by the secretariat in relation to those treaties were set out in a note by the secretariat (A/CN.9/WG.IV/WP.94) that was submitted to the Working Group at its thirty-ninth session, in March 2002.

11. The Working Group took note of the progress that had been made by the secretariat in connection with the survey, but did not have sufficient time to consider the preliminary conclusions of the survey. The Working Group requested the secretariat to seek the views of member and observer States on the survey and the preliminary conclusions indicated therein and to prepare a report compiling such comments for consideration by the Working Group at a later stage. The Working Group took note of a statement stressing the importance that the survey being conducted by the secretariat should reflect trade-related instruments emanating from the various geographical regions represented on the Commission. For that purpose, the Working Group requested the secretariat to seek the views of other international organizations, including organizations of the United Nations system and other intergovernmental organizations, as to whether there were international trade instruments in respect of which those organizations or their member States acted as depositaries that those organizations would wish to be included in the survey being conducted by the secretariat.

12. The Commission considered the Working Group's report at its thirty-fifth session, in 2002. The Commission noted with appreciation that the Working Group had started its consideration of a possible international instrument dealing with selected issues on electronic contracting. The Commission reaffirmed its belief that an international instrument dealing with certain issues of electronic contracting might be a useful contribution to facilitate the use of modern means of communication in cross-border commercial transactions. The Commission commended the

Working Group for the progress made in that regard. However, the Commission also took note of the varying views that had been expressed within the Working Group concerning the form and scope of the instrument, its underlying principles and some of its main features. The Commission noted, in particular, the proposal that the Working Group's considerations should not be limited to electronic contracts, but should apply to commercial contracts in general, irrespective of the means used in their negotiation. The Commission was of the view that member and observer States participating in the Working Group's deliberations should have ample time for consultations on those important issues. For that purpose, the Commission considered that it might be preferable for the Working Group to postpone its discussions on a possible international instrument dealing with selected issues on electronic contracting until its forty-first session, to be held in New York from 5 to 9 May 2003.<sup>5</sup>

13. As regards the Working Group's consideration of possible legal obstacles to electronic commerce that might result from trade-related international instruments, the Commission reiterated its support for the efforts of the Working Group and the secretariat in that respect. The Commission requested the Working Group to devote more of its time at its fortieth session, in October 2002, to a substantive discussion of various issues that had been raised in the secretariat's initial survey (A/CN.9/WG.IV/WP.94).<sup>6</sup>

14. At its fortieth session, held in Vienna from 14 to 18 October 2002, the Working Group reviewed the survey of possible legal barriers to electronic commerce contained in document A/CN.9/WG.IV/WP.94. The Working Group generally agreed with the analysis and endorsed the recommendations that had been made by the secretariat (see A/CN.9/527, paras. 24-71). The Working Group agreed to recommend that the secretariat take up the suggestions for expanding the scope of the survey so as to review possible obstacles to electronic commerce in additional instruments that had been proposed for inclusion in the survey by other organizations and explore with those organizations the modalities for carrying out the necessary studies, taking into account the possible constraints put on the secretariat by its current workload. The Working Group invited member States to assist the secretariat in that task by identifying appropriate experts or sources of information in respect of the various specific fields of expertise covered by the relevant international instruments.

15. The Working Group used the remaining time at its fortieth session to resume its deliberations on the preliminary draft convention, which it began by a general discussion on the scope of the preliminary draft convention (see A/CN.9/527, paras. 72-81). The Working Group proceeded to consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (Definitions) and 6 (Interpretation) (A/CN.9/527, paras. 82-126). The Working Group requested the secretariat to prepare a revised text of the preliminary draft convention for consideration at its forty-first session.

<sup>5</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 206.

<sup>6</sup>Ibid., para. 207.

## II. ORGANIZATION OF THE SESSION

16. The Working Group on Electronic Commerce, which was composed of all States members of the Commission, held its forty-first session in New York, from 5 to 9 May 2003. The session was attended by representatives of the following States members of the Working Group: Austria, Brazil, Burkina Faso, Canada, China, Colombia, Fiji, France, Germany, Honduras, India, Italy, Iran (Islamic Republic of), Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Russian Federation, Sierra Leone, Singapore, Spain, Sudan, Sweden, Thailand and the United States of America.

17. The session was attended by observers from the following States: Belarus, Belgium, Denmark, Dominican Republic, Finland, Gabon, Holy See, Ireland, Kuwait, Madagascar, Marshall Islands, Panama, Peru, Philippines, Poland, Qatar, Republic of Korea, Saudi Arabia, Sri Lanka, Switzerland, Syrian Arab Republic, Timor-Leste and Turkey.

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

(a) *Organizations of the United Nations system:* United Nations Development Programme and World Intellectual Property Organization;

(b) *Intergovernmental organizations:* Asian Clearing Union, European Commission and World Bank;

(c) *Non-governmental organizations invited by the Commission:* Association of the Bar of the City of New York—Committee on Foreign and Comparative Law, Centre for International Legal Studies, Inter-American Bar Association, International Association of Ports and Harbors, International Chamber of Commerce and International Law Institute.

19. The Working Group elected the following officers:

*Chairman:* Jeffrey Chan Wah Teck  
(Singapore)

*Rapporteur:* Ligia Claudia González Lozano  
(Mexico)

20. The Working Group had before it the following documents:

(a) Provisional agenda (A/CN.9/WG.IV/WP.99);

(b) Note by the secretariat containing a revised version of the preliminary draft convention, which reflects the deliberations and decisions of the Working Group at its thirty-ninth and fortieth sessions (A/CN.9/WG.IV/WP.100);

(c) Note by the secretariat transmitting comments thereon by a task force established by the International Chamber of Commerce (A/CN.9/WG.IV/WP.101);

(d) Note by the secretariat transmitting further comments on the survey referred to in paragraph 10 that had been received from member and observer States and intergovernmental and international non-governmental organizations since the Working Group's fortieth session (A/CN.9/WG.IV/WP.98 and Add.5 and 6).

21. The following background documents were also made available to the Working Group:

(a) Reports of the Working Group's thirty-eighth, thirty-ninth and fortieth sessions (A/CN.9/484, A/CN.9/509 and A/CN.9/527, respectively);

(b) Notes by the secretariat on legal barriers to the development of electronic commerce (A/CN.9/WG.IV/WP.89) and on electronic contracting (A/CN.9/WG.IV/WP.91), which are referred to in paragraph 2;

(c) Legal aspects of electronic commerce: proposal by France (A/CN.9/WG.IV/WP.93);

(d) Note by the secretariat containing the initial version of the preliminary draft convention (A/CN.9/WG.IV/WP.95) and the comments that had been made thereon by an ad hoc expert group established by the International Chamber of Commerce (A/CN.9/WG.IV/WP.96);

(e) Note by the secretariat referred to in paragraph 10 (A/CN.9/WG.IV/WP.94) and a note by the secretariat transmitting comments on the survey received from member and observer States and intergovernmental and international non-governmental organizations (A/CN.9/WG.IV/WP.98 and Add.1-4) prior to the fortieth session.

22. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Electronic contracting: provisions for a draft convention.
4. Legal barriers to the development of electronic commerce in international instruments relating to international trade.
5. Other business.
6. Adoption of the report.

## III. SUMMARY OF DELIBERATIONS AND DECISIONS

23. The Working Group resumed its deliberations on the preliminary draft convention by holding a general discussion on the purpose and nature of the preliminary draft convention (see paras. 28-31).

24. The Working Group reviewed articles 1-11 of the revised preliminary draft convention contained in annex I to the note by the secretariat (A/CN.9/WG.IV/WP.100). The decisions and deliberations of the Working Group with respect to the draft convention are reflected in section IV below (see paras. 26-151). The secretariat was requested to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its forty-second session, tentatively scheduled to take place in Vienna from 17 to 21 November 2003.

25. In accordance with a decision taken at its fortieth session (A/CN.9/527, para. 93), the Working Group also held a preliminary discussion on the question of excluding intel-



lectual property rights from the draft convention (see paras. 55-60). The Working Group also exchanged views on the relationship between the draft convention and the Working Group's efforts to remove possible legal obstacles to electronic commerce in existing international instruments relating to international trade within the context of its preliminary review of draft article X, which the Working Group agreed to retain in substance for further consideration.

#### IV. ELECTRONIC CONTRACTING: PROVISIONS FOR A DRAFT CONVENTION

##### *General comments*

26. The Working Group noted that, at its thirty-ninth session, held in New York from 11 to 15 March 2002, it had begun its deliberation on the preliminary draft convention by holding a general exchange of views on the form and scope of the instrument (see A/CN.9/509, paras. 18-40). At that time, the Working Group had agreed to postpone discussion of exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation. In particular, the Working Group had then proceeded with its deliberations by firstly taking up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract formation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion on draft article 15 (A/CN.9/509, paras. 122-125).

27. The Working Group resumed its deliberations on the draft convention at its fortieth session, held in Vienna from 14 to 18 October 2002, and again considered general issues relating to the scope of the draft instrument (see A/CN.9/527, paras. 72-81). The Working Group then proceeded to consider articles 2-4, dealing with the scope of application of the draft convention (A/CN.9/509, paras. 82-104); article 5, containing definitions of terms used in the draft convention (A/CN.9/509, paras. 111-122); and article 6, which set forth rules of interpretation (A/CN.9/509, paras. 123-126). The Working Group concluded its deliberations with a request to the secretariat to prepare a revised version of the preliminary draft convention, based on those deliberations and decisions for consideration by the Working Group at its forty-first session.

##### *Purpose and nature of the instrument*

28. At the current session, the Working Group decided to resume its deliberations on the preliminary draft convention by holding a general discussion on the scope of the Convention.

29. The Working Group noted that a task force that had been established by the International Chamber of Commerce had submitted substantive comments on the scope and purpose of the draft convention (A/CN.9/WG.IV/WP.101). It was pointed out that, subsequent to

the fortieth session of the Working Group, consultations with business entities from various sectors and of various sizes had been conducted concerning their experience with electronic contracting and the problems that arose in practice in electronic contracting so as to consider ways in which an international instrument could create more certainty. The aim of those consultations had been to assess the needs of global business in relation to electronic contracting.

30. It was stated that the main conclusions from those consultations had been that electronic contracting was not fundamentally different from paper contracting and that most issues arising in electronic contracting could be dealt with by the legal regime applying to paper contracts. It had also been found that the problems arising in the context of electronic contracting were due in large part to the absence of experience in electronic contracting and an absence of knowledge on how best to solve those problems. On that basis, it was felt that an international instrument might not be the best way to resolve those problems, but rather that legal certainty in electronic contracting could be provided by giving users a combination of voluntary rules, model clauses and guidelines, which could be developed in cooperation between UNCITRAL and international non-governmental organizations representing the private sector. The advantage of that approach would be its flexibility in that business could take up components of the standards or model clauses that could be amended easily if necessary.

31. The Working Group generally welcomed the work being undertaken by the private sector representatives, such as the International Chamber of Commerce, which was considered to complement usefully the work being undertaken in the Working Group to develop an international convention. The Working Group was of the view that the two lines of work were not mutually exclusive, in particular as the draft convention dealt with requirements that were typically found in legislation and that, being statutory in nature, those obstacles could not be overcome by contractual provisions or non-binding standards.

##### **Article 1. *Scope of application***

32. The text of the draft article was as follows:

“1. This Convention applies to [any kind of information in the form of data messages that is used] [the use of data messages] in the context of [transactions] [contracts] between parties whose places of business are different States:

“(a) When the States are Contracting States;

“[(b) When the rules of private international law lead to the application of the law of a Contracting State]; or

“(c) When the parties have agreed that it applies.

“2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the [transaction] [contract] or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the [transaction] [contract].

“3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.”

#### *General comments*

33. The Working Group noted that the draft article reflected essentially the scope of application of the United Nations Sales Convention, as set out in its article 1. The Working Group also noted that the draft article reflected its earlier decision, at its thirty-ninth session, that the draft convention should be limited to international transactions so as not to interfere with domestic law (A/CN.9/509, para. 31).

34. In that connection, the Working Group heard reservations as to the manner in which the scope of application of the draft article had been formulated. It was pointed out that, to the extent that the purpose of the draft instrument might be to remove possible obstacles to electronic commerce that might arise under existing international instruments, such as those referred to in draft article Y, its field of application should be aligned with the field of application of those instruments.

35. In response to those observations, it was pointed out that the purpose of the draft convention was broader than merely adapting the rules of existing instruments to electronic commerce, as the draft convention might extend to contracts not yet covered by any international convention in force. As such, the draft convention might have an autonomous field of application. The Working Group therefore agreed that the manner in which the field of application of the draft convention was defined in the draft article could be retained, but that the Working Group should consider possible difficulties in the relationship between the draft article and draft article Y at an appropriate stage.

#### *Paragraph 1*

36. Several questions were raised concerning the meaning of the expression “transactions” in the draft paragraph and elsewhere in the draft convention and its appropriateness to describe the substantive field of application of the draft convention.

37. The Working Group was reminded that, at its fortieth session, it had been agreed that it might be useful to consider extending the scope of the preliminary draft convention to issues beyond contract formation, so as to include also the use of electronic messages in connection with the performance or termination of contracts. Moreover, the Working Group had then been invited to consider dealing not only with electronic contracts or contract-related communications, but also with other transactions conducted electronically, subject to specific exclusions that the Working Group might deem appropriate (A/CN.9/527, para. 77).

38. While there was general agreement within the Working Group on extending the scope of application of the preliminary draft convention beyond the use of data messages for contract formation, several objections were

raised to the use of the word “transactions”. It was pointed out that the term was not used in several legal systems and that it might have an excessively broad meaning for the purposes of the draft convention. It was felt that the proposed definition of “transactions” in draft article 5, subparagraph 1, was not sufficiently precise to avoid those difficulties, in particular as it referred to “governmental affairs”, which were said to fall clearly outside the intended scope of the draft convention.

39. In view of those comments, the Working Group paused to consider alternative solutions for describing the field of application of the draft convention. One possible alternative to the current wording, which gathered some support, was to make reference to the use of data messages “in the context of legal acts or contracts between parties having their places of business in different States”. However, that suggestion was objected to on the grounds that the notion of “legal acts” was unclear in some legal systems and that it seemed to imply extending the scope of application of the draft convention to the use of data messages in situations that were not contractual in nature, a proposition on which there was no consensus within the Working Group at that time (see also A/CN.9/527, para. 78). Another proposal was to link the definition of the scope of application to the types of use of data messages mentioned in draft article 10. However, that proposal, too, gave rise to objections, as it might result in a circular definition of the field of application of the draft convention.

40. It was then pointed out to the Working Group that the actual subject matter covered by the draft convention could be inferred from its operative provisions, rather than from draft article 1, which was meant only to provide a general indication of the substantive field of application of the draft convention. It was said, in that connection, that the words “in the context of contracts”, as used in the draft article, were sufficiently broad as to encompass most if not all of the situations referred to in draft article 10. The Working Group was then invited to retain the phrase currently used in paragraph 1 of the draft article, without the word “transactions”, and to revisit the definition of the substantive scope of application once it had had an opportunity to consider the operative provisions of the draft convention, in particular draft article 10, with a view of ascertaining whether there were any additional situations that needed to be covered by the draft convention that were not covered by the phrase “in the context of contracts” in the draft article. The Working Group concurred with that suggestion.

41. The Working Group proceeded to consider which of the first two sets of language within square brackets (i.e. “[any kind of information in the form of data messages that is used]” or “[the use of data messages]”) should be used to describe the scope of application of the draft convention. In favour of the first option, it was said that the reference to “information” was in line with the objective of media neutrality and would cover situations where the parties used different media. That was said to be of great practical importance, since many contracts were concluded by a mixture of oral conversations, telefaxes, paper contracts, electronic mail (e-mail) and web communication (see A/CN.9/509, para. 34). In favour of the second option,

it was pointed out that it was more concise and avoided repeating the word “information”, which was already contained in the definition of “data message” in draft article 5, subparagraph (a). As it was suggested that the choice between the two options was more a matter of style than of substance, the Working Group decided to retain both options for the time being and to revert to the matter at a later stage.

42. With regard to subparagraph (b), which currently appeared within square brackets, the Working Group noted that the rule contained therein was derived from the provisions on the sphere of application of the United Nations Sales Convention and other UNCITRAL instruments. Although it had been suggested that the phrase should be deleted, the Working Group, at its thirty-ninth session, had decided to retain it for further consideration (A/CN.9/509, para. 38). At the current session, the Working Group agreed to remove the square brackets around the provision and to consider, at a later stage, a proposal for adding a provision allowing a Contracting State to exclude the application of the subparagraph, as had been done by article 95 of the United Nations Sales Convention.

43. As regards draft subparagraph (c), the Working Group noted that the possibility for the parties to subject a contract to the regime of the draft convention in the absence of other connecting factors was provided, for instance, in article 1, paragraph 2, of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (General Assembly resolution 50/48, annex).

44. The Working Group decided to postpone its deliberations on that particular matter until it had considered the operative provisions of the draft convention.

#### *Paragraph 2*

45. It was pointed out that the draft paragraph followed a similar rule contained in article 1, paragraph 2, of the United Nations Sales Convention, which applied to international contracts if both parties were located in Contracting States of the Convention, but not when such a situation was not apparent either from the contract or from the dealings between the parties. In those cases, the United Nations Sales Convention gave way to the application of domestic law. The incorporation of a similar rule in the draft convention was to be welcomed, it was said, so as not to frustrate the legitimate expectations of parties that assumed they were operating under their domestic regime given the absence of a clear indication to the contrary.

46. Nevertheless, questions were raised regarding the appropriateness of the draft paragraph in the context of the draft convention, in particular in the light of draft article 15, which contemplated an obligation for the parties to disclose their places of business. If such an obligation was retained, the parties should normally have available to them sufficient elements to allow them to ascertain whether or not a contract was international for the purposes of the draft convention. The draft paragraph, it was said, would only become relevant in the event of failure by a party to comply

with draft article 15. The question was asked whether the non-applicability of the convention would be the most appropriate sanction for failure to comply with article 15.

47. In response, it was pointed out that paragraph 2 was not meant to provide sanctions for failure to comply with draft article 15. Furthermore, given that the Working Group had yet to decide whether or not draft article 15, which currently appeared within square brackets, should be retained, it was suggested that it would be premature to change the formulation of paragraph 2 of draft article 1. The Working Group agreed with that suggestion and decided that it might return to draft paragraph 2 after it had made a final decision on draft article 15.

#### *Paragraph 3*

48. The draft paragraph did not give rise to comments and was retained by the Working Group with its current formulation.

### **Article 2. Exclusions**

49. The text of the draft article was as follows:

#### *Variant A*

“This Convention does not apply to [transactions relating to] the following contracts:

“(a) Contracts concluded for personal, family or household purposes unless the party offering the goods or services, at any time before or at the conclusion of the contract, neither knew nor ought to have known that they were intended for any such use;

“(b) [Contracts granting] limited use of intellectual property rights;

“(c) [Other exclusions, such as real estate transactions, that could be added by the Working Group.] [Other matters identified by a Contracting State under a declaration made in accordance with article X].”

#### *Variant B*

“1. This Convention does not apply to [transactions relating to] the following [contracts]:

“(a) [Contracts for] [the grant of] limited use of intellectual property rights;

“(b) [Other exclusions, such as real estate transactions, that could be added by the Working Group.] [Other matters identified by a Contracting State under a declaration made in accordance with article X].

“2. This Convention does not override any rule of law intended for the protection of consumers.”

#### *General comments*

50. The Working Group noted that the essential difference between variants A and B lay in the manner in which each of them excluded consumer protection matters from the scope of application of the draft instrument. While variant A contained an exclusion modelled on article 2, sub-

paragraph (a), of the United Nations Sales Convention, variant B refrained from offering a definition of consumer transactions, leaving consumer protection rules unaffected by the draft convention.

#### *Consumer transactions*

51. It was recalled that the Working Group had agreed that the draft convention should not be concerned with consumer contracts on the grounds that many States already had strong domestic legislation relating to consumer contracts (A/CN.9/527, paras. 83-85) and that UNCITRAL did not have the mandate to deal with consumer issues.

52. Some support was expressed for variant A with the suggested modification that all of the words following the phrase "household purposes" should be deleted to prevent an uncertain provision based on what was or ought to have been known by the party offering the goods or service. Some support was expressed for that approach, provided that, to ensure the preservation of consumer rights, the words used in variant B, paragraph 3, namely, "This Convention does not override any rule of law intended for the protection of consumers" were also retained in the text.

53. Some delegations however took the view that it would be premature to make a final decision on how to exclude consumer transactions at the present stage of the discussion. In support of the approach to leave the question of application to consumer transactions open, it was said that the draft convention appeared to be a technical one that was meant to facilitate the application of provisions that were derived from other international instruments and in domestic law. It was also said that consumers needed legal certainty in the area of electronic business transactions as much as business needed such certainty. Following that approach, it was suggested that preference ought to be given to variant B on the basis that it appeared to ensure that consumers would gain the benefit of certainty offered by the future convention without it being at the expense of consumer protection legislation.

54. The Working Group took note of the varying views that were expressed, in particular the reiterated objections to leaving any doubts about the exclusion of consumer transactions from the scope of the draft convention. The Working Group decided that the matter required further consideration once it had considered the provisions in chapter III of the draft convention.

#### *Licensing contracts*

55. It was noted that both variants excluded contracts relating to the limited use of intellectual property rights. That exclusion reflected the initial understanding of the Working Group that licensing contracts should be distinguished from other commercial transactions and might need to be excluded from the draft convention (A/CN.9/527, paras. 90-93).

56. Pursuant to one view, the exclusion contained in that paragraph should be retained with a view to preventing potential conflict with existing intellectual property regimes. A note of caution was expressed that the future

convention ought not to conflict with existing international instruments on the protection of intellectual property rights.

57. The countervailing view, which gathered strong support, was that inasmuch as the draft convention did not deal with substantive aspects of intellectual property rights, it was not necessary to exclude licensing contracts. It was also said that, since the draft convention was concerned with the use of data messages in contract formation and not with the way in which a contract was to be executed or performed, the exclusion of contracts relating to intellectual property rights might deprive those contracts of the benefit of legal certainty that the draft convention aimed to provide. It was also stated that, in its current broad formulation, the exclusion might be understood to encompass contracts that were not concerned primarily with licensing of intellectual property rights, but that nevertheless included such a licence as a part of a broader series of rights. That was said to be the case in respect of various types of contract routinely used in certain industries, such as in the telecommunication industry, which might otherwise wish to have their contracts benefit from the provisions of the draft convention.

58. Having considered the varying views on the matter, it was agreed that the secretariat should be requested to seek the specific advice of relevant international organizations, such as the World Intellectual Property Organization and the World Trade Organization, as to whether, in the view of those organizations, including contracts that involved the licensing of intellectual property rights in the scope of the draft convention so as to expressly recognize the use of data messages in the context of those contracts might negatively interfere with established rules on the protection of intellectual property rights.

59. In the light of those discussions, the Working Group agreed to retain both subparagraph (b) of variant A and subparagraph (a) of variant B of draft article 2 in square brackets, pending further consultations with relevant bodies. It was agreed that whether or not such exclusion was necessary would ultimately depend on the substantive scope of the convention.

60. The Working Group noted that, to the extent that its work on the draft convention might constitute a basis for removal of possible obstacles to electronic commerce in existing international conventions, such as the United Nations Sales Convention, consideration might be given to addressing an issue that had been the cause of some controversy in the application of the United Nations Sales Convention, namely, whether that Convention also applied to transactions involving so-called "virtual goods" or "digitalized goods". The Working Group was reminded of the different interpretations that had been given to the term "goods" under the United Nations Sales Convention in various jurisdictions and to the conflicting conclusions that had been reached on that issue. The Working Group further noted that work was being undertaken by the World Trade Organization as to whether electronic commerce transactions should be classified as transactions involving trade in goods or trade in services. The outcome of that work by the World Trade Organization could potentially have an impact on the question before the Working Group.

In order not to pre-empt any agreement that States might arrive at in another forum and in view of the fact that there were no concrete proposals at the moment to amend or clarify the notion of “goods” under the United Nations Sales Convention, it was agreed that the Working Group would give no further consideration to the matter.

#### *Additional exclusions*

61. The Working Group noted that the draft article might contain additional exclusions, as might be decided by the Working Group. With a view to facilitating the consideration of that issue by the Working Group, annex II of the initial draft (A/CN.9/WG.IV/WP.95) reproduced, for illustrative purposes and with no intention of being exhaustive, exclusions typically found in domestic laws on electronic commerce that had been proposed at the Working Group’s fortieth session (A/CN.9/527, para. 95). The second phrase in square brackets in the subparagraph was an alternative formulation that would obviate the need for a common list of exclusions (A/CN.9/527, para. 96).

62. It was proposed that other exclusions that should be included in the text of subparagraph (c) should be those listed in footnote 7 of A/CN.9/WG.IV/WP.100 relating to financial transactions, namely, contracts involving “payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets”. It was said that such transactions were already subject to well-defined regulatory and non-regulatory rules and thus should be excluded from the reach of the draft convention. However, concern was expressed that the exclusion of financial transactions from the draft convention would be retrograde to the facilitation and promotion of the use of electronic commerce. It was suggested that financial transactions was an important area in which to develop electronic means of communication.

63. It was also suggested that real estate transactions, as well as contracts involving courts or public authorities, family law and the law of succession should also be excluded from the scope of the draft convention.

64. The Working Group took note of those suggestions and agreed that it should revert to the draft article, possibly at a future session, once it had had an opportunity to consider the operative provisions of the draft convention.

#### **Article 3. Matters not governed by this Convention**

65. The text of the draft article was as follows:

“This Convention is not concerned with:

“(a) The validity of the [transaction] [contract] or of any of its provisions or of any usage [except as otherwise provided in articles [...]];

“(b) The rights and obligations of the parties arising out of the [transaction] [contract] or of any of its provisions or of any usage;

“(c) The effect which the [transaction] [contract] may have on the ownership of rights created or transferred by the [transaction] [contract].”

66. The Working Group recalled that draft subparagraphs (a) and (c) were derived from article 3 of the United Nations Sales Convention. It was noted that those provisions had been included so as to make it clear that the convention was not concerned with substantive issues arising out of the contract, which, for all other purposes, remained subject to its governing law (see A/CN.9/527, paras. 10-12). Draft subparagraph (c) was based, *mutatis mutandis*, on article 4, subparagraph (b), of the United Nations Sales Convention.

67. As a matter of drafting, it was suggested that the words “this Convention is not concerned with” were inaccurate and that the draft article should instead use words such as “This convention does not affect the rules of national law relating to”.

68. The Working Group was reminded that the goal of the convention was to provide standards of functional equivalence and enhance legal certainty, in particular for countries that did not have laws governing electronic means of communication. However, there seemed to be some tension between draft subparagraph (a), as currently formulated, and draft article 14, which was meant to provide criteria for fulfilling form requirement, even as they pertained to the validity of contracts. One way to clarify the relationship between the two provisions might be to include the words “With the exception of processes and procedures as to data messages under this Convention, this Convention does not affect”, or a similar phrase to that effect, as the opening words of draft article 3.

69. The Working Group took note of those suggestions and decided to consider them when it resumed its consideration of the draft article, which it agreed to postpone pending its deliberations on the operative provisions of chapter III of the draft convention.

#### **Article 4. Party autonomy**

70. The text of the draft article was as follows:

“1. The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [except for the following: ...].

“[2. Nothing in this Convention requires a person to use or accept [information in electronic form] [data messages], but a person’s consent to do so may be inferred from the person’s conduct.]”

71. It was pointed out that draft paragraph 1 was a standard clause in that it appeared in other international instruments setting out the limits of the instrument and the principle of party autonomy. Paragraph 2 had been added to draft article 4 to reflect the idea that parties should not be forced to accept contractual offers or acts of acceptance by electronic means if they did not want to do so (A/CN.9/527, para. 108).

72. The view was expressed that it was essential that the right of a party to derogate from the application of the convention should not be restricted. In that respect, it was suggested that the bracketed text, namely, the words “except

for the following”, should be deleted from the text to make it clear that a party’s right to exclude the application of the Convention or derogate or vary any of its provisions was totally unrestricted.

73. A contrary view was that the square brackets in paragraph 1 of draft article 4 should be removed and that the Working Group should consider which provisions of the convention ought to be mandatory. It was said that, in its current formulation, article 4 was too broadly drafted and might permit parties to flout form requirements in conflict with draft article 14. To the extent that draft article 14 already contemplated minimum requirements for the recognition of functional equivalence, so as to satisfy mandatory requirements as to form prescribed by national law, draft article 4 should not allow the parties to lessen those requirements. It was pointed out that such an approach would be consistent with texts previously adopted by UNCITRAL, in particular with the Model Law on Electronic Signatures (General Assembly resolution 56/80, annex), which provided, in its article 5, that derogation or variation of its provisions by agreement might not be permissible where any such variation or derogation “would not be valid or effective under applicable law”.

74. In response, it was suggested that the limitations to party autonomy under article 5 of the UNCITRAL Model Law on Electronic Signatures did not exclude the ability of any person to establish the reliability of an electronic signature by any means other than by those referred to in article 6, paragraph 3, of the Model Law, as clearly stated in paragraph 4 (a) of the same article. A similar element of flexibility, it was said, was contemplated in variant B of draft article 14. If the proposed changes to draft article 4 were meant to preserve the applicability of mandatory form requirements, it was suggested that a better way of achieving that result might be by way of appropriate exclusions under draft article 2. Limiting party autonomy under draft article 4 or providing an open-ended exclusion in favour of domestic form requirements under draft article 3 were said to be undesirable options, which, if accepted, might defeat the very purpose of draft article 14.

75. Having considered the various views that were expressed, the Working Group agreed to defer finalizing draft article 4 until other operative provisions of the convention, in particular its draft article 14, had been fully considered.

### Article 5. Definitions

76. The text of the draft article was as follows:

“For the purposes of this Convention:

“(a) ‘Data message’ means information generated, sent, received or stored by electronic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“(b) ‘Electronic data interchange (EDI)’ means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

“(c) ‘Originator’ of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

“(d) ‘Addressee’ of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

“(e) ‘Information system’ means a system for generating, sending, receiving, storing or otherwise processing data messages;

“(f) ‘Automated information system’ means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;

“(g) ‘Offeror’ means a natural person or legal entity that offers goods or services;

“(h) ‘Offeree’ means a natural person or legal entity that receives or retrieves an offer of goods or services;

“(i) ‘Electronic signature’ means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the person holding the signature creation data in relation to the data message and indicate that person’s approval of the information contained in the data message;

“[(j) ‘Place of business’ means”

#### Variant A

“any place of operations where a person carries out a non-transitory activity with human means and goods or services;]

#### Variant B

“the place where a party pursues an economic activity through a stable establishment for an indefinite period;]

“[(k) ‘Person’ and ‘party’ include natural persons and legal entities;]

“[(l) ‘Transaction’ means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs;]

“[(m) Other definitions that the Working Group may wish to add.]”

77. The Working Group noted that the definitions contained in draft paragraphs (a)-(d) and (f) were derived from article 2 of the UNCITRAL Model Law on Electronic Commerce. It was suggested that it would be appropriate to deal with any issues that arose under any of the proposed definitions within the context of the operative articles in which the terms defined were used. The Working Group agreed to that suggestion and consideration of the definitions was deferred accordingly.

### Article 6. *Interpretation*

78. The text of the draft article was as follows:

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

“2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable [by virtue of the rules of private international law].”

79. The Working Group noted that the draft article mirrored article 7 of the United Nations Sales Convention and similar provisions in other UNCITRAL instruments. The Working Group further noted that the closing phrase had been placed in square brackets at the request of the Working Group at its fortieth session. Similar formulations in other instruments had been incorrectly understood as allowing immediate referral to the applicable law pursuant to the rules on conflict of laws of the forum State for the interpretation of a convention without regard to the rules on conflict of laws contained in the convention itself (A/CN.9/527, paras. 125 and 126).

80. The Working Group decided to retain the draft article, as currently formulated, for consideration at a later stage, after it had considered the operative provisions contained in chapter III of the draft convention.

### Article 7. *Location of the parties*

81. The text of the draft article was as follows:

“1. For the purposes of this Convention, a party is presumed to have its place of business at the geographical location indicated by it [in accordance with article 15] [, unless it is manifest and clear that”

#### *Variant A*

“the party does not have a place of business at such location].”

#### *Variant B*

“the party does not have a place of business at such location [[and] [or] that such indication is made solely to trigger or avoid the application of this Convention]].”

“2. If a party has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant [transaction] [contract] and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the [transaction] [contract].

“3. If a natural person does not have a place of business, reference is to be made to the person’s habitual residence.

“4. The place of location of the equipment and technology supporting an information system used by a legal entity for the conclusion of a contract or the place from which such information system may be accessed by other persons, in and of themselves, does not constitute a place of business [, unless such legal entity does not have a place of business [within the meaning of article 5, subparagraph (j)]]].

“5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country.”

#### *General comments*

82. The Working Group noted that the draft article was one of the central provisions in the convention and one that might be essential, if the scope of application of the convention was defined along the lines of draft article 1.

#### *Paragraph 1*

83. The Working Group noted that draft paragraph 1 built upon a proposal that had been made at the thirty-eighth session of the Working Group to the effect that the parties in electronic transactions should have the duty to disclose their places of business (A/CN.9/484, para. 103). That duty was reflected in draft article 15, paragraph 1 (b), but the draft provision, it was noted, was not intended to create a new concept of “place of business” for the online world.

84. There was general agreement in principle within the Working Group as to the desirability of including a provision that offered elements that allowed the parties to ascertain beforehand the location of their counterparts, thus facilitating a determination, among other factors, of the international or domestic character of a contract and the place of contract formation. However, in the course of the Working Group’s extensive discussions on the draft paragraph, varying views were voiced concerning other possible objectives that should be pursued by the draft article and the best ways of expressing them.

85. It was suggested that the cross reference to draft article 15 should be deleted, as the latter provision was addressed primarily, even if not expressly so, at parties offering goods or services through an information system that was generally accessible to the public. It was also pointed out, in support of that suggestion, that an indication of a party’s place of business might be surmised from other dealings between the parties, as implied by draft article 1, paragraph 2, and not only from a statement made pursuant to draft article 15. Although there were views in favour of retaining the cross reference to draft article 15, and in favour of stating in draft article 7 itself the indications to be given by a party using data messages as to its location, the prevailing view within the Working Group was in support of deletion of the cross reference to draft article 15.

86. The Working Group proceeded to consider the conditions under which the presumption established by the

draft paragraph might be rebutted. The Working Group noted that the words “manifest and clear” were meant to raise the standard of proof required to rebut the presumption established by the draft paragraph 1, which was generally felt to be desirable. However, the prevailing view within the Working Group was that it might be preferable to delete those words, as they required a subjective judgment that would not contribute to the uniform application of the future convention.

87. The Working Group proceeded then to consider the choice between the two variants proposed in the draft paragraph. One view, which received strong support, was that, for the purpose of enhancing legal certainty in the interpretation of the draft paragraph, variant A was preferable to variant B. In particular the last phrase within square brackets in variant B (“and such indication is made solely to trigger or avoid the application of this Convention”) was said to be of questionable usefulness, as the parties were in any event free, under draft article 1, paragraph 3, to agree to the application of the draft convention or, under draft article 4, to exclude its application. Moreover, by requiring proof of a party’s intention, variant B introduced an element of subjectivity, which was said to be of difficult practical application. It was also said that the clause in question did not easily fit with the scope of the draft convention, since the legal consequences of intentional misrepresentations made by the parties were a matter of criminal or tort law, which should best be left for the applicable law outside the draft convention.

88. The countervailing view, which was also widely shared, was that, despite the apparent subjectivity implied by its language, variant B was more conducive to ensuring legal certainty than variant A, in view of the high standard required to rebut the presumption of the *chapeau* of paragraph 1. Variant A, it was said, rendered the rebuttal of the presumption a simple factual question, whereas variant B only allowed the rebuttal of the presumption when a false or inaccurate indication of place of business had been made by a party for the purpose of triggering or avoiding the application of the convention. Therefore, variant B was said to be more favourable to a consistent application of the convention to contracts that appeared to meet the territoriality criteria set forth in draft article 1.

89. In the course of its search for a consensus on the matter, the Working Group considered various alternative proposals for the formulation of the draft paragraph. One such proposal was to replace the draft paragraph with a provision to the effect that a party that indicated it was located in a contracting State should be deemed to be located in that contracting State. That proposal was said to be preferable to the current formulation, as it stated more clearly the purpose of the draft article, which was to support the application of draft article 1, and attributed legal consequences to a party’s representations, without the uncertainties that might be raised by a system of presumptions. Another alternative proposal was to reformulate the draft paragraph to emphasize the conditions under which a party might rely upon an indication of a place of business made by the other party. For that purpose, it was suggested that the draft paragraph should provide that a party was presumed to be located at the place indicated by

it unless the other party knew or ought to have known that such indication was false or inaccurate.

90. The difficulty of reaching a consensus on the draft paragraph, it was said, resulted from the fact that draft paragraph 1, and possibly draft paragraphs 2 and 3, did not contain rules specific to the use of electronic means of communications. In the interest of advancing the deliberations of the Working Group, while focusing on issues specific to electronic contracting, it was proposed that only paragraphs 4 and 5 of the draft article 7 should be retained, possibly combined with the definition of “place of business” in draft article 5, subparagraph (j). The prevailing view within the Working Group, however, was that, if adequately crafted, the principles underlying paragraphs 1-3 of draft article 7 provided useful solutions to address the considerable legal uncertainty that was caused at present by the difficulty of determining where a party to an online transaction was located. While that danger had always existed, the global reach of electronic commerce had made it more difficult than ever to determine location. Helping to avoid a problem made more conspicuous by electronic commerce was said to be a valuable objective of the draft article.

91. Having considered the various comments that had been made, the Working Group generally felt that it should consider further the provisions dealing with the location of the parties. The secretariat was requested to prepare a revised version of the draft paragraph that presented alternative options that reflected the various proposals that had been made.

#### *Paragraphs 2 and 3*

92. The Working Group noted that draft paragraphs 2 and 3 reflected traditional rules applied to determine a party’s place of business that were used, for instance, in article 10 of the United Nations Sales Convention. The Working Group decided to retain those draft paragraphs for consideration at a later stage.

#### *Paragraphs 4 and 5*

93. The Working Group noted that the draft paragraphs proposed rules specifically concerned with issues raised by the use of electronic means of communication in contract formation. Draft paragraph 4 was intended to reflect an opinion shared by many delegations participating at the thirty-eighth session of the Working Group that, when dealing with the location of the parties, the Working Group should take care to avoid devising rules that would result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (A/CN.9/484, para. 103). Draft paragraph 5 reflected the fact that the current system for assignment of domain names was not originally conceived in geographical terms and that, therefore, the apparent connection between a domain name and a country was often insufficient to conclude that there was a genuine and permanent link between the domain name user and the country (A/CN.9/509, paras. 44-46). The Working Group decided to retain those draft paragraphs for consideration at a later stage.



**Article 8. Use of data messages in contract formation**

94. The text of the draft article was as follows:

“1. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer].

“2. When expressed in the form of a data message, an offer and the acceptance of an offer become effective when they are received by [the addressee] [the offeree or the offeror, as appropriate].

“3. Where data messages are used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.”

95. The Working Group noted that the draft article had been extensively reformulated since the thirty-ninth session of the Working Group so as to reflect the wish prevailing within the Working Group to limit any substantive provisions to those which were strictly required to facilitate the use of data messages in the formation of international contracts (A/CN.9/509, paras. 67-73).

*Paragraph 1*

96. The Working Group accepted a proposal to delete the phrase “Unless otherwise agreed by the parties” at the opening of the draft paragraph, as there was no need to repeat the principle of party autonomy, which had already been stated in draft article 4.

97. Differing views were expressed, however, concerning the need for and usefulness of the bracketed words “or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer”. Pursuant to one view, those words were useful to clarify that offer or acceptance could be effected by conduct other than the sending of a data message containing a written text of offer or acceptance, such as by touching or clicking on a designated icon or place on a computer screen. Such a clarification, which was contained in legislation on electronic commerce in some jurisdictions, was important in the draft text, as it gave express recognition to a growing practice in electronic commerce.

98. The countervailing view, which eventually prevailed once the Working Group had considered the use of a similar phrase in draft article 10, paragraph 1 (see para. 126), was that the words in question might add uncertainty, rather than enhance clarity in the application of the convention. An earlier version of the text, which had made an illustrative reference to indication of assent by “touching or clicking on a designated icon or place on a computer screen” had been rejected by the Working Group at its thirty-ninth session, as not being consistent with the principle of technological neutrality and because it carried the risk of being incomplete or becoming dated, as other means of indicating assent not expressly mentioned therein might already be in use or might possibly become widely used

in the future (A/CN.9/509, para. 89). As currently drafted, however, the phrase was vague and did not provide sufficient indication of the types of action being contemplated, and for that reason it might be preferable to delete the phrase altogether.

99. In support of the deletion of the words in square brackets, it was further stated that domestic legislation that had included additional illustrations of conduct indicating acceptance in a context similar to the draft article had done so for specific reasons, namely, that they used concepts such as “electronic document” or “electronic record”, and there might be doubts as to whether they encompassed actions other than the sending of messages in electronic form containing a written text of offer or acceptance. However, the context of the draft convention was different in that any of the actions purported to be covered by the words in question would in fact generate a data message in the meaning given to that expression in draft article 5, subparagraph (a). Any additional illustration that the Working Group might deem necessary could be provided in an explanatory text accompanying the draft convention. Another possibility might be to include appropriate clarification in the definition of “data message”, a proposal, however, that was received with reservations, in view of the undesirability of altering an accepted definition that had been already used in two model laws and in domestic legislation.

100. Having considered those views, the Working Group decided to delete the words in square brackets in the draft paragraph and elsewhere in the draft convention.

*Paragraph 2*

101. The Working Group noted that rules in the draft paragraph reflected the essence of the rules on contract formation contained, respectively, in articles 15, paragraph 1, and 18, paragraph 2, of the United Nations Sales Convention. The verb “reach”, which was used in the United Nations Sales Convention, had been replaced with the verb “receive” in the draft article so as to align it with draft article 11, which was based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

102. The Working Group held an extensive discussion on the need to retain the draft paragraph in the draft convention, in the course of which it reverted to various aspects of a debate that had taken place at its thirty-ninth session (A/CN.9/509, paras. 67-73).

103. In favour of the deletion of the draft paragraph, it was pointed out that the provision did not specifically address the issues of electronic contracting to which the draft convention should confine itself. Strong support was expressed in favour of the view that, even in its current form, which was meant to be limited in scope to electronic commerce transactions, the draft paragraph should still be deleted to avoid the creation of a dual regime where different rules would govern the time of formation of an electronic commerce contract within the draft instrument and the time of formation of other types of contract outside the purview of the draft instrument. If the purpose of the draft paragraph, it was said, was to facilitate a determination of the time of contract formation when data messages were used for that

purpose, the issue was regarded as being adequately dealt with by draft article 11. Also in favour of deletion of draft article 8, it was stated that no attempt should be made to provide a rule on the time of contract formation that might be at variance with the rules on contract formation of the law applicable to any given contract. It was pointed out that there were domestic laws under which a contract would typically be formed when the offeror became aware of the acceptance of the offer (a theory known as contract formation through “information” of the offeror, as opposed to the mere “receipt” of the acceptance by the offeror). The draft paragraph interfered with the application of those rules and should therefore be deleted.

104. In response to those views, it was stated that the draft paragraph, in combination with draft article 11, offered useful provisions to facilitate a determination on the formation of a contract by electronic means. If the specific focus of the draft paragraph on electronic contract issues was not sufficiently clear, the text could be amended to refer to “data messages containing an offer or an acceptance”. The alleged risk of duality of regimes, it was further said, was inherent to many uniform law instruments, such as the United Nations Sales Convention, to the extent that those instruments might provide different rules from those which would apply to purely domestic contracts or under the law otherwise applicable in the absence of an international convention. The usefulness of the draft paragraph was moreover justified by the fact that even where an international convention governed a particular contract, such a convention might not provide rules on contract formation.

105. The Working Group considered at length the arguments that were put forward by both lines of thought, and considered proposals to eliminate the reasons for concern that had been raised. One such proposal, which received some support, was to delete the draft article and combine the remainder of draft article 8 with draft article 10. Another proposal was to reformulate the draft paragraph along the following lines:

“2. Where the law of a Contracting State attaches consequences to the moment in which an offer or an acceptance of an offer reaches the offeror or the offeree, and a data message is used to convey such offer or acceptance, the data message is deemed to reach the offeror or the offeree when it is received by him.”

106. The Working Group noted that, although the proposal to delete the draft paragraph had obtained greater support than the retention of the provision, there was not sufficient consensus in the Working Group to make a firm decision on the matter. The Working Group therefore agreed to retain the provision in square brackets for further consideration at a later stage. The Working Group accepted that the word “addressee” should be used in a future version of the draft paragraph instead of the words “the offeror and the offeree”.

#### *Paragraph 3*

107. Strong support was expressed for the proposal that, to avoid unnecessary repetition, the draft paragraph should

be deleted, since draft paragraph 1 already recognized expressly the possibility of offer and acceptance being expressed by means of data messages.

108. The countervailing view, which the Working Group eventually adopted, was that it should retain the draft paragraph for further consideration, as it restated the general rule of non-discrimination of data messages, which was one of the fundamental principles of the UNCITRAL Model Law.

#### **Article 9. *Invitations to make offers***

109. The text of the draft article was as follows:

“1. A data message containing a proposal to conclude a contract that is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, is to be regarded merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.

“2. Unless otherwise indicated by the offeror, the offer of goods or services through [automated information systems] [using an interactive application that appears to allow for the contract to be concluded automatically]”

#### *Variant A*

“is presumed to indicate the intention of the offeror to be bound in case of acceptance.”

#### *Variant B*

“does not, in and of itself, constitute evidence of the offeror’s intention to be bound in case of acceptance.”

110. The Working Group noted that the provision, which was inspired by article 14, paragraph 1, of the United Nations Sales Convention, was intended to clarify an issue that had raised a considerable amount of discussion since the advent of the Internet. It was recalled that the proposed rule resulted from an analogy between offers made by electronic means and offers made through more traditional means (see A/CN.9/509, paras. 76-85).

111. It was recalled that paragraph 1 was intended to cover advertisements of goods and services made on web sites and aimed to treat such advertisements as equivalent to notices or advertisements made in shop windows, namely, as an invitation to treat rather than as a formal offer. It was suggested that the term “offer” used in paragraph 1 of draft article 9 could actually undermine that intention and therefore the term should be replaced with a more objective term such as the term “advertisement”. While support was expressed for the suggestion to seek a more objective term, concern was expressed at the use of the term “advertisement”.

112. It was questioned whether the example set out in paragraph 1, namely, “such as the offer of goods and serv-

ices through an Internet web site”, should be included in the draft provision at all. It was suggested that it would be better placed in explanatory material relating to the convention.

113. It was further suggested that the use of the term “offeror” in paragraph 1 was also confusing if read with the definition of the term as set out in draft paragraph 5 (g), which defined the term as “a natural person or legal entity that offers goods or services”. It was suggested that the definition of “offeror” would need to be revisited once the scope of the convention had been settled, as it could ultimately have application beyond the offer of goods or services. It was suggested that more neutral text such as a reference to the term “sender” might be preferable.

114. A proposal was made that the words “the person making the proposal”, as was used in article 14, paragraph 2, of the United Nations Sales Convention, or similar words would be more appropriate. The Working Group agreed to that suggestion.

115. It was also suggested that the term “clearly” should be included in paragraph 1 of draft article 9 before the words “indicates the intention of the offeror to be bound in case of acceptance” to better align the text with the approach taken in article 14, paragraph 2, of the United Nations Sales Convention.

116. In respect of paragraph 2 of draft article 9, it was noted that the rule proposed in variant A was similar to the rule proposed in legal writings for the functioning of automatic vending machines (see A/CN.9/WG.IV/WP.95, para. 54). At the Working Group’s thirty-ninth session, it had been pointed out that entities offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicated in their web sites that they were not bound by those offers. If that already was the case in practice, it would be questionable for the Working Group to reverse that situation in the draft provision (A/CN.9/509, para. 82). The Working Group was informed that variant A reflected that proposition and treated offers of goods or services, even where an “automated information system” was used, as an invitation to make offers.

117. However, it was noted that there was currently no standard business practice in that area and that the two variants represented the two different business practices that existed. It was said that, if the Working Group chose one variant, then that choice could do harm to the existing different practices with the result that parties could be misled into believing they were not bound when they were in fact bound or into believing that they were bound when in fact they were not bound.

118. It was further stated that the Working Group should not seek to fill a gap in business practice that either did not exist or on which there was no consensus. On that basis, it was suggested that the two practices, as reflected in variants A and B in paragraph 2 of draft article 9, could form part of an explanatory text instead of being included in the draft convention.

119. Having considered the various views, the Working Group was reminded that paragraphs 1 and 2 of draft article 9 could be combined in a single provision, along the following lines:

“A proposal for concluding a contract that is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, including offers using [automated information systems] [interactive applications that appear to allow for the contract to be concluded automatically], is to be considered merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance”,

as had been suggested at the Working Group’s thirty-ninth session (A/CN.9/509, para. 84).

120. Following discussions, the Working Group requested the secretariat to prepare a text based on a combination of draft paragraphs 1 and 2 of draft article 9 as set out in the above paragraph to be included in the revised draft for further consideration by the Working Group. The revised draft should take account of earlier comments made in respect of draft article 9, paragraph 1.

**Article 10. Other uses of data messages  
in international [transactions]  
[in connection with international contracts]**

121. The text of the draft article was as follows:

“1. Unless otherwise agreed by the parties, any communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer].

“2. Where data messages are used for communication, declaration, demand, notice or request in accordance with this article, such communication, declaration, demand, notice or request shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

“[3. The provisions of this article do not apply to the following: ...] [The provisions of this article do not apply to those matters identified by a Contracting State under a declaration made in accordance with article X.]”

122. As a general comment, it was suggested that there might not be a need for the draft article as a separate provision and that draft articles 8 and 10 should be combined in a future version of the draft convention. It was pointed out that draft article 10 dealt with a wide range of communications that a party might wish to make in the context of an existing or contemplated contract. As offer and acceptance could also be regarded as falling under that category, there was no need to treat them separately in draft article 8.

123. In response, it was stated that it would be preferable to keep the two provisions separate, at least until a common

understanding had emerged within the Working Group as to the scope of application of the convention and the content of current draft article 8. It was pointed out that, depending on the final decision on the scope of the convention, its rules might apply to a variety of communications that might not be regarded as being strictly made “in the context” of a contract. Also, merging the two provisions might have the consequence of extending to all communications currently covered by draft article 10 the principle of effectiveness upon receipt, which was embodied in draft article 8, paragraph 2. The Working Group, it was said, should consider carefully the implications of that result.

124. Having noted those views, the Working Group decided that the desirability of combining draft articles 8 and 10 should be considered at a later stage.

#### *Paragraph 1*

125. The question was raised as to whether the words “in connection with a contract” or “in the context of a contract” were broad enough to encompass all types of communication intended to be covered by the draft paragraph. Pursuant to one view, no additional language was needed, as the current words, or their equivalent in draft article 1, were sufficiently flexible and could be read to include communications that took place between the parties even if no contract came into being. However, the countervailing view, which gathered considerable support, was that it might be useful to include an additional qualification that made it clear that the communications referred to in the draft article might occur before or after the formation of a contract, such as “before, during or following an existing or contemplated contract”. The Working Group agreed that possible options to enhance clarity in the draft article should be explored in a revised version of the provision.

126. The Working Group agreed to delete the words “Unless otherwise agreed by the parties”, as well as the closing phrase in square brackets, as had been done with similar phrases in connection with draft article 8, paragraph 1 (see paras. 97-100).

#### *Paragraph 2*

127. As it had done in connection with paragraph 3 of draft article 8 (see paras. 107 and 108), the Working Group agreed to retain the draft paragraph for further consideration, as it restated the general rule of non-discrimination of data messages, which was one of the fundamental principles of the UNCITRAL Model Law.

#### *Paragraph 3*

128. The Working Group noted that, given the broad scope of the draft convention, which in its revised version covered various types of electronic communication and not only contract formation, the draft paragraph offered two possibilities for providing additional specific exclusions to the provisions of draft article 10. The first alternative in square brackets would require the Working Group to develop a common list of exclusions, whereas the second alternative would leave the matter for declarations by a contracting State under draft article X.

129. Doubts were voiced as to the desirability of adding a specific provision on exclusions in the draft paragraph, as draft article 2 already contemplated such a possibility. The purpose of the draft convention was to remove obstacles to electronic commerce and, for that purpose, any exceptions to the regime of the draft convention should be kept to a minimum.

130. In response, it was pointed out that draft article 2 contemplated exclusions by subject matter, in which case any and all communications relating to an excluded contract would fall outside the scope of the draft convention. The draft paragraph, in turn, contemplated exclusions of specific types of communication, leaving other communications not expressly excluded to fall under the draft convention, even if they related to the same contract. The need for the draft paragraph was justified by provisions of domestic law that required certain types of notice related to contract formation or termination to be made in writing. An example of such requirements might be notices of termination of loan agreements, which, pursuant to rules on debtor protection of some jurisdictions, were not admissible in any form other than a notice written on paper. An international convention such as the one under consideration, it was said, should not interfere with the operation of those rules of domestic law.

131. The Working Group agreed that there might indeed be instances where reasons of public policy might require that certain types of communication be subject to more stringent form requirements than others, even if relating to the same contractual relationship. As regards the manner in which such exclusions might be made, there were expressions of support for developing a common list of exclusions, in the interest of ensuring a high degree of uniformity in the application of the convention, but there were also expressions of doubt as to the feasibility of developing such a list. The Working Group agreed to keep both options in the text and to revert to the matter later.

### **Article 11. *Time and place of dispatch and receipt of data messages***

132. The text of the draft article was as follows:

#### *Variant A*

“1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

“2. Unless otherwise agreed by the parties, if the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system; if the data message is sent to an information system of the addressee that is not the designated information system, the data message is deemed to be received at the time when the data message is retrieved by the addressee. If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

“3. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 5 of this article.

“4. Unless otherwise agreed by the parties, when the originator and the addressee use the same information system, both the dispatch and the receipt of a data message occur when the data message becomes capable of being retrieved and processed by the addressee.

“5. Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7.”

#### *Variant B*

“1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

“2. Unless otherwise agreed by the parties, the data message is deemed to be received at the time when the message is capable of being retrieved and processed by the addressee.”

#### *General comments*

133. The discussion focused initially on the general structure of the draft article as reflected in the two variants. It was recalled that, except for draft paragraph 4, the rules contained in variant A were based on article 15 of the UNCITRAL Model Law on Electronic Commerce, with some adjustments to harmonize the style of the individual provisions with the style used elsewhere in the draft convention, which followed more closely the style of the United Nations Sales Convention. By contrast, variant B was intended to reflect a line of thought expressed during the thirty-ninth session of the Working Group that it would be preferable to replace paragraphs 2-5 of variant A with a shorter provision to the effect that a data message was deemed to be received if the message was capable of being retrieved and processed by the addressee (A/CN.9/509, para. 96).

134. Some support was expressed for variant B, which was said to present the advantage of simplicity and to avoid operating what was described as a complex legal distinction according to whether or not the addressee had designated an information system for the receipt of data messages. Another advantage of variant B was said to be that it avoided any interference with existing substantive rules of contract formation under applicable law. In addition, it was suggested that a provision along the lines of variant B should be preferred for the reason that it was in line with harmonized rules currently promoted by certain regional organizations. In response, it was pointed out that the search for simplicity, a characteristic that, in itself, could appeal to the business community, should not lead those drafting the convention to disregard the need to ensure a high level of predictability and certainty with

respect to contract formation. It was strongly felt that, on such important issues as the time and place of contract formation, the need for certainty was paramount. In that respect, variant B was found to be gravely lacking in precision, open to misinterpretation and oblivious of the practical needs of users of electronic commerce techniques.

135. It was suggested that the Working Group should try to improve on variant B to reach an acceptable formulation of a simple and abstract rule, while providing the required level of certainty with respect to a variety of factual situations by way of a guide or other explanatory material. The prevailing view, however, was that provisions on the issues of time and place of receipt of data messages should be further refined on the basis of variant A, possibly with a view to adopting a simpler version of that variant. In support of variant A, it was further stated that a nuanced system distinguishing whether an information system had been designated by the addressee and used by the sender reflected electronic commerce practice more closely. It was also stated that variant A was more likely to meet the needs of those countries which did not already have elaborate rules on contract formation in the context of electronic commerce transactions. Various suggestions were made as to how variant A could be improved. One suggestion was that, for a data message to be deemed to be received, paragraph 2 should require that the addressee should be aware of the entry of the data message in the relevant information system and able to retrieve the message. Another suggestion was that the words “unless otherwise agreed by the parties” should be deleted from paragraphs 1, 2 and 4 as superfluous. Yet another suggestion was that the order of paragraphs 3 and 4 should be reversed. A further suggestion was that paragraph 4 should be deleted, since requiring that a message should be “capable of being retrieved and processed” went beyond the notion of availability that seemed to inspire article 24 of the United Nations Sales Convention.

136. After consideration of the various views that had been expressed, the Working Group decided to retain variant A as the basis for continuation of the discussion and proceeded to consider its individual provisions and proposals for improving their clarity. As a result of the extensive discussions held by the Working Group in connection with draft paragraph 2 (see paras. 141-151), it did not have time to consider draft paragraphs 3-5 at its forty-first session.

#### *Paragraph 1*

137. As a general comment, it was pointed out that the notions of “dispatch” and “receipt” of data messages, which appeared throughout the draft article, were not used elsewhere in the draft convention, thus raising the question of the need for specific provisions dealing with those notions. Another related question was whether a definition of dispatch and receipt, which was said to be a question of substantive law, in particular as regards contract formation, should not be better left to domestic law or other international conventions dealing with contract law, so as to avoid a duality of regimes, depending on the means of communication used by the parties. In response, it was pointed out that one of the main objectives of the draft

convention was to provide guidance that allowed for the application, in the context of electronic contracting, of concepts traditionally used in international conventions and domestic law, such as “dispatch” and “receipt” of communications. To the extent that those traditional concepts were essential for the application of rules on contract formation under domestic and uniform law, the provision of functionally equivalent concepts for an electronic environment was said to be an important objective of the draft convention. There was strong support for that objective and, in general, for the idea that draft paragraph 1 was a useful provision.

138. The Working Group agreed that, as had been done elsewhere in the draft convention, the opening words “Unless otherwise agreed by the parties” in paragraph 1 and in the remaining portions of the draft article should be deleted. In that connection, the question was asked as to whether the parties’ intent to derogate from the provisions contemplated in the draft article could be inferred from the fact that they had agreed on a different set of rules for determining dispatch and receipt, or whether the agreement to derogate should make explicit reference to the provisions of article 11 from which the parties intended to deviate. In response, it was pointed out that draft article 4 allowed the parties to exclude the application of the convention as a whole or only to derogate from or vary the effect of any of its provisions. While an exclusion of the convention as a whole would normally require a specific reference to that effect, variations from its individual provisions could be effected without specific reference to the provisions being derogated from.

139. A proposal was made to the effect that, in order to simplify the structure of the draft article, paragraphs 1 and 4 could be combined into a single provision that stated that the dispatch of a data message occurred when it entered an information system outside the control of the originator or, in any case, when the data message became capable of being retrieved and processed by the addressee. That proposal was objected to on the grounds that draft paragraphs 1 and 4 dealt with different situations, in that draft paragraph 1 contemplated parties using different information systems, while draft paragraph 4 applied to messages exchanged between parties using the same information system. In the case of draft paragraph 4, the objective criteria based on the moment when the data message entered an information system outside the control of the originator could not be used, a situation that required the use of another criterion. It would, however, be undesirable to extend the more subjective criterion provided in draft paragraph 4 to the situation contemplated in draft paragraph 1.

140. With a view to enhancing understanding of the provision, it was suggested that the order of the sentences could be reversed along the following lines:

“1. When a data message enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator, the data message is deemed to have been dispatched.”

The Working Group took note of that drafting suggestion and agreed that it could be considered at a later stage.

### *Paragraph 2*

141. The Working Group’s deliberations focused initially on the third sentence of the draft paragraph, which dealt with the time of receipt of a data message sent to an addressee who had not designated a particular information system for the receipt of the data message.

142. It was pointed out that, in implementing the UNCITRAL Model Law on Electronic Commerce, which had a similar provision in its article 15, paragraph 2 (*b*), some jurisdictions had replaced the rule of receipt based on the time a data message “entered an information system of the addressee” with another rule whereby, in the absence of a designated information system, a message was deemed to be received when the addressee became aware of the data message and the data message was capable of being retrieved. It was suggested that the rule contained in the UNCITRAL Model Law, and reflected in the second sentence of the draft paragraph, should be reconsidered, as it might lead to the undesirable result of binding the addressee even in the event that the data message was sent to an information system rarely or at least not routinely used by the addressee in the regular course of its business dealings.

143. The Working Group heard expressions of strong support for that suggestion. It was acknowledged that requiring actual awareness of the addressee constituted a more subjective rule than the one contained in the draft paragraph. However, such a rule was said to be more equitable than holding the addressee bound by a message sent to an information system that the addressee could not reasonably expect would be used in the context of its dealings with the originator or for the purpose for which the data message had been sent.

144. However, there were also various objections to that suggestion. In favour of retaining the rule contained in the second sentence of the draft paragraph, it was stated that the proposed change would in practice mean that the addressee alone would have the power to cause the receipt of the message to occur, as the originator would need to establish that the addressee had been made aware of the existence of the data message. That situation was said to be potentially unfair, for instance, to an originator who, in the absence of a designation of an information system by the originator, addressed the data message to the only information system of the addressee known to the originator. The fact that the addressee might not routinely use such information system, it was said, could not always and as a general rule be held against the originator. Furthermore, it was suggested that a judge or arbitrator called to decide upon a dispute on the time of receipt of a data message would most likely apply a test of reasonableness to the choice of an information system by the originator in the absence of a clear designation by the addressee.

145. The Working Group paused to consider those views. It was recognized that both lines of thought were concerned with establishing a fair allocation of risks and responsibilities between originator and addressee. In normal business dealings, it was said, parties could be expected to take the care of designating a particular information system for the

receipt of messages of a certain nature, where they owned a number of information systems, and to refrain from disseminating, for example, electronic mail (e-mail) addresses they rarely used for business purposes. By the same token, however, parties should be expected not to address data messages containing information of a particular business nature (e.g. acceptance of a contract offer) to an information system they knew or ought to have known would not be used to process communications of such a nature (e.g. an e-mail address used to handle consumer complaints). It was said that it was not reasonable to expect that the addressee, in particular large business entities, should pay the same level of attention to all the information systems it had established.

146. Having noted the common elements and concerns between the two lines of argument that had been put forward, the Working Group considered further proposals for clarifying the objectives of the third sentence of draft paragraph 2. One such proposal was to reformulate that sentence to the effect that, if the addressee had not designated an information system, receipt should be deemed to have occurred when the data message entered an information system of the addressee, unless if it was unreasonable for the originator to have chosen that particular information system for sending the data message, having regard to the circumstances of the case and the content of the data message. Another proposal was to provide that, in the absence of designation of an information system, receipt occurred when the data message entered an information system of the addressee, unless the addressee could not reasonably expect that the data message would be addressed to the particular information system to which the data message was sent.

147. It was generally agreed that those proposals deserved further consideration by the Working Group at a later stage, as alternatives to the current text of the third sentence of the draft paragraph, which the secretariat was requested to prepare for continuation of the deliberations of the Working Group at a later stage. It was suggested that, in its future consideration of those issues, the Working Group should examine the implications of additional factual situations, such as the possible existence in some information systems of firewalls that automatically prevented the entrance of messages identified as being corrupted or that placed suspect messages on “quarantine” or automatically blocked messages coming from a specific sender. The Working Group took note of that suggestion.

148. The view was expressed that some of the difficulties that some delegations had encountered with the last sentence of draft paragraph 2 derived from the notion of “designated information system” and the uncertainty as to the level of precision that might be required in order for an indication of an information system to constitute a “designation” of an information system. Those difficulties, it was added, could not simply be overcome by a definition of what constituted a “designated information system”, as they were inherent in the structure of the draft paragraph, which was criticized for being overly complex and for containing an excessive level of detail. It was noted that the different criteria for determining receipt of data messages, which was used in the first and the second

sentences of the draft paragraph, might lead to conflicting results, depending on the understanding given to the word “information system”. For example, if “information system” covered systems that carried data messages to their addressees, including, for instance, an external server, a data message might be deemed to have been received by the addressee under the first sentence of the draft paragraph even if it was lost prior to retrieval, as long as the loss had occurred after the message had entered the server’s information system and that system was a “designated system”. Under the second sentence of the draft paragraph, however, the lost message would not be deemed to have been received by the addressee on the grounds that it had not been actually retrieved by the addressee simply because the server’s information system had not been “designated” by the addressee. It was said that there was no justification for those discrepancies, which were only due to the complexity of the draft paragraph. In order to avoid such discrepancies, it was proposed to insert a provision in paragraph 2 covering the situation where the addressee had designated, for instance, an e-mail address, in which case the data message should be deemed to have been received at the time when the retrieval of that data message by the addressee from an information system administered by an intermediary could normally be expected or at the time when a data message directly transmitted to the information system of the addressee entered that system.

149. The Working Group took note of that proposal but noted that the proposal had not received sufficient support. Instead, strong support was expressed for the view that the rules in the draft paragraph established useful distinctions that reflected the reality of solutions found by business entities that routinely used electronic communications. Rather than being unnecessarily complex, the draft paragraph distinguished between three basic situations to achieve a higher level of legal certainty, which subjective notions such as “accessibility” could not provide. It was pointed out that the entire draft paragraph was based on article 15 of the UNCITRAL Model Law on Electronic Commerce and that care should be taken to avoid inconsistencies between the two texts. As currently formulated, the rules contained in the draft paragraph were felt to replicate, in an electronic environment, the tests used for dispatch and receipt of paper-based communications, namely, the moment when the communication left the sphere of control of the sender and the moment when it entered the sphere of control of the recipient. The notion of “entry” into an information system, which was used for both the definition of dispatch and that of receipt of a data message, referred to the moment when a data message became available for processing within an information system. It was pointed out, moreover, that the notion of “information system” was intended to cover the entire range of technical means for generating, sending, receiving, storing or otherwise processing data messages and that, depending on the context, it could include a communications network, an electronic mailbox or even a telecopier. However, care should be taken to avoid confusion between information systems and information service providers or telecommunications carriers that might offer intermediary services or technical support infrastructure for the exchange of data messages.

150. Furthermore, it was said that paragraph 2 contained an important rule allowing the parties to designate a specific information system for receiving certain communications, for instance, where an offer expressly specified the address to which acceptance should be sent. Such a possibility was said to be of great practical importance, in particular for large corporations using various communication systems at different places.

151. The Working Group considered at length the differing views that had been expressed. While a broadly held view was in favour of retaining the draft paragraph as its working basis, the Working Group agreed that the matter required further consideration, possibly in connection with a future review and discussion of the notion of "information system" in draft article 5, subparagraph (e).

**D. Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal barriers to the development of electronic commerce in international instruments relating to international trade:**

**Compilation of comments by Governments and international organizations (A/CN.9/WG.IV/WP.98/Add.5 and Add.6) [Original: English]**

**ADDENDUM**

**CONTENTS**

	<i>Page</i>
I. Compilation of comments .....	632
B. Intergovernmental organizations .....	632
Permanent Bureau of the Hague Conference on Private International Law .....	632

**I. COMPILATION OF COMMENTS**

**B. Intergovernmental organizations**

***Permanent Bureau of the Hague Conference on Private International Law***

*[9 October 2002]*

1. At the request of the Working Group on Electronic Commerce of the United Nations Commission on International Trade Law (UNCITRAL), the UNCITRAL secretariat has invited the Hague Conference and other intergovernmental organizations to identify any "trade-related instruments" developed under their auspices that might pose a possible legal barrier to the use of electronic commerce. Organizations were asked to provide the title and source of any instrument that was considered to be of relevance to the UNCITRAL project.

2. The Permanent Bureau of the Hague Conference on Private International Law welcomes the efforts undertaken by UNCITRAL and congratulates the secretariat on its extremely valuable study contained in document A/CN.9/WG.IV/WP.94. As to the invitation extended by the UNCITRAL secretariat to intergovernmental organizations to indicate any convention hosted by them that they would like to see included in the survey carried out by UNCITRAL, the Hague Conference finds itself in a similar position to that stated by the World Intellectual Property Organization in document A/CN.9/WG.IV/ WP.98. With regard to the Hague Conventions, the work contemplated

in the letter from UNCITRAL is to a large extent already under way within the framework of the Hague Conference. A review of the Hague Conventions is currently being carried out by the Permanent Bureau in the context of its general mandate to examine private international law rules in the context of the information society.<sup>1</sup> While that work therefore should not be duplicated within the framework of UNCITRAL, the Permanent Bureau of the Hague Conference is happy to share the information below concerning the work carried out by it in that respect with UNCITRAL and its member States.

3. In order to facilitate the work of the UNCITRAL secretariat, the Permanent Bureau hereby submits a first report describing the Hague Conventions on administrative and judicial cooperation that have an impact on electronic commerce (e-commerce) and trade, specifically, the Hague Convention of 1 March 1954 Relating to Civil Procedure, the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and the Hague

<sup>1</sup>See, in this context, in Preliminary Document No. 3 of April 1992, the Note on problems that, in the area of commercial law, arise from the utilization of electronic processes, drawn up by Michel Pelichet (Hague Conference on Private International Law, *Proceedings of the Seventeenth Session, 1995, Tome I*, p. 89).



Convention of 25 October 1980 on International Access to Justice. In structure, the report annexed to the present document follows the summary format used by UNCITRAL in its preliminary survey of such instruments (A/CN.9/WG.IV/WP.94).

4. Two preliminary remarks are in order:

(a) The five Hague Conventions analysed below may well, after a final review of their operation in a digitized environment, appear to be able to function without any need for a formal revision. Although they are without any doubt of relevance for e-commerce, caution is therefore needed when discussing them under the heading of “possible legal barriers” to e-commerce as suggested in the UNCITRAL documents;

(b) With regard to the Convention Abolishing the Requirement of Legislation for Foreign Public Documents as well as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Service Convention”) and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, the work carried out by the Hague Conference in examining the “fitness” of those conventions in a digital environment will be continued in the framework of a special commission to which all the 62 member States of the Hague Conference as well as non-member States who are parties to those conventions will be invited, to take place probably in March 2003. Therefore, it is at present too early for the Permanent Bureau to draw final conclusions in this respect. Moreover, the Permanent Bureau reserves the possibility to submit a further report on any other Hague Conventions that, during the continuing research, might appear of relevance to the work undertaken by UNCITRAL.

#### *General comments*

5. In analysing digitization of the five Hague Conventions, the annexed report relies upon several pre-suppositions concerning digital communications in general and e-commerce in particular.

6. To begin with, the report recognizes that there seems to be at least some international consensus on the pre-conditions for e-commerce, but little consensus on the means to achieve those goals. Specifically, consensus seems to emerge that any e-commerce standards must satisfy at least two<sup>2</sup> minimum requirements:

(a) *Authentication* (some means to verify that data is what it purports to be); and

(b) *Security* (a means to protect data from corruption during transmission and to ensure that only authorized parties have access to it).

7. Likewise, it is widely understood that e-commerce has both legal and technological components that will require international cooperation by public and private players. However, standards are only beginning to emerge in each of those dimensions and so the report does not specify any

particular means (legal or technological) whereby the Hague Conventions could achieve either authentication or security.

8. On principle, the five e-commerce-related Hague Conventions listed above will tend to facilitate trade because each convention harmonizes transnational judicial or administrative procedures by means of standardized forms or procedures. Such harmonization thereby increases the legal certainty and access to judicial proceedings that are so crucial to international trade. Nevertheless, the conventions were drafted prior to the existence of the Internet and their reliance on standardized forms or procedures presumes a physical legal universe. In the pre-electronic legal universe, most legal rights, duties and statuses were authenticated only via a physical document (contracts, wills, judgements, birth certificates and so on). Similarly, most of those physical documents were legally valid only if they contained a signature/certification by the authorized person or organization. Therefore, electronic versions of documents and signature/certification will be developed for all the conventions’ forms and procedures by applying the method of the functional equivalent,<sup>3</sup> as noted in the analysis of each convention below.

9. One underlying element of all five Hague Conventions discussed below that may be beneficial for their application in a digital environment is that many of the forms and procedures mandated by the conventions are intergovernmental or at least “semi-governmental”.<sup>4</sup> The forms provided for in the conventions must be completed by public or semi-public bodies or authorities (judicial, diplomatic, consular, notarial or administrative) and then transmitted to other public authorities, without the participation or intervention of any private parties. One might designate such communications “Government-to-Government” or “G2G” (by analogy with “business-to-business” or “B2B” transactions in the commercial universe). A possible effect of G2G control over these documents and procedures may be that it might facilitate implementation of any common standard for a functional equivalent for the electronic environment within States parties to the conventions discussed here and thereby enhance trust. The same actors, that is, the contracting States and bodies supervised by them, would be involved in agreeing on such standards and in subsequently applying them to their own documents and procedures.

10. Several important questions relating to e-commerce are explicitly excluded from the report because a political and/or legal consensus has not yet emerged as to how they should be resolved. Specifically, the report does not address the issues of localization, in particular in relation to jurisdiction (the “where” and thus the jurisdiction to adjudicate over an electronic event or a party involved in such an

<sup>3</sup>This means that for each of the documents, methods, forms and procedures referred to in the conventions, the aims and function will have to be considered before assessing whether these can also be achieved in an electronic environment.

<sup>4</sup>In the context of the Service Convention, for instance, it has to be recalled that service of process is carried out by public officials in many States, while in others it is done by bailiffs or *huissiers* who may have a semi-public, semi-private status. In a third group of States, again, service lies with the parties themselves. Generally speaking, however, there is a strong predominance of immediate contacts between public authorities that justifies the statement made here.

<sup>2</sup>Some countries have already developed further standards. In Canada, for instance, there are five requirements: authenticity, security, confidentiality, integrity and non-repudiation.

event), the digital divide (the political, economic and geographical inequities created by the fact that e-commerce is not yet fully global), electronic alternative dispute resolution (whether and to what extent dispute resolution should occur electronically) and excluded subject matter (those transactions which, for reasons of public policy or pragmatics, cannot or should not occur electronically). Although each of these issues will directly impact the five Hague Conventions when applied to e-commerce, the report is merely a preliminary analysis of authentication, documentation and certification for the digitized version of each convention's scope.

11. In sum, the report analyses each of the relevant Hague Conventions in its relationship to the e-commerce

goals of authentication and security, but does not specify the means to achieve those goals or resolve ancillary legal issues. A more general discussion of many of the issues dealt with in the report can be found in the document "Electronic data interchange, internet and electronic commerce", which was drawn up by Catherine Kessedjian after the round table on the issues of private international law raised by electronic commerce and the Internet, organized by the Hague Conference in collaboration with the University of Geneva in September 1999.<sup>5</sup>

<sup>5</sup>Preliminary Document No. 7 for the attention of the Special Commission on General Affairs and Policy of the Hague Conference of May 2000, to be found at [www.hcch.net/doc/gen\\_pd7e.doc](http://www.hcch.net/doc/gen_pd7e.doc)

## ANNEX

### The Hague Conventions

#### 1. Convention relative à la procédure civile [Convention relating to Civil Procedure]

(The Hague, 1 March 1954)

*Status:* Entered into force on 12 April 1957 (43 parties).

*Source:* Hague Conference, Collection of Conventions, Convention No. 2 (available at [www.hcch.net/e/conventions/text02e.html](http://www.hcch.net/e/conventions/text02e.html)).

#### Comments

1. The purpose of the Convention is twofold: to promote national treatment in legal procedures for parties who are nationals of, and for authorities of, other contracting States, and to facilitate judicial cooperation between contracting States by creating uniform procedures and forms for service of process, letters rogatory, security for costs, legal aid, issuance of extracts of records and imprisonment for debts. The Convention has been revised in three stages: service, evidence and access to justice (see the discussion of the Conventions in sections 3-5 below).

#### *Service of process (arts. 1-7)*

2. Service of process typically involves three elements: (a) the documents to be served; (b) service of those documents by means of a representative of the requested State on the person of the receiving party with exception occasionally made for service by mail or by a diplomatic or consular representative of the requesting State; and (c) the proof of service documents created by that representative. Physicality, at the time of drafting, was (only) implicitly present under the Convention for all three elements, while signatures/certifications are required for proof of service under the Convention.

3. An electronic version of service of process could conceivably be created for any one of the elements in the service of process, or for all three of them. The documents to be served are created by or under the control of (semi-)public authorities; therefore, it should not be difficult to transform the documents into electronic form. By contrast, service addressees are often private parties and so the actual service of the documents may in effect be difficult to perform electronically. Whether this is legally permitted will depend on the national law(s) involved and requires further study. Indeed, based on the functional equivalent approach and extrapolating from the fact that many contracting States refuse to accept service by mail, electronic

service may prove legally or practically impossible at least for the near future. Nevertheless, States may be willing to make distinctions between private addressees, commercial addressees, attorneys and public addressees in a graduated acceptance of electronic service (presumably public addressees and attorneys would be the least problematic and private addressees the most so).

#### *Letters rogatory (arts. 8-16)*

4. A letter rogatory is the request by one court to a second court to perform a judicial act on behalf of the first court. Under the Convention, three documents are required in order to execute this judicial request: (a) the requesting court must, through diplomatic channels, submit the letter rogatory to the requested authority; (b) the requested authority must, through the same channels, transmit to the requesting State a document certifying that the letter rogatory has been executed (or the reason why it was not executed); and (c) if the letter rogatory is not in the language of the requested State or in a language agreed upon by both States, it must be accompanied by a translation into one of those languages, which itself must be certified by a diplomatic or consular agent of the requesting State or by a sworn translator of the requested State.

5. Again, there is no explicit requirement under the Convention for any of those documents to be tangible. Furthermore, the only signature and/or certification required by the Convention is when the letter rogatory must be accompanied by a translation that itself must be certified by a diplomatic or consular agent of the requesting State or by a sworn translator of the requested State.

6. Letters rogatory and their accompanying translations as well as the certificates of execution are documents created by or under the oversight of, and communicated between, public authorities. Therefore, States parties may be ready to define common standards for the electronic versions of such documents and subsequently apply them in their mutual relations.

#### *Costs of proceedings (arts. 17-19)*

7. The Convention mandates that a final decision from one contracting State concerning the costs and expenses of a lawsuit (if imposed according to the principle of national treatment) is enforceable in other contracting States. The requested State must enforce that decision if presented with the following documents: (a) a transcript of the decision satisfying relevant conditions of

authenticity established by the national law of its country of origin; (b) an official declaration by the issuing authorities that this decision has achieved the status of *res judicata*; (c) a certification as to the competence of the issuing authority made by the highest official in charge of the administration of justice in the requesting State; and (d) and (e) translations of both the decision and the competency certification into the language of the requested State or into a language agreed upon by the States concerned, to be accompanied, unless agreed otherwise, by a certification of accuracy.

*Legal aid (arts. 20-24)*

8. The Convention establishes that indigent nationals of one contracting State are entitled to the same free legal aid in another contracting State as provided by the latter for civil, commercial or administrative matters to its own nationals. Three types of documentation are required under the Convention in order to benefit from this legal aid: (a) nationals of other contracting States must prove their need through a certificate or declaration of need issued by the authorities of (in order of preference) their habitual residence, their present residence or the country to which they belong; (b) if the person concerned does not reside in the country where the request is made, the certificate or statement of need must be authenticated by a diplomatic or consular agent of the country where the document is to be produced; and (c) the documentary and procedural provisions concerning letters rogatory (i.e. the certifications and translations outlined in paras. 4 and 5 above) are applicable to the transmission of requests for free legal aid and of any documents attached thereto.

9. The Convention does not explicitly specify any format for the required documents.

*Free issue of extracts from civil status records (art. 25)*

10. This section allows indigent nationals of one contracting State to procure free extracts of civil status records from other contracting States under the same conditions as nationals of those States. The Convention does not specify any physical format or signature/certification when the national requests or the State provides those extracts. As far as the requirements for proof of need as set out in paragraph 8 are read as being implied also in this provision, the same considerations as described above would apply here.

*Imprisonment for debt (art. 26)*

11. The Convention here forbids a contracting State to imprison nationals of another contracting State for debts (either as a precautionary measure or as a means of enforcement) under different conditions than the imprisoning State would apply to its own nationals. The Convention does not require any documents or signatures/certifications under this provision.

**Conclusion**

12. See cover note above (in particular paras. 2 and 4).

**2. Convention Abolishing the Requirement of Legalization for Foreign Public Documents**  
(*The Hague, 5 October 1961*)

*Status:* Entered into force on 24 January 1965 (77 parties).

*Source:* Hague Conference, *Collection of Conventions*, Convention No. 12 (available at [www.hcch.net/e/conventions/text12e.html](http://www.hcch.net/e/conventions/text12e.html)).

**Comments**

13. The purpose of this Convention is to abolish the requirement of diplomatic or consular legalization for foreign public documents, specifying instead that authorities in contracting States may issue a certificate ("*apostille*") that will accompany the document and certify the identity and capacity of the document's signatory for the purpose of evidence in all other contracting States.

14. The Convention specifies the size, format and required elements for the *apostille*, a sample of which is annexed to the Convention. Although the *apostille* certifies the identity and capacity of the document's signatory, the *apostille* itself is explicitly exempted from any certification requirement. Finally, the Convention specifies that each contracting State must maintain a register of issued *apostilles*.

15. The *apostille* could easily be given an electronic format (possibly designed under the direction of the Hague Conference), as could the public register of issued *apostilles*.<sup>a</sup> A more difficult problem, however, arises from the fact that the *apostille* must travel together with the public document that it certifies; therefore, an electronic *apostille* will only be effective if the public document that it accompanies is likewise in electronic format. Given that the *apostille* must emanate from the authorities of the same contracting State that issued the original public document but not necessarily from the same authority within that State, it will have to be further discussed whether, for instance, the authority issuing the *apostille* should be entitled to convert the document emanating from another authority within that same State into an electronic form or whether other solutions would have to be found.<sup>b</sup> Member States of the Hague Conference on Private International Law and other States parties to this Convention will address these issues during a special commission on the operation of this Convention as well as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Service Convention") and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Evidence Convention"), to be held in March 2003.

**Conclusion**

16. See cover note above (in particular paras. 2 and 4).

**3. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**  
(*The Hague, 15 November 1965*)

*Status:* Entered into force on 10 February 1969 (48 parties).

*Source:* Hague Conference, *Collection of Conventions*, Convention No. 14 (available at [www.hcch.net/e/conventions/text14e.html](http://www.hcch.net/e/conventions/text14e.html)).

<sup>a</sup>To some extent, electronic land title registers or electronic personal property registers, which do already exist in some States, could serve as examples to develop an electronic *apostille* register.

<sup>b</sup>A first study of these questions was conducted by the Permanent Bureau of the Hague Conference on Private International Law as early as 1990. The preliminary conclusions drawn at that time can be found in the Note on certain questions concerning the operation of the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, drawn up by the Permanent Bureau (Hague Conference on Private International Law, *Proceedings of the Seventeenth Session, 1995, Tome I*, p. 219). Following discussion at the Seventeenth Diplomatic Session, member States decided to include in the agenda of the Conference the international legal problems raised by electronic data interchange (*ibid.*, p. 43). See further the discussion of these issues at the Geneva Round Table in 1999, reported in Preliminary Document No. 7 (see above, note 5) at p. 31 ff.

### Comments

17. The purpose of this Convention is to create uniform procedures for service abroad of judicial and extrajudicial documents, by establishing standardized service documents and a nationally designated central authority for each contracting State through which these documents are to be transmitted to another contracting State for service there. This Convention replaces the provisions of articles 1-7 of the 1954 Convention on Civil Procedure for the States that are party to both Conventions.

18. This Convention differs from the service provisions under the 1954 Civil Procedure Convention (see paras. 2 and 3 above on that Convention) in its standardized service documents and its requirement that each contracting State designate a central authority. The Convention mandates uniform service documents—the request for service from the originating authority and the certificate of service once service has been completed by the requested authority—which are annexed at the end of the Convention. Service as such has to be effected according to the internal law of the requested State or by a method specifically requested by the applicant. The Convention makes a mandatory exception for nationals of the requesting State, who may be served directly through the diplomatic or consular agents of that State, and for addressees who accept service voluntarily; in all other cases, service abroad must be performed according to the procedures and forms established by the Convention.

19. In accommodating this Convention to the electronic universe, the analysis is the same as for the Service portion of the 1954 Civil Procedure Convention (see paras. 2 and 3 above on that Convention). Again, one could assume that States parties may be ready to define common standards for the electronic versions of such documents and subsequently apply them in their mutual relations, given that they are all created by or under the control of (semi-)public authorities. By contrast, the actual service of these documents on the addressee will be more difficult to perform electronically because many service addressees are private parties. Nevertheless, States may be willing to introduce a graduated electronic service, accepting it first for governmental addressees and/or attorneys and then for commercial addressees, but they may not accept electronic service for private addressees in the near future.<sup>e</sup>

### Conclusion

20. See cover note above (in particular paras. 2 and 4).

#### 4. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 18 March 1970)

*Status:* Entered into force on 7 October 1972 (1 signatory, 38 parties).

*Source:* Hague Conference, *Collection of Conventions*, Convention No. 20 (available at [www.hcch.net/e/conventions/text20e.html](http://www.hcch.net/e/conventions/text20e.html)).

### Comments

21. The purpose of the Convention is to facilitate the transmission and execution abroad of requests for evidence in civil or commercial matters through the creation of national central authorities and a standardized procedure. This Convention

replaces the provisions of articles 8-16 of the 1954 Convention on Civil Procedure for the States that are party to both Conventions.

22. The Convention does not specify any particular form for the letter of request (and indeed it explicitly prohibits contracting States from requiring that such request be subject to legalization) or for the documents certifying that the request was executed. However, recommended forms have been developed for letters of request, which can be found in the Practical Handbook on the operation of the Evidence Convention.<sup>d</sup> Moreover, if the letter of request must be translated into an official language of the requested State, then that translation must be certified by a diplomatic officer, consular agent, sworn translator or other authorized person of either State.

23. The letter of request, as well as the certification that the request was executed and any necessary translations are all created by or under the control of public authorities. Therefore, States parties may be ready to define common standards for the electronic versions of each document and subsequently apply them in their mutual relations.<sup>e</sup>

### Conclusion

24. See cover note above (in particular paras. 2 and 4).

#### 5. Convention on International Access to Justice (The Hague, 25 October 1980)

*Status:* Entered into force on 1 May 1988 (6 signatories, 18 parties).

*Source:* Hague Conference, *Collection of Conventions*, Convention No. 29 (available at [www.hcch.net/e/conventions/text29e.html](http://www.hcch.net/e/conventions/text29e.html)).

### Comments

#### Legal aid (arts. 1-13)

25. The purpose of this Convention is to facilitate access to legal aid for eligible nationals of one contracting State for civil and commercial court proceedings in another contracting State and on the same conditions as that second State provides legal aid to its own nationals habitually resident there. Transmission of applications is effected according to a standardized procedure between transmitting and central authorities. This Convention provides similar benefits by means of similar procedures as those stipulated under the 1954 Civil Procedure Convention (see above) and adds an increased standardization; indeed, this Convention replaces the legal aid provisions of the 1954 Convention for those States that are party to both Conventions.

26. The Convention mandates that applications for legal aid falling within the scope of the Convention must be made according to the model form annexed to it; any supporting documentation required by the application is exempted from legalization. If the application (or any supporting documentation) must be translated into an official language of the requested State, the translation does not need to be certified.

<sup>d</sup>Practical Handbook on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (loose-leaf edition), 1984. A new version is currently being prepared by the Permanent Bureau.

<sup>e</sup>See further the discussion of these issues at the Geneva Round Table in 1999, reported in Preliminary Document No. 7 (see above, note 5) at pp. 30 ff.

<sup>e</sup>See also the extensive discussion of these issues at the Geneva Round Table in 1999, reported in Preliminary Document No. 7 (see above, note 5) at pp. 25-30.

*Security for costs and enforceability of orders  
for costs (arts. 14-17)*

27. No contracting State may require any security, bond or deposit for costs from a plaintiff who is a foreign national habitually resident in another contracting State only on the basis of that (natural or legal) person's foreign nationality. Where an order for payment of costs and expenses of proceedings is made against such person, it is to be declared enforceable in other contracting States upon application by the person entitled to the benefit of the order. That application must include four documents: (a) a true copy of the relevant part of the decision; (b) any document necessary to prove that the decision is final and enforceable in the country of origin; and (c) and (d) certified translations of both the decision and the document proving finality.

28. All documents required by the Convention for enforcing cost orders are public documents circulated among public authorities. Therefore, States parties may be ready to define common

standards for the electronic versions of each document and subsequently apply them in their mutual relations.

**Conclusion**

29. See cover note above (in particular paras. 2 and 4).

30. For any questions and comments please contact:

Andrea Schulz, LL.M.  
First Secretary  
Hague Conference on Private International Law  
6, Scheveningseweg  
2517 KT The Hague  
Netherlands  
Telephone: + (31) (70) 363 3303  
Facsimile: + (31) (70) 360 4867  
Electronic mail: secretariat@hcch.nl  
Internet: www.hcch.net

**A/CN.9/WG.IV/WP.98/Add.6**

**[Original: French]**

**CONTENTS**

	<i>Page</i>
II. Compilation of comments .....	637
B. Intergovernmental organizations .....	637
1. International Road Transport Union .....	637

**II. COMPILATION OF COMMENTS**

**B. Intergovernmental organizations**

**1. International Road Transport Union**

*[Original: French]  
[25 November 2002]*

1. The International Road Transport Union (IRU) is following with interest the work of UNCITRAL to eliminate legal barriers to the development of electronic commerce in international instruments relating to international trade. It appreciates the high-quality analysis of legal instruments—including those relating to carriage by road—contained in document A/CN.9/WG.IV/WP.94.

2. It has examined closely the preliminary draft convention on [international] contracts concluded or evidenced by data messages. In the light of the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention) of 19 May 1956, we wish to make the following comments:

*1. Preliminary draft convention*

*Article 1*

*Variant A*

3. The provision stating that “this Convention applies to contracts concluded or evidenced by means of data messages” may raise problems of interpretation. All the means of communication between parties to a contract of carriage are complementary to one another and non-exclusive in character. Thus, a contract of international carriage by road may be concluded orally by telephone, confirmed by an exchange of correspondence on paper and evidenced by a CMR consignment note in electronic form. It is not clear whether, in such a case, the future Convention is applicable or not. If it were confirmed that it was applicable to such a case, this would imply standardization of the rules for contract formation, not only when the contract is concluded electronically but also when it is concluded orally or by exchange of correspondence on paper, solely because one of the contractual documents (in this case the CMR consignment

note) is exchanged electronically. However, if it were not confirmed that the future Convention applied to the case in question, this would mean there was a conflict between the scope of application as formulated and the content of the future Convention.

4. Paragraph 3 of the preliminary draft, which allows the contracting parties the right to declare that they will apply the future Convention only to contracts concluded between parties having their places of business in two different States, would exclude a large number of contracts of carriage that are subject to the CMR Convention and concluded between parties having their places of business in the same State. A distinction should therefore be made between “international contracts” and “international carriage”.

#### *Variant B*

5. The term “international” as defined in the preliminary draft is incompatible with the term “international” as defined in the CMR Convention. The CMR Convention (art. 1.1) considers international any carriage in which the place of taking over of the goods and the place designated for delivery are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties to the contract of carriage. The definition in the preliminary draft, which states that a contract is considered international (the future Convention therefore being applicable to it) if, at the time of conclusion of the contract, the parties have their places of business in different States, would exclude a large number of contracts of carriage that are subject to the CMR Convention and concluded between parties having their places of business in the same State.

#### *Article 3*

6. A contract of international carriage by road “evidenced” by a CMR consignment note established electronically could be considered subject, in terms of its formation, to the future Convention, even in cases where the contract was concluded orally or on paper. In order to avoid problems of interpretation, the scope of application of the future Convention should be better defined (see the comments on article 1).

#### *Article 5*

7. The definition of the term “data message” includes, inter alia, “telegram, telex or telecopy”. However, variants A and B of article 13, paragraph 3,\* of the preliminary draft do not seem to take account of this definition.

8. Under variant A, the signature would not be valid unless “a method” were used to identify the signatory. If this provision were kept in its current form, it could imperil practices such as the exchange of contractual documents by fax. Under variant B, the requirement for a signature is met

if “a data message” bears “an electronic signature ... which is as reliable as was appropriate ...”. Telegram, telex and telecopy do not presuppose the use of electronic signatures.

#### *Article 8*

9. This article states that “an acceptance of an offer becomes effective at the moment the indication of assent is received by the offeror”—that is, pursuant to article 5 (g), by “a natural person or legal entity that offers goods or services”.

10. Unlike public transport operators, which offer their services on an ongoing basis, road carriers must consent to a contract. The principal is generally the offeror (cf. J. Putzeys, *Le contrat de transport routier de marchandises (The contract for the carriage of goods by road)*, p. 113 and 114). The principal’s order for a means of transport must be accepted by the road carrier.

11. It follows that, contrary to the provisions of article 8, the time of formation of the contract of carriage most often corresponds to the time when the “indication of assent” is received by the principal.

#### *2. Other problems*

12. Ms. Geneviève Burdeau, Professor of the University of Paris, proposes (annex to document A/CN.9/WG.IV/WP.89) an interpretative agreement, which she believes would be sufficient to eliminate the barriers to electronic commerce in existing treaties.

13. France, on the other hand, believes (A/CN.9/WG.IV/WP.93, para. 7) that an agreement that interprets existing treaties would not achieve the intended objective. It is not a case of negotiating an agreement that would interpret, modify or amend existing treaties, but of concluding a new agreement allowing for electronic equivalents.

14. As the Swiss delegation rightly states (A/CN.9/WG.IV/WP.98/Add.4, para. 7), the question of whether an amendment or simply a supplement to existing treaties is needed cannot be decided a priori. To answer it, the treaties involved would have to be looked at individually. The Swiss delegation therefore also sees no possibility of avoiding the need for a revision by choosing the form of an authentic interpretation. The delegation believes that changing the rules for the interpretation of a legal instrument means amending it; therefore, such an action has to be treated as a revision.

15. With regard to considering the CMR Convention, as the Swiss delegation advises, IRU must emphasize that the drafters of that Convention wanted to prevent it from meeting the same fate as the Warsaw Convention and the rules of maritime law concerning bills of lading and the contract of carriage by sea.

16. Article 1, paragraph 5, of the CMR Convention therefore provides that “the Contracting Parties agree not to vary any of the provisions of this Convention by special agreements between two or more of them”. Thanks to this provision, there is a single text that governs uniformly the

\*Translator’s note: The reference to the paragraph has been added in the English translation for clarity.

contract of international carriage by road between the Atlantic and the Pacific. In respect of the CMR Convention, therefore, the only remaining option is a supplementary agreement allowing for electronic equivalents. This option, in the form of a protocol on electronic data interchange (EDI) to the CMR Convention, is currently being used by the Working Group on Road Transport of the United Nations Economic Commission for Europe (ECE), which is considering the supplement to the CMR Convention drafted and proposed by Professor Jacques Putzeys and the International Institute for the Unification of Private Law (Unidroit).

#### *Conclusions*

#### 17. Bearing in mind:

(a) That, in order to cater for specific characteristics of road transport set out above, several principles

already adopted by the drafters of the preliminary draft convention on [international] contracts concluded or evidenced by data messages need to be thoroughly amended, by analogy with the United Nations Sales Convention; and

(b) That ECE has already begun work on the supplementary agreement to the CMR Convention allowing electronic equivalents,

IRU considers that it would be appropriate not to include international carriage by road in the preliminary draft convention but, as suggested in the note by the secretariat (A/CN.9/WG.IV/WP.94, para. 104), to continue, within UNCITRAL, “monitoring the current efforts being undertaken under the auspices of ECE” and to consider “their progress at a later stage”. This would avoid duplication of effort, which would cause confusion and produce incoherent results.

### **E. Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal aspects of electronic commerce: Electronic contracting: provisions for a draft convention**

(A/CN.9/WG.IV/WP.100) [Original: English]

#### **NOTE BY THE SECRETARIAT**

1. The Working Group began its deliberations on electronic contracting at its thirty-ninth session, held in New York from 11 to 15 March 2002, when it considered a note by the secretariat on selected issues relating to electronic contracting (A/CN.9/WG.IV/WP.95). That note also contained an initial draft tentatively entitled “Preliminary draft convention on [international] contracts concluded or evidenced by data messages” (A/CN.9/WG.IV/WP.95, annex I). The Working Group further considered a note by the secretariat transmitting comments that had been formulated by an ad hoc expert group established by the International Chamber of Commerce to examine the issues raised in document A/CN.9/WG.IV/WP.95 and the draft provisions set out in its annex I (A/CN.9/WG.IV/WP.96).

2. At that time, the Working Group held a general exchange of views on the form and scope of the instrument, but agreed to postpone discussion on exclusions from the draft convention until it had had an opportunity to consider the provisions related to location of the parties and contract formation (see A/CN.9/509, paras. 18-40). The Working Group then took up articles 7 and 14, both of which dealt with issues related to the location of the parties (A/CN.9/509, paras. 41-65). After it had completed its initial review of those provisions, the Working Group proceeded to consider the provisions dealing with contract for-

mation in articles 8-13 (A/CN.9/509, paras. 66-121). The Working Group concluded its deliberations on the draft convention at that session with a discussion of draft article 15 on availability of contract terms (A/CN.9/509, paras. 122-125). The Working Group agreed, at that time, that it should consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation), at its fortieth session (A/CN.9/509, para. 15).

3. The Working Group resumed its deliberations on the preliminary draft convention at its fortieth session, held in Vienna from 14 to 18 October 2002. The Working Group began its deliberations by a general discussion on the scope of the preliminary draft convention (see A/CN.9/527, paras. 72-81). The Working Group proceeded to consider articles 2-4, dealing with the sphere of application of the draft convention and articles 5 (definitions) and 6 (interpretation) (A/CN.9/527, paras. 82-126). The Working Group requested the secretariat to prepare a revised text of the preliminary draft convention for consideration by the Working Group at its forty-first session.

4. The annex to this note contains the revised version of the preliminary draft convention, which reflects the deliberations and decisions of the Working Group at its thirty-ninth and fortieth sessions.

## ANNEX I

Preliminary draft convention<sup>1</sup> on [international] contracts concluded or evidenced by data messages

## Chapter I. Sphere of application

## Article 1

Scope of application<sup>2</sup>

1. This Convention applies to [any kind of information in the form of data messages that is used] [the use of data messages] in the context of [transactions] [contracts] between parties whose places of business are different States:

(a) When the States are Contracting States;

[(b) When the rules of private international law lead to the application of the law of a Contracting State]; or<sup>3</sup>

(c) When the parties have agreed that it applies.<sup>4</sup>

2. The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the [transaction] [contract] or from any dealings between the parties or from information disclosed by the parties at any time before or at the conclusion of the [transaction] [contract].

3. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

## Article 2

## Exclusions

## Variant A

This Convention does not apply to [transactions relating to] the following contracts:

(a) Contracts concluded for personal, family or household purposes unless the party offering the goods or services, at any time before or at the conclusion of the contract, nei-

<sup>1</sup>The draft instrument has been prepared in the form of a convention in accordance with the working assumption agreed to at the thirty-eighth session of the Working Group (A/CN.9/484, para. 124) and without prejudice to a final decision by the Working Group as to the nature of the instrument.

<sup>2</sup>This provision reflects essentially the scope of application of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980, "The United Nations Sales Convention"), as set out in its article 1.

<sup>3</sup>The phrase "when the rules of private international law lead to the application of the law of a Contracting State" in paragraph (b) reproduces a rule that is contained in the provisions on the sphere of application of other United Nations Commission on Trade Law (UNCITRAL) instruments. Although it was suggested that the phrase should be deleted, the Working Group, at its thirty-ninth session, decided to retain it for further consideration (A/CN.9/509, para. 38).

<sup>4</sup>This possibility is provided, for instance, in article 1, paragraph 2 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. However, the Working Group may wish to consider whether, in the context of the preliminary draft convention, it would be appropriate to offer the parties such a right even in the absence of other connecting factors.

ther knew nor ought to have known that they were intended for any such use;<sup>5</sup>

(b) [Contracts granting] limited use of intellectual property rights;<sup>6</sup>

(c) [Other exclusions, such as real estate transactions, that could be added by the Working Group.] [Other matters identified by a Contracting State under a declaration made in accordance with article X].<sup>7</sup>

## Variant B

1. This Convention does not apply to [transactions relating to] the following [contracts]:

(a) [Contracts for] [the grant of] limited use of intellectual property rights;

(b) [Other exclusions, such as real estate transactions, that could be added by the Working Group.] [Other matters identified by a Contracting State under a declaration made in accordance with article X].

2. This Convention does not override any rule of law intended for the protection of consumers.<sup>8</sup>

## Article 3

## Matters not governed by this Convention

This Convention is not concerned with:

(a) The validity of the [transaction] [contract] or of any of its provisions or of any usage [except as otherwise provided in articles [...]].<sup>9</sup>

<sup>5</sup>This provision follows an exclusion contained in article 2, subparagraph (a) of the United Nations Sales Convention, and in most instruments prepared by UNCITRAL. It reflects the initial understanding of the Working Group that the future instrument should not focus on consumer transactions (A/CN.9/527, paras. 83-89).

<sup>6</sup>This exclusion reflects the initial understanding of the Working Group that licensing contracts should be distinguished from other commercial transactions and might need to be excluded from the draft convention (A/CN.9/527, paras. 90-93).

<sup>7</sup>This draft article might contain additional exclusions, as may be decided by the Working Group. With a view to facilitating the consideration of this issue by the Working Group, annex II of the initial draft (A/CN.9/WG.IV/WP.95) reproduced, for illustrative purposes and without the intention of being exhaustive, exclusions typically found in domestic laws on electronic commerce. Other exclusions proposed at the Working Group's fortieth session include the following: contracts creating rights in real estate, contracts involving courts or public authorities, suretyship, family law or the law of succession; payment systems, negotiable instruments, derivatives, swaps, repurchase agreements (repos), foreign exchange, securities and bond markets, while possibly including general procurement activities of banks and loan activities (A/CN.9/527, para. 95). The second phrase in square brackets in this subparagraph is an alternative formulation that would obviate the need for a common list of exclusions (A/CN.9/527, para. 96).

<sup>8</sup>Paragraph 2 of variant B has been included as an alternative to subparagraph (a) of variant A following a suggestion made at the Working Group's fortieth session (see A/CN.9/527, para. 89).

<sup>9</sup>Draft subparagraphs (a) and (c) are derived from article 3 of the United Nations Sales Convention. The Working Group may wish to consider the relationship between the general exclusions under the draft article and other provisions that, for instance, affirm the validity of data messages (see A/CN.9/527, para. 103).



(b) The rights and obligations of the parties arising out of the [transaction] [contract] or of any of its provisions or of any usage;<sup>10</sup>

(c) The effect which the [transaction] [contract] may have on the ownership of rights created or transferred by the [transaction] [contract].<sup>11</sup>

#### Article 4

##### Party autonomy

1. The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions [except for the following: ...].<sup>12</sup>

[2. Nothing in this Convention requires a person to use or accept [information in electronic form] [data messages], but a person's consent to do so may be inferred from the person's conduct.]<sup>13</sup>

## Chapter II. General provisions

#### Article 5

##### Definitions<sup>14</sup>

For the purposes of this Convention:

(a) "Data message" means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

(b) "Electronic data interchange (EDI)" means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) "Originator" of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

(d) "Addressee" of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) "Information system" means a system for generating, sending, receiving, storing or otherwise processing data messages;

(f) "Automated information system" means a computer program or an electronic or other automated means used to initiate an action or respond to data messages or performances in whole or in part, without review or intervention by a natural person each time an action is initiated or a response is generated by the system;<sup>15</sup>

(g) "Offeror" means a natural person or legal entity that offers goods or services;<sup>16</sup>

(h) "Offeree" means a natural person or legal entity that receives or retrieves an offer of goods or services;

(i) "Electronic signature" means data in electronic form in, affixed to, or logically associated with, a data message, which may be used to identify the person holding the signature creation data in relation to the data message and indicate that person's approval of the information contained in the data message;<sup>17</sup>

(j) "Place of business"<sup>18</sup> means ...

##### Variant A<sup>19</sup>

... any place of operations where a person carries out a non-transitory activity with human means and goods or services;]

<sup>15</sup>This definition is based on the definition of "electronic agent" contained in section 2 (6) of the Uniform Electronic Transactions Act of the United States of America; a similar definition is also used in section 19 of the Uniform Electronic Commerce Act of Canada. This definition was included in view of the provisions of draft article 12.

<sup>16</sup>The proposed definitions of "offeror" and "offeree" (draft subparagraphs (g) and (h), respectively) have been included in view of the fact that those expressions are used in draft articles 8 and 9, in a context in which they might not easily be replaced with the words "originator" or "addressee".

<sup>17</sup>This provision reproduces the definition of electronic signature contained in article 2 (a) of the UNCITRAL Model Law on Electronic Signatures. The initial draft contained in document A/CN.9/WG.IV/WP.95 included, as a variant to this provision, a general definition of "signature". Although the Working Group tentatively agreed on retaining both variants, the secretariat suggests that it might be more appropriate, given the limited scope of the draft convention, to define only "electronic signatures", leaving a definition of "signature" for the otherwise applicable law, as had been suggested at the Working Group's fortieth session (see A/CN.9/527, paras. 116-119).

<sup>18</sup>The proposed definition appears within square brackets in view of the fact that, although having repeatedly used the concept of "place of business" in its various instruments, the Commission has not thus far defined that concept (see A/CN.9/527, paras. 120-122). At the Working Group's thirty-ninth session, it was suggested that the rules on parties' location should be expanded to include elements such as the place of an entity's organization or incorporation (A/CN.9/509, para. 53). The Working Group decided that it could consider the desirability of using supplementary elements to the criteria used to define the parties' location by expanding the definition of place of business (A/CN.9/509, para. 54). The Working Group may wish to consider whether the proposed additional notions and any other new elements should be provided as an alternative to the elements currently used or only as a default rule for those entities without an "establishment". Additional cases that might deserve further consideration by the Working Group might include situations where the most significant component of human means or goods or services used for a particular business are located in a place bearing little relationship to the centre of a company's affairs, such as when the only equipment and personnel used by a so-called "virtual business" located in one country consists of leased space in a third-party server located elsewhere.

<sup>19</sup>Variant A reflects the essential elements of the notions of "place of business", as understood in international commercial practice, and "establishment", as used in article 2, subparagraph (f), of the UNCITRAL Model Law on Cross-Border Insolvency.

<sup>10</sup>This provision has been included so as to make it clear that the preliminary draft convention is not concerned with substantive issues arising out of the contract, which, for all other purposes, remains subject to its governing law (see A/CN.9/527, paras. 10-12).

<sup>11</sup>Draft subparagraph (c) was based, *mutatis mutandis*, on article 4, subparagraph (b), of the United Nations Sales Convention.

<sup>12</sup>Draft article 4 reflects the general principle of party autonomy, as recognized in several UNCITRAL instruments. The Working Group may wish to consider, however, whether some limitation to this principle might be appropriate or desirable in the context of the preliminary draft convention, in particular in the light of provisions such as draft articles 13, paragraphs 2 and 15 (see A/CN.9/527, para.109).

<sup>13</sup>The provision reflects the idea that parties should not be forced to accept contractual offers or acts of acceptance by electronic means if they did not want to do so (A/CN.9/527, para. 108).

<sup>14</sup>The definitions contained in draft paragraphs (a) to (d) and (f) are derived from article 2 of the UNCITRAL Model Law on Electronic Commerce.

*Variant B*<sup>20</sup>

... the place where a party pursues an economic activity through a stable establishment for an indefinite period;]

[(k) "Person" and "party" include natural persons and legal entities;]<sup>21</sup>

[(l) "Transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs;]<sup>22</sup>

[(m) Other definitions that the Working Group may wish to add.]<sup>23</sup>

**Article 6***Interpretation*<sup>24</sup>

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

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable [by virtue of the rules of private international law].<sup>25</sup>

**Article 7**<sup>26</sup>*Location of the parties*

1. For the purposes of this Convention, a party is presumed to have its place of business at the geographic location indicated by it [in accordance with article 15] [, unless it is manifest and clear that ...

<sup>20</sup>Variant B follows the understanding of this expression within the European Union (see paragraph 19 of the preamble to Directive 2000/31/EC of the European Union). The words "indefinite period" are meant to exclude only the temporary provision of goods or services out of a specific location, without requiring, however, that the company providing those goods or services be established indefinitely at that place.

<sup>21</sup>This definition is offered to make it clear that when using the words "person" or "party" without further qualification, the preliminary draft convention is referring to both natural persons and legal entities. The Working Group may wish to note that, during the preparation of the UNCITRAL Model Law on Electronic Commerce, it was felt that such a definition did not belong in the text of the instrument, but in its guide to enactment.

<sup>22</sup>The Working Group may find it desirable to include a definition of "transaction" in the event that the word is used in article 1 and elsewhere, in view of the varying meaning of the word "transaction" in various legal systems (A/CN.9/527, para. 101). The proposed definition is drawn from section 2, paragraph 16 of the Uniform Electronic Transactions Act of the United States.

<sup>23</sup>The Working Group may wish to consider the need for or desirability of including definitions for other terms used in the preliminary draft convention, such as "signatory" (if variant B of draft article 14 (Form requirements) is adopted), "Internet", "web site" and "domain name".

<sup>24</sup>This draft article mirrors article 7 of the United Nations Sales Convention and similar provisions in other UNCITRAL instruments.

<sup>25</sup>The closing phrase has been placed in square brackets at the request of the Working Group. Similar formulations in other instruments had been incorrectly understood as allowing immediate referral to the applicable law pursuant to the rules on conflict of laws of the forum State for the interpretation of a Convention without regard to the conflict of laws rules contained in the Convention itself (A/CN.9/527, paras. 125 and 126).

<sup>26</sup>Draft article 7 is one of the central provisions in the preliminary draft convention and one which might be essential, if the sphere of application of the preliminary draft convention is defined along the lines of

*Variant A*

... the party does not have a place of business at such location].

*Variant B*

... the party does not have a place of business at such location [[and] [or] that such indication is made solely to trigger or avoid the application of this Convention]].

2. If a party has more than one place of business, the place of business for the purposes of this Convention is that which has the closest relationship to the relevant [transaction] [contract] and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the [transaction] [contract].<sup>27</sup>

3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.

4. The place of location of the equipment and technology supporting an information system used by a legal entity for the conclusion of a contract or the place from which such information system may be accessed by other persons, in and of themselves, does not constitute a place of business [, unless such legal entity does not have a place of business [within the meaning of article 5 (j)].<sup>28</sup>

5. The sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country.<sup>29</sup>

variant A of draft article 1. Draft paragraph 1 builds upon a proposal that was made at the thirty-eighth session of the Working Group, to the effect that the parties in electronic transactions should have the duty to disclose their places of business (A/CN.9/484, para. 103). That duty is reflected in draft article 15, paragraph 1, subparagraph (b). The draft provision is not intended to create a new concept of "place of business" for the online world. The phrase in square brackets in variant B aims to prevent a party from benefiting from recklessly inaccurate or untruthful representations (A/CN.9/509, para. 49), but not to limit the parties' ability to choose the Convention or otherwise agree on the applicable law.

<sup>27</sup>Draft paragraphs 2 and 3 reflect traditional rules applied to determine a party's place of business (see, for instance, United Nations Sales Convention, art. 10).

<sup>28</sup>This draft paragraph proposes a rule specifically concerned with issues raised by the use of electronic means of communication in contract formation. The draft paragraph is intended to reflect an opinion shared by many delegations participating at the thirty-eighth session of the Working Group that, when dealing with the location of the parties, the Working Group should take care to avoid devising rules that would result in any given party being considered as having its place of business in one country when contracting electronically and in another country when contracting by more traditional means (A/CN.9/484, para. 103). The draft paragraph follows the solution proposed in paragraph 19 of the preamble to Directive 2000/31/EC of the European Union. The phrase within square brackets is intended to deal only with so-called "virtual companies" and not with natural persons, who are covered by the rule contained in draft paragraph 3. The Working Group may wish to consider whether draft paragraphs 4 and 5, which the Working Group agreed to retain for further consideration, should be combined in one provision (A/CN.9/509, para. 59).

<sup>29</sup>This draft paragraph takes into account the fact that the current system for assignment of domain names was not originally conceived in geographical terms and that, therefore, the apparent connection between a domain name and a country is often insufficient to conclude that there is a genuine and permanent link between the domain name user and the country (A/CN.9/509, paras. 44-46). However, at the Working Group's thirty-ninth session, it was said that in some countries the assignment of domain names was only made after verification of the accuracy of the

### Chapter III. Use of data messages in international [transactions] [contracts]

#### Article 8

##### *Use of data messages in contract formation*<sup>30</sup>

1. Unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer].<sup>31</sup>
2. When expressed in the form of a data message, an offer and the acceptance of an offer become effective when they are received by [the addressee] [the offeree or the offeror, as appropriate].<sup>32</sup>
3. Where data messages are used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

#### Article 9

##### *Invitations to make offers*

1. A data message containing a proposal to conclude a contract that is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, is to be regarded merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.<sup>33</sup>
2. Unless otherwise indicated by the offeror, the offer of goods or services through [automated information systems] [using an

information provided by the applicant, including its location in the country to which the relevant domain name related. For those countries, it might be appropriate to rely, at least in part, on domain names for the purpose of article 7, contrary to what was suggested in the draft paragraph (A/CN.9/509, para. 58). The Working Group may wish to consider whether the proposed rules should be expanded to deal with those situations.

<sup>30</sup>The draft article, which was previously numbered article 10, replaces the entirety of former draft article 8, except for its paragraphs 2 and 3, which have been combined in the new paragraph 2, as requested by the Working Group at its thirty-ninth session (A/CN.9/509, paras. 67-73). The provisions of paragraph 1 are based on article 11, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce.

<sup>31</sup>The phrase “or other actions communicated electronically”, which is derived from section 20, paragraph 1, subparagraph (b) of the Uniform Electronic Commerce Act of Canada, are intended to clarify rather than expand the scope of the rule contained in the Model Law. They appear within square brackets, however, in the event that the Working Group finds that such additional clarification is not needed, as was suggested at its thirty-ninth session (A/CN.9/509, para. 89).

<sup>32</sup>The rules in this paragraph, which appeared in the former draft article 8, reflect the essence of the rules on contract formation contained, respectively, in articles 15, paragraph 1, and 18, paragraph 2, of the United Nations Sales Convention. The verb “reach”, which is used in the United Nations Sales Convention, has been replaced with the verb “receive” in the draft article so as to align it with draft article 11, which is based on article 15 of the UNCITRAL Model Law on Electronic Commerce.

<sup>33</sup>This provision, which is inspired by article 14, paragraph 1, of the United Nations Sales Convention, is intended to clarify an issue that has raised a considerable amount of discussion since the advent of the Internet. The proposed rule results from an analogy between offers made by electronic means and offers made through more traditional means (see A/CN.9/509, paras. 76-85).

interactive application that appears to allow for the contract to be concluded automatically]<sup>34</sup> ...

#### *Variant A*

... is presumed to indicate the intention of the offeror to be bound in case of acceptance.<sup>35</sup>

#### *Variant B*

... does not, in and of itself, constitute evidence of the offeror’s intention to be bound in case of acceptance.<sup>36</sup>

#### Article 10

##### *Other uses of data messages in international [transactions] [in connection with international contracts]*<sup>37</sup>

1. Unless otherwise agreed by the parties, any communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention may be expressed by means of data messages [or other actions communicated electronically in a manner that is intended to express the offer or acceptance of the offer].

<sup>34</sup>Paragraph 2 offers criteria for determining a party’s intention to be bound in case of acceptance. The first phrase is based on the general rule on interpretation of a party’s consent, which is contained in paragraph 3 of article 8 of the United Nations Sales Convention. At the Working Group’s thirty-ninth session, it was said that the party placing an order might have no means of ascertaining how the order would be processed and whether it was in fact dealing with “automated computer systems allowing the contract to be concluded automatically” or whether other actions, by human intervention or through the use of other equipment, might be required in order effectively to conclude a contract or process an order. The original formulation in the draft paragraph was further criticized because the words “allowing the contract to be concluded automatically”, which appeared to assume that a valid contract had been concluded, were felt to be misleading in a context dealing with actions that might lead to contract formation (A/CN.9/509, para. 82). The Working Group may wish to consider whether the alternative formulation proposed in the second set of square brackets, which places emphasis on the reliance by the offeree, adequately address those concerns.

<sup>35</sup>The rule proposed in variant A is similar to the rule proposed in legal writings for the functioning of automatic vending machines (see A/CN.9/WG.IV/WP.95, para. 54).

<sup>36</sup>At the Working Group’s thirty-ninth session, it was pointed out that entities offering goods or services through a web site that used interactive applications enabling negotiation and immediate processing of purchase orders for goods or services frequently indicated in their web sites that they were not bound by those offers. If that already was the case in practice, it would be questionable for the Working Group to reverse that situation in the draft provision (A/CN.9/509, para. 82). Variant A reflects that proposition and treats offers of goods or services, even where an “automated information system” is used, as an invitation to make offers. An alternative approach to that end might be to combine paragraphs 1 and 2 in a single provision, as had been suggested at the Working Group’s thirty-ninth session (A/CN.9/509, para. 84) along the following lines:

“A proposal for concluding a contract that is not addressed to one or more specific persons, but is generally accessible to persons making use of information systems, such as the offer of goods and services through an Internet web site, including offers using [automated information systems] [interactive applications that appear to allow for the contract to be concluded automatically] is to be considered merely as an invitation to make offers, unless it indicates the intention of the offeror to be bound in case of acceptance.”

<sup>37</sup>The rules contained in this draft article are based on article 11, paragraph 1, of the UNCITRAL Model Law on Electronic Commerce. See also footnote 31 for explanations on the phrase “or other actions communicated electronically”.

2. Where data messages are used for communication, declaration, demand, notice or request in accordance with this article, such communication, declaration, demand, notice or request shall not be denied validity or enforceability on the sole ground that data messages were used for that purpose.

[3. The provisions of this article do not apply to the following: ...] [The provisions of this article do not apply to those matters identified by a Contracting State under a declaration made in accordance with article X.]<sup>38</sup>

### Article 11

#### *Time and place of dispatch and receipt of data messages*<sup>39</sup>

##### *Variant A*

1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

2. Unless otherwise agreed by the parties, if the addressee has designated an information system for the purpose of receiving data messages, the data message is deemed to be received at the time when it enters the designated information system; if the data message is sent to an information system of the addressee that is not the designated information system, the data message is deemed to be received at the time when the data message is retrieved by the addressee. If the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.<sup>40</sup>

3. Paragraph 2 of this article applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph 5 of this article.

4. Unless otherwise agreed by the parties, when the originator and the addressee use the same information system, both the dispatch and the receipt of a data message occur when the data message becomes capable of being retrieved and processed by the addressee.<sup>41</sup>

<sup>38</sup>Given the broad scope of the draft convention, which now covers all electronic communications and not only contract formation, the Working Group may wish to consider whether additional specific exclusions would be needed.

<sup>39</sup>Except for draft paragraph 4, the rules contained in this draft article are based on article 15 of the UNCITRAL Model Law on Electronic Commerce, with some adjustments to harmonize the style of the individual provisions with the style used elsewhere in the draft convention, which follows more closely the style of the United Nations Sales Convention.

<sup>40</sup>Draft paragraph 2 of variant A does not add further requirements to those set forth in article 15, paragraph 2, of the Model Law, unlike some domestic legislative texts based on the Model Law that generally require that a message should in all cases be "in a form capable of being retrieved and processed by [the addressee's] system" (Uniform Electronic Transactions Act of the United States, section 15 (b) (1) (2)), or "capable of being retrieved and processed by the addressee" (Uniform Electronic Commerce Act of Canada, section 23 (1)), and not only when both parties use the same system.

<sup>41</sup>This draft paragraph deals with cases where both the originator and the addressee use the same communication system. In such a case, the criterion used in draft paragraph 1 cannot be used, since the message remains in a system that cannot be said to be "outside the control of the originator". The rule proposed in the draft paragraph treats dispatch and receipt of a data message as being simultaneous when the message "becomes capable of being retrieved and processed by the addressee". This situation was not contemplated by article 15, paragraph 1, of the Model Law. It is submitted, however, that the proposed special rule, which is inspired by section 23 (1) (a) of the Uniform Electronic Commerce Act of Canada, does not conflict with the rules contained in article 15 of the Model Law.

5. Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business and is deemed to be received at the place where the addressee has its place of business, as determined in accordance with article 7.

##### *Variant B*

1. Unless otherwise agreed by the parties, the dispatch of a data message occurs when it enters an information system outside the control of the originator or of the person who sent the data message on behalf of the originator.

2. Unless otherwise agreed by the parties, the data message is deemed to be received at the time when the message is capable of being retrieved and processed by the addressee.<sup>42</sup>

### Article 12

#### *Automated transactions*

Unless otherwise agreed by the parties, a contract may be formed by the interaction of an automated information system and a person or by the interaction of automated information systems, even if no person reviewed each of the individual actions carried out by such systems or the resulting agreement.<sup>43</sup>

### Article 13

#### *Error in electronic communications*

##### *Variant A*

1. Unless otherwise [expressly] agreed by the parties, a party offering goods or services through an automated information system shall make available to the parties that use the system technical means allowing the parties to identify and correct errors [in data messages exchanged through the information system] [prior to the conclusion of a contract]. [The technical means to be made available pursuant to this paragraph shall be appropriate, effective and accessible.]<sup>44</sup>

<sup>42</sup>At the Working Group's thirty-ninth session it was suggested that paragraph 2, and possibly paragraphs 3-5, should be replaced with a shorter provision to the effect that a data message was deemed to be received if the message was capable of being retrieved and processed by the addressee, as contemplated in draft paragraph 4 of variant A. The Working Group may wish to consider whether transforming such a special provision into the general rule for dispatch and receipt would not create a duality of regimes for electronic and paper-based transactions, at least in respect of sales contracts. Under article 24 of the United Nations Sales Convention, a notice "reaches" the addressee, inter alia, when it is "delivered" to his or her mailing address. The Working Group may wish to consider whether requiring that a message must be "capable of being retrieved and processed" goes beyond the notion of availability which seems to inspire article 24 of the United Nations Sales Convention.

<sup>43</sup>This draft provision, which the Working Group, at its thirty-ninth session, decided to retain in substance (A/CN.9/509, para. 103), develops further a principle formulated in general terms in article 13, paragraph 2, subparagraph (b) of the UNCITRAL Model Law on Electronic Commerce. The draft article does not innovate on the current understanding of legal effects of automated transactions, as expressed by the Working Group, that a contract resulting from the interaction of a computer with another computer or person is attributable to the person in whose name the contract is entered into (A/CN.9/484, para. 106).

<sup>44</sup>This draft paragraph deals with the issue of errors in automated transactions (see A/CN.9/WG.IV/WP.95, paras. 74-79). The rule contained in the draft paragraph, which is inspired in article 11, paragraph 2, of Directive 2000/31/EC of the European Union, creates an obligation for persons offering goods or services through automated information systems, to offer means for correcting input errors. The Working Group may wish to consider whether the possibility of derogation by agreement needs

2. A contract concluded by a person that accesses an automated information system of another person has no legal effect and is not enforceable if the person made an error in a data message and:<sup>45</sup>

(a) The automated information system did not provide the person with an opportunity to prevent or correct the error;

(b) The person notifies the other person of the error as soon as practicable when the person making the error learns of it and indicates that he or she made an error in the data message;

[(c) The person takes reasonable steps, including steps that conform to the other person's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; and

[(d) The person has not used or received any material benefit or value from the goods or services, if any, received from the other person.]<sup>46</sup>

#### Variant B

1. A contract concluded by a person that accesses an automated information system of another person has no legal effect and is not enforceable if the person made an error in a data message and the automated information system did not provide the person with an opportunity to prevent or correct the error, provided that the person invoking the error notifies the other person of the error as soon as practicable and indicates that he or she made an error in the data message.<sup>47</sup>

[2. A person is not entitled to invoke an error under paragraph 1:

(a) If the person fails to take reasonable steps, including steps that conform to the other person's instructions, to return the goods or services received, if any, as a result of the error or, if instructed to do so, to destroy such goods or services; or

(b) If the person has used or received any material benefit or value from the goods or services, if any, received from the other person.]<sup>48</sup>

to be expressly made or can result from tacit agreement, for instance, when a party proceeds to place an order through the seller's automated information system even though it is apparent to such party that the system does not provide an opportunity to correct input errors.

<sup>45</sup>Draft paragraph 2 deals with the legal effects of errors made by a natural person communicating with an automated information system. The draft provision is inspired by section 22 of the Uniform Electronic Commerce Act of Canada. At the Working Group's thirty-ninth session it was suggested that the provisions might not be appropriate in the context of commercial (that is, non-consumer) transactions, since the right to repudiate a contract in case of material error may not always be provided under general contract law. The Working Group nevertheless decided to retain it for further consideration (A/CN.9/509, paras. 110 and 111).

<sup>46</sup>Subparagraphs (c) and (d) appear within square brackets since it was suggested, at the Working Group's thirty-ninth session, that the matters dealt with therein went beyond matters of contract formation and departed from the consequences of avoidance of contracts under some legal systems (A/CN.9/509, para. 110).

<sup>47</sup>This variant combines in two paragraphs the various elements contained in paragraphs 2 and 3 and subparagraphs (a)-(d) of the previous version of the draft article, as was requested by the Working Group (A/CN.9/509, para. 111). In order to focus on contract law matters, paragraph 1 of variant A has not been reproduced in variant B, following suggestions at the Working Group's thirty-ninth session, that the language in paragraph 2 of the former draft article 12 was of a regulatory nature (A/CN.9/509, para. 108).

<sup>48</sup>See footnote 45.

## Article 14

### Form requirements<sup>49</sup>

[1. Nothing in this Convention requires a [transaction] [contract] or any other communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention to be concluded or evidenced in [a particular form, including written form] [by data messages, writing or any other form] or subjects a [transaction] [contract] to any other requirement as to form.]<sup>50</sup>

2. Where the law requires that a [transaction] [contract] or any other communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention should be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.<sup>51</sup>

3. Where the law requires that a [transaction] [contract] or any other communication, declaration, demand, notice or request that the parties are required to make or may wish to make in connection with a [transaction] [contract] falling within the scope of this Convention should be signed, or provides consequences for the absence of a signature, that requirement is met in relation to a data message if:

#### Variant A<sup>52</sup>

(a) A method is used to identify that person and to indicate that person's approval of the information contained in the data message; and

(b) That method is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

#### Variant B<sup>53</sup>

... an electronic signature is used which is as reliable as appropriate to the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

4. An electronic signature is considered to be reliable for the purposes of satisfying the requirements referred to in paragraph 3 of this article if:

<sup>49</sup>This draft article combines essential provisions on form requirements of the United Nations Sales Convention (art. 11) with the provisions of articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce.

<sup>50</sup>This provision transposes to the context of the draft convention the general principle of freedom of form contained in article 11 of the United Nations Sales Convention, in the manner suggested at the Working Group's thirty-ninth session (A/CN.9/509, para. 115).

<sup>51</sup>This provision sets forth the criteria for the functional equivalence between data messages and paper documents, in the same manner as article 6 of the UNCITRAL Model Law on Electronic Commerce. The Working Group may wish to consider the meaning of the words "the law" and "writing" and whether there would be a need for including definitions of those terms (see A/CN.9/509, paras. 116 and 117).

<sup>52</sup>Variant A recites the general criteria for the functional equivalence between handwritten signatures and electronic identification methods referred to in article 7 of the UNCITRAL Model Law on Electronic Commerce.

<sup>53</sup>Variant B is based on article 6, paragraph 3, of the draft UNCITRAL Model Law on Electronic Signatures.

(a) The signature creation data are, within the context in which they are used, linked to the signatory and to no other person;

(b) The signature creation data were, at the time of signing, under the control of the signatory and of no other person;

(c) Any alteration to the electronic signature, made after the time of signing, is detectable; and

(d) Where the purpose of the legal requirement for a signature is to provide assurances as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

5. Paragraph 4 of this article does not limit the ability of any person:

(a) To establish in any other way, for the purposes of satisfying the requirement referred to in paragraph 3 of this article, the reliability of an electronic signature;

(b) To adduce evidence of the non-reliability of an electronic signature.

### [Article 15]

#### *General information to be provided by the parties*<sup>54</sup>

1. A party that uses data messages to advertise or offer goods or services<sup>55</sup> shall render the following information available [in the data message or by appropriate reference therein]:<sup>56</sup>

(a) Its name and, for legal entities, its full corporate name and place of incorporation;<sup>57</sup>

(b) The geographic location and address at which it has its place of business;

(c) Its contact details, including its electronic mail address.

2. A party offering goods or services through an information system that is generally accessible to the public shall ensure that the information required to be provided under paragraph 1 of this article is easily, directly and permanently accessible to parties accessing the information system.]

<sup>54</sup>This draft article is intended to enhance certainty and clarity in international transactions by ensuring that a party offering goods or services through open networks, such as the Internet, should offer some minimum information on its identity, legal status, location and address. The draft article, which is inspired by article 5, paragraph 1, of Directive 2000/31/EC of the European Union, appears in square brackets, as there was no consensus on the need for the provision within the Working Group (A/CN.9/509, paras. 61-65). In its current form, the draft article does not contemplate any sanctions or consequences for a party's failure to provide the required information, a matter that still needs to be considered by the Working Group (see A/CN.9/509, para. 123, and A/CN.9/527, para. 103).

<sup>55</sup>The phrase "through an information system generally accessible to the public" has been deleted, as the Working Group felt that the obligations contemplated in the draft article, if retained, should apply regardless of the medium used by the parties (A/CN.9/509, paras. 46 and 65).

<sup>56</sup>The Working Group may wish to consider the desirability of specifying in the provision how the information is to be made "available", in particular whether the information also needs to be capable of being retrieved or stored by the addressee.

<sup>57</sup>The reference to trade registers and registration numbers has been replaced with a more general reference to the corporate name and place of incorporation.

### [Article 16]

#### *Availability of contract terms*<sup>58</sup>

A party offering goods or services through an information system that is generally accessible to the public<sup>59</sup> shall make the data message or messages which contain the contract terms<sup>60</sup> available to the other party [for a reasonable period of time] in a way that allows for its or their storage and reproduction. [A data message is deemed not to be capable of being stored or reproduced if the originator inhibits the printing or storage of the data message or messages by the other party.]<sup>61</sup>

*[Other substantive provisions that the Working Group may wish to include.]*

### [Article X]

#### *Declarations on exclusions*<sup>62</sup>

1. Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not apply this Convention to the matters specified in its declaration.]

2. Any declaration made pursuant to paragraph 1 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.

### [Article Y]

#### *Relationship with other conventions*<sup>63</sup>

1. Except as otherwise stated in a declaration issued in accordance with paragraph 2 of this article, a State party to this

<sup>58</sup>The draft article, which is based on article 10, paragraph 3, of Directive 2000/31/EC of the European Union, appears in square brackets, as there was no consensus on the need for the provision within the Working Group (A/CN.9/509, paras. 123-125).

<sup>59</sup>The Working Group may wish to consider whether these words adequately describe the types of situations that the Working Group intends to address in the draft article.

<sup>60</sup>The words "and general conditions" have been deleted to avoid redundancy. The Working Group may however wish to consider whether the provision should be more explicit as to the version of the contract terms that needs to be retained.

<sup>61</sup>The Working Group may wish to consider whether this sentence is sufficiently flexible to allow for the creation of "original" or "unique" electronic records, which the parties might have a legitimate interest in rendering incapable of replication (A/CN.9/509, para. 124).

<sup>62</sup>The Working Group has not yet concluded its deliberations on possible exclusions to the preliminary draft convention under draft article 2 (A/CN.9/527, paras. 83-98). The draft article has been added as a possible alternative, in the event that no consensus could be achieved on possible exclusions to the preliminary draft convention.

<sup>63</sup>The draft article is intended to offer a possible common solution for some of the legal obstacles to electronic commerce under existing international instruments, which had been the object of a survey contained in an earlier note by the secretariat (A/CN.9/WG.IV/WP.94). In that survey, the secretariat had indicated that certain types of issues raised under the surveyed conventions might be addressed in the context of the Working Group's deliberations on the development of an international instrument dealing with some issues of electronic contracting. At the Working Group's fortieth session, there was general agreement to proceed in that manner, to the extent that the issues were common, which was the case at least with regard to most issues raised under the instruments listed in variant A (see A/CN.9/527, paras. 33-48). Variant B, in turn, would make it possible for a Contracting State to extend the application of the new instrument to the use of data messages in the context of other international conventions, as the Contracting State sees fit.

Convention undertakes to apply the provisions of this Convention to the formation of contracts and to the exchange of any communications, declarations, demands, notices or requests that the parties may wish to make or are required to make in connection with or under ...

*Variant A*

... any of the following international agreements or conventions to which the State is or may become a Contracting State:

Convention on the Limitation Period in the International Sale of Goods (New York, 14 June 1974) and Protocol thereto (Vienna, 11 April 1980)

United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)

United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 17 April 1991)

United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 11 December 1995)

United Nations Convention on the Assignment of Receivables in International Trade (New York, 12 December 2001)

*Variant B*

... any international agreements or conventions on private commercial law matters to which the State is or may become a Contracting State.]

2. Any State may declare at any time that it will not apply this Convention to international transactions falling within the scope of [any of the above conventions] [one or more international agreements, treaties or conventions to which the State is a Contracting Party and which are identified in that State's declaration].

3. Any declaration made pursuant to paragraph 2 of this article shall take effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.

*[Customary and other final clauses that the Working Group may wish to include.]*

**F. Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal aspects of electronic commerce: Electronic contracting: provisions for a draft convention: Comments by the International Chamber of Commerce**

**(A/CN.9/WG.IV/WP.101) [Original: English]**

**NOTE BY THE SECRETARIAT**

The secretariat has received comments on the Working Group's consideration of a possible new international instrument on electronic contracting by a task force established by the International Chamber of Commerce. The text of those comments is reproduced in the annex to this note in the form in which it was received by the secretariat.



International Chamber of Commerce

*The world business organization*

Department of Policy and Business Practices

---

## Commission on E-Business, IT and Telecoms

---

### Task Force on International Harmonization Efforts

#### ICC Task Force on International Harmonization Efforts position on UNCITRAL and e-contracting issues.

##### 1. Introduction

The International Chamber of Commerce (ICC) is grateful to UNCITRAL for the invitation to provide views regarding current UNCITRAL proposals for the legal framework for electronic contracting.

ICC understands that e-contracting developments within UNCITRAL currently follow two strands that are not mutually exclusive. The first is the proposal to produce a draft convention relating to electronic contracting (set forth in UN Document [A/CN.9/WG.IV/WP.95](#)), and the second is a proposal to draft an “omnibus” convention to remove barriers to e-commerce in existing international conventions caused by writing and form requirements (set forth in UN Document [A/CN.9/WG.IV/WP.94](#)).

The purpose of this paper is to outline how ICC as the world’s leading international business organization, with long experience in self-regulatory rule-making, might assist the UNCITRAL Electronic Commerce Working Group in its current work, and how such cooperation might work in practice.

##### 2. ICC’s Role in Business-Based Rule-Making

Since its inception, ICC has facilitated the creation by business of commercial rules which have become part of the legal fabric of international commerce. Examples of ICC rules include ICC's Uniform Customs and Practice for Documentary Credits (UCP 500, the rules that banks apply to finance billions of dollars worth of world trade every year) and ICC’s International Commercial Terms (Incoterms 2000, standard international trade definitions used every day in countless thousands of sales contracts). ICC also drafts model contracts, which give parties a neutral framework for their contractual relationships, and which are drafted without expressing a bias for any one particular legal

---

International Chamber of Commerce

38, Cours Albert 1er, 75008 Paris, France  
Telephone +33 1 49 53 28 28 Fax +33 1 49 53 28 59  
Internet [www.iccwbo.org](http://www.iccwbo.org) E-mail [icc@iccwbo.org](mailto:icc@iccwbo.org)

21 February 2003 JA  
Document 373-35/2v2





system. Major intergovernmental organizations (IGOs) such as UNCITRAL, UN/ECE and the World Bank endorse and actively support the use of several such ICC rules.

ICC model contracts and clauses, uniform rules and voluntary codes are elaborated after extensive consultation with business worldwide. They provide practical and efficient tools to facilitate international business transactions – for the benefit of both businesses and their governments. ICC has members in over 140 countries worldwide, and the drafting of business rules by ICC is based on global participation.

ICC and its members continue to update and revise the ICC rule base to make sure it reflects current business practices in a fast changing business environment. An example of how ICC approaches these issues is the eUCP, a response to the growing number of electronic documents being used in international trade.

The eUCP is the electronic supplement to UCP 500. The 12 Articles of the eUCP work in tandem with UCP 500 where electronic presentation of documents occurs. They cover a range of issues common to electronic documents, including format, presentation, originals and copies and examination of electronic records. They also contain highly useful definitions of terms – such as “appears on its face” or “place for presentation” – that have different meanings in the paper and electronic worlds.

GUIDEC and GUIDEC II are other examples of ICC guidelines for electronic transactions. The GUIDEC framework deals with the use of digital signatures and the role of certification authorities. GUIDEC enhances the ability of the international business community to execute trustworthy digital transactions utilizing legal principles that promote reliable digital authentication and certification practices.

### **3. Scope and Format of an E-Contracting Instrument**

Following consultation with its electronic commerce and commercial law and practice experts, ICC believes that the following principles should guide any work on the international legal framework for electronic contracting:

- It should be based on a careful assessment of need. Thus, ICC believes that before making a decision on the scope and format of any initiatives in this field, there is a need to carefully consider and analyze what problems do international commercial players currently face in using electronic contracting, if any, and how they best can be solved.
- It is important that any instrument should avoid giving the impression to the international commercial community that electronic contracting is in some fundamental manner different from international contracting conducted through other media. It is true that the Internet may well raise certain specific questions, which have not arisen before in quite the same way. It is equally true, however, that international commerce has over many years adapted with remarkable speed and



pragmatism to other technological advances without re-visiting the fundamentals of international commerce. It thus follows that a new instrument should provide solutions to media-specific problems, rather than a comprehensive code for international commerce on the Internet.

- It is important that any instrument be as useful, practical and affordable for large international commercial entities as for small or medium-sized entities. An instrument addressed solely towards the former may be unsuitable for the latter, and one directed solely towards the latter may substantially reduce its utility.
- Any instrument should be based on the contractual autonomy of the parties who will, through an assessment of their own needs, risks and experience, be able to organize their commercial dealings within an electronic environment in a manner which best suits their expectations and requirements. These requirements will change from customer to customer and, given the speed of technological advance, from time to time.
- Such an instrument should concentrate on problems that arise in the sphere of business-to-business commerce (which is also UNCITRAL's traditional mandate), rather than also encompassing consumer issues.

ICC believes that it would presently be difficult to realize these goals within the context of an international convention, and that a convention such as that proposed in WP 95 would be premature, for several reasons:

- It could be dangerous to adopt such a convention without first isolating the specific practical problems, if any, which business currently faces regarding electronic contracting, since this would present the risk of not addressing the actual problems that exist in practice while arguably implying comprehensiveness.
- The drafting of a convention can take a significant amount of time, as does the implementation of such a convention into national law.
- A convention is difficult to amend if specific provisions of it turn out not to be useful or to create unanticipated problems.

These considerations do not necessarily mean that there is no need for an international legal framework for electronic contracting, but that such a framework must focus on actual, practical problems specific to the electronic medium, that it must be flexible, and be capable of being adopted swiftly.

#### **4. Possible ICC Work on Electronic Contracting**

ICC is willing to explore the possibility of drafting an instrument which would assist companies worldwide in providing increased legal certainty for their electronic contracting. Such work would



concentrate on issues specific to the electronic medium. ICC is currently seeking to identify the critical media-specific issues that are most important to businesses in relation to electronic contracting.

Based on preliminary investigations, the following appear to be examples of such issues:

- When does an offer “reach” the offeree? Under most existing legal instruments an offer becomes effective when it reaches the offeree, and may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. However, in an electronic context with EDI messages, e-mails, Instant Messaging (IM) and communication via web sites it is not always clear exactly when a message has reached the addressee.
- Buyers and sellers are often faced with requirements to give the other party notice of certain events or situations. In an electronic context questions arise in terms of form requirements to such notices. Can a party for instance give notice by using a GSM phone and Short Messaging System (SMS)? Will an e-mail in all cases be considered a valid notice?
- The risk of making mistakes may be higher in an electronic context as it seems easier for a contracting party to accidentally click the wrong button rather than signing a document by mistake. On the other side, electronic applications provide better possibilities for validating data, which can prevent misunderstandings due to missing or unclear information such as for instance amounts, dates and times.

It would be premature at this time to decide precisely which regulatory vehicle would be most appropriate for the resolution of issues such as these. However, ICC is planning to address them through the following steps:

- ICC is planning to collect views from a representative sample of international commercial players, drawn from an appropriate sectoral and geographical cross-section, regarding the practical problems, which are currently faced in the use of electronic technology in international commerce. Views will also be sought as to the type of instrument which might best assist in providing solutions to such problems. In particular, ICC will hold a meeting in the beginning of April 2003 with business representatives. ICC hopes to be in a position to provide UNCITRAL with the conclusions from this meeting at the 41st Session of the UNCITRAL Working Group at the beginning of May 2003.
- Based on these views, ICC could produce an instrument to guide businesses when contracting electronically. It must be stressed that the exact scope and format of this instrument will depend on the analysis mentioned above, but could include some combination of the following: 1) a



guidance document on how to structure electronic contracts so as to ensure their probity; 2) a set of uniform customs and practices which businesses could incorporate, either directly or by reference, into their electronic contracts or electronic contracting practices; or 3) model clauses or contracts to be used in the electronic medium.

Such an exercise by ICC would have the following advantages as compared to a convention:

- It could be finished more quickly, and would thus be available for use by business more swiftly.
- It could be used more flexibly; i.e., a company could decide to use the ICC instrument in all its electronic contracting, only in certain electronic contracts, or not at all.
- It could be amended more swiftly if problems were to arise with specific provisions.

It should be emphasized that ICC would not perform this work in isolation, but would need to consult extensively with the members of the UNCITRAL Working Group in drafting it. If, after promulgation of a business self-regulatory instrument, the Working Group felt a convention or another type of legal mechanism, was a desirable way to address additional issues, the assessment conducted in relation to the self-regulatory initiative would nonetheless help to define the appropriate scope of such instrument.

## 5. Timeline

ICC believes that it would be premature to base its work on an inflexible time schedule, since it is difficult to foresee now the exact progress of the work. However, based on its experience with similar projects, ICC believes that the following is a realistic time-frame for the work:

- 9 April 2003: ICC will hold a meeting in Paris with representatives of companies engaged in electronic contracting to gain a more detailed assessment of their views on the need for further international regulation in their area.
- May 2003: ICC will participate in the meeting of the Working Group in New York and discuss the proposal further with members.
- June 2003: ICC will begin drafting of the document.
- October 2003: At the next meeting of the Working Group, ICC will report on its progress.
- 2004: Work will be completed in time for either the spring or fall 2004 meetings of the Working Group.

During the drafting process, ICC would consult closely with the members of the Working Group and the UNCITRAL secretariat by participating in the Working Group's meetings, and by e-mail, telephone, and Internet consultation to keep the members apprised of its progress and to solicit their input into the document.

## VI. SECURITY INTERESTS

### A. Report of Working Group VI (Security Interests) on the work of its second session (Vienna, 17-20 December 2002)

(A/CN.9/531) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction . . . . .	1-8
II. Organization of the session. . . . .	9-14
III. Deliberations and decisions. . . . .	15
IV. Preparation of a legislative guide on secured transactions . . . . .	16-80
Chapter VI. Filing . . . . .	16-28
General remarks . . . . .	16-17
A. Introduction. . . . .	18
B. Notice filing vs. document filing . . . . .	19
C. Authority to file and signature . . . . .	20
D. Grantor- or asset-based index . . . . .	21
E. The filing process. . . . .	22
F. Duration of effectiveness of a filed notice. . . . .	23
G. Public access and extent of detail in statutory text . . . . .	24
H. Fees . . . . .	25
I. Other elements of a filing system. . . . .	26
J. Summary and recommendations . . . . .	27-28
Chapter VII. Priority . . . . .	29-61
A. The concept of priority and its importance . . . . .	29
B. First-to-file priority rule. . . . .	30-32
C. Alternative priority rules . . . . .	33-35
D. Other consensual secured and unsecured creditors . . . . .	36
E. Sellers of encumbered assets with purchase money security rights . . . . .	37-38
F. Sellers of encumbered assets with reclamation claims . . . . .	39-40
G. Buyers of encumbered assets . . . . .	41-46
H. Judgement creditors . . . . .	47
I. Statutory (preferential) creditors . . . . .	48-49
J. Creditors adding value to or storing encumbered assets. . . . .	50-51
K. Insolvency administrators. . . . .	52
L. Future advances . . . . .	53
M. After-acquired property . . . . .	54
N. Priority in proceeds . . . . .	55
O. Subordination agreements . . . . .	56
P. Relevance of priority prior to enforcement . . . . .	57
Q. Additional issues . . . . .	58-59
R. Summary and recommendations . . . . .	60-61

	<i>Paragraphs</i>
Chapter IX. Default and enforcement. ....	62-80
A. Introduction. ....	62
B. Key objectives. ....	63-64
C. Default. ....	65
D. Judicial Action. ....	66-68
E. Freedom of parties to agree to the enforcement procedure. ....	69
F. Acceptance of the encumbered assets in satisfaction of the secured obligation. ....	70-72
G. Redemption of the encumbered assets. ....	73
H. Disposition by the debtor authorized by the grantor. ....	74
I. Removing the encumbered assets from the grantor's control. ....	75
J. Sale or other disposition of the encumbered assets. ....	76
K. Allocation of proceeds. ....	77
L. Finality. ....	78
M. Summary and recommendations. ....	79-80
V. Future work. ....	81

## I. INTRODUCTION

1. At its present session, the Working Group continued its work on the development of “an efficient legal regime for security rights in goods involved in a commercial activity”.<sup>1</sup>

2. The Commission's decision to undertake work in the area of secured credit law was taken in response to the need for an efficient legal regime that would remove legal obstacles to secured credit and could thus have a beneficial impact on the availability and the cost of credit.<sup>2</sup>

3. At its thirty-third session (2000), the Commission discussed a report prepared by the secretariat on issues to be addressed in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that secured credit law was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of its close link with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. Furthermore, it was stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable.<sup>3</sup>

<sup>1</sup>Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 358.

<sup>2</sup>Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 455, and Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 347.

<sup>3</sup>Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 459.

4. At its thirty-fourth session (2001), the Commission considered another report prepared by the secretariat (A/CN.9/496) and agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.<sup>4</sup> As to the form of work, the Commission considered that a model law would be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include legislative recommendations.<sup>5</sup>

5. At its first session (New York, 20-24 May 2002), the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10) of the first preliminary draft guide on secured transactions, prepared by the secretariat. At that session, the Working Group requested the secretariat to prepare revised versions of those chapters (see A/CN.9/512, para. 12). At that session, the Working Group also considered suggestions for the presentation of modern registration systems in order to pro-

<sup>4</sup>Ibid., Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 351.

<sup>5</sup>Ibid., para. 357.

vide the Working Group with information necessary to address concerns expressed with respect to registration of security rights in movable property (see A/CN.9/512, para. 65). At the same session, the Working Group agreed on the need for coordination with Working Group V (Insolvency Law) on matters of common interest and endorsed the conclusions of Working Group V with respect to those matters (see A/CN.9/512, para. 88).

6. At its thirty-fifth session (2002), the Commission considered the report of the first session of the Working Group (A/CN.9/512). It was widely felt that the legislative guide was a great opportunity for the Commission to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations. In that connection, the Commission noted with satisfaction that the project had attracted the attention of international, governmental and non-governmental organizations and that some of those took an active part in the deliberations of the Working Group.

7. At that session, the Commission also felt that the timing of the Commission's initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission's own initiative in the field of insolvency law.

8. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.<sup>6</sup>

## II. ORGANIZATION OF THE SESSION

9. The Working Group, which was composed of all States members of the Commission, held its second session in Vienna from 17 to 20 December 2002. The session was attended by representatives of the following States members of the Commission: Argentina (alternating annually with Uruguay), Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Romania, Russian Federation, Rwanda, Singapore, Spain, Sudan, Sweden, Thailand, The Former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland and United States of America.

10. The session was attended by observers from the following States: Algeria, Australia, Belarus, Bulgaria, Indonesia, Kuwait, Lebanon, New Zealand, Philippines, Poland, Republic of Korea, Senegal, Slovakia, Switzerland, Syrian Arab Republic, Turkey, Ukraine, Venezuela and Yemen.

11. The session was also attended by observers from the following national or international organizations: (a) organizations of the United Nations system: International Monetary Fund (IMF), the World Bank; (b) intergovernmental organizations: Asian-African Legal Consultative Organization (AALCO), Common Market for Eastern and Southern Africa (COMESA), International Institute for the Unification of Private Law (UNIDROIT); (c) non-governmental organizations invited by the Commission: American Bar Association (ABA), American Bar Foundation (ABF), Center for International Legal Studies, Center of Legal Competence (CLC), Commercial Finance Association (CFA), Europafactoring, International Bar Association, Committee J (IBA), International Federation of Insolvency Professionals (INSOL), International Chamber of Commerce (ICC), Max-Planck-Institute, Society of European Contract Law (SECOLA), The Association of the Bar of the City of New York and Union of Industrial and Employers' Confederations of Europe (UNICE).

12. The Working Group elected the following officers:

*Chairman:* Ms. Kathryn Sabo (Canada)

*Rapporteur:* Mr. Vilius Bernatonis (Lithuania)

13. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.5 (provisional agenda), A/CN.9/WG.VI/WP.2 and Add.6-9, 11 and 12, as well as A/CN.9/WG.VI/WP.6 and Add.1-5 (draft legislative guide on secured transactions).

14. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a legislative guide on secured transactions.
4. Other business.
5. Adoption of the report.

## III. DELIBERATIONS AND DECISIONS

15. The Working Group considered chapters VI, VII and IX of the draft Guide. The deliberations and decisions of the Working Group are set forth below in part IV. The secretariat was requested to prepare, on the basis of those deliberations and decisions, a revised version of chapters VI, VII and IX of the draft Guide.

## IV. PREPARATION OF A LEGISLATIVE GUIDE ON SECURED TRANSACTIONS

### Chapter VI. Filing

#### *General remarks*

16. It was noted that the term "filing", as opposed to the term "registration", was used in order to emphasize the dif-

<sup>6</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 202-204.

ference between the system envisaged in the draft Guide and traditional registries. It was stated that, unlike traditional registration, filing involved only a notice, rather than the transaction documents, and provided a warning to potential financiers about the possible existence of a security right and a system to settle priority conflicts, rather than constituting the right. In order to reflect these characteristics of filing, it was suggested that reference should be made to a "filed notice" rather than to a "filed security right".

17. It was also observed that filing raised the same concerns expressed with respect to chapter V (see A/CN.9/512, paras. 63-67), in particular concerns about cost and complexity. In response, it was observed that the overall cost was probably higher in the absence of publicity.

#### *A. Introduction*

18. A number of suggestions were made. One suggestion was that the purpose of filing should be further clarified in the introductory paragraphs. Another suggestion was that, in paragraph 3, reference should be made to priority as against an insolvency representative. Yet another suggestion was that, in paragraph 4, it should be clarified that filing ensured enforceability of a security right against third parties. Yet another suggestion was that another system in which documents were presented to the filing office, checked and filed in summary form, should also be discussed.

#### *B. Notice filing vs. document filing*

19. With respect to paragraph 7, in response to a question, it was stated that the amount of the secured obligation should not be part of the information to be filed. As to whether a maximum amount secured should be specified in the notice, the Working Group noted that the matter raised a policy issue that was adequately discussed in paragraphs 11 and 12, as well as in chapter V (see paras. 35-37). The concern was expressed that a requirement to specify in the notice a maximum amount would raise issues of confidentiality. In response, it was observed that the maximum amount in the notice did not refer to the amount of the secured obligation but to the maximum amount that could be recovered in the case of enforcement of a security right. With respect to paragraph 14, it was suggested that, as the issue of filing with respect to foreign debtors or grantors raised conflict-of-laws issues, a cross-reference to the conflict-of-laws chapter should be made.

#### *C. Authority to file and signature*

20. Support was expressed for the approach taken in paragraphs 15 to 17, according to which the debtor's signature did not have to be on the notice filed. It was stated that such a requirement would slow down the filing process and it was unnecessary since creditors would gain nothing from unauthorized filing and debtors could obtain relief.

#### *D. Grantor- or asset-based index*

21. It was noted that paragraphs 18 to 21 adequately discussed the issue whether the index should be organized on the basis of the debtor's or other grantor's name or on the basis of asset identification.

#### *E. The filing process*

22. Support was expressed for a fully computerized filing system. It was stated that such a system was significantly more transparent and cost-effective than a paper-based system.

#### *F. Duration of effectiveness of a filed notice*

23. It was stated that, in some legal systems, there was a time period after creation of a security right within which notice of it should be filed ("grace period"). It was observed that such a time period was intended to prevent fraud in particular in the case of insolvency. While it was agreed that the matter could be discussed in the draft Guide, it was widely felt that such a time period was not necessary since the need to ensure priority was a sufficient incentive for secured parties to file. It was also stated that imposing an arbitrary time period was not appropriate with the exception of security rights with respect to which priority dated back to the time of creation rather than to the time of filing (e.g. purchase money security rights). In addition, it was observed that it was important to distinguish between a time period as a condition to achieving super priority and a time period that might relate to the general effectiveness of the filing.

#### *G. Public access and extent of detail in statutory text*

24. It was noted that paragraphs 34 to 36 were adequate in discussing public access to the database and the extent of detail in the law.

#### *H. Fees*

25. It was agreed that filing fees should be kept to a minimum and be based on cost-recovery rather than on percentages of the value of the secured claim. It was also widely felt that filing should not be used for purposes unrelated to its warning and priority functions (e.g. for collecting stamp duties).

#### *I. Other elements of a filing system*

26. It was stated that a filing system operated by a private entity might have the advantage that any cost would not have to be borne by the Government but by the businesses using the services of the filing office. It was also observed that rights in certain high-value and uniquely identifiable movables, such as vessels and aircraft, might be more appropriately filed in alternative registration systems.

#### *J. Summary and recommendations*

27. It was agreed that a recommendation should be added with respect to the need for the filing fee to be nominal. It was also widely felt that, as the draft Guide was intended to serve as a basis for preparing national legislation, the focus should be on national registries. It was stated, however, that, to the extent that national legislation followed the recommendations in the draft Guide, national registries could be linked and facilitate trade across national borders. In that connection, it was observed that international reg-



istration systems, such as the ones envisaged in the United Nations Convention on the Assignment of Receivables in International Trade and the Convention on International Interests on Mobile Equipment and the relevant Protocols, could provide useful examples. With regard to the latter, it was noted that it envisaged an international asset-based and fully computerized registry.

28. After discussion, the Working Group requested the secretariat to revise chapter VI taking into account the views expressed and the suggestions made.

## Chapter VII. Priority

### A. *The concept of priority and its importance*

29. A number of suggestions were made. One suggestion was that, in paragraph 2, the statement linking priority to the availability of credit should be qualified since that result depended on the type of the security right. Another suggestion was that, in paragraph 4, it should be made clearer that, while the focus of the draft Guide should be on consensual security rights, conflicts of priority with non-consensual security rights should also be discussed. Yet another suggestion was that, in paragraph 4, clarity of law should be emphasized without under-estimating the importance of workable rules, since not all clear rules were equal.

### B. *First-to-file priority rule*

30. It was suggested that that section could be prefaced with a statement to the effect that the various priority rules it referred to could coexist in the same legal system applying to different types of conflict. With respect to paragraph 6, the concern was expressed that it failed to reflect a minority view, according to which priority based on filing was not the most appropriate rule. In response, it was stated that the draft Guide would be more useful to the extent it contained clear recommendations and that, if alternative rules were presented, their relative disadvantages would also have to be discussed.

31. With respect to paragraph 9, the Working Group considered the question whether, if creation of a security right and filing of a notice of it did not coincide, the secured creditor should be given a grace period within which to file, with priority dating back to the time of creation. While some support was expressed for a flexible regime with grace periods, the prevailing view was against such broad exceptions to the first-to-file priority rule. It was stated that, in order to avoid undermining the certainty achieved by a first-to-file rule, exceptions in the form of grace periods should be prescribed in a very narrow and clear way. Such exceptions could apply only to specific situations (e.g. to purchase money security rights) or only if filing was not possible before creation or the time difference between creation and filing could not be significantly reduced through the use of the appropriate filing technique (e.g. electronic filing). It was agreed that paragraph 9 should be revised to reflect that understanding.

32. As to paragraph 12, the concern was expressed that it gave the impression that possession and filing could generally coexist and that by obtaining possession a creditor

could obtain priority over a security right, notice of which was previously filed. It was stated that, in jurisdictions with a filing system, to the extent possible, alternative priority rules should not coexist with the first-to-file rule. It was also observed that: the first-to-take possession or control rule should apply with respect to security rights in assets susceptible to possession only; and the first-to-file rule should apply with respect to security rights in assets insusceptible to possession or assets with respect to which possession was not practical. It was also suggested that, in the case of security rights in assets susceptible to both possession and filing, priority should be accorded to the first to obtain possession or to file. It was noted that that approach was followed in the Inter-American Model Law on Secured Transactions (articles 10 and 52). There was broad support for that suggestion. It was also widely felt that exceptions to that rule should be very limited and apply, for example, to documents of title, such as bills of lading and warehouse receipts.

### C. *Alternative priority rules*

33. With respect to paragraph 14, the concern was expressed that it was not sufficiently balanced to the extent that it suggested that a priority rule based on the time of creation of a security right was a major impediment to the availability of low-cost credit. It was stated that, while no system might be perfect, that system worked, at least in some countries, as well as any other system. It was also observed that such a system was simple and cost-efficient. In addition, it was stated that, in such a system, parties were aware of the existence of retention-of-title arrangements through debtor representations or information otherwise available in the market, and priced their transactions accordingly. In support of supplier credit with retention-of-title arrangements in particular, it was said that, in some countries with a first-in-time of creation rule, it generated much more credit and at much lower cost than bank credit (e.g. because no interest was charged).

34. In response, it was observed that the fact that such a system seemed to work in some countries did not mean that it provided a good model for most countries. In particular with respect to retention-of-title arrangements, it was said that practice varied from country to country and there was no single model. It was noted that, in some countries, such arrangements were only available to certain suppliers and only in the case of transaction with individual debtors, while, in at least one other country, retention-of-title arrangements were subject to public registration. It was also stated that competition would normally be inhibited in situations where suppliers, who, as was generally admitted, deserved to be protected, would be overly protected through priority without any publicity at the expense of other credit providers. In the absence of competition ensured by equal access to credit-relevant information, credit would be more expensive even if the cost was not reflected in the interest but in the price of the relevant goods. After discussion, it was agreed that paragraph 14 should be redrafted to add balance to the discussion, taking into account the views expressed and the suggestions made.

35. As to paragraph 15, it was agreed that it should be made clear that, even if notification of the debtor of the

receivable was not a condition for a transaction involving receivables to be effective against third parties, notification was still relevant with respect to claims or enforcement as against the debtor of the receivable.

#### *D. Other consensual secured and unsecured creditors*

36. It was suggested that, in paragraph 18, adjustment of interest rates should be added to the list of steps unsecured creditors could take to protect themselves. It was also suggested that reference should be made to conflicts of priority between holders of security rights in fixtures and holders of security rights in the movable or immovable property to which the fixtures were attached.

#### *E. Sellers of encumbered assets with purchase money security rights*

37. With respect to paragraph 19, the question was raised as to whether supplier credit and bank credit for the purchase of goods could be assimilated into the same category of "purchase money security rights" and treated in the same way. It was stated that supplier credit, supported through retention-of-title arrangements, was developed as an alternative to bank credit that was secured with security in all the assets of a debtor. It was also observed that, in many legal systems, supplier credit was given priority over bank credit for general socio-economic reasons and that, therefore, treating bank credit in the same way as supplier credit was an important policy decision, the advantages and disadvantages of which needed to be weighed carefully. In response, it was stated that, in the interest of promoting trade, suppliers and banks providing purchase money credit should be treated in the same way. It was observed that such an equal treatment would enhance competition, which in turn should have a positive impact on the availability and the cost of credit.

38. While some doubt was expressed, there was broad support in the Working Group for the principle, reflected in paragraphs 20 and 21, that purchase money credit (however defined) should be given heightened priority as of the time of the creation of the security right ("super-priority"), as long as it was filed within a prescribed time period after creation. The main justification mentioned for that approach was that super priority was not detrimental to other creditors as long as purchase money credit enriched the debtor's estate with new assets. However, in view of the possibility that that might not be the case with inventory, the purchase of which could be financed by inventory financiers, differing views were expressed as to whether holders of purchase money security rights should, in addition to filing, give notice to inventory financiers in order to ensure super-priority. One view was that such notice was necessary so as to inform inventory financiers not to extend more credit with the exception of cases in which there was excess value beyond the value of the rights of the purchase money financier. It was stated that, in the absence of such a notice, inventory financiers would need to check the register daily before they advance new credit against new inventory, a result that would complicate inventory financing. Another view was that such a notice to inventory financiers was unnecessary. It was stated that, once holders of purchase

money security rights had filed a notice, the compliance cost should be on third parties expected to search in the register. In the discussion, the view was also expressed that filing might not be required at all or, at least, in some cases since suppliers included unsophisticated parties that should not be expected to file or to search in the register (for certain exceptions to filing, see A/CN.9/WG.VI/WP.2/Add.5, para. 67). After discussion, it was agreed that these different views should be reflected in the draft Guide.

#### *F. Sellers of encumbered assets with reclamation claims*

39. It was noted that the main question in paragraph 25 was whether a seller, reclaiming, under contract law, property in assets sold within a short period prior to the buyer's insolvency, had priority over or took the assets free of any security right granted by the buyer. It was also noted that, in situations where the seller had retained title, the issue was whether the seller should be given super-priority even if it had not filed a notice.

40. While some doubt was initially expressed as to whether that was a matter of secured transaction law, the Working Group agreed that it should be discussed in the draft Guide. As to the way in which it should be addressed, differing views were expressed. One view was that revindication by the seller had retroactive effects and, therefore, the seller should obtain the goods free of any security right. The prevailing view, however, was that the seller should obtain the goods subject to the security rights, at least in the case of a security right in the specific assets sold. It was stated that, even if the retransfer of property to the seller had retroactive effects, the secured party relying on the appearance of ownership on the part of the buyer should be protected. In the discussion, a number of suggestions were made. One suggestion was that the matter arose not only in the case of the debtor's insolvency but also in the case of debtor default. Another suggestion was that reference should be made to avoidance of the relevant sales agreement. After discussion, it was agreed that these views and suggestions should be reflected in the draft Guide.

#### *G. Buyers of encumbered assets*

41. There was general support for the need to strike an appropriate balance between the interests of buyers of encumbered assets and creditors with security rights in those assets. However, differing views were expressed as to the ways in which that policy could be implemented. One view was that the basic criterion for establishing a balance between the interests of buyers and the interests of secured creditors was the notion of "ordinary course of business". It was stated that that notion, which referred to the line of business the debtor was involved in, was a simple and transparent notion. The example was mentioned of a sale of cars by a car dealer.

42. Another view was that the basic criterion should be the principle of "good faith". It was observed that "good faith" was a notion known to all systems and there was significant experience with its application both at the national and the international level. The example was given of a buyer with no actual knowledge of the existence of a

security right. In addition, it was stated that all buyers should be presumed to be in good faith unless otherwise proven. Yet another view was that the main criterion should be the notion of “ordinary course of business” but that the principle of good faith could apply to exceptional situations, such as where A bought goods from B who had bought them from the debtor or other grantor (A would be a “remote purchaser”). It was said that that would be necessary since if A were to search the registry by the name of B it would not find out about the security right granted by the debtor or other grantor.

43. Various concerns were expressed with respect to both notions of “ordinary course of business” and “good faith”. It was stated that these notions were not clear and that their use could create uncertainty, in particular in international trade. In particular, with respect to the notion of “ordinary course of business”, it was observed that it might not be apparent to the buyer what the ordinary course of business of the debtor selling the encumbered assets might be. In addition, it was stated that applying the notion of “ordinary course of business” only to inventory would create an additional complication since it might not be clear to the buyer that the asset was inventory from the seller’s point of view. Moreover, it was said that, in jurisdictions with filing systems, the mere existence of filing created the presumption that all buyers were in bad faith.

44. In response, it was said that, in a normal buyer-seller relationship, buyers would know what type of business the seller was involved in. In addition, it was observed that limiting the protection of the buyer to the case where inventory was sold in the ordinary course of business addressed a need of practice without undermining secured credit or creating unnecessary complication. Moreover, it was emphasized that, as that rule did not apply to retail trade, buyers were not required to check the registry and were presumed to be in good faith. In other situations, buyers could protect their interests by negotiating with sellers and their secured creditors to obtain the assets free of any security right.

45. In order to bridge the gap between these diverging views, a number of suggestions were made. One suggestion was that emphasis should be placed on the common interest not to disrupt retail trade and not on the legal theories developed to achieve that result. Another suggestion was that, if a filing system were adopted, the matter could be addressed by creating a presumption that buyers that did not have to search in the registry were in good faith and that the encumbered assets sold were part of the debtor’s inventory.

46. With respect to the view that remote purchasers should be protected (either on the basis of the notion of “ordinary course of business” or a combination of that notion with the principle of good faith), it was stated that it might inadvertently open the way to abuse, since a debtor could frustrate the rights of the secured creditor by selling an encumbered asset outside the ordinary course of its business to a party that would then sell it in the ordinary course of its business. On the other hand, support was expressed for the need to protect remote purchasers. It was stated that secured creditors could be protected by making the debtor liable to damages towards the secured creditor.

## *H. Judgement creditors*

47. The view was expressed that judgement creditors should be treated in the same way as other unsecured creditors. In support, it was stated that, otherwise, a creditor could inappropriately obtain priority by having its claim recognized in a court judgement. That result was said to be particularly unfair in jurisdictions where even a single creditor could apply to have the debtor declared insolvent. In response, it was stated that, in jurisdictions in which judgement creditors were granted priority by statute, such priority was not applicable in the case of insolvency. With respect to paragraph 36, it was observed that consideration should be given to giving priority to judgement creditors over secured creditors with respect to advances made within a prescribed time period after the issuance of a judgement.

### *I. Statutory (preferential) creditors*

48. It was stated that statutory preferential claims (e.g. for wages or taxes), whether within or outside insolvency, increased the risk that secured creditors might not be paid in full. To the extent that that risk was manageable, it was observed, secured creditors would evaluate it and turn it over to the debtor, for example, by increasing interest rates or by withholding part of the credit. In order to avoid that result, it was generally agreed, statutory preferential claims should be as limited as possible, imposed only to the extent that there was no other means of implementing the relevant social policies and prescribed in a clear and transparent way.

49. It was stated that, as a practical matter, secured creditors should not have to bear an undue share in subsidizing the Government’s social policy. It was also observed that there was a variety of means to finance such policies (e.g. employee insurance funds). With respect to transparency, it was said that it could be served, for example, by listing preferential claims in one law or in an annex to the law, or by requiring that they be filed in a public registry. In that connection, it was observed that, in some jurisdictions, certain preferential claims were subject to filing. In at least one jurisdiction, it was said, the Government had to file its claims and those claims obtained priority only forty-five days after filing. On the other hand, it was said that other preferential claims arose only immediately before insolvency (e.g. claims for wages) and it was difficult to file them in time or to calculate their amount. It was also stated that relying on insurance funds might not provide a solution since such funds often substituted employees and claimed payment as preferential creditors. After discussion, it was agreed that a strong recommendation should be made in the draft Guide with respect to preferential claims along the lines mentioned above (paragraph 48).

### *J. Creditors adding value to or storing encumbered assets*

50. There was support for the view that the extent, scope and nature of the right of creditors adding value to or storing assets, as well as filing requirements and priority should be further discussed in the draft Guide. With regard

to the extent of the right, it was stated that the right should be limited in amount (e.g. in the case of landlords, to one month's rent) and be recognized only where the value added benefited the secured creditor. On the other hand, it was said that such an approach might limit credit availability to such service providers. It was also observed that secured creditors could protect themselves in various ways, including by imposing conditions with respect to service contracts relating to the encumbered assets. As to the scope of the right, it was stated that creditors creating or preserving value needed to be treated in the same way as creditors adding value to or storing the encumbered assets. Reference could also be made to other creditors with retention of possession rights, which operated like possessory pledges (see A/CN.9/WG.VI/WP.6/Add.2, para. 14).

51. With regard to the nature of the right and filing requirements, it was suggested that a distinction be made between a right of retention and a non-consensual security right. It was observed that the right of retention existed as long as the debtor had possession and that in that case no filing was necessary. That right was said to be more a means of exerting pressure on the debtor to pay rather than a priority right. It was also said that, once the debtor had lost possession, the creditor could only rely on the non-consensual security right and in that case filing would be useful to warn other creditors and to provide a method of resolving priority disputes. In the discussion, a note of caution was struck that expanding the scope of the exceptions to the normal priority rules could undermine their effectiveness.

#### *K. Insolvency administrators*

52. It was agreed that the issue in paragraph 44 should be briefly stated and a cross-reference should be made to the detailed discussion in the chapter dealing with security rights in the case of insolvency. It was suggested that it should be made clear that the preferential claim referred to in paragraph 44 was a super-priority right and that a cross-reference should be made to any discussion in the insolvency chapter as to the parties that could challenge the effectiveness of security rights.

#### *L. Future advances*

53. It was suggested that it should be made clear that, in the case of instalment contracts, the claim came into existence upon conclusion of the contract and not upon each delivery. The importance of filing the maximum amount secured was also emphasized (see para. 19).

#### *M. After-acquired property*

54. It was suggested that paragraph 50 should provide guidance as to the time when priority was obtained with respect to assets acquired after the conclusion of the initial security agreement. In that connection, it was suggested that priority should date back to the time of the initial filing rather than to the time when the debtor or other grantor acquired the property.

#### *N. Priority in proceeds*

55. It was suggested that the discussion should relate both to proceeds and fruits (see A/CN.9/512, para. 47).

#### *O. Subordination agreements*

56. In response to a question, it was noted that it was important for insolvency law to provide that subordination agreements should be enforced. In some jurisdictions, such a provision was necessary to empower the courts to enforce subordination agreements and insolvency representatives to deal with priority conflicts between the parties to subordination agreements without being exposed to the risk of becoming liable. It was suggested that the draft Guide should include a cross-reference to the relevant section in the draft Insolvency Guide where that matter was discussed. It was also suggested that a distinction might be drawn between subordination agreements between unsecured creditors, waiving the principle of equal treatment, and priority agreements between secured creditors.

#### *P. Relevance of priority prior to enforcement*

57. Some doubt was expressed as to the need to retain paragraphs 62 and 63. It was stated that priority was relevant only upon default as it related to the encumbered assets rather than to the secured obligation. In response, it was observed that the draft Guide needed to discuss the licence of the debtor to dispose of the encumbered assets and to pay with the proceeds obligations as they matured, irrespective of priority.

#### *Q. Additional issues*

58. A number of suggestions were made with respect to additional issues to be discussed in chapter VII. One suggestion was that the principle of equitable subordination should also be discussed. It was stated that, in view of the possibility that courts might apply that principle and change priority in the case of a violation of the obligation to act in good faith, the draft Guide needed to discuss and discourage it. It was also observed that the issue arose not only in insolvency but also outside insolvency proceedings. In view of the doubt expressed as to whether the matter was relevant outside insolvency proceedings, it was agreed that it could be left to the draft Insolvency Guide.

59. Another suggestion was that the draft Guide should discuss a priority conflict between a secured creditor and a holder in due course of a negotiable instrument or a document of title. While it was noted that the matter was discussed in the context of a conflict between a party that obtained priority by possession and a party that obtained priority by filing (see para. 32), it was suggested that the discussion needed to be expanded and preference be given to negotiable instrument law, as that law was understood in the State enacting legislation based on the draft Guide. Yet another suggestion was that conflicts of priority in fixtures and accessions should also be discussed. There was support for all those suggestions.

### *R. Summary and recommendations*

60. It was noted that the summary and recommendations that were tentative would be revised to take into account the discussion of chapter VII. Examples of paragraphs that needed to be adjusted included: paragraph 64 (pre-commencement priority dealt with in the insolvency chapter), paragraph 65 (emphasis to be placed not only on clear rules but also on workable ones), paragraph 66 (statement as to the efficiency of the filing system to be qualified by referring to conditions, such as cost-efficiency, simplicity, ease of access, centralized registry, infrastructure), paragraph 67 (priority by possession or control, reference to preferential or superior claim, exceptions to first-to-file rule), paragraph 71 (relevant before default and enforcement).

61. After discussion, the Working Group requested the secretariat to revise chapter VII taking into account the views expressed and the suggestions made.

## **Chapter IX. Default and enforcement**

### *A. Introduction*

62. The substance of paragraphs 1 to 4 was found to be acceptable.

### *B. Key objectives*

63. While there was general support for the substance of the key objectives, it was suggested that, as they addressed several issues reflecting recommendations, they should be merged with the recommendations at the end of chapter IX. With respect to paragraph 9, some doubt was expressed as to whether the ambiguity as to the rights of secured creditors other than the secured creditor taking enforcement action was consistent with the finality principle. It was explained that that ambiguity was due to the need to protect the first-ranking creditor in cases where the second-ranking creditor initiated enforcement action (see A/CN.9/WG.VI/WP.2/Add.9, para. 33).

64. With respect to paragraph 10, it was stated that reference should be made to court involvement before or after an agreement as to enforcement was concluded between the parties. Support was expressed for court involvement after conclusion of such an agreement on enforcement. With respect to paragraph 11, it was observed that it failed to take sufficiently into account the fact that a sale of encumbered assets in an insolvency proceeding would produce less value than a private sale.

### *C. Default*

65. It was agreed that paragraph 13 should simply state that the secured creditor's right to enforce its claim upon default may be affected by provisions of contract law giving the debtor time to cure the default. With respect to paragraph 14, while the need for a fair notice was recognized, the concern was expressed that excessive notice requirements could delay and complicate enforcement. In order to address that concern, it was suggested that the appropriate balance needed to be established between fairness and efficiency of the enforcement system. As a

matter of drafting, it was suggested that the word "redemption" of the encumbered assets by the debtor should be replaced by language referring to the debtor paying its debt and obtaining the assets free of the relevant security right.

### *D. Judicial action*

66. With respect to paragraph 18, some doubt was expressed as to the statement that there was no reason to distinguish between possessory and non-possessory security rights with respect to enforcement procedures (see A/CN.9/WG.VI/WP.2/Add.9, para. 43 (i)). It was observed that an obvious difference related to removing the asset from the debtor's control (see A/CN.9/WG.VI/WP.2/Add.9, para. 30). With respect to paragraph 21, it was suggested that additional clarification was needed with respect to out-of-court remedies by moving paragraphs 22, 25, 30 and 32 to 34 to a separate section. It was also stated that the approach to judicial action should depend on the efficiency of the relevant judicial system and that reference should also be made to efficient judicial systems in which out-of-court action might not be necessary. It was also observed that, in some jurisdictions, the degree of court control in the case of out-of-court receivers was limited to the control of the professional accreditation of the person appointed.

67. With respect to out-of-court remedies, the view was expressed that, while they should be available, their efficiency should not be over-estimated, since it depended to a large extent on the judicial system, the general infrastructure and the relevant market conditions. At the same time, it was observed that fears expressed with respect to out-of-court remedies were often exaggerated since they were always subject to public policy considerations (e.g. "breach of peace") and to the consent of the debtor who could, at any time, seek the intervention of the judicial system. It was suggested that all those issues in relation to the judicial system and other infrastructure should be discussed in the draft Guide. As a matter of drafting, it was suggested that the draft Guide should discuss first debtor dispossession, whether by judicial or out-of-court action, and then judicial or out-of-court sale.

68. With respect to paragraph 25, a number of suggestions were made. One suggestion was that a distinction should be drawn between an agreement of the parties choosing a remedy which was not a statutory remedy (e.g. collection rather than sale of a receivable) and an agreement as to how to exercise a contractual or statutory remedy (e.g. notifications, use of certain auction houses, methods of sale). In that connection, the need for flexibility was emphasized. Another suggestion was that agreements as to remedies, concluded after default occurred, might be less objectionable than agreements at the time of the conclusion of the security agreement in which the debtor could be put under pressure to accept a harsh remedy in return for some concession in the security agreement. Yet another suggestion was that notice to and consent of third parties affected by such an agreement should also be discussed in the draft Guide. In that connection, it was stated that tangibles might need to be treated differently from intangibles.

### *E. Freedom of parties to agree to the enforcement procedure*

69. Several suggestions were made. One suggestion was that freedom of parties to agree to the enforcement procedure should be the general rule, subject to exceptions (e.g. public policy, priority, third party rights and insolvency). Another suggestion was that the focus should be on the timing of the agreement, with an agreement being permitted only after conclusion of the financing contract. Yet another suggestion was that emphasis should be placed on the need for an efficient enforcement mechanism, in which judicial involvement might not be the exclusive or primary procedure.

### *F. Acceptance of the encumbered assets in satisfaction of the secured obligation*

70. A number of suggestions were made. One suggestion was that such an agreement could be permitted after the time of the conclusion of the financing contract. Another suggestion was that the agreement should not affect priority and acceptance of the encumbered assets should be in full or partial satisfaction of the secured obligation. Yet another suggestion was that an agreement that automatically vested ownership of the encumbered assets in the secured creditor should be null and void rather than unenforceable. That suggestion was objected to. Yet another suggestion was that the last sentence in paragraph 26 should be deleted.

71. Yet another suggestion was that, irrespective of whether retention or transfer of title was assimilated to a security right or not, acceptance of encumbered assets in satisfaction of the secured obligation might not apply to those quasi-security devices. In that connection, it was stated that such a remedy would be unfair in situations where the debtor had paid the bulk of the price or the value of the assets exceeded the value of the secured obligations. In response, it was observed that any excess value would be returned to the next creditor in the order of priority and then to the debtor. It was noted that that principle should be emphasized in the draft Guide.

72. In that connection, the Working Group had a discussion about retention and transfer of title devices. It was stated that there were several possibilities, including that those devices would be assimilated into a security right system, not assimilated to that system but made subject to filing (perhaps with the exception of consumer transactions and transactions up to a certain amount) and that the same or different remedies would apply to such devices. It was agreed that the matter needed to be discussed once the Working Group had the opportunity to complete its first reading of the draft Guide.

### *G. Redemption of the encumbered assets*

73. It was suggested that redemption should be clearly distinguished from reinstatement, which was a matter of contract. It was also suggested that redemption should be allowed only in very exceptional and clearly defined situations (for a suggestion to avoid using the term "redemption", see para. 65).

### *H. Disposition by the debtor authorized by the grantor*

74. A number of suggestions were made. One suggestion was that it should be clarified that such a remedy existed only in some countries. Another suggestion was that one important disadvantage of such a remedy was that it could delay disposition of the asset by the secured creditor. Yet another suggestion was that paragraph 29 should be deleted. After discussion, it was agreed that paragraph 29 could be retained, provided that the disadvantages of disposition by the debtor with the authority of the grantor were clearly set out.

### *I. Removing the encumbered assets from the grantor's control*

75. Several suggestions were made. One suggestion was that paragraph 30 should clarify whether consent of the debtor was required and define the meaning of the notion "breach of peace". Another suggestion was that the need for interim measures of protection to avoid dissipation of assets should be emphasized. Yet another suggestion was that paragraph 30 should discuss repossession in the case of retention or transfer of title arrangements. It was stated that, in the case of such arrangements, repossession without prior court intervention might not be appropriate. Yet another suggestion was that the disadvantages of requiring that a notice of default be given to the debtor might be counter-productive, since it could inadvertently result in permitting the debtor to hide the encumbered assets. Yet another suggestion was that the efficiency of the judicial system and its impact on such a remedy should be discussed in more detail.

### *J. Sale or other disposition of the encumbered assets*

76. It was noted that the substance of paragraphs 32 to 34 had been discussed in the context of the Working Group's discussion on options following default (see paras. 66-68). It was stated that, with respect to receivables, collection, and not only sale or other disposition, should also be discussed.

### *K. Allocation of proceeds*

77. It was suggested that allocation of proceeds between secured creditors and other parties (e.g. joint owners of the encumbered assets) should also be discussed. In addition, it was suggested that the impact of the distribution of proceeds and, in particular, whether rights of other secured parties were purged based on the principle of finality should also be discussed. Moreover, it was suggested that the time of allocation of proceeds should also be considered.

### *L. Finality*

78. In light of the earlier discussion in the Working Group on the issue of finality (see para. 63), it was agreed that paragraph 37 should be revised to consider the advantages and disadvantages of the various systems on the issue of purging security rights other than those of the secured creditor taking enforcement action.

*M. Summary and recommendations*

79. It was agreed that the summary and recommendations should be revised to take into account the discussion of chapter IX by the Working Group.

80. After discussion, the Working Group requested the secretariat to revise chapter IX taking into account the views expressed and the suggestions made.

## V. FUTURE WORK

81. The Working Group noted that its third session was scheduled to take place in New York from 3 to 7 March 2003 and its fourth session was scheduled to take place in Vienna from 8 to 12 September 2003 (the latter dates being subject to confirmation by the Commission at its thirty-sixth session).

**B. Working paper submitted to the Working Group on Security Interests at its second session: Draft legislative guide on secured transactions**

(A/CN.9/WG.VI/WP.6 and Add.1-5) [Original: English]

## A/CN.9/WG.VI/WP.6

## REPORT OF THE SECRETARY-GENERAL

**Background remarks**

1. At its thirty-third session in 2000, the Commission considered a report of the Secretary-General on possible future work in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that security interests was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of the close link of security interests with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. It was also stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable. Furthermore, in order to ensure the optimal benefits from law reform, including financial-crisis prevention, poverty reduction and facilitation of debt financing as an engine for economic growth, any effort on security interests would need to be coordinated with efforts on insolvency law.<sup>1</sup>

2. At its thirty-fourth session in 2001, the Commission considered a further report by the secretariat (A/CN.9/496). At that session, the Commission agreed that work

should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macroeconomic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.<sup>2</sup>

3. While some concerns were expressed with respect to the feasibility of work in the field of secured credit law, the Commission noted that those concerns were not widely shared and went on to consider the scope of work.<sup>3</sup> It was widely felt that work should focus on security interests in goods involved in a commercial activity, including inventory. It was also agreed that securities and intellectual property should not be dealt with as matters of priority. With respect to securities, the Commission noted the interest of the International Institute on Private Law (UNIDROIT). As to intellectual property, it was stated that there was less

<sup>1</sup>Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 459.

<sup>2</sup>Ibid., Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 351.

<sup>3</sup>Ibid., paras. 352-354.

need for work in that area, the issues were extremely complex and any efforts to address them should be coordinated with other organizations, such as the World Intellectual Property Organization (WIPO).<sup>4</sup> As to the form of work, the Commission considered that a model law might be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include, where feasible, model legislative provisions.<sup>5</sup>

4. After discussion, the Commission decided to entrust a working group with the task of developing “an efficient legal regime for security rights in goods involved in a commercial activity, including inventory, to identify the issues to be addressed, such as the form of the instrument, the exact scope of the assets that can serve as collateral ...”.<sup>6</sup> Emphasizing the importance of the matter and the need to consult with representatives of the relevant industry and practice, the Commission recommended that a two- to three-day colloquium be held.<sup>7</sup>

5. At its first session (New York, 20-24 May 2002), Working Group VI (Security Interests) had before it a first, preliminary draft legislative guide on secured transactions, prepared by the secretariat (A/CN.9/WG.VI/WP.2 and Addenda 1 to 12), a report on an UNCITRAL-CFA international colloquium, held in Vienna from 20 to 22 March 2002 (A/CN.9/WG.VI/WP.3), and comments by the European Bank for Reconstruction and Development (A/CN.9/WG.VI/WP.4). At that session, the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Addenda 1 to 5 and 10), and requested the secretariat to revise these chapters (A/CN.9/512, para. 12). At the same session, the Working Group agreed on the need to ensure, in cooperation with Working Group V (Insolvency Law), that issues relating to the treatment of security rights in insolvency proceedings would be addressed consistently with the conclusions of Working Group V on the intersection of the work of Working Group V and Working Group VI (see A/CN.9/512, para. 88 and A/CN.9/511, paras. 126-127).

6. At its thirty-fifth session in 2002, the Commission had before it the report of Working Group VI (Security Interests) on the work of its first session (A/CN.9/512). The Commission expressed its appreciation to the Working Group for the progress made in its work. It was widely felt that, with that legislative guide, the Commission had a great opportunity to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among countries.

7. In addition, the feeling was widely shared that the timing of the Commission’s initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission’s own initiative in the field of insolvency law. In that connection, the Commission noted with particular satisfaction the efforts undertaken by Working Group VI and Working Group V (Insolvency Law) towards coordinating their work on a subject of common interest such as the treatment of security interests in the case of insolvency proceedings. Strong support was expressed for such coordination, which was generally thought to be of crucial importance for providing States with comprehensive and consistent guidance with respect to the treatment of security interests in insolvency proceedings. The Commission endorsed a suggestion made to revise the insolvency chapter of the draft legislative guide on secured transactions in light of the core principles agreed by Working Groups V and VI (see A/CN.9/511, paras. 126-127 and A/CN.9/512, para. 88). The Commission stressed the need for continued coordination and requested the secretariat to consider organizing a joint session of the two Working Groups in December 2002.

8. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security interests in goods, including inventory.<sup>8</sup> The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative guide.<sup>9</sup>

9. Addenda to this introductory document contain chapters I to V (combined with chapter VI) and X of the revised draft legislative guide on secured transactions: chapter I, Introduction, and chapter II, Key objectives of an efficient secured transactions regime (A/CN.9/WG.VI/WP.6/Add.1); chapter III: Basic approaches to security (A/CN.9/WG.VI/WP.6/Add.2); chapter IV, Creation of security rights (A/CN.9/WG.VI/WP.6/Add.3); chapter V, Publicity, combined with chapter VI, Publicity via filing (A/CN.9/WG.VI/WP.6/Add.4) and chapter IX, Insolvency (A/CN.9/WG.VI/WP.6/Add.5).

10. The remaining chapters are contained in Addenda to the first draft of the legislative guide: chapter VII, Priority (A/CN.9/WG.VI/WP.2/Add.7); chapter VIII, Pre-default rights and obligations of the parties (A/CN.9/WG.VI/WP.2/Add.8); chapter IX, Default and enforcement (A/CN.9/WG.VI/WP.2/Add.9); chapter XI, Conflict of laws and territorial application (A/CN.9/WG.VI/WP.2/Add.11) and chapter XII, Transition issues (A/CN.9/WG.VI/WP.2/Add.12).

<sup>4</sup>Ibid., paras. 354-356.

<sup>5</sup>Ibid., para. 357.

<sup>6</sup>Ibid., para. 358.

<sup>7</sup>Ibid., para. 359.

<sup>8</sup>Ibid., para. 358.

<sup>9</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 202-204.



## A/CN.9/WG.VI/WP.6/Add.1

## ADDENDUM

## CONTENTS

	<i>Paragraphs</i>
Draft legislative guide on secured transactions .....	1-36
I. Introduction 1-26	
A. Purpose and scope .....	1-13
B. Terminology .....	14
C. Examples of financing practices to be covered in the <i>Guide</i> .....	15-26
1. Inventory and equipment purchase-money financing .....	16-20
2. Receivable and inventory revolving loan financing .....	21-23
3. Term loan financing .....	24-26
II. Key objectives of an effective and efficient secured transactions regime .....	27-36
A. Allow a broad array of businesses to utilize the full value inherent in their assets to obtain credit in a broad array of credit transactions .....	28
B. Obtain security rights in a simple and efficient manner .....	29
C. Recognize party autonomy .....	30
D. Provide for equal treatment of domestic and non-domestic creditors .....	31
E. Validate non-possessory rights .....	32
F. Encourage responsible behaviour by enhancing predictability and transparency .....	33
G. Establish clear and predictable priority rules .....	34
H. Facilitate enforcement of creditor's rights in a predictable and efficient manner .....	35
I. Balance the interests of the affected persons .....	36

***Draft legislative Guide on secured transactions***  
*[Prefatory remarks to be prepared at a later stage]*

## I. INTRODUCTION

## A. Purpose and scope

1. The purpose of this *Guide* is to assist States in the development of modern secured transactions laws, with the goal of promoting the availability of low-cost secured credit. The *Guide* 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 review or modernize them, or to harmonize or coordinate their laws with those of other States.

2. The *Guide* is based on the premise that sound secured transactions laws can have many benefits for States that adopt them, including attracting credit from domestic as well as from foreign creditors, promoting the development and growth of domestic businesses, and generally promoting trade. Such laws also can result in benefits for consumers by lowering the cost of goods and services and promoting the availability of low-cost consumer credit. To be effective in promoting the availability of low-cost credit,

such laws must be supported by efficient and effective judicial systems and other enforcement mechanisms. They must also be supported by insolvency laws that respect rights derived from secured transactions laws.

3. The *Guide* seeks to rise above differences among legal regimes to suggest pragmatic and proven solutions that can be accepted and implemented in States having divergent legal traditions. The focus of the *Guide* is on developing laws that achieve practical economic benefits for States that adopt them. While it is possible that States will have to incur predictable and limited costs to develop and implement these laws, substantial experience suggests that the resulting short- and long-term benefits to such States should greatly outweigh the costs.

4. All businesses, whether manufacturers, distributors, service providers or retailers, require working capital to operate, to grow and to compete successfully in the marketplace. It is well established, through studies conducted by such organizations as the International Bank for Reconstruction and Development, the International Monetary Fund, the Asian Development Bank and the European Bank for Reconstruction and Development (EBRD), that one of the most effective means of providing working capital to commercial enterprises is through secured credit.

5. The key to the effectiveness of secured credit is that it allows businesses to use the value inherent in their assets as a means of reducing credit risk for the creditor. Risk is reduced because credit secured by the assets of a business gives creditors access to the assets as another source of payment in the event of non-payment by the debtor. As the risk of non-payment is reduced, the availability of credit increases and the cost of credit falls. On the other hand, in States where creditors perceive the risks associated with credit transactions to be high, the cost of credit increases as creditors require increased compensation to evaluate and assume the increased risk.

6. A legal system that supports secured credit transactions is critical to reducing the perceived risks of credit transactions and promoting the availability of secured credit. Secured credit is more readily available to businesses in States that have efficient and effective laws that provide for consistent, predictable outcomes for creditors in the event of non-performance by debtors. In some States, the absence of an efficient and effective secured transactions regime or of an insolvency law regime, under which security rights are recognized, has resulted in the virtual elimination of credit for consumers, as well as for small and medium commercial enterprises.

7. Creating a legal regime that promotes secured credit not only aids in the cultivation and growth of individual businesses, but also can have a positive effect upon the economic prosperity of States. Thus, States that do not have an efficient and effective secured transactions regime may deny themselves a valuable potential economic benefit.

8. To best promote the availability of low-cost secured credit, the *Guide* suggests that secured transactions laws should be structured to enable businesses to utilize the value inherent in their property to the maximum extent possible to obtain credit. The primary focus of the *Guide* is consensual security rights in movables, and the *Guide* suggests that a broad range of movables be permitted to serve as encumbered assets, including inventory, equipment and receivables. In addition to movables, the *Guide* covers immovables that are fixtures, and also recommends the recognition of a security device (sometimes referred to as an "enterprise mortgage") under which an enterprise may create a security right in all or substantially all of its assets (including immovables) so long as this security device does not inappropriately conflict with other laws dealing with real property. Although the *Guide* focuses on consensual security rights, it also contains references to non-consensual security rights, such as those provided by statute or judicial process, when the same property is subject to both consensual and non-consensual security rights and the law must provide for the relative priority of such rights (see A/CN.9/WG.VI/WP.2/Add.7, paras. 33-38).

9. The *Guide* does not cover security rights in securities as original encumbered assets (as to rights in proceeds, see ...). The nature of securities and their importance for the functioning of financial markets gives rise to a broad range of issues that merit special legislative treatment. These issues are the subject of a text being prepared by the International Institute for the Unification of Private Law

(UNIDROIT). The law applicable to security and other rights in securities is addressed in a convention being prepared by the Hague Conference on Private International Law. The *Guide* is structured in such a way that the State enacting legislation based on the regime envisaged in the *Guide* can, at the same time, implement the texts being prepared by UNIDROIT and the Hague Conference. [*Note to the Working Group: In due course, the Working Group may wish to expand on this matter.*]

10. Because secured transactions often involve parties and assets located in different jurisdictions, the *Guide* also seeks to address the mutual recognition of security rights validly created in other jurisdictions. This would represent a marked improvement over the laws currently in effect in many States, under which security rights often are lost once an encumbered asset is transported across national borders, and would go far toward encouraging creditors to extend credit in cross-border transactions.

11. Various concerns with respect to secured credit have been voiced. For example, providing a creditor with a priority claim to all or substantially all of a grantor's assets (who may be the debtor or a third party, see Terminology, section B) may appear to limit the ability of the grantor to obtain financing from other sources. Additionally, a secured creditor can wield significant influence over a grantor's business, as the creditor may seize, or threaten seizure of, the encumbered assets upon default. There is also the further concern that secured creditors will effectively take most or all of an insolvent grantor's assets and leave little for unsecured creditors, some of whom are not in a position to bargain for a security right in the grantor's assets. The *Guide* discusses these concerns and, in those situations where the concerns appear to have merit, the *Guide* suggests solutions.

12. Throughout, the *Guide* seeks to establish a balance between the interests of debtors, creditors (whether secured, privileged or unsecured), affected third persons, purchasers and other transferees and the State. In so doing, the *Guide* adopts the premise, supported by substantial empirical evidence, that creditors will accept such a balanced approach, and will thereby be encouraged to extend low-cost credit, so long as the laws (and supporting legal and governmental infrastructure) are effective to enable the creditors to assess their risks with a high level of predictability and with confidence that they will realize the economic value of the encumbered assets. Essential to this balance is a close coordination between the secured transactions and insolvency law regimes, including provisions pertaining to the treatment of security rights in the event of a reorganization of an insolvent debtor. Additionally, certain debtors, such as consumer debtors, require additional protections. Thus, although the regime envisioned by the *Guide* will apply to many forms of consumer transactions, it is not intended to override consumer-protection laws or to discuss consumer-protection policies, since this matter does not lend itself to unification.

13. The *Guide* builds on the work of UNCITRAL and other organizations. Such work includes: the United Nations Convention on the Assignment of Receivables in

International Trade, adopted in December 2001; the Convention on International Interests in Mobile Equipment, approved in November 2001; the EBRD Model Law on Secured Transactions, completed in 1994; the EBRD General principles of a modern secured transactions law, completed in 1997; the study on Secured Transactions Law Reform in Asia, prepared by the Asian Development Bank in 2000; the OAS Model Inter-American Law on Secured Transactions, prepared in 2002; [...].

## B. Terminology

14. This *Guide* has adopted terminology to express the concepts that underlie a secured transactions regime. The terms used are not drawn from any particular legal system. Even when a particular term appears to be the same as that found in a particular national law, the meaning given the term may differ. This approach is taken to provide readers a common vocabulary and conceptual framework and to encourage transnational harmonization of the law governing security rights. The following paragraphs therefore identify the principal terms used and the core meaning given to them in this *Guide*. The meaning of these terms is further refined when the terms are used in subsequent chapters. Those chapters also define and use additional terms.

<i>Security right</i>	A “security right” is a consensual <i>in rem</i> right in movable property [and fixtures] that secures payment or other performance of one or more obligations.
<i>Secured obligation</i>	A “secured obligation” is the obligation secured by a security right.
<i>Secured creditor</i>	A “secured creditor” is a creditor that has a security right.
<i>Debtor</i>	A “debtor” is a person that owes performance of the secured obligation. The debtor may or may not be the person that grants the security right to a secured creditor (see grantor).
<i>Grantor</i>	A “grantor” is a person that creates a security right in one or more of its assets in favour of a secured creditor. The grantor may or may not be the debtor that owes performance of the secured obligation (see debtor).
<i>Security agreement</i>	A “security agreement” is an agreement between a grantor and a creditor which creates a security right that secures one or more of the debtor’s obligations.
<i>Encumbered assets</i>	An “encumbered asset” is property subject to a security right. In general, encumbered assets are divided into tangible and intangible property. Each of these two general classes comprises several sub-types.

<i>Tangibles</i>	The term “tangibles” includes all forms of tangible movable property. Among the sub-types of tangibles are inventory, equipment, and fixtures.
<i>Inventory</i>	“Inventory” includes not only a stock of tangibles held for sale or lease in the usual course of business but also raw and semi-processed materials.
<i>Equipment</i>	“Equipment” means tangibles, other than inventory, used by a person in the operation of its business.
<i>Fixtures</i>	The term “fixtures” means tangibles that have become immovable property under the law of the State where the immovable property is situated.
<i>Intangibles</i>	The term “intangibles” covers all movable property other than tangibles. Among the sub-types of intangibles are claims and receivables.
<i>Claims</i>	The term “claims” includes both a receivable and a right to the performance of a non-monetary obligation.
<i>Receivable</i>	A “receivable” is a right to the payment of a monetary sum.
<i>Proceeds</i>	The term “proceeds” includes [the fruits of encumbered assets and] whatever is received on the disposition of encumbered assets.
<i>Priority</i>	The “priority” of a secured creditor refers to the extent to which the secured creditor may derive the economic benefit of its security right in preference to other parties with a right in the same encumbered asset. Rules of priority rank security rights and other property rights in encumbered assets in the order in which they are to be satisfied out of the encumbered assets.
<i>Possessory security right</i>	A “possessory security right” is a security right in encumbered assets in the possession of a secured creditor or of its agent other than the grantor.
<i>Non-possessory security right</i>	A “non-possessory security right” is a security right in intangible encumbered assets and in tangible encumbered assets in the possession of the grantor or of its agent.
<i>Insolvent debtor</i>	An “insolvent debtor” is a person that is subject to insolvency proceedings. If a security right has been granted by a third party grantor, the <i>Guide</i> refers to an “insolvent grantor”.

*Insolvency proceedings*

“Insolvency proceedings” are collective proceedings that involve the partial or total divestment of the insolvent debtor and the appointment of an insolvency representative for the purpose of either liquidation or reorganization of the insolvent debtor’s assets or affairs.

*Insolvency representative*

An “insolvency representative” is a person, designated by law or appointed by a court, that is in charge of administering the insolvent debtor’s assets or affairs for the purpose of either the liquidation or reorganization of those assets or affairs. Insolvency representatives include insolvent debtors left in possession to administer their assets or affairs in reorganization proceedings in those legal regimes where this is permitted.

### C. Examples of financing practices to be covered in the Guide

15. Set forth below are three short examples of the types of secured credit transactions that the *Guide* is designed to encourage, and to which reference will be made throughout the *Guide* to illustrate specific points. These examples represent only a few of the numerous forms of secured credit transactions currently in use, and an effective secured transactions regime must be sufficiently flexible to accommodate many existing modes of financing, as well as modes that may evolve in the future.

[*Note to the Working Group: In order to avoid distracting the reader with an overly complex discussion, only a few limited examples of the most basic and common transactions are given. Other examples of some of the more complex transactions, such as project finance and securitization, may be added by the Working Group, if necessary to illustrate points made in the Guide.*]

#### 1. Inventory and equipment purchase-money financing

16. Businesses often desire to finance specific purchases of inventory or equipment. In many cases, the financing is provided by the seller of the goods. In other cases, the financing is provided by a lender instead of the seller. Sometimes the lender is an independent third party, but in other cases the lender may be an affiliate of the seller.

17. This type of financing is often referred to as “purchase money financing” and occurs in a number of different legal forms (e.g. retention of title). In many States, the seller retains by agreement title to the goods sold until the credit is paid in full. These types of transactions are generally referred to as retention of title arrangements or conditional sales agreements (see also A/CN.9/WP.6/Add.2, paras. ...). In other States, the seller or lender is granted by agreement a security right in the goods sold to secure the repayment of the credit or loan.

18. Here is an example of “purchase money financing”: Agrico is a manufacturer and distributor of agricultural equipment with facilities located in State X and customers located in multiple States. Agrico desires to purchase 10,000 units of paint from Vendor A and 5,000 wheels from Vendor B, and to lease certain manufacturing equipment from Lessor A, all of which will be used by Agrico in manufacturing certain types of agricultural equipment.

19. Under the purchase agreement with Vendor A, Agrico is required to pay the purchase price for the paint within thirty days of delivery to Agrico, and Vendor A retains title to the units until Agrico pays the purchase price in full. Under the purchase agreement with Vendor B, Agrico is required to pay the purchase price for the wheels before they are delivered to Agrico. Agrico obtains a loan from Lender A to finance the purchase of the wheels from Vendor B. The loan is secured by the wheels being purchased.

20. Under the lease agreement with Lessor A, Agrico leases the manufacturing equipment from Lessor A for a period of two years. Agrico is required to make monthly lease payments during the lease term. Agrico has the option to purchase the manufacturing equipment for a nominal purchase price at the end of the lease term. Lessor A retains title to the manufacturing equipment during the lease term. Title will transfer to Agrico at the end of the lease term if Agrico exercises the purchase option.

#### 2. Receivable and inventory revolving loan financing

21. Businesses generally have to expend capital before they are able to generate and collect revenues. For example, before a typical manufacturer can generate receivables and collect payments, the manufacturer must expend capital to purchase raw materials, to convert the raw materials into finished goods and to sell the finished goods. Depending on the type of business, this process may take up to several months. Access to working capital is critical to bridge the period between cash expenditures and revenue collections.

22. One highly effective method of providing such working capital is a revolving loan facility. Under this type of facility, loans secured by the borrower’s existing and future receivables and inventory are made from time to time at the request of the borrower to fund the borrower’s working capital needs (see also A/CN.9/WG.VI/WP.6/Add.3, para. ...). The borrower typically requests loans when it needs to purchase and manufacture inventory, and repays the loans when the inventory is sold and the sales price is collected. Because the revolving loan structure matches borrowings to the borrower’s cash conversion cycle (that is, acquiring inventory, selling inventory, creating receivables, receiving payment and acquiring more inventory to begin the cycle again), this structure is, from an economic standpoint, highly efficient and beneficial to the borrower.

23. Here is an example of this type of financing: Agrico is a manufacturer and distributor of agricultural equipment with facilities located in State X and customers located in multiple States. It typically takes four months for Agrico to manufacture, sell and collect the sales price for its products. Lender B agrees to provide a revolving line of credit

to Agrico to finance this process. Under the line of credit, Agrico may obtain loans from time to time in an aggregate amount of up to 80 per cent of the value of its receivables and of up to 50 per cent of the value of its inventory. Agrico is expected to repay these loans from time to time as it receives payments from its customers. The line of credit is secured by all of Agrico's existing and future receivables and inventory.

### **3. Term loan financing**

24. Businesses often need to obtain financing for large, non-ordinary course expenditures, such as the construction of a new manufacturing plant. In these situations, businesses often seek financing that is not repayable until long after construction is completed. This type of facility is typically referred to as a term loan. In many cases, a term loan is amortized in accordance with an agreed-upon payment schedule, while in other cases the principal balance may be repayable in full at the end of the term.

25. For businesses that do not have strong, well-established credit ratings, term loan financing will typically only be available to the extent that the business is able to grant security rights in assets to secure the financing. The amount of the financing will be based in part on the creditor's estimated net realizable value of the assets securing the financing. In many States, real property is the only type of asset that generally secures term loan financing. However, many businesses, particularly newly-established businesses, do not own any real property and, therefore, may not have access to term loan financing. In other States, term loans secured by other assets, such as equipment and even intellectual property, are common.

26. Here is an example of this type of financing: Agrico is a manufacturer and distributor of agricultural equipment with facilities located in State X and customers located in multiple States. Agrico desires to expand its operations and construct a new manufacturing plant in State Y. Agrico obtains a loan from Lender C to finance such construction. The loan is repayable in equal monthly instalments over a period of ten years. The loan is secured by the new manufacturing plant, including all equipment located in the plant at the time of the conclusion of the financing contract and thereafter.

## **II. KEY OBJECTIVES OF AN EFFECTIVE AND EFFICIENT SECURED TRANSACTIONS REGIME**

27. In the spirit of providing practical, effective solutions, the *Guide* explores and develops the following key objectives and themes of an effective and efficient secured transactions regime:

### ***A. Allow a broad array of businesses to utilize the full value inherent in their assets to obtain credit in a broad array of credit transactions***

28. A key to a successful legal regime governing secured transactions is to enable a broad array of businesses to uti-

lize the full value inherent in their assets to obtain credit in a broad array of credit transactions. In order to achieve this objective, the *Guide* emphasizes the importance of comprehensiveness, by: (i) permitting a broad range of assets to serve as encumbered assets (including inventory, equipment, and receivables); (ii) permitting a broad range of obligations (including future obligations) to be secured; and (iii) extending the benefits of the regime to a broad array of debtors, creditors and credit transactions.

### ***B. Obtain security rights in a simple and efficient manner***

29. The cost of credit will be reduced if security rights can be obtained in an efficient manner. For this reason, the *Guide* suggests methods for streamlining the procedures for obtaining security rights and otherwise reducing transaction costs. These methods include: eliminating unnecessary formalities; providing for a single method for creating security rights rather than a multiplicity of security devices for different kinds of encumbered assets; and permitting security rights in after-acquired property without additional actions on the part of the parties.

### ***C. Recognize party autonomy***

30. Because an effective secured transactions regime should provide maximum flexibility and durability to encompass a broad array of credit transactions, and also accommodate new and evolving forms of credit transactions, the *Guide* stresses the importance of party autonomy, while at the same time protecting the legitimate interests of all persons (especially consumers) affected by the transaction.

### ***D. Provide for equal treatment of domestic and non-domestic creditors***

31. Because healthy competition among all potential creditors (both domestic and non-domestic) is an effective way of reducing the cost of credit, the *Guide* recommends that the secured transactions regime apply equally to domestic and non-domestic creditors.

### ***E. Validate non-possessory security rights***

32. Because the granting of a security right should not make it difficult or impossible for the grantor to continue to operate its business, the *Guide* recommends that the legal regime provide for non-possessory security rights in encumbered assets coupled with mechanisms for publicizing the existence of such security rights.

### ***F. Encourage responsible behaviour by enhancing predictability and transparency***

33. Because an effective secured transactions regime should also encourage responsible behaviour by all parties to a credit transaction, the *Guide* seeks to promote predictability and transparency to enable the parties to assess all relevant legal issues and to establish appropriate consequences for non-compliance with applicable rules, while at the same time respecting, and addressing, confidentiality concerns.

### **G. Establish clear and predictable priority rules**

34. A security right will have little or no value to a creditor unless the creditor is able to ascertain its priority in the property relative to other creditors (including an insolvency representative for the grantor). Thus, the *Guide* proposes clear rules that allow creditors to determine the priority of their security rights at the outset of the transaction in a reliable, timely and cost-efficient manner.

### **H. Facilitate enforcement of creditor's rights in a predictable and efficient manner**

35. A security right will also have little or no value to a creditor unless the creditor is able to enforce the security right in a predictable and efficient manner, including real-

izing the full economic value of the security right in the event of the insolvency of the grantor. The *Guide* proposes procedures that allow creditors to so enforce their security rights, subject to judicial or other official control, supervision or review, when appropriate, and recommends that there be a close coordination between a State's secured transactions laws and its insolvency laws.

### **I. Balance the interests of the affected persons**

36. Because secured transactions affect the interests of various persons, including the debtor, other grantors, competing creditors (including secured, privileged and unsecured creditors, purchasers and other transferees, and the State, the *Guide* proposes rules that take into account their legitimate interests and seek to achieve, in a balanced way, all the objectives mentioned above.

## **A/CN.9/WG.VI/WP.6/Add.2**

### **ADDENDUM**

#### **CONTENTS**

	<i>Paragraphs</i>
III. Basic approaches to security .....	1-54
A. General remarks .....	1-47
1. Introduction .....	1-2
2. Instruments traditionally designed for security .....	3-28
a. Security rights in tangible movable property .....	3-23
b. Security rights in intangible movable property .....	24-28
3. The use of title for security purposes .....	29-42
a. Transfer of title to the creditor .....	30-33
b. Retention of title by the creditor .....	34-42
4. Uniform comprehensive security .....	43-47
B. Summary and recommendations .....	48-54

### **III. BASIC APPROACHES TO SECURITY**

#### **A General remarks**

##### **1. Introduction**

1. Over time, a broad variety of practices have been developed in different countries to secure a creditor's claims (usually for monetary payment) against its debtor. It is the purpose of this chapter to provide a broad survey of the various major approaches for affording the creditor effective means of security; the advantages and disadvantages of each approach to both the immediate parties involved, i.e. creditor and debtor, and third parties; and the major policy options for legislators.

2. In a general sense, it is possible to distinguish three major types of instruments that are used for the purposes

of security. These are, first, instruments designed for and openly denominated as security (see section A.2); second, the recourse to title (ownership) for purposes of security combined with various types of contractual arrangements (see section A.3); and, third, a uniform comprehensive security (see section A.4).

##### **2. Instruments traditionally designed for security**

###### *a. Security rights in tangible movable property*

3. Traditionally, most countries distinguish between proprietary security rights in tangible movable property ("tangibles"; see section A.2.a) and those in intangible movable property ("intangibles"; see section A.2.b). In fact, the tangible nature of an asset gives rise to forms of security that are not available for intangibles (see paras. 8, and 25-26).

4. Within the group of security rights in tangibles, most countries draw a distinction based upon whether the encumbered assets must be transferred into the possession of the creditor (or a third party) or whether the debtor (or a third party) granting the security can retain possession. The former alternative is designated as possessory security (see section A.2.a.i) and the latter alternative as non-possessory security (see section A.2.a.ii).

*i. Possessory security*

(a) *Pledge*

5. By far the most common (and also ancient) form of possessory security in tangibles is the pledge. A pledge requires for its validity that the debtor (references to “the debtor” should be understood as references to “the grantor” where security is granted by a third party in favour of the debtor) effectively give up possession of the encumbered tangibles and that these be transferred either to the secured creditor or to a third party agreed upon by the parties (e.g. a warehouse). The actual holder may also be an agent or trustee who holds the security in the name, or at least for the account, of the creditor or a syndicate of creditors. The required dispossession of the debtor must not only occur at the creation of the security right but it must be maintained during the life of the pledge; return of the encumbered assets to the debtor usually extinguishes the pledge.

6. Dispossession need not always require physical removal of the encumbered assets from the debtor’s premises, provided that the debtor’s access to them is excluded in other ways. This can be achieved, for example, by handing over the keys to the rooms in which the encumbered assets are stored to the secured creditor, provided that this excludes any unauthorized access by the debtor.

7. The debtor’s dispossession can also be effected by delivering the encumbered assets to, or by using assets that are already held by, a third party. Examples are merchandise or raw materials stored in a warehouse or a tank of a third party. An institutional (and more expensive) arrangement may be involving an independent “warehousing” company, which exercises control over the pledged assets as agent for the secured creditor. For this arrangement to be valid, there cannot be any unauthorized access by the debtor to the rooms in which the pledged assets are stored. In addition, the warehousing company’s employees must not work for the debtor (if they are drawn from the debtor’s workforce, because of their expertise, they may no longer work for the debtor).

8. In the case of assets of a special nature, such as documents and instruments (whether or not negotiable), that embody rights in tangible assets (e.g. bills of lading or warehouse receipts) or intangible rights (e.g. negotiable instruments, bonds or share certificates), dispossession is effected by transferring the documents or instruments to the secured creditor. However, in this context, the line between possessory and non-possessory security may not always be easy to draw.

9. In view of the debtor’s dispossession, the possessory pledge presents three important advantages for the secured

creditor. First, the debtor is unable to dispose of the pledged assets without the secured creditor’s consent. Second, the creditor does not run the risk that the actual value of the encumbered assets will be reduced through the debtor neglecting upkeep and maintenance. Third, if enforcement becomes necessary, the secured creditor is saved the trouble, time, expense and risk of having to claim delivery of the encumbered assets from the debtor.

10. Possessory security has also advantages for third parties, especially the debtor’s other creditors. The required dispossession of the debtor avoids any risk of creating a wrong impression of wealth and also minimizes the risk of fraud.

11. On the other hand, the possessory pledge has also major disadvantages. The greatest disadvantage for the debtor is the required dispossession, which precludes the debtor from using the encumbered assets. Dispossession is particularly troublesome in situations where possession of the encumbered assets is indispensable for commercial debtors who require these assets to generate the income from which to repay the loan (as is the case, for example, with raw materials, semi-finished goods, equipment and inventory).

12. For the secured creditor, the possessory pledge has the disadvantage that it has to store, preserve and maintain the encumbered assets, unless a third party assumes this task. Where secured creditors themselves are neither able nor willing to assume these tasks, entrusting third parties will involve additional costs that will be directly or indirectly borne by the debtor. Another disadvantage is the potential liability of the secured creditor in possession of encumbered assets (e.g. pledgee, holder of a warehouse warrant or a bill of lading) that might have caused damage. This is a particularly serious problem in the case of liability for contamination of the environment, since often the monetary consequences (cleanup, damages) substantially exceed the value of the encumbered asset, let alone the prejudice to the reputation and image of the lender. Very few laws address environmental liability of secured creditors in possession. Some of them expressly exempt secured creditors from liability. Other laws limit such liability under certain conditions. When no such exemption from or limitation of liability exists, the risk may be too high for a lender to accept to extend credit or, at least, require insurance, which to the extent it is available, will significantly increase the cost of the transaction to the debtor.

*[Note to the Working Group: The Working Group may wish to define the limits of secured creditors’ liability and establish safe harbours for creditors in connection with their entering into possession of encumbered assets to protect their security right, whether when taking a possessory security or upon enforcement of a non-possessory security.]*

13. However, where the parties are able to avoid the aforementioned disadvantages (see paras. 11-12), the possessory pledge can be utilized successfully. There are two major fields of application. First, where the encumbered assets are already held by or can easily be brought into the possession of a third party, especially a commercial keeper of other persons’ assets. The second field of application is

where instruments and documents, embodying tangible assets or intangible rights, can be easily kept by the secured creditor itself.

(b) *Right of retention of possession*

14. Statutory rights of retention are not discussed since, with few exceptions, statutory rights are outside the scope of this *Guide* (see A/CN.9/WG.VI/WP.6/Add.1, para. 8). A right of retention created by agreement allows a party whose contractual partner is in breach of contract to withhold its own performance and, in particular, an asset which under the terms of the contract the withholding party is obliged to deliver to the party in breach. For example, a bank need not return securities it holds for its customer or allow withdrawals from the customer's bank account, if the customer is in default on repayment of a credit and had agreed to grant the bank a right of retention. Where such a right of retention is reinforced by a valid power to sell the retained item, some legal systems regard such a reinforced right of retention as a pledge, although the method of its creation deviates from that of the pledge proper (see paras. 5-8). Alternatively, a reinforced right of retention may be regarded as having some of the effects of a pledge. The most important consequence of such an assimilation to a pledge is that the creditor in possession has a priority in the assets retained, unless they are subject to an earlier created and effective non-possessory security right.

ii. *Non-possessory security*

15. As noted above (see para. 11), a possessory pledge of tangibles required for production or sale (such as equipment, raw materials, semi-finished goods and inventory) is economically impractical. These goods are necessary for the entrepreneurial activity of commercial debtors. Without access to, and the right and power of disposition over those assets, the debtor would not be able to earn the necessary income to repay the loan. This problem is particularly acute for the growing number of commercial debtors who do not own immovables that can be used as security.

16. To address this problem, laws, especially in the last fifty years, began providing for security in movable assets outside the narrow confines of the possessory pledge. While some countries introduced a new security right encompassing various arrangements serving security purposes, most countries, continuing the tradition of the nineteenth century but disregarding an earlier, more liberal attitude, insisted on the "pledge principle" as the only legitimate method of creating security in movable assets. The English common law "charge" was for some time the only genuine non-possessory security. In the twentieth century, legislators and courts have come to acknowledge the urgent economic need to provide security without recourse, and in addition, to the possessory pledge.

17. Individual countries attempted to find appropriate solutions according to particular local needs and in conformity with the general framework of their legal system. The result is a diverse range of solutions. An external indication of the existing diversity is the variety of names for the relevant institutions, sometimes differing even within a single country, such as: "fictive" dispossession of the

debtor; non-possessory pledge; registered pledge; *nantissement*; warrant; *hypothèque*; "contractual privilege"; bill of sale; chattel mortgage; and trust. More relevant is the limited scope of application of the approaches taken. Only a few countries have enacted a general statute on non-possessory security (for a more comprehensive approach, see section A.4). Some countries have two sets of legislation, one dealing with security for financing of industrial and artisan enterprises, the other with security for financing of farming and fishing enterprises. In most countries, however, there is a variety of statutes covering only small economic sectors, such as the acquisition of cars or of machinery, or the production of films.

18. In some countries, there is even some reluctance to allow security rights in inventory. This is sometimes based upon an alleged inconsistency between the creditor's security right and the debtor's right and power to sell which is indispensable for converting the inventory to cash with which to repay a secured loan. Another objection is that the disposition of inventory will often give rise to difficult conflicts between multiple transferees or multiple secured creditors. Yet another possible objection may come from a policy decision to reserve inventory for the satisfaction of the claims of the debtor's unsecured creditors (see A/CN.9/WG.VI/WP.6/Add.5, para. 26, note).

19. Varied as the legislation providing for non-possessory security might be, it shares one common feature, namely that some form of publicity of the security right is usually provided for. The purpose of publicity is to dispel the false impression of wealth which otherwise may be derived from the fact that the security right in assets held by the debtor is not apparent (for a detailed discussion of this matter, see A/CN.9/WG.VI/WP.6/Add.4, paras. ...). It is often argued that, in a modern credit economy, parties may assume that assets may be encumbered or may be subject to a retention of title. Such general assumptions, however, are bound to increase the cost of credit, even in cases where the person in possession is the owner and the assets are not encumbered (a risk that can be only partially avoided at the cost of an extensive and costly search). In addition, such assumptions fail to sufficiently protect the secured creditor or other third parties, since they do not reveal the name of the owner or previous secured creditor, or the amount owed, and they do not provide information as to the asset encumbered. Furthermore, in such a system based on general assumptions, there is no objective basis for a priority system to rank security rights in the same assets and thus debtors may not be able to use the full value of their assets to obtain credit.

20. There appears to be a need to bridge the gap between the general economic demand for non-possessory security with the often limited access to such security under current law. A major purpose of legal reform in the area of secured transactions is to develop suggestions for improvement in the field of non-possessory security and in the related field of security in intangibles (see section A.2.b).

21. While modern regimes demonstrate that difficulties can be overcome, experience has shown that legislation on non-possessory security is more complicated than the regulation of the traditional possessory pledge. This is due



mainly to the following four key characteristics of non-possessory security rights. First, since the debtor retains possession, it has the power to dispose of or create a competing right in the encumbered assets, even against the secured creditor's will. This situation necessitates the introduction of rules concerning the effects and priority of such dispositions (see A/CN.9/WG.VI/WP.2/Add.7 on priority). Second, the secured creditor must ensure that the debtor in possession takes proper care of, duly insures and protects the encumbered assets to preserve their commercial value, matters which must all be addressed in the security agreement between the secured creditor and the debtor (see A/CN.9/WG.VI/WP.2/Add.8 on rights and obligations of parties before default). Third, if enforcement of the security becomes necessary, the secured creditor will usually prefer to obtain the encumbered assets. However, if the debtor is not willing to part with those assets, court proceedings may have to be instituted. Proper remedies and possibly an accelerated proceeding may have to be provided for (see A/CN.9/WG.VI/WP.2/Add.9 on default and enforcement). Fourth, the appearance of false wealth in the debtor which is created by "secret" security rights in assets held by the debtor may have to be counteracted by various forms of publicity (see A/CN.9/WG.VI/WP.6/Add.4 on publicity).

22. In light of the generally recognized economic need for allowing non-possessory security and the basic differences between possessory and non-possessory security mentioned above (see para. 21), new legislation will be necessary in many countries. In order to meet this economic need and to promote certainty, such legislation should be uniform, comprehensive and consistent. Legislation that introduces non-possessory security by way of narrow and divergent exceptions to the traditional principle of the possessory pledge, as is the case with some countries, could not achieve this result and should be revised.

23. In view of earlier legislative models (see paras. 16-19), legislators may be faced with three alternatives. One alternative may be to adopt uniform legislation for both possessory and non-possessory security rights (see section A.4). This is the well-considered approach of the Model Inter-American Law on Secured Transactions, adopted in February 2002. Another alternative may be to adopt uniform legislation for non-possessory security rights, leaving the regime on possessory rights to other domestic law. Yet another alternative may be to adopt special legislation allowing non-possessory security for credit to debtors in specific branches of business. The prevailing trend of modern legislation, both at the national and the international level, is towards a uniform approach at least as far as non-possessory security is concerned. A selective approach is likely to result in gaps, inconsistencies and lack of transparency, as well as in discontent in those sectors of the industry that might be excluded.

#### b. *Security rights in intangible movable property*

24. Intangibles comprise a broad variety of rights (e.g. right to the payment of money or the performance of other contractual obligation, such as the delivery of oil under a production contract). They include some relatively new

types of asset (e.g. uncertificated securities, held indirectly through an intermediary) and intellectual property rights (i.e. patents, trade marks and copyrights). In view of the dramatic increase in the economic importance of intangibles in recent years, there is a growing demand to use these rights as assets for security. Intangibles, such as receivables and intellectual property rights, are often part of inventory or equipment financing transactions, and often the main value of the security is in those intangibles. Furthermore, intangibles may be proceeds of inventory or equipment. However, this *Guide* does not deal with securities, since they raise a whole range of issues requiring special treatment and these issues are addressed in texts being prepared by the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law. Similarly, this *Guide* will not deal with security in intellectual property rights either because of their complex and specialized nature. The *Guide* does, however, discuss security in receivables, i.e. rights to claim payment of money, and rights to claim performance of non-monetary contractual obligations, as well as security in other types of intangibles as proceeds of tangibles or receivables.

25. By definition, intangibles are incapable of (physical) possession. Nevertheless, most codes of the so-called "civil law" countries have dealt with the creation of possessory pledges (see paras. 5-13) at least in monetary claims. Some codes have attempted to create the semblance of dispossession by requiring the debtor to transfer any writing or document relating to the pledged claim (such as the contract from which the claim was derived) to the creditor. However, such transfer does not suffice to constitute the pledge. Rather, the debtor's "dispossession" is, in many countries, replaced (quite artificially) by requiring that a notice of the pledge be given to the debtor of the pledged claim.

26. In some countries, techniques have been developed that achieve ends comparable to those attained by the possession of tangibles. The most radical method is the full transfer of the encumbered right (or the encumbered share of it) to the secured creditor. However, this goes beyond creation of a security right and amounts to transfer of title (see section A.3.a). Under a more restrained approach, title to the encumbered rights is not affected but dispositions by the debtor that are not authorized by the secured creditor are blocked. This technique can be used where a person other than the person owing the performance in which the secured creditor's right is created (the third-party debtor) has the power to dispose of the encumbered right. In the case of a bank account, if the debtor as holder of the account agrees that its account can be blocked in favour of the secured creditor, the latter has the equivalent of possession of a tangible movable. That is even more true if the bank itself is the secured creditor.

27. In modern terminology, such techniques of obtaining "possession" of intangible property are appropriately called "control". The degree of control though may vary. In some cases, the control is absolute and any disposition by the debtor is prevented. In other cases, the debtor is allowed to make certain dispositions or dispositions up to a fixed maximum, as long as the secured creditor has access to the

account. Control may be a condition for the validity of a security right (see A/CN.9/WG.VI/WP.6/Add.3, para. ...) or priority (see A/CN.9/WG.VI/WP.2/Add.7, para. 12).

28. In the context of efforts to create comprehensive regimes for non-possessory security in tangibles (see section A.2.a), it is common for security in the most important types of intangibles to be integrated into the same legal regime, especially in receivables. This serves consistency since the sale of inventory results, as a rule, in receivables and it is often desirable to extend the security in inventory to the resulting proceeds. The publicity system provided for security in tangibles can perform its salutary functions (for details, see A/CN.9/WG.VI/WP.6/Add.4 on publicity) for security in intangibles, such as receivables, as well. This may have the additional benefit of dispensing with notification of the debtor of receivables, which in certain security transactions involving a pool of assets that are not specifically identified may not be feasible. Even if such notification is feasible, in some legal systems, it may not be desirable (e.g. for reasons of cost or confidentiality).

### 3. *The use of title for security purposes*

29. In addition to instruments for security proper (see section A.2), practice and sometimes also legislation has in many countries developed an alternative approach for non-possessory security rights in both tangible and intangible assets, namely title (or ownership) as security (*propriété sûreté*). Title as security can be created either by transfer of title to the creditor (see section A.3.a) or by retention of title by the creditor (see section A.3.b). Both transfer and retention of title enable the creditor to obtain non-possessory security (for the economic need for, and justification of, non-possessory security, see para. 15).

#### a. *Transfer of title to the creditor*

30. In the absence of a regime of non-possessory security rights, or to fill gaps or address impediments, courts and legislators in some countries have taken recourse to transfer of title of the assets to the secured creditor.

31. There are two features that make the security transfer of title attractive for creditors in certain jurisdictions. First, the formal and substantive requirements for transferring title in tangibles or intangibles to another person are often less onerous than the requirements for creating a security right. Second, in the case of enforcement and in the debtor's insolvency, a creditor often has a better position as an owner than as a holder of a mere security right, especially where the owner's assets, although in the debtor's possession, do not belong to the insolvency estate whereas the debtor's assets, if merely encumbered by a security right for the creditor, do belong to the estate. In other jurisdictions though there is no difference between title for security purposes and security rights with respect to the requirements for creation or enforcement.

32. The security transfer of title has been allowed by law in some countries and by court practice in other countries. In many other countries, especially from the civil law world, such transfers of title are regarded as a circumvention of the ordinary regime of security instruments proper

and are therefore held to be void. Some countries, while allowing a security transfer of title, compromise by reducing its effect to that of an ordinary security, especially where it competes with other creditors of the debtor.

33. Legislators are faced with two policy options. One option is to admit security transfers of title with the (usually) reduced requirements and the greater effects of a full transfer, thus avoiding the general regime for security rights. The other option is to admit security transfers of title, but to limit either the requirements or the effects or both to those of a mere security right. The first option results in enhancing the secured creditor's position (although at the risk of increasing the liability of the creditor, see para. 12), while weakening the position of the debtor and the debtor's other creditors. This solution may make sense if the ordinary security regime for debtor-held security is underdeveloped. Under the second option, a graduated reduction of the secured creditor's advantages and of the other parties' corresponding disadvantages is possible, especially if the requirements of a transfer or its effects or both are limited to those relating to a security right. Any variant of this solution may also counter specific weaknesses of the ordinary regime for non-possessory security. However, generally speaking, in countries with a modern, comprehensive and workable regime for non-possessory security, there is no need for allowing transfer of title as a security device. Further, the system of a uniform comprehensive security (see section G) integrates transfers of title by regarding them as security rights.

#### b. *Retention of title by the creditor*

34. The second method of using title as security is by contractual retention of title (reservation of ownership). The seller or other lender of the money necessary to purchase tangible or even intangible assets may retain title until full payment of the purchase price (simple retention of title or "ROT" arrangement). This type of transaction is often called "purchase money financing", (see description and example in A/CN.9/WG.VI/WP.6/Add.1, paras. 16-19).

35. There are several variations of ROT arrangements, including: "all monies" or "current account" clauses, in which the seller retains title until all debts owing from the buyer have been discharged and not just those arising from the particular contract of sale; and proceeds and products clauses, in which title extends to the proceeds and the products of the assets in which the seller retained title. An alternative to a retention of title arrangement with the same economic result is achieved by combining a lease contract with an option to purchase for the lessee (for a nominal value), which may only be exercised after the lessee has paid most of the "purchase price" through rent instalments (see example in A/CN.9/WG.VI/WP.6/Add.1, para. 20). In some cases, where the lease covers the useful life of equipment, it is equivalent to a retention of title arrangement even without an option to buy.

36. Economically, a retention of title arrangement provides a security right which is particularly well adapted to the needs of, and therefore is widely used by, sellers for securing purchase money credit. In many countries, this kind of credit is widely used as an alternative to bank

financing that is not purchase money financing and is given preferential status in view of the importance of small- and medium-size suppliers for the economy. In other countries, banks also provide on a more regular basis purchase money financing, for example, where the seller sells to a bank and the bank sells to buyer with a retention of title or where the buyer pays the seller in cash from a loan and transfers title to the bank as security for the loan. In those countries, this source of credit and its attendant specific security is given special attention.

37. Due to its origin as a term of a contract of sale or lease, many countries regard the retention of title arrangement as a mere quasi-security, and, therefore, not subject to the general rules on security, such as requirements of form, publicity or effects (principally priority). Contrary to the transfer of title, its retention by the creditor has, in many countries, a privileged status. This may be justified by the desire to support normally small- and medium-size suppliers and to promote purchase money financing by suppliers as an alternative to bank credit that is not purchase money financing. This privileged status may also be justified by the fact that the seller, by parting with the sold goods without having received payment, increases the debtor's pool of assets and requires protection.

38. In contrast, a number of jurisdictions do not recognize retention of title clauses, while a number of other jurisdictions even prohibit them. Other countries restrict the scope of application of such clauses by denying them effect with respect to certain assets, especially inventory, on the theory that the seller's retention of title is incompatible with the seller granting to the buyer the right and power of disposition over the inventory.

39. Several policy options may be considered. One option is to preserve the special character of the retention of title arrangement as a title device. Another option might be to limit the effect of the retention of title arrangement to: only the purchase price of the respective asset to the exclusion of any other credit; and/or to the purchased asset to the exclusion of proceeds or products. Yet another option might be to integrate the retention of title arrangement into the ordinary system of security rights. In such a case, one may consider granting certain advantages to the seller-creditor for the policy reasons mentioned above (see para. 36). Yet another option might be to place the retention of title fully on a par with any other non-possessory security.

40. The first two options would preserve or even create a special regime outside a comprehensive system of non-possessory security rights. In particular, the first option provides the seller-creditor with extensive privileges, a result that has consequential disadvantages for competing creditors of the buyer, especially in the case of execution and insolvency. A technical disadvantage of the title approach is that it prevents or at least impedes the buyer from using the purchased assets for granting a second-ranking security to another creditor. Another disadvantage of the title approach is that executions by the buyer's other creditors are impossible or difficult without the seller's consent.

41. The last two options mentioned above (see para. 39) are more in line with a comprehensive system of security

rights. These options accept that the seller extending credit deserves a certain privileged position since it parts with the sold goods on credit and purchase money credit should be promoted for economic reasons. On the other hand, in the interest of competing creditors, the statutory privilege is limited to the purchase price for the specific asset and to the sold goods as such. By contrast, rights in proceeds or products of the purchased goods, or sums owing from the debtor-buyer other than those arising from the particular contract of sale with an ROT clause, do not enjoy such a privilege and are subject to the rules applicable to ordinary security rights (e.g. have priority as of the time the relevant transaction is registered).

42. Converting retention of title to a security right would enhance the position of the buyer-debtor since it would be enabled to create a second-ranking (non-possessory) security right to secure a loan from another creditor. It could also improve the position of other creditors of the buyer-debtor in the case of execution with respect to the encumbered asset and in the case of the debtor's insolvency. The supplier's position would not necessarily be weakened, since: with a few exceptions, in principle only simple ROT clauses enjoy a privileged position; and whether or not the retention of title is assimilated to a security right, the assets subject to it are not necessarily part of the debtor's estate (see A/CN.9/WG.VI/WP.6/Add.5, para. 12). However, the supplier would need to register (see A/CN.9/WG.VI/WP.2/Add.7, para. 23), and "all sums" clauses, proceeds and products would enjoy priority only as of the time of registration.

#### 4. *Uniform comprehensive security*

43. The idea of a single, uniform, comprehensive security right in all types of assets was first developed in the United States of America in the middle of the twentieth century in the context of the Uniform Commercial Code ("UCC"). The UCC, a model law adopted by all fifty states, created a single, comprehensive security right in movables. Article 9 of the UCC unified numerous and diverse possessory and non-possessory rights in tangibles and intangibles, including transfer and retention of title arrangements, that existed under state statutes and common law. The idea spread to Canada, New Zealand and a few other countries. It is recommended in the Model Law of the European Bank for Reconstruction and Development. The Inter-American Model Law on Secured Transactions follows in many respects a similar approach.

44. Technically, two approaches can be used to achieve a uniform and comprehensive security right. Under one approach, the names of the old security devices are preserved and can be used, such as (possessory) pledge and transfer of title. However, their creation and effects are made subject to one unified set of rules. Under a slightly different approach, a new, comprehensive security right is created. In the end, though, there is no substantive difference between the two approaches.

45. The main feature of a broad approach is that it merges the rules for the traditional possessory pledge with the rules on non-possessory pledge and transfer or retention of title for security purposes. This approach results in

the creation of a single and comprehensive security right system, ensuring consistent treatment of different types of security rights. This is to the benefit of debtors, secured creditors and third parties, including the insolvency representative in the debtor's insolvency (or the grantor's insolvency if the debtor and the grantor are two different persons). A creditor who envisages granting a secured loan, need not investigate various alternative security devices and evaluate their respective prerequisites and limits as well as advantages and disadvantages. Correspondingly, the burden borne by the debtor's creditors or the insolvency representative for the debtor who must consider their rights (and duties), vis-à-vis the secured creditor is lessened if only one regime, characterized by a comprehensive security right, has to be examined rather than several different regimes. Further, this will reduce the cost of creating security and, concomitantly, the cost of the secured credit.

46. In cross-border situations, the recognition of security rights created in another jurisdiction will also be facilitated if the jurisdiction of the new location of encumbered assets has a comprehensive security right. Such a system can much more easily accept a broad variety of foreign security rights, whether of a narrow or an equally comprehensive character.

47. The basic approach does not prevent a legislature from adjusting the contents of the individual provisions implementing them so as to reflect its particular policies. For example, within this unitary system, special interests (e.g. for purchase money security) may be addressed by means of priority rules (see A/CN.9/WG.VI/WP.2/Add.7, paras. 19-24).

## B. Summary and recommendations

48. In certain, albeit limited, practical situations, the possessory pledge functions usefully as a strong security right (see para. 13).

*[Note to the Working Group: The Working Group may wish to consider recommending to States to include in their secured transactions laws or in their environmental laws a rule exempting the secured creditor from liability (or limiting such liability under certain conditions) that may arise from the secured creditor obtaining possession of encumbered assets in the case of possessory pledges. The same exemption (or limitation of liability) could also apply to creditors with a non-possessory security right seeking to enforce their security right upon default, including when engaging, prior to enforcement, in workout activities involving the encumbered assets or the facility where the encumbered assets are stored. Such an exemption or limitation of liability may be limited to secured creditors that have not operated, managed or exercised decision-making control over the facility where the encumbered assets are located.]*

49. A right of retention of possession created by agreement, if accompanied by the creditor's power of sale, functions as a possessory pledge (see para. 14).

*[Note to the Working Group: The Working Group may wish to consider subjecting such a right of retention*

*to the same rules that govern possessory pledges, perhaps with the exception of the rules governing the creation of such rights of retention.]*

50. Non-possessory security rights are of utmost importance for a modern and efficient regime of secured transactions. Debtors need to retain possession of encumbered assets and secured creditors need to be protected against competing claims in the case of debtor default and in particular insolvency (see para. 15).

51. In light of the growing importance of intangibles as security for credit, and the often insufficient rules applicable to this type of security, it would be desirable to develop a modern legal regime for security in intangibles, especially for receivables (see para. 28).

*[Note to the Working Group: To ensure consistency, the Working Group may wish to consider that a regime for security rights in certain types of intangibles should be as close as possible to that for non-possessory security in tangibles.]*

*The Working Group may also wish to discuss the conclusions to be arrived at in the Guide with respect to particular types of intangibles, such as receivables. In its discussion of this matter, the Working Group may wish to take into account: other work of UNCITRAL and work of other organizations; the fact that intangibles may be taken as security in the context of transactions relating to security in tangibles (e.g. inventory or equipment financing) or may be proceeds of tangibles; and the complexity and feasibility of a regime on security rights in intangibles.]*

52. The transfer of title for security purposes does not appear to be useful where there is an efficient and effective regime of non-possessory security in tangible and intangible assets (see para. 33).

53. If the retention of title (or reservation of ownership) is treated as a mere security device, the seller-creditor or other provider of purchase money should be conferred a special priority equivalent to that of a holder of title.

*[Note to the Working Group: The Working Group may wish to consider whether such a special priority should be limited to the sold asset and/or to its outstanding purchase price (to the exclusion of proceeds and products, as well as of other sums owing from the debtor, see para. 40). The Working Group may also wish to consider that treating the retention of title as equivalent to an "ordinary" security right should not prejudice its qualification for other purposes (e.g. taxation, accounting, etc.).]*

54. There are good reasons for replacing a regime of security rights consisting of a variety of specific security devices by a general, comprehensive security right (see paras. 45-47).

*[Note to the Working Group: The Working Group may wish to consider the advantages and disadvantages of the approach taken in several modern security laws that introduce a uniform comprehensive security right (see paras. 43-47).]*

## A/CN.9/WG.VI/WP.6/Add.3

## ADDENDUM

## CONTENTS

	<i>Paragraphs</i>
IV. Creation .....	1-75
A. General remarks .....	1-70
1. Introduction.....	1-3
2. Basic elements of a security right .....	4-47
a. Obligations to be secured .....	4-15
b. Assets to be encumbered.....	16-35
c. Proceeds .....	36-47
3. Security agreement.....	48-60
a. Definition and functions .....	48-50
b. Parties .....	51
c. Minimum contents .....	52-53
d. Formalities .....	54-58
e. Effects.....	59-60
4. Proprietary requirements .....	61-70
a. Ownership or right of disposition.....	61-65
b. Transfer of possession, control, notification, publicity .....	66-70
B. Summary and recommendations .....	71-75

## IV. CREATION

## A. General remarks

## 1. Introduction

1. This chapter deals with issues relating to the contractual basis for creating a security right (statutory or judicial security rights are only mentioned in the context of conflicts of priority; see A/CN.9/WG.VI/WP.2/Add.7, paras. 33-39). As the agreement of the parties alone is usually not sufficient to create a security right, this chapter also discusses the additional, proprietary requirements, such as transfer of possession, notification, publicity or control. Before dealing with the issues relating to the security agreement (see section A.3) and the additional requirements for the creation of an effective security right (see section A.4), this Guide outlines the two basic elements of both, namely the obligations to be secured (see section A.2.a) and the assets to be encumbered (see section A.2.b)

2. The time of the conclusion of the security agreement or of the completion of an additional act is important for ranking security rights in the same asset (for the conditions and effects of ranking, see A/CN.9/WG.VI/WP.2/Add.7). As distinct from ownership, which, in principle, does not allow ranking of several owners, several security rights may be ranked and thus coexist in the same asset. The coexistence of several security rights in the same asset enables the debtor or other grantor to make full use of the economic value of the asset.

3. Even if a security right has been validly created, it may nevertheless fail to fulfil its most important function, i.e.

to ensure priority in the case of the debtor's insolvency. This may occur, for example, where the creation of the security right contravenes prohibitions of insolvency law against preferential transfers made in the suspect period preceding the opening of an insolvency proceeding or contravenes applicable fraudulent transfer laws (for details, see A/CN.9/WG.VI/WP.6/Add.5).

## 2. Basic elements of a security right

## a. Obligations to be secured

## i. Connection between security and secured obligation

4. Security rights are accessory to, or dependent upon, the secured obligation. This means that the validity and the terms of the security agreement depend on the validity and the terms of the agreement giving rise to the secured obligation. In particular, the terms of the security right (e.g. the amount of the claim) cannot surpass the terms of the secured obligation (but they may be reduced if the parties agree). In order to accommodate modern financing practices (e.g. revolving loan facilities), the secured obligation does not need to be specific but can encompass future obligations and fluctuating obligations (see paras. 9-15). In countries where retention of title is not assimilated to a security right, the principle of the accessory character of the security right does not govern title-based security rights (see A/CN.9/WG.VI/WP.6/Add.2, paras. 29-42). In such cases, the creditor's position is stronger since it does not need to prove the outstanding amount of the secured obligation in order to enforce its claim. However, the debtor may require the creditor to return any surplus obtained over the debtor's indebtedness.

## *ii. Limitations*

5. In some countries, non-possessory security may relate only to specific types of obligations described in legislation (e.g. loans for the purchase of automobiles or loans to farmers). In other countries with a general regime for possessory only or also for non-possessory security rights, no such limitations exist. Such a comprehensive approach has the potential of spreading the main benefits from secured financing (i.e. greater availability of credit and at a lower cost) to the parties to a wide range of transactions. To the extent that no such limitations or distinctions of secured obligations are introduced, this approach may also enhance certainty.

6. In order to ensure certainty, consistency and equal treatment of all debtors and secured creditors, special regimes applicable to various types of obligations should be avoided to the extent possible. In situations where such special regimes are necessary for special socio-economic reasons, they should be specifically established by national legislators and not be prescribed for a broad variety of obligations. Such a specific regime may relate, for example, to obligations for payment of purchase money secured with a retention of title, which is generally given priority because of the importance of supplier or other purchase money credit for the economy (see A/CN.9/WG.VI/WP.6/Add.2, para. 36 and A/CN.9/WG.VI/WP.6/Add.5, para. 12).

## *iii. Varieties of obligations*

### *(a) Monetary and non-monetary obligations*

7. Following the example of most national laws, the regime envisaged in the Guide is based on the assumption that, in practice, the most important type of secured obligations is monetary obligations. At the same time, the Guide takes into account the widely recognized need to allow security for the performance of non-monetary obligations (e.g. for delivery of goods). However, in order to be enforceable against the encumbered asset, non-monetary obligations should be convertible to monetary obligations by the time of enforcement.

### *(b) Type of monetary obligation*

8. It is neither possible nor necessary to list in legislation the potential sources of monetary obligations that can be secured. There is a wide range of potential sources and, in any case, the legal source is irrelevant, unless there is a special regime for security rights in specific types of obligations (e.g. for loans by pawnbrokers). An indicative list of such monetary obligations would typically include obligations arising from loans and the purchase of goods, including inventory and equipment, on credit.

### *(c) Future obligations*

9. Legal systems may differ on the distinction between “present” and “future” obligations. In some systems, an obligation is future if it is not due. In other systems, it is future if the contract from which it may arise has not been concluded at the time it is transferred or encumbered (see article 5 (b) of the United Nations Convention on the

Assignment of Receivables in International Trade; “the United Nations Assignment Convention”). The former approach is aimed at enhancing certainty and debtor protection, while the latter approach, in the interest of the economy as a whole, is aimed at validating transactions relating to future obligations. Such transactions securing future obligations are of great economic importance (e.g. revolving loan transactions; see A/CN.9/WG.VI/WP.6/Add.1, paras. 21-23). If each extension or increase of credit were to require that the corresponding security right be modified or even newly created, this could have a negative impact on the availability and the cost of credit.

10. For this reason, modern legal systems recognize security for future obligations. The potential inconsistency with the principle of the accessory character of security rights (see para. 4) is more apparent than real, since, while the security right may be created before, it cannot be enforced until the secured obligation actually arises. In some jurisdictions, in order to protect debtors from over-indebtedness, future obligations may be secured up to a maximum amount. A potential disadvantage of such an approach is that it may not be possible for the debtor to benefit from certain transactions, such as revolving loan facilities (see also para. 13).

11. Obligations subject to a condition subsequent are present obligations and, therefore, do not raise particular issues. Obligations subject to a condition precedent are normally treated like future obligations (see paras. 9-10).

## *iv. Description*

### *(a) General*

12. While a specific description of each secured obligation is usually not necessary, the secured obligation must be determined or determinable on the basis of the security agreement whenever a determination is needed. Such determination is needed, for example, upon enforcement by the secured creditor or upon execution by another creditor of the debtor.

### *(b) Maximum amount*

13. In some legal systems, it is necessary for the parties to describe in specific terms the secured obligation in their agreement or to set a maximum limit to it. The assumption is that such description or limit is in the interest of the debtor since it would be protected from over-indebtedness and would have the option of obtaining additional credit from another party. However, such requirements may inadvertently result in limiting the amount of credit available and thereby in increasing the cost of credit. This is the main reason why many legal systems do not require specific descriptions and allow “all sums” clauses or, at least, do not set maximum limits for secured obligations (see also paras. 10 and 14). This approach is based on the assumption that the secured creditor cannot claim more than it is owed and that, if the obligation is fully secured, better credit terms are likely to be offered to the debtor (see also A/CN.9/WG.VI/WP.2/Add.5, paras. 35-37 and A/CN.9/WG.VI/WP.2/Add.6, paras. 11-12).

(c) *Fluctuating amounts*

14. As already noted (see para. 9 and A/CN.9/WG.VI/WP.6/Add.1, paras. 21-23), modern financing transactions often no longer involve a one-time payment but frequently foresee advances being made at different points of time depending on the needs of the debtor. Such financing may be conducted by a current account, the balance of which fluctuates daily. If the amount of the secured obligation were to be reduced by each payment made (in line with the principle of the accessory nature of security), lenders would be discouraged from making further advances unless they were granted additional security. The law should, therefore, validate rights securing future advances.

(f) *Amounts in foreign currency*

15. The amount of the secured obligation may be expressed in any currency. Occasionally, difficulties of conversion into the currency of the place of payment, execution or insolvency may arise. This matter may be left to the agreement of the parties. However, in the interest of certainty, a secured transactions law should provide that, in the absence of an agreement, the amount of the secured obligation should be converted into the domestic currency.

b. *Assets to be encumbered*i. *Object of the security right*

16. The object of the security right is the debtor's or (in cases where security is provided by a third party) the grantor's ownership (title) in the encumbered asset (including future assets; see para. 61). In the case of a security right in a receivable, it is the grantor's title in the receivable that is being encumbered. However, it is also possible to encumber a limited proprietary right, such as a right of use or a lease. In such cases, the secured creditor's rights are as limited as the encumbered right of use or lease and are subject to any overriding rights of the owner.

ii. *Limitations*

17. As in the case of special regimes for certain types of secured obligations (see para. 5), special laws for specific types of non-possessory security rights introduce limitations as to the types of asset that may serve as security. Assets that may not be encumbered at all or may be encumbered only subject to limitations (e.g. a minimum value that may not be encumbered), may include, for example, wages, pensions and essential household goods (except as security for obligations to pay their purchase price).

18. In the absence of a public policy reason for such special regimes, it should be possible to create a security right in all types of asset, tangible or intangible, such as receivables and other rights, including counter-claims of debtors against secured creditors.

iii. *Future assets*

19. The issue of whether future assets may be encumbered is of great practical importance. The term "future"

covers assets that already exist at the time of the conclusion of the security agreement but do not belong to the debtor (or the debtor cannot dispose of them). It also covers assets that, at that point of time, do not even exist. In both cases, it is assumed that the assets can be encumbered.

20. In many countries, the parties may agree to create a security right in a future asset of the debtor. The disposition is a present one but it becomes effective only when the debtor becomes the owner of the asset or becomes otherwise entitled to dispose of it. The United Nations Assignment Convention takes this approach (see art. 8 (2) and art. 2 (a)).

21. Permitting the use of future assets as security for credit is important, in particular, for securing claims arising under revolving loan transactions (see paras. 9-10) by a revolving pool of assets. Assets to which this technique is typically applied include inventory, which by its nature is to be sold and replaced, and receivables, which after collection are replaced by new receivables. The main advantage of this approach is that one security agreement may cover a changing pool of assets that fit the description in the security agreement. Otherwise, successive acts of creating new security rights would be necessary, a result that could increase transaction costs.

22. In some countries, future assets may not be used as security. This approach is partly based upon technical notions of property law (what does not exist cannot be transferred or encumbered). Another reason is the concern that allowing broad dispositions of future assets may inadvertently result in over-indebtedness and in making the debtor excessively dependent on one creditor, preventing the debtor from obtaining additional secured credit from other sources (see para. 26). Yet another reason for not permitting the creation of security rights in future assets is that the possibility that unsecured creditors of the debtor will obtain satisfaction for their claims may be significantly reduced.

23. Technical notions of property law should not be invoked to pose obstacles to meeting the practical need of using future assets as security to obtain credit. In addition, business debtors can protect their own interests and do not need statutory limitations on the transferability of future assets. Moreover, unsecured creditors could be protected by appropriate rules of priority. Such rules could provide, for example, that, in the case of a conflict of priority between a secured creditor with a security right in all assets of a debtor and unsecured creditors, a certain part of the debtor's assets may be kept aside for the satisfaction of unsecured creditors (see paras. 26 and 32, as well as A/CN.9/WG.VI/WP.6/Add.5, paras. 26-28).

iv. *Assets not specifically identified*

24. Some types of asset, especially equipment, are stable and not subject to frequent dispositions and replacement. They can, therefore, be individually described and identified. Such specific identification, however, may not be possible for other types of asset, especially inventory and, to some degree, receivables. To address this problem, many countries have developed rules that allow the parties to

describe only in general terms the assets to be encumbered. The specific identification, generally required, is transposed from the individual items to an aggregate, which in turn has to be specifically identified. For example, in the case of receivables, it may be sufficient to identify them by referring to "all debtors with initials A to G". In the case of inventory, a sufficient identification may be "all assets stored in the debtor's business premises room A".

25. In some legal systems, even a description referring to all assets, present and future, is sufficient (e.g. "all my assets, presently owned and after acquired"). In some of these legal systems, such an all-assets security is not allowed with respect to consumers or even to individual small traders.

26. Related to, though distinguishable from, the all-assets security is the issue of over-collateralization, which arises in situations where the value of the security significantly exceeds the amount of the secured obligation. While the secured creditor cannot claim more than its secured claim plus interest and expenses (and perhaps damages), over-collateralization may create problems. The debtor's assets may be encumbered to an extent that makes it difficult or even impossible for the debtor to obtain a second-ranking security from another creditor. In addition, executions by the debtor's unsecured creditors may be precluded or at least be made more difficult. Title-based security rights present the same problem. A solution developed by courts in some countries is to declare any excess security void or to grant the debtor a claim for release of such excess security (see paras. 23 and 32, as well as A/CN.9/WG.VI/WP.6/Add.5, paras. 26-28). This solution could work in practice, provided that a commercially adequate margin is granted to the secured creditor.

#### *v. Enterprise mortgages and floating charges*

27. In some countries, all-assets security takes the form of enterprise mortgages or floating charges. One type of such mortgage is a small enterprise mortgage, which is essentially limited to intangibles such as trade names, the clientele or intellectual property rights (see article 69 of the OHADA Uniform Act). Due to its limited scope, this mortgage is of limited importance.

28. By contrast, the large enterprise mortgage plays a major role as security in some countries. A large enterprise mortgage may comprise all movable assets of an enterprise, whether tangible or intangible, although it may be limited to divisible parts of an enterprise. Usually, it does not comprise immovables, since they are subject to a distinct regime (as to fixtures, see paras. 34-35).

29. The most essential aspect of an enterprise mortgage is that the debtor-enterprise has the authority to dispose of its encumbered assets in the ordinary course of its business and that the security attaches automatically to the proceeds taking the place of the disposed assets. Under most legal systems, such an authority to dispose of encumbered assets is admissible without affecting the security right. However, in certain legal systems, dispositions of encumbered assets by the debtor, although authorized by the creditor, are regarded as irreconcilable with the idea of a

security right. In some of these legal systems, the courts invented the idea of a "floating" charge, which is merely a potential property right with a licence to the debtor-enterprise to dispose of the assets in the normal course of business. Dispositions are barred as of the time the debtor is in default, when the floating charge "crystallizes" to become a fully effective "fixed" charge.

30. An interesting advantage of large enterprise mortgages is that upon enforcement by the secured creditor and upon execution by another creditor, an administrator can be appointed for the enterprise. This may assist in avoiding liquidation and in facilitating reorganization of the enterprise with beneficial effects for creditors, the workforce and the economy in general. In practice, however, administrators appointed by the secured creditor may favour the secured creditor. This problem may be mitigated to some extent if the administrator is appointed by a court or other authority.

31. However, large enterprise mortgages present other disadvantages in practice. One disadvantage is that the secured creditor usually is or becomes the firm's major or even exclusive credit provider. Although competition by another credit provider offering better terms is not necessarily precluded, such a situation is, in principle, undesirable. Another disadvantage is that, in practice, the holder of the mortgage often fails to sufficiently monitor the firm's business activities and to actively participate in reorganization proceedings since the mortgagee is amply secured.

32. In order to counterbalance the mortgagee's overly strong position, the debtor-enterprise may be given a claim for the release of grossly excessive security (see para. 26). Following the example of some countries, one may also consider mitigating the mortgagee's priority in the case of the enterprise's insolvency (see paras. 23 and 26, as well as A/CN.9/WG.VI/WP.6/Add.5, paras. 26-28).

33. In a modern secured transactions system, which allows security to be taken in all assets of a commercial debtor (whether incorporated or individual), the particular construction or the terminology of an "enterprise mortgage" or a "floating" need not be preserved. What is important is to preserve the functional characteristics of these devices. This means that a non-possessory security right in all assets of a debtor could be created and that the debtor could be given a right to dispose of the encumbered assets in the ordinary course of its business.

[*Note to the Working Group: The Working Group may wish to consider whether, in the case of enforcement of a security right in all assets of a debtor, an administrator by a court or other authority could be appointed.*]

#### *vi. Fixtures*

34. Fixtures are movables, especially equipment, attached to immovable property. This attachment raises the question whether fixtures continue to be governed by the law governing movable property (and the rights in them are preserved) or they become subject to the law governing immovable property (and the rights in them are extin-



guished). In many countries, fixtures or attachments that may not be easily separated become subject to the law governing immovable property and any previous rights in such fixtures or attachments may be extinguished (whether holders of such rights have a right to be compensated is a separate question). The determination whether a fixture may be easily separated is made on the basis of criteria, such as technical difficulty or cost (compared to the value of the fixture).

35. In those countries, fixtures that may easily be separated from the immovable property to which they have been attached do not become subject to the rights in the immovable property, if the owner of the fixtures and the owner of the immovable are different persons. This rule applies to a supplier with a retention of title in fixtures (typically equipment) and should apply to other secured creditors providing money for the purchase of the encumbered assets (“purchase money secured creditors”). Otherwise, the rights of purchase money secured creditors would be expropriated and the owner or mortgagee of the immovable property would be unjustly enriched. Such an approach would not result in frustrating legitimate expectations of third parties, if retention of title arrangements with respect to such fixtures could be noted in the land register, which is already possible in many countries.

*[Note to the Working Group: The Working Group may wish to extend to holders of security rights securing purchase money for fixtures the right to register rights in fixtures in the land registry. Such an approach would prevent both the “expropriation” of the creditor’s security rights in fixtures and the unjustified enrichment of the real estate mortgagee.]*

### c. Proceeds

#### i. Introduction

36. When encumbered assets are disposed of (or leased or licensed) during the time in which the indebtedness they secure is outstanding, the debtor typically receives, in exchange for those assets, cash, tangible property (e.g. goods or negotiable instruments) or intangible property (e.g. receivables or other rights). Such cash or other tangible or intangible property is referred to in many legal systems as “proceeds” of the encumbered assets. In some cases, the original encumbered assets may generate proceeds that generate other proceeds when the debtor sells, exchanges or otherwise disposes of the original proceeds in return for other property. Such proceeds are referred to as “proceeds of proceeds”.

37. In other situations, the encumbered asset may generate other property for the debtor even without a transaction occurring. Property generated in this way by encumbered assets is referred to in some legal systems as “civil” or “natural fruits”. Such property may include, for example, interest or dividends on financial assets, insurance proceeds, new-born animals and fruits or crops.

38. In some legal systems, civil or natural fruits and proceeds are clearly distinguished and made subject to different rules. The difficulty in identifying proceeds and the need

to protect rights of third parties in proceeds is often cited to justify this approach. Other legal systems do not distinguish between civil or natural fruits and proceeds and subject both to the same rules. The difficulty in distinguishing between civil or natural fruits and proceeds, the fact that both civil or natural fruits and proceeds flow from, take the place of or may affect the value of the encumbered assets are among the reasons mentioned to justify this approach.

39. A legal system governing security rights must address two distinct questions with respect to proceeds and civil or natural fruits (hereinafter referred to collectively as “proceeds”, unless otherwise indicated). The first issue is whether the secured creditor retains the security right if the encumbered asset is transferred from the debtor to another person in the transaction that generates the proceeds (for a discussion of this issue, see A/CN.9/WG.VI/WP.2/Add.7, paras. 26-32).

40. The second issue concerns the creditor’s rights with respect to the proceeds. A legal system governing security rights should provide clear answers to a number of questions (see paras. 41-47).

#### ii. Existence of rights in proceeds

41. The justification for a right in proceeds lies in the fact that, if the secured creditor does not obtain such a right, its rights in the encumbered assets could be defeated or reduced by a disposition of those assets. If the security right were extinguished once the encumbered assets are transferred to another person, it would not adequately protect the secured creditor against default and thus its value as a source of credit would diminish. This result, which would have a negative impact on the availability and the cost of credit, would be the same even if the security right in the original encumbered assets were to survive their disposition. The reason for this result lies in the possibility that a transfer of the encumbered assets may increase the difficulty in locating and obtaining possession, increase the cost of enforcement and reduce their value.

#### iii. Circumstances in which rights in proceeds may arise

42. A right in proceeds typically arises where the encumbered assets are disposed of (or leased or licensed). In systems that treat civil or natural fruits as proceeds, a right in such proceeds may arise even if no transaction takes place with respect to the encumbered assets (e.g. dividends arising from stocks).

#### iv. Personal or proprietary nature of rights in proceeds

43. If the secured creditor’s right in proceeds is a proprietary right, the secured creditor will not suffer a loss by reason of a transaction or other event, since a proprietary right produces effects against third parties. On the other hand, granting the secured creditor a proprietary right in proceeds might result in frustrating legitimate expectations of parties who obtained security rights in those proceeds as original encumbered assets. However, in legal systems in which security rights are subject to filing, this matter may be easier to deal with. In such systems, potential financiers are forewarned about the potential existence of a

security right in assets of their potential borrower (including proceeds of such assets) and can take the necessary steps to identify and trace proceeds.

v. *Extent and time of identification of proceeds*

44. [The Working Group may wish to discuss the extent to which and the time when proceeds must be identifiable as resulting from the encumbered assets.]

vi. *Tracing of proceeds mingled with other assets*

45. [The Working Group may wish to discuss the issue of tracing of proceeds that have been intermingled with other assets.]

vii. *Basis of the rights in proceeds*

46. In some legal systems, the law extends security rights to proceeds of encumbered assets and to proceeds of proceeds through default rules applicable in the absence of an agreement to the contrary. In other legal systems, such a statutory right in proceeds does not exist (for the reasons mentioned in para. 43), but parties may take security in all types of asset. In such systems, parties may be free to provide, for example, that security is created in inventory, receivables, negotiable instruments, securities and cash. In such a way, all these assets become original encumbered assets and not proceeds. In some of these legal systems, parties may extend by agreement certain quasi security rights (e.g. retention of title) to proceeds (see A/CN.9/WG.VI/WP.6/Add.2, paras. 34-42 and A/CN.9/WG.VI/WP.2/Add.7, paras. 51-59).

viii. *Proceeds of proceeds*

47. If there is a right in proceeds of encumbered assets, it should extend to proceeds of proceeds. If the secured creditor loses its right in the proceeds once they take another form, the secured creditor would be subject to the same credit risks as would be the case if there were no rights in proceeds (see para. 41).

### 3. Security agreement

a. *Definition and functions*

48. The security agreement between the creditor and the debtor or, in cases where security is provided by a third party, the grantor is one of the constitutive elements of a security right. An additional act is required in most, but not all, countries (see Section A.4). In some countries, the security agreement, accompanied by an additional act, produces proprietary effects against all parties (*erga omnes*). In those countries, quasi security devices, such as retention-of-title arrangements, produce proprietary effects *erga omnes* as of the time of the conclusion of the relevant agreement, which may even be oral. In other countries, the security agreement has proprietary effects only between the parties (*inter partes*), third-party effects being subject to an additional act.

49. The security agreement should be distinguished from an agreement to create security in the future (e.g. if a credit

is extended to the debtor). Such an agreement creates an obligation to create a security right, but has no proprietary consequences.

50. The security agreement fulfils several functions. First, in civil law countries it is the legal justification (*causa*) for granting the security right to the creditor. Second, the security agreement establishes the connection between the security right and the secured claim. Third, the security agreement generally regulates the relationship between the debtor (or a third party) as grantor of the security right in the encumbered assets and the secured creditor (for pre-default rights, see A/CN.9/WG.VI/WP.2/Add.8; for post-default rights, see and A/CN.9/WG.VI/WP.2/Add.9 and A/CN.9/WG.VI/WP.6/Add.5). While the security agreement may be a separate agreement, often it is contained in the underlying financing contract or other similar contract (e.g. contract of sale of goods on credit) between the debtor and the creditor.

b. *Parties*

51. In most cases, the security agreement is concluded between the debtor as grantor of the security right and the creditor as the secured party. Occasionally, if a third person grants the security for the benefit of the debtor, this person becomes a party to the agreement instead of the debtor. In the case of major loans granted by several creditors (especially in case of syndicated loans), a third party, acting as agent or trustee for the creditors, may hold security rights. None of these possible variations affects the substance of the security agreement.

c. *Minimum contents*

52. The security agreement should identify the parties and reasonably describe the obligation to be secured by the encumbered assets. Whether or not legislation lists these matters as the minimum contents of a security agreement, failure to deal with them in the security agreement may result in the security being null and void, unless the missing elements may be established through other means.

53. The parties may clarify in the security agreement additional matters, such as the duty of care on the part of the party in possession of the encumbered asset. In the absence of an agreement, default rules may apply to clarify the relationship between the parties (for pre-default issues, see A/CN.9/WG.VI/WP.2/Add.8; for post-default issues, see A/CN.9/WG.VI/WP.2/Add.9 and A/CN.9/WG.VI/WP.6/Add.5).

d. *Formalities*

i. *Written form and related requirements*

54. Legal systems differ as to form requirements and their function. In particular with respect to written form, some legal systems require no writing at all while other legal systems require a simple writing, a signed writing or even a notarized writing or an equivalent court or other document (as is the case with enterprise mortgages). Normally, written form performs the function of a warning to the parties about the legal consequences of their

agreement, of evidence of the agreement and of protection for third parties against fraudulent antedating of the security agreement.

55. Written form may also be a condition of validity (or effectiveness in the sense of producing proprietary effects) between the parties or a condition of enforceability as against third parties or of priority among competing claimants. It may also be a condition of obtaining possession of the encumbered assets or invoking a security agreement in the case of enforcement, execution or insolvency.

56. In some legal systems, a certification of the date by a public authority is required for possessory pledges, with the exception of small amount loans where proof even by way of witnesses is permitted. While such certification may address the problem of fraudulent antedating, it may raise the time and cost required for a transaction.

57. In other legal systems, a certified date or authentication of the security agreement is required for various types of non-possessory security (see, for example, articles 65, 70, 94 and 101 of the OHADA Act). At least in one country, such certification is required instead of publicity by registration. Where, however, registration is necessary, an additional certification of the date of the security agreement may not be required.

58. In the interest of saving time and cost, mandatory form requirements need to be kept to a minimum. Written form does not appear necessary as a condition of the validity (or effectiveness in the sense of producing proprietary effects) of the security agreement between the parties. However, with respect to third parties, a written security agreement may usefully serve evidentiary purposes and prevent fraudulent antedating, at least with respect to non-possessory security rights. A simple writing (which would need not to be signed by both parties and would include modern means of communication) should be sufficient. For enterprise mortgages or cases where the security agreement can serve as sufficient title for execution (see para. 55), a more formal document may be necessary. Alternatively, in such a case, no writing may be required but the secured creditor will have to bear the burden of establishing the contents and the date of the security agreement.

#### e. *Effects*

59. In some countries, in which property rights are only those that can be asserted against all parties (*erga omnes*), a fully effective security only comes into being upon conclusion of the security agreement and completion of an additional act (delivery of possession, notification, registration or control; see paras. 61-70). There are two exceptions. In some countries, a retention-of-title clause is effective vis-à-vis third parties upon conclusion of the sales agreement in which it is contained. The other exception relates to an assignment of receivables by way of security, which in some countries is fully effective even without notification of the debtor of the receivable.

60. In other countries, a distinction is drawn between proprietary effects as between the parties to the security agreement and proprietary effects as against third parties.

In those countries, the security comes already into existence upon conclusion of the security agreement (in writing) but only between the contracting parties (*inter partes*). An additional act is required for the security to take effect against third parties (see paras. 61-70).

#### 4. *Proprietary requirements*

##### a. *Ownership or right of disposition*

61. In most legal systems, the grantor of the security (who normally is the debtor but may also be a third party) has to be the owner of the assets to be encumbered (see para. 16). In other legal systems, it is sufficient if the grantor has the power to dispose of the assets (but no ownership). With respect to future assets, it suffices if the grantor becomes the owner or obtains the power of disposition at a future time (see paras. 19-23).

62. Where the grantor does not have the ownership or the power to dispose of the assets, the question arises whether the secured creditor can nevertheless acquire the security right in good faith. In some legal systems, the creditor acquires the security right if the subjective good faith is supported by objective indicia of ownership. These elements include situations where the creditor has extended or is about to extend credit to the debtor, or the grantor is registered as the owner of the assets to be encumbered or holds them and transfers possession thereof to the creditor.

63. Legislation on this subject often addresses the related issue of the validity and the effectiveness of contractual restrictions on dispositions. In some countries, effect is given to such limitations in order to protect the interests of one or the other party to the agreement restricting dispositions. In other countries, no effect or only a limited effect is given to contractual restrictions of dispositions so as to preserve the grantor's freedom of disposition prevails, in particular if the person acquiring an asset is not aware of the contractual restriction.

64. The United Nations Assignment Convention takes a similar approach to support transferability of a receivable claim, which is in the interest of the economy as a whole. Under article 9 of the Convention, the assignment is effective despite a contractual restriction on assignment agreed upon between the assignor and the debtor. Mere knowledge of the existence of the restriction on the part of the assignee is not enough for the avoidance of the contract from which the assigned receivable arises. The effect of this provision is limited in two ways. First, its application is limited to trade receivables broadly defined; and second, the contractual restriction is effective as between the assignor and the debtor, and the debtor is free to claim damages from the assignor for breach of contract, if such a claim exists under law applicable outside the Convention. However, this claim may not be raised against the assignee by way of set-off (see article 18, paragraph 3).

65. This approach promotes receivables financing transactions since it relieves the assignee (i.e. the secured creditor) of the burden of having to examine the contract from which the assigned claim arose, in order to ascertain

whether transfer of the claim has been prohibited or made subject to conditions. Otherwise, lenders would have to examine potentially a large number of contracts which may be costly or even impossible (e.g. in the case of future receivables).

b. *Transfer of possession, control, notification, publicity*

66. The methods of producing proprietary effects as against third parties and, in those systems that allow the ranking of several security rights in the same assets, of establishing priority over competing claimants vary from country to country, and even within individual countries, according to the type of security right involved. There are four main methods of creating a security right that is effective as against all persons (and has priority over competing claimants).

i. *Transfer of possession*

67. The possessory pledge type of security right is created by agreement and transfer of possession of the asset to the creditor or to an agreed third person acting as the creditor's agent. In the case of a transfer of ownership for security purposes, possession may be fictitiously transferred to the creditor by way of an additional agreement of deposit or security. Such an agreement superimposes on the debtor's direct possession the creditor's indirect possession (*constitutum possessorium*). In the case of negotiable instruments, possession may also be transferred by delivery, with an endorsement, if necessary, under the rules governing negotiable instruments.

ii. *Control*

68. Security rights in certain intangibles (e.g. bank accounts) are created by agreement and transfer of control. Control may take the form of fictitious possession (e.g. if the bank has a security right in the debtor's account with the bank). It may also be reflected in the power of disposition (e.g. if the secured creditor, on the basis of an agreement with the debtor, can dispose of the debtor's account, without the debtor's further consent).

iii. *Notification*

69. Security rights in receivables may be created by agreement and notification of the debtor of the receivables. Such notification is regarded as an act of publicity. However, notification may not be a very effective way to publicize an assignment, since notification may be impossible (e.g. in the case of an assignment of future receivables) or very costly (e.g. in the case of a bulk assignment involving several debtors), or debtors may not provide any or accurate information to interested third parties.

iv. *Publicity*

70. Some form of publicity may be required in particular for the creation of non-possessory security rights in tangibles and intangibles. This publicity may take the form of registration of the security agreement and have constitutive

effects. It may also take the form of registration of a limited amount of data and function as a warning to third parties about the potential existence of a security right and as a basis for establishing priority among competing claimants (for details on the forms, functions and effects of publicity, see A/CN.9/WG.VI/WP.2/Add.5 and 6).

## B. Summary and recommendations

71. In a modern secured credit law, it should be possible to secure all types of obligations, including future obligations and a fluctuating amount of obligations. It should also be possible to provide security in all types of asset, including assets of which the debtor may not own or have the power to dispose of, or which do not exist, at the time of creation of the security right.

[*Note to the Working Group: The Working Group may wish to consider whether any exceptions to these rules should be introduced. In addition, the Working Group may wish to consider the comparative advantages and disadvantages of a regime where security can be taken over all assets of a debtor.*]

72. The secured creditor should also be given a right in readily identifiable proceeds.

[*Note to the Working Group: The Working Group may wish to consider the nature and the extent of the right in proceeds (see paras. 36-47).*]

73. In principle, a security agreement creating a non-possessory security right should be in written form. No writing should be required for possessory security rights. Writing should include modern means of communications and need not be signed by both parties. It should identify the parties and reasonably describe the encumbered assets and the secured obligation. In situations where no formalities are required, the secured creditor should have the burden of proving both the terms of the security agreement and the date of creation of the security.

[*Note to the Working Group: The Working Group may also wish to consider whether further exceptions to the written form rule should be introduced.*]

74. An agreement between the secured creditor and the debtor (or other grantor) and transfer of possession of the encumbered asset to the secured creditor or to an agreed third party is necessary for the creation of a possessory security right.

75. An agreement (in written form; see para. 72) and some additional act (control, notification or publicity) should be sufficient for the creation of a non-possessory security right.

[*Note to the Working Group: The Working Group may wish to consider whether any exceptions to this general rule should be introduced. The Working Group may also wish to consider whether a distinction should be made between a security right that is valid or effective as between the parties thereto and a security right that is effective as against all third persons.*]

## A/CN.9/WG.VI/WP.6/Add.4

As chapters V (Publicity) and VI (Filing system) may be usefully combined, the revised version of the new chapter will be issued after the second session of the Working Group when the Working Group will have the opportunity to discuss chapter VI.

## A/CN.9/WG.VI/WP.6/Add.5

### Security Interests

#### Draft legislative guide on secured transactions

#### REPORT OF THE SECRETARY-GENERAL

#### ADDENDUM

#### CONTENTS

	<i>Paragraphs</i>
IX. Insolvency . . . . .	1-53
A. General remarks . . . . .	1-45
1. Introduction . . . . .	1-5
2. Key objectives . . . . .	6-8
3. Security rights in insolvency proceedings . . . . .	9-45
a. The inclusion of encumbered assets in the insolvency estate . . . . .	9-15
b. Limitations on the enforcement of security rights . . . . .	16-22
c. Participation of secured creditors in insolvency proceedings . . . . .	23-24
d. The validity of security rights and avoidance actions . . . . .	25
e. The relative priority of security rights . . . . .	26-28
f. Post-commencement financing . . . . .	29-35
g. Reorganization proceedings . . . . .	36-41
h. Expedited reorganization proceedings . . . . .	42-45
B. Summary and recommendations . . . . .	46-53

#### IX. INSOLVENCY

##### A. General remarks

###### 1. Introduction

1. This chapter examines the effects of insolvency proceedings on the enforcement rights of the secured creditor. It should be read together with the UNCITRAL Legislative Guide on Insolvency Law, which addresses the issues identified here in the broader context of insolvency law (see A/CN.9/WG.V/WP.63 and Addenda). Conflict of laws issues arising with respect to security rights in insolvency proceedings are discussed in chapter X.

2. Secured transactions laws and insolvency laws have overlapping concerns and objectives. Both are concerned

with debtor-creditor relations and both encourage credit discipline on the part of debtors. Although insolvency regimes typically have additional objectives, such as the preservation of viable enterprises in temporary financial difficulty, both regimes share a common objective of protecting the economic value of security rights. Effective regulation in either area will contribute to positive outcomes in the other. A secured transactions law, for example, may expand the availability of credit, thus facilitating the operation of a business and the avoidance of insolvency. A secured transactions law may also promote responsible behaviour on the part of both creditors and debtors by requiring creditors to monitor the ability of debtors to perform their obligations, thereby discouraging over-indebtedness and consequent insolvency. Moreover, a secured transactions law that provides for a public record of security rights will make it easier for an insolvency adminis-

trator to determine promptly the legal status of creditors who claim that obligations owed to them are secured.

3. Nevertheless, there are tensions where secured transactions and insolvency law intersect because of the different approaches taken to discharging debts or other obligations. A secured transactions regime seeks to ensure that the value of the encumbered assets protects the secured creditor when the obligations owed to the secured creditor are not satisfied, while an insolvency regime deals with circumstances where obligations owing to all creditors cannot be satisfied. In addition, the former regime focuses on effective enforcement rights of individual creditors to maximize the likelihood that the obligations owed are performed or their economic value realized. The latter regime, on the other hand, seeks to maximize the return to all creditors by preventing a race between creditors to enforce individually their rights against their common debtor. These tensions need to be considered by legislators because development or reform in one regime can impose unforeseen transaction and compliance costs on stakeholders of the other regime. For this reason, conflicts between the rights and obligations imposed by the different regimes governing secured transactions and insolvency should be identified and reconciled by a country in its law reform process.

4. Insolvency regimes generally provide for two main types of proceedings: liquidation (which involves the termination of the commercial business of the debtor, and the subsequent realisation and distribution of the insolvent debtor's assets), and reorganization (designed to maximize the value of assets, and returns to all creditors, by saving a business rather than terminating it). In a liquidation proceeding, the insolvency representative is entrusted with the task of gathering the insolvent debtor's assets, selling or otherwise disposing of them, and distributing the proceeds to the debtor's creditors. To maximize the liquidation value of these assets, actions by individual creditors against the debtor are usually stayed initially and the representative may continue the debtor's business for a short time and may sell the business as a going concern rather than selling individual assets separately. In a reorganization proceeding, on the other hand, the objective of the proceeding is to continue the debtor's business as a going concern if economically feasible. Most insolvency laws providing for reorganization proceedings take as their premise that the value of the insolvent debtor's business as reorganized will provide a greater return to creditors than if the individual assets of the business were liquidated. Thus, a successful reorganization will capture for the creditors the premium of the business's going concern value over its liquidation value (see A/CN.9/WG.V/WP.63/Add.12).

5. As a supplement to reorganization proceedings, expedited approaches are evolving that encourage prompt judicial confirmation in a formal reorganization proceeding of an agreement reached by the principal creditors or classes of creditor before an insolvency proceeding commences (e.g. reorganizations dealing only with certain classes of debt, such as financial debt). These approaches respond to the need to support economic stability by rapid adjustment of the claims of financial institutions and reduce the cost and delay of the reorganization proceedings (see paras 42-45).

## 2. Key objectives

6. Legislators revising existing security rights laws or introducing a new secured transactions regime should reconcile proposed legislation with existing or proposed insolvency laws. To implement broad economic and social policies (e.g. protecting workers or preserving supply markets), an insolvency regime may adopt rules that modify rights of secured creditors. This is most notable in regimes that provide for reorganization proceedings. For example, insolvency laws that provide for reorganization of an insolvent debtor's business will often permit the insolvency representative to continue to use encumbered assets in the business to be reorganized. Secured creditors will, however, factor in these potential limitations on their rights to enforce their security rights when making their decision to extend credit. Modifications of the secured creditors' rights will therefore come at the cost of restricting the economic benefits of an effective secured transactions regime. Any modification should therefore be based on articulated policies and the insolvency law should set out the modifications in clear and predictable terms.

7. As a general rule, the validity and relative priority of a security right should be recognized in an insolvency proceeding. If a security right is valid outside insolvency proceedings so that it is effective against third parties, the validity of the security right should be recognized in the insolvency proceeding. Similarly, if a security right has priority over the right of another creditor outside the insolvency proceeding, the commencement of an insolvency proceeding should not alter the relative priority of this security right.

8. Any limitation on the right of a secured creditor to enforce its security right without the secured creditor's consent should preserve as nearly as possible the economic value that a security right had outside the insolvency proceeding. An insolvency regime should therefore provide mechanisms that protect the economic value of the security right.

### 3. Security rights in insolvency proceedings

#### a. The inclusion of encumbered assets in the insolvency estate

9. An initial question is whether the secured creditor's security right is subject to insolvency proceedings or, in other words, whether the encumbered assets are part of the "estate" created when insolvency proceedings are commenced against a debtor (see A/CN.9/WG.V/WP.63/Add.5). The estate is comprised of those assets of an insolvent debtor that are subject to administration in and use during the insolvency proceeding.

10. Inclusion of encumbered assets within the insolvency estate can give rise to different effects. In many jurisdictions, inclusion in the estate will limit a secured creditor's ability to enforce its security right (see para. 16). Any such legislative limitations on commercial agreements will be taken into account by creditors when deciding whether to extend credit to a debtor, and at what cost. Some insolvency laws that require all assets to be subject to insol-

veny proceedings in the first instance allow the separation of encumbered assets from the estate where there is proof of harm or prejudice to the economic value of the security right or where the particular assets are shown to be fully encumbered and unnecessary to the reorganization process.

11. To allow for an assessment of whether the continuation of the proceedings will maximize the eventual return to creditors overall, an insolvency law may subject the encumbered assets to control within the insolvency proceedings. As a consequence, a secured creditor may be prohibited from taking possession of encumbered assets or, if it is in possession, may be required to surrender possession of the encumbered assets to the insolvency representative. This approach may be taken not only in reorganization proceedings, but also in liquidation proceedings in which the insolvent debtor's business is to continue while assets are liquidated in stages, or there is a likelihood that the business may be sold as a going concern. As it may not be possible to know at the commencement of insolvency proceedings whether it is desirable to continue the business, many insolvency regimes include the encumbered assets in the estate at least for a limited time period.

12. An insolvency estate will normally include all assets in which the insolvent debtor has a right at the time insolvency proceedings are commenced. In those jurisdictions where title of the encumbered assets is transferred to the creditor and this is treated as creating a security right (see chapter III.A.3), the assets are treated as being part of the insolvency estate. The transfer of title to the creditor should, however, be distinguished from the retention of title by the supplier or other purchase-money financier of tangibles. Those jurisdictions that recognize the retention of title do not always include these tangibles within the insolvency estate, whether or not they otherwise assimilate the retention of title to security rights. A jurisdiction may, for example, wish to protect suppliers or other purchase-money financiers from the claims of other creditors when the assets and affairs of their common debtor are liquidated in an insolvency proceeding. Even these jurisdictions might not extend this exclusion to reorganization proceedings because of an overriding policy objective of continuing potentially viable businesses. In any event, this Guide recommends (see A/CN.9/WG.VI/WP.2/Add.5, paras. 11-14 and A/CN.9/WG.VI/WP.2/Add.7, paras. 23-24) that the secured transactions regimes in these jurisdictions should require the suppliers to publicize their interests so that non-purchase money creditors are informed of the suppliers' rights.

*[Note to the Working Groups: The Working Groups may wish to consider whether (i) assets transferred to a secured creditor as security or assets in which title is retained by their seller or other purchase-money financier until full payment of the purchase money (see chapter III, section A.3) and (ii) assets transferred to the insolvent debtor as security or assets sold by the insolvent debtor in which the insolvent debtor has retained title until full payment of their price should be part of the estate.]*

13. Some secured creditors will participate in insolvency proceedings because they have both a secured and an unse-

cured claim. This is not limited to situations where the creditor has two separate obligations, only one of which is secured. It also occurs when the secured creditor is under-secured (i.e. the value of the encumbered assets is less than the amount of the secured obligation). In such a case, the secured creditor has a secured claim only to the extent of the value of the encumbered assets and an unsecured claim for the difference (see also section A.3.b).

14. An insolvency law should provide for the time and manner for determining the economic value of a security right. In principle, the value should be determined as of the time that the insolvency proceeding formally commences. The manner for determining the value will ordinarily be related to the procedure for the recognition of the validity of claims against the debtor's estate (for the variety of possible mechanisms for the admission of claims, including secured claims, see A/CN.9/WG.V/WP.63/Add.13).

15. Outside insolvency, a security agreement may provide that a security right includes the proceeds of encumbered assets and after-acquired assets. An insolvency law should address the issue of whether the secured creditor continues to be entitled to these proceeds and assets acquired after the commencement of insolvency proceedings. Proceeds received on the disposition of encumbered assets in effect are a substitute for those assets and should in principle secure the economic value of the security right. Proceeds in the form of fruits and products of encumbered assets are not literally substitutes but represent natural increases which all parties expect to be subject to the security right. To the extent, however, that the insolvency representative incurs expenses in connection with these proceeds, the secured creditor rather than the estate should ultimately bear the burden of these expenses. Assets acquired by the estate after the commencement of the insolvency proceedings in which the secured creditor might have a right outside insolvency are not substitutes of encumbered assets or the natural fruits or products of those assets. In the absence of new financing by the secured creditor, the case for recognizing the creditor's right in these new assets is less compelling.

#### b. *Limitations on the enforcement of security rights*

16. Many insolvency laws limit the rights of creditors to pursue any remedies or proceedings against the debtor after insolvency proceedings are commenced, through the imposition of a stay or moratorium. The stay may be imposed either automatically or at the discretion of a court, either on its own motion or on application of an interested party. A number of jurisdictions extend the stay to both unsecured and secured creditors. The same reasons for including encumbered assets within the estate (see para. 13) apply to the stay of enforcement of security rights. Limitations, however, on a secured creditor's ability to enforce its security right may have an adverse impact on the cost and availability of credit. An insolvency law must balance these competing interests (see A/CN.9/WG.V/WP.63/Add.6).

17. Some insolvency laws authorize the court to order protective measures to preserve the estate in the period between a petition to open insolvency proceedings and the

court's decision on the petition. These laws typically permit the court to order these protective measures in its discretion, either on its own motion or on application of an interested party. Where these provisional measures are available they may include staying a secured creditor from taking possession of encumbered assets or otherwise enforcing its security right. Because these measures are provisional and are ordered before the decision to commence proceedings, creditors requesting these measures may be required by the court to provide evidence that the measure is necessary and, in some cases, some form of security for costs or damages that may be incurred.

18. With few exceptions (see para. 11), the need to stay enforcement of a security right for a substantial period of time is less compelling when the insolvency proceeding is a liquidation proceeding. In most liquidation proceedings, the insolvency representative will dispose of assets individually rather than by selling the business as a going concern. Different approaches may be taken to account for this. For example, an insolvency regime may exclude secured creditors from the application of the stay, but encourage negotiations between the insolvent debtor and the creditors prior to commencement of the insolvency proceedings to achieve the best outcome for all parties. An alternative approach would provide that in insolvency proceedings the stay lapses after a brief prescribed period of time (e.g. 30 days) unless a court order is obtained, extending the stay on grounds specified in the insolvency law. These grounds might include a demonstration that there is a reasonable possibility the business will be sold as a going concern; this sale will maximize the value of the business; and secured creditors will not suffer unreasonable harm. Yet another approach is to leave the lifting of the stay to the discretion of the court supervising the insolvency proceedings but to provide statutory guidelines for the exercise of this discretion (see A/CN.9/WG.V/WP.63/Add.6, paras. 80-83 and 91-92).

19. A stronger case for a stay is made when the insolvency proceeding is a reorganization proceeding. The objective of such a proceeding is to restructure a potentially economically viable entity so as to restore the financial well being and viability of the business, to maximize the return to creditors, and to maintain employment. This may involve restructuring the finances of the business by such means as debt rescheduling, debt reduction, debt-equity conversions, and sale of all or part of the business as a going concern. Removal of encumbered assets from the business will often defeat attempts to continue the business or to sell it as a going concern. Accordingly, an insolvency law might extend the application of a stay to secured creditors for the time period necessary to formulate, present to creditors and implement a reorganization plan to creditors (see A/CN.9/WG.V/WP.63/Add.6, para. 91).

20. If an enforcement action by a secured creditor is stayed, an insolvency regime should provide safeguards to protect the economic value of the security rights in the encumbered assets. Such safeguards might include court orders for cash payments for interest on the secured claim, payments to compensate for the depreciation of the encumbered assets, and extension of the security right to cover additional or substitute assets. The need for such safeguards

is particularly compelling when the encumbered assets are perishable or consumable (such as cash or cash equivalents).

21. In addition, an insolvency law might also relieve a secured creditor from the burden of a stay by authorizing the insolvency representative to release the encumbered assets to the secured creditor. Grounds for such a release might include cases where the encumbered assets are of no value to the estate and are not essential for the sale or rehabilitation of the business, cases where it is not feasible or is overly burdensome to protect the value of the security right, and cases where the insolvency representative has failed in a timely fashion to sell or abandon the encumbered assets. An insolvency law might also provide that once the stay has been terminated with respect to particular encumbered assets, the secured creditor could use, at its cost and if it wished, procedures in the insolvency proceeding to sell the encumbered assets.

22. Where the value of the encumbered assets is greater than the secured claim, the insolvency estate has an interest in the surplus if the assets are to be liquidated. In the absence of insolvency, the secured creditor would have to account to the grantor for the surplus proceeds. If the same assets are disposed of during insolvency proceedings, the surplus would be available for distribution to other creditors. As to who should dispose of the encumbered assets, an insolvency law should address the question whether the same policies that apply outside of insolvency should apply also in insolvency proceedings. For example, if the applicable security rights law authorizes the secured creditor to dispose of an asset outside insolvency, the question is whether the secured creditor, rather than the insolvency representative, should control disposition of the relevant encumbered assets during insolvency. An insolvency law might provide that, in a liquidation procedure, the encumbered assets would be turned over to the secured creditor if there was a reasonable indication that the secured creditor would sell them more easily and at a better price. In any event, the insolvency law should make clear that any surplus after paying reasonable expenses and satisfying the secured claim should be returned to the insolvency estate.

#### *c. Participation of secured creditors in insolvency proceedings*

23. If secured creditors are required to participate in insolvency proceedings, the insolvency regime should ensure that participation is effective to protect the interests of secured creditors (see A/CN.9/WG.V/WP.63/Add.11). For example, the notification to creditors announcing the commencement of insolvency proceedings should indicate whether secured creditors need to make a claim and, if so, to what extent.<sup>1</sup> Secured creditors should have at least the same standing in court proceedings as other creditors.

24. In addition, if an insolvency law provides for creditor committees to advise the insolvency representative, the law should provide for adequate representation of the inter-

<sup>1</sup>For notification to foreign creditors, see article 14 of the UNCITRAL Model Law on Cross-Border Insolvency and paras. 106-111 of the Guide to Enactment of the Model Law.



ests of secured creditors. Secured creditor representatives may sit on a committee with representatives of unsecured creditors or, alternatively, the law might provide for a separate committee for secured creditors. Concerns that in the context of a single committee the interests of secured creditors might dominate proceedings to the detriment of other creditors, might be addressed by limiting the issues on which secured creditors may vote. For example, voting might be restricted to the selection of the insolvency representative and matters directly affecting encumbered assets or the economic value of security rights.

d. *The validity of security rights and avoidance actions*

25. In general, a security right valid against third parties outside of insolvency should be recognized as valid in an insolvency proceeding. However, a challenge to the validity of a security right in insolvency proceedings should be allowed on the same grounds that any other claim might be challenged. Many jurisdictions allow an insolvency representative, for example, to set aside (“avoid”) or otherwise render ineffective any fraudulent or preferential transfer made by the insolvency debtor within a certain period before the commencement of insolvency proceedings. The creation or transfer of a security right is a transfer of property subject to these general provisions, and if that transfer is fraudulent or preferential, the insolvency representative should be entitled to avoid or otherwise render ineffective the security right. This would mean that a security right, which is valid under the secured transaction regime of a jurisdiction, may be invalidated, in certain circumstances, under the insolvency regime of the same jurisdiction (see A/CN.9/WG.V/WP.63/Add.9). In any event, the insolvency law should set out any grounds for avoidance of a security right in clear and predictable terms. Payment of proceeds after the commencement of insolvency proceedings (see para. 15), should be possible, unless such payment is fraudulent or voidable under other applicable principles.

e. *The relative priority of security rights*

26. A secured transaction regime will establish the priority of claims to encumbered assets. In exceptional situations, insolvency laws may affect that priority (see A/CN.9/WG.V/WP.63/Add. 14). Many laws, for example, give a priority to one or more of the following classes of claims: unpaid wages and employee benefits, environmental damage and government taxes (“privileged claims”). While most legal systems award these claims priority only over unsecured claims, some regimes extend the priority to rank ahead of even secured claims.

[*Note to the Working Groups: The Working Groups may wish to consider adding a new paragraph along the following lines: “Some laws alter the pre-insolvency ranking of secured and unsecured creditors by setting aside a portion of the estate, including encumbered assets, for the benefit of some classes of unsecured creditors, such as employees of the debtor or persons with personal injury claims against the debtor. Some other laws, to discourage egregious conduct by secured creditors before insolvency proceedings commence, provide that in exceptional cir-*

*cumstances the priority of a secured creditor’s security right may be reduced. Examples might include situations in which the secured creditor dictates major decisions by the company prior to the commencement of insolvency proceedings or the secured creditor engages in inequitable conduct prior to the insolvency proceedings relative to the company or its creditors.”]*

27. The greater the uncertainty regarding the number and amounts of claims given priority over claims of secured creditors, the greater will be the negative impact on the availability and cost of credit. It is, therefore, essential that exceptions to the priority of secured creditors be limited, in number and monetary amount, and that the existence and amount of these exceptions be expressed in a transparent and predictable way. For example, the exceptions should be set forth, not only in labour or tax law, but also in insolvency and secured transactions law.

28. The insolvency representative may incur costs in the maintenance of encumbered assets and pay for these costs from the general funds of the insolvency estate. Because such expenditure preserves the economic value of the security right, not to grant priority over the secured creditor for these administrative expenses would unjustly enrich the secured creditor to the detriment of the unsecured creditors. To discourage unreasonable expenditure, however, an insolvency law might limit the priority to the reasonable cost of foreseeable expenses that directly preserve or protect the encumbered assets. As a general rule, the insolvency law should not subject the value of the encumbered assets to a surcharge for the general administration of the insolvency proceeding. An exception includes the case where the value of the encumbered assets does not meet the full value of the secured creditor’s claim, there are no other assets and the secured creditor does not object to the insolvency proceeding.

f. *Post-commencement financing*

29. In order for an insolvency proceeding to yield the maximum return for all creditors, either through liquidation or reorganization, the insolvency representative must have sufficient funds available to it to fund the expenses of the liquidation or reorganization. In the case of a liquidation, these expenses may include the cost of preserving and protecting the debtor’s assets pending their sale or other disposition. In the case of a reorganization, the expenses may include funding payroll and other operating expenses to enable the debtor to carry on its business as a going concern during the insolvency proceeding.

30. In some cases, the insolvency representative may already have sufficient liquid assets to fund such anticipated expenses, in the form of cash or other assets that will be converted to cash (such as anticipated proceeds of receivables). However, these assets may already be subject to valid security rights held by the debtor’s pre-existing creditors (such as a lender that has security rights in the debtor’s receivables arising as proceeds from the sale of inventory). The use of such assets by the insolvency representative during the insolvency proceeding could well impair, or even destroy, the economic value of such security rights. As a result, an insolvency representative should

only be permitted to use such assets in the insolvency proceeding to the extent that the rights of pre-existing secured creditors to receive the economic value of their security rights are protected. Otherwise, prospective secured creditors will be reluctant to extend credit to a debtor knowing that, if the debtor were to become subject to an insolvency proceeding, they could lose the economic value of their security rights as a result of the use of those assets in the insolvency proceeding.

31. In other cases, the insolvency estate's existing liquid assets and anticipated cash flow may be insufficient to fund the expenses of the insolvency proceeding, and the insolvency representative must seek financing from third parties. Such financing may take the form of credit extended to the debtor by vendors of goods and services, or loans or other forms of credit extended by lenders. Often, these are the same vendors and lenders that extended credit to the debtor prior to the insolvency proceeding. Typically, these providers of credit will only be willing to extend credit to an insolvency estate if they receive appropriate assurance (either in the form of a priority claim on, or security rights in, the assets of the insolvent debtor) that they will be repaid. Yet here again, those assets may already be subject to valid security rights held by the debtor's pre-existing creditors and, for the reason described in the preceding paragraph, new creditors asked to extend credit to the insolvency estate should only be given a priority claim or security rights in the insolvent debtor's existing or future assets to the extent that the rights of any pre-existing holders of security rights to receive the economic value are protected.

32. Thus, in any of these financing arrangements (referred to collectively as "post-commencement financing") it is essential that the economic value of the security rights of pre-existing secured creditors is protected so that the secured creditors will not be unreasonably harmed. If the existing secured creditors' encumbered assets are of a value significantly in excess of the amount of the secured obligations owing to them, no special protections to the pre-existing secured creditors may be necessary initially (subject to the creditors' right to ask for protection at a later date if circumstances change). However, in many cases such an excess does not exist, and the pre-existing secured creditors should receive additional protections to preserve the economic value of their security rights, such as periodic payments or security rights in additional assets in substitution for the assets to be used by the insolvency representative or encumbered in favour of a new lender.

33. In providing additional protections to a pre-existing secured creditor, it is likewise important that such creditor not receive greater security rights than it would have been entitled to if there were no post-commencement financing. Thus, the granting of additional security rights should not result in the pre-existing creditor improving its pre-insolvency secured position by, for example, securing pre-insolvency obligations that were unsecured. Rather, any additional security rights granted to a pre-existing secured creditor should secure only the insolvency estate's obligation to reimburse the secured creditor for the decline in value of the encumbered assets subject to its pre-existing security rights.

34. In some legal regimes, post-commencement financing is governed by specific provisions of the insolvency law, while in other regimes there are no such provisions, and post-commencement financing is extended merely on the basis of a negotiated agreement between the new creditor and the insolvency representative. In both cases, the financing often is extended only after the entry of an order by the insolvency tribunal after a hearing conducted with notice to all affected parties.

35. This Guide recommends that specific provision for post-commencement financing be incorporated into the insolvency law, so that the circumstances in which such financing may be provided, the rules applicable thereto, and the effect of such financing on the rights of all parties may be easily ascertained, and taken into account, by a creditor considering extending credit to a solvent debtor before an insolvency proceeding is commenced and may be taken into account by the creditor before extending the credit (for further discussion of this topic, see A/CN.9/WG.V/WP.63/Add.14).

*g. Reorganization proceedings*

36. The principal objective of reorganization proceedings is to maximize the value of the insolvency debtor's business in the interest of all creditors by formulating a plan for the business's rescue as well as to protect investments and preserve employment. In order to achieve these goals, it may be necessary for a secured creditor to participate in the reorganization, especially if the encumbered assets must be used in the insolvency debtor's business for the business to be able to reorganize and for the insolvency debtor, on emergence from the insolvency proceedings, to conduct its affairs.

37. An important corollary of the secured creditor participating in the reorganization, however, is that the secured creditor should not be made worse off than if the secured creditor resorted to its non-insolvency enforcement rights to dispose of the encumbered assets and applied the proceeds of the disposition to the secured obligations. Indeed, as a general matter, the economic value of the secured creditor's security rights should be preserved and maintained in the reorganization. Otherwise, the uncertainty created by the inability of the secured creditor to rely upon receipt of the economic value of its security rights in the event of the reorganization of the insolvency debtor in an insolvency proceeding could result in the secured creditor not extending credit to the debtor in the first place or extending the credit at a higher cost. Moreover, such preservation of value is also essential to attract the financing that the insolvency debtor will require in order to implement its reorganization plan and to operate as a rehabilitated enterprise.

38. To be sure, if the secured creditor is to participate in the reorganization, the reorganization plan might contain provisions by which its security rights are proposed to be adversely affected. Even so, the secured creditor may be willing to have its security rights be adversely affected and therefore may agree to be bound by the reorganization plan. However, if the secured creditor does not agree to be bound by the reorganization plan, the question arises as to whether the secured creditor may nevertheless be required to be

bound by the reorganization plan over the secured creditor's objection.

39. If under the relevant insolvency law a secured creditor may be required to be bound by the reorganization plan over the secured creditor's objection, the secured creditor should receive the basic protection that the economic value of its security rights should not be diminished under the plan without the consent of the secured creditor. The protection of the secured creditor's security rights should be clear and transparent under the insolvency law so that the secured creditor will be able to make its decision as to whether to extend credit to the grantor and, if so, on what terms, with the certainty of knowing that its security rights will be appropriately protected if the grantor were to become an insolvent debtor and if a reorganization plan were to be adopted for the grantor over the objection of the secured creditor's class or, as the case may be, of the secured creditor itself.

40. There are several examples of ways in which the economic value of the secured creditor's security rights may be preserved in the reorganization plan even though the security rights of the secured creditor are being altered by the plan. If the plan provides that the secured creditor would receive a cash payment under the plan in exchange for the secured obligations, the cash payment should not be less than what the secured creditor would have received had it resorted to its non-insolvency enforcement rights to dispose of the encumbered assets and applied the proceeds of the disposition to the secured obligations. If the plan provides for the secured creditor to release its security rights in some encumbered assets, the plan should provide for substitute assets of at least equal value to become subject to the secured creditor's security rights, unless the remaining encumbered assets have sufficient value to enable the secured creditor to be paid in full upon any disposition or liquidation of the remaining encumbered assets. If the plan subordinates the secured creditor's security rights to those of another secured creditor, the encumbered assets should have sufficient value to enable both the senior and the subordinated secured creditors to be paid in full upon any disposition or liquidation of the encumbered assets. If the plan provides for the amount of the secured obligations constituting a monetary indebtedness to be paid over time, the secured creditor should retain its security rights and the present value of the future payments of the secured obligations, after giving effect to the restructuring of the secured obligations. In addition, the interest rate on the restructured secured obligations provided under the plan, should not be less than the amount that the secured creditor would have been received had it resorted to its non-insolvency enforcement rights to dispose of the encumbered assets and applied the proceeds of the disposition to the secured obligations.

41. Whether the economic value of the secured creditor's security rights is preserved in a reorganization plan may be more of a factual issue rather than a legal issue in many circumstances. In the event of a contest in the insolvency proceeding as to whether the economic value of the security rights is being preserved under the plan, the determination of value will often require consideration of markets and market conditions. The valuation may, indeed, require expert testimony, especially if the treatment of the secured

creditor under the plan involves encumbered assets or securities whose present value may be dependent upon the grantor's future performance and therefore may contain elements of performance risk to be factored into the determination of value. Absent agreement among the contesting parties, the insolvency tribunal will have to decide on the evidence presented whether the economic value of the security rights is being preserved.

#### *h. Expedited reorganization proceedings*

42. In recent years, significant attention has been given to the development of expedited reorganization proceedings ("expedited proceedings") as a means of streamlining the reorganization of a debtor, without the cost or delay inherent in formal reorganization proceedings, in situations where all or substantially all of the debtor's major creditors (usually other than trade creditors) are able to reach an agreement as to the terms of the reorganization.

43. Expedited proceedings may take the form of a procedure in which (i) the creditors first conduct negotiations concerning the terms of a proposed reorganization plan prior to the commencement of a formal insolvency proceeding, (ii) a formal insolvency proceeding is then commenced, and (iii) the reorganization plan is presented to the insolvency tribunal for its approval on an expedited basis (but subject to the same requirements for disclosure to, and voting by, all of the debtor's creditors and other procedural requirements that are applicable in formal reorganization proceedings). When approved, the reorganization plan would bind dissenting creditors in the same manner as in a formal reorganization proceeding. (see A/CN.9/WG.V/WP.63/Add.12). However, some proposals for expedited proceedings contemplate less involvement by the insolvency tribunal, and rely primarily on agreements by the major creditors of the debtor, with resort to the tribunal only for limited purposes. Expedited proceedings might also incorporate provisions for obtaining post-commencement financing of the debtor, and an expedited procedure for obtaining judicial review of rulings of the insolvency tribunal.

44. From the perspective of promoting the availability of low-cost secured credit, it is essential that expedited proceedings not frustrate the reasonable expectations of secured creditors, or create a circumstance in which a secured creditor is worse off in such proceedings than it would be in a formal insolvency proceeding. Thus, for example, an expedited proceeding should not, without the secured creditor's consent, deprive that creditor of its ability to realize the full economic value of its encumbered assets, and should reasonably compensate the secured creditor for any diminution in that value resulting from the use of such assets by the debtor during the proceeding. Moreover, the expedited proceeding should not frustrate the reasonable expectations of the secured creditor under its credit documents and applicable law with respect to choice of law or applicable forum.

45. As a general matter, the existence, in a given jurisdiction, of properly constructed expedited proceedings that adhere to the principles discussed above would encourage creditors to extend secured credit in that jurisdiction.

## B. Summary and recommendations

46. A secured transactions regime should recognize the right of secured creditors to the economic value of their security rights and maintain the pre-insolvency priority of security rights. Any exceptions should be limited, clear and predictable.

47. In principle, encumbered assets should be included in the insolvency estate.

*[Note to the Working Groups: The Working Groups may wish to consider adding a recommendation as to the question whether assets that are subject to a retention or transfer of title arrangement should be part of the insolvency estate (see para. 12 and note).]*

48. If secured creditors are required to participate in insolvency proceedings, the insolvency regime should ensure that participation is sufficiently effective to protect the interests of secured creditors.

49. The distinction between insolvency proceedings designed to liquidate the assets of an insolvency debtor and proceedings designed to rescue the business of the insolvency debtor support different treatment of stays of enforcement of security rights in those proceedings. With few exceptions (see para. 11), the need to stay enforcement of a security right is less compelling when the insolvency proceeding is a liquidation proceeding than when it is a reorganization proceeding. Application of the stay, its dura-

tion, and the grounds for relief from the stay should be adjusted accordingly. In any event, the secured creditors should be provided with safeguards to ensure adequate protection of the economic value of their security rights when their right to enforce their security rights in the encumbered assets is deferred for a substantial period of time by the stay.

50. Subject to any avoidance actions, security rights created before the commencement of an insolvency proceeding should be equally valid in an insolvency proceeding.

51. As a general rule, insolvency proceedings should not alter the priority of secured claims prevailing before the commencement of the insolvency proceedings. Certainty and transparency with respect to any necessary exceptions will help limit the negative impact on the availability and cost of credit.

52. An insolvency law should incorporate specific provision for post-commencement financing so that a creditor extending credit to a debtor before an insolvency proceeding is commenced may take into account the possibility of post-commencement financing before extending the credit (see A/CN.9/WG.V/WP.63/Add.14).

53. Expedited proceedings should not frustrate the reasonable expectations of secured creditors, or create a circumstance in which a secured creditor is worse off in such proceedings than it would be in a formal insolvency proceeding.

## C. Report of Working Group VI (Security Interests) on the work of its third session (New York, 3-7 March 2003)

(A/CN.9/532) [Original: English]

### CONTENTS

	<i>Paragraphs</i>
I. Introduction .....	1-6
II. Organization of the session .....	7-12
III. Deliberations and decisions .....	13-14
IV. Preparation of a Legislative Guide on Secured Transactions .....	15-108
Chapter VIII. Pre-default rights and obligations of the parties (A/CN.9/WG.VI/WP.2/Add.8) .....	15-35
A. Limitations .....	15
B. Default rules .....	16-17
C. Duty of care .....	18-20
D. Right to be reimbursed for reasonable expenses .....	21
E. Duty to keep the encumbered assets identifiable .....	22
F. Duty to take steps to preserve the debtor's rights .....	23
G. Right to impute revenues to the payment of the secured obligation .....	24
H. Right to assign the secured obligation and the security right .....	25-26
I. Right to "repledge" the encumbered asset .....	27

	<i>Paragraphs</i>
J. Right to insure against loss or damage of the encumbered asset .....	28
K. Duty to account and to keep adequate records .....	29
L. Right to use, mix, commingle and process the encumbered asset .....	30
M. Duty to return encumbered assets upon payment of secured obligation .....	31
N. Summary and recommendations .....	32-35
Chapter XI. Conflict of laws and territorial application (A/CN.9/WG.VI/WP.2/Add.11) .....	36-57
General remarks .....	36-410
A. Law governing the creation, publicity and priority of a security right .....	42-47
B. Party autonomy with respect to the law governing the creation of a security right .....	48
C. Subsequent change in the connecting factor .....	49
D. Law governing the enforcement of a security right .....	50
E. The impact of insolvency on the law applicable .....	51-54
F. Scope of conflict of laws rules .....	55-57
Chapter XII. Transition issues (A/CN.9/WG.VI/WP.2/Add.12) .....	58-72
General remarks .....	58-61
A. Effective date .....	62
B. Transition period .....	63-65
C. Priority .....	66-72
Chapter III. Basic approaches to security (A/CN.9/WG.VI/WP.6/Add.2) .....	73-91
A. Pledge .....	73-75
B. Non-possessory security .....	76-77
C. Security rights in intangible movable property .....	78
D. Transfer of title for security purposes .....	79
E. Retention of title .....	80-84
F. Uniform comprehensive security .....	85
G. Summary and recommendations .....	86-91
Chapter IV. Creation (A/CN.9/WG.VI/WP.6/Add.3) .....	92-108
A. Introduction .....	92
B. Accessory character of the security right .....	93-94
C. Limitations on types of obligations that could be secured .....	95
D. Varieties of obligations .....	96-97
E. Description .....	98-99
F. Assets to be encumbered .....	100-101
G. Future assets .....	102-103
H. Assets not specifically identified .....	104-105
I. Enterprise mortgage and floating charges .....	106-108
V. Future work .....	109

## I. INTRODUCTION

1. At its present session, the Working Group continued its work on the development of “an efficient legal regime for security rights in goods involved in a commercial activity”.<sup>1</sup>

The Commission’s decision to undertake work in the area of secured credit law was taken in response to the need for an efficient legal regime that would remove legal obstacles to secured credit and could thus have a beneficial impact on the availability and the cost of credit.<sup>2</sup>

<sup>1</sup>Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 358.

<sup>2</sup>Ibid., Fifty-fifth Session, Supplement No. 17 (A/55/17), para. 455, and Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 347.

2. At its thirty-third session (2000), the Commission discussed a report prepared by the secretariat on issues to be addressed in the area of secured credit law (A/CN.9/475). At that session, the Commission agreed that secured credit law was an important subject and had been brought to the attention of the Commission at the right time, in particular in view of its close link with the work of the Commission on insolvency law. It was widely felt that modern secured credit laws could have a significant impact on the availability and the cost of credit and thus on international trade. It was also widely felt that modern secured credit laws could alleviate the inequalities in the access to lower-cost credit between parties in developed countries and parties in developing countries, and in the share such parties had in the benefits of international trade. A note of caution was struck, however, in that regard to the effect that such laws needed to strike an appropriate balance in the treatment of privileged, secured and unsecured creditors so as to become acceptable to States. Furthermore, it was stated that, in view of the divergent policies of States, a flexible approach aimed at the preparation of a set of principles with a guide, rather than a model law, would be advisable.<sup>3</sup>

3. At its thirty-fourth session (2001), the Commission considered another report prepared by the secretariat (A/CN.9/496) and agreed that work should be undertaken in view of the beneficial economic impact of a modern secured credit law. It was stated that experience had shown that deficiencies in that area could have major negative effects on a country's economic and financial system. It was also stated that an effective and predictable legal framework had both short- and long-term macro-economic benefits. In the short term, namely, when countries faced crises in their financial sector, an effective and predictable legal framework was necessary, in particular in terms of enforcement of financial claims, to assist the banks and other financial institutions in controlling the deterioration of their claims through quick enforcement mechanisms and to facilitate corporate restructuring by providing a vehicle that would create incentives for interim financing. In the longer term, a flexible and effective legal framework for security rights could serve as a useful tool to increase economic growth. Indeed, without access to affordable credit, economic growth, competitiveness and international trade could not be fostered, with enterprises being prevented from expanding to meet their full potential.<sup>4</sup> As to the form of work, the Commission considered that a model law would be too rigid and noted the suggestions made for a set of principles with a legislative guide that would include legislative recommendations.<sup>5</sup>

4. At its first session (New York, 20-24 May 2002), the Working Group considered chapters I to V and X (A/CN.9/WG.VI/WP.2 and Add.1-5 and 10) of the first preliminary draft guide on secured transactions, prepared by the secretariat. At that session, the Working Group requested the secretariat to prepare revised versions of

those chapters (see A/CN.9/512, para. 12). At that session, the Working Group also considered suggestions for the presentation of modern registration systems in order to provide the Working Group with information necessary to address concerns expressed with respect to registration of security rights in movable property (see A/CN.9/512, para. 65). At the same session, the Working Group agreed on the need for coordination with Working Group V (Insolvency Law) on matters of common interest and endorsed the conclusions of Working Group V with respect to those matters (see A/CN.9/512, para. 88).

5. At its thirty-fifth session (2002), the Commission considered the report of the first session of the Working Group (A/CN.9/512). It was widely felt that the legislative guide was a great opportunity for the Commission to assist States in adopting modern secured transactions legislation, which was generally thought to be a necessary, albeit not sufficient in itself, condition for increasing access to low-cost credit, thus facilitating the cross-border movement of goods and services, economic development and ultimately friendly relations among nations. In that connection, the Commission noted with satisfaction that the project had attracted the attention of international, governmental and non-governmental organizations and that some of those took an active part in the deliberations of the Working Group. At that session, the Commission also felt that the timing of the Commission's initiative was most opportune both in view of the relevant legislative initiatives under way at the national and the international level and in view of the Commission's own initiative in the field of insolvency law. After discussion, the Commission confirmed the mandate given to the Working Group at its thirty-fourth session to develop an efficient legal regime for security rights in goods, including inventory. The Commission also confirmed that the mandate of the Working Group should be interpreted widely to ensure an appropriately flexible work product, which should take the form of a legislative Guide.<sup>6</sup>

6. At its second session (Vienna, 17-20 December 2002), the Working Group considered chapters VI, VII and IX (A/CN.9/WG.VI/WP.2 and Add.6, 7 and 9) of the first preliminary draft Guide on secured transactions, prepared by the secretariat. At that session, the Working Group requested the secretariat to prepare revised versions of those chapters (see A/CN.9/531, para. 15). In conjunction with that session and in accordance with suggestions made at the first session of the Working Group (see A/CN.9/512, para. 65), an informal presentation of the registration systems of security rights in movable property of New Zealand and Norway was held. Immediately before that session, Working Groups V (Insolvency Law) and VI (Security Interests) held their first joint session (Vienna, 16-17 December 2002), during which the revised version of former chapter X (new chapter IX; A/CN.9/WG.VI/WP.6/Add.5) on insolvency was considered. At that session, the secretariat was requested to prepare a revised version of that chapter (see A/CN.9/535, para. 8).

<sup>3</sup>Ibid., *Fifty-fifth Session, Supplement No. 17 (A/55/17)*, para. 459.

<sup>4</sup>Ibid., *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, para. 351.

<sup>5</sup>Ibid., para. 357.

<sup>6</sup>Ibid., *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, paras. 202-204.

## II. ORGANIZATION OF THE SESSION

7. The Working Group, which was composed of all States members of the Commission, held its third session in New York from 3 to 7 March 2003. The session was attended by representatives of the following States members of the Commission: Argentina (alternating annually with Uruguay), Austria, Brazil, Cameroon, Canada, China, Colombia, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Morocco, Paraguay, Russian Federation, Singapore, Spain, Sweden, Thailand and United States of America.

8. The session was attended by observers from the following States: Australia, Jordan (Hashemite Kingdom of), Malta, Marshall Islands, Philippines, Republic of Korea, Turkey, Venezuela and Viet Nam.

9. The session was also attended by observers from the following national or international organizations: (a) organizations of the United Nations system: International Monetary Fund (IMF), International Bank for Reconstruction and Development (the World Bank); (b) intergovernmental organizations: International Institute for the Unification of Private Law (UNIDROIT); (c) non-governmental organizations invited by the Commission: American Bar Association (ABA), Center for International Legal Studies, Commercial Finance Association (CFA), Inter-American Bar Association (IABA), International Chamber of Commerce (ICC), International Federation of Insolvency Professionals (INSOL), International Swaps and Derivatives Association (ISDA), Max-Planck-Institute of Foreign and Comparative Law, National Law Center for Inter-American Free Trade (NLCIFT), The Association of the Bar of the City of New York, the European Law Students Association (ELSA), and the Union of Industrial and Employers' Confederations of Europe (UNICE).

10. The Working Group elected the following officers:

*Chairman:* Ms. Kathryn Sabo (Canada)

*Rapporteur:* Mr. M. R. Umarji (India)

11. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.7 (provisional agenda), A/CN.9/WG.VI/WP.2 and Addenda 8, 11 and 12 (first version of the draft Guide), as well as A/CN.9/WG.VI/WP.6 and Addenda 1 to 3 (second version of the draft Guide).

12. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Preparation of a legislative Guide on secured transactions.
4. Other business.
5. Adoption of the report.

## III. DELIBERATIONS AND DECISIONS

13. At the beginning of its deliberations, the Working Group held a moment of silence in memory of Ms. Pascale

de Boeck, representative of the International Monetary Fund. The Working Group considered chapters VIII, XI and XII of the first version of the draft Guide and chapter II and paragraphs 1 to 33 of chapter III of the second version of the draft Guide. The deliberations and decisions of the Working Group are set forth below in part IV. The secretariat was requested to prepare, on the basis of those deliberations and decisions, a revised version of the chapters of the draft Guide discussed at the present session.

14. Having noted that the World Bank was working on a technical paper that would address both insolvency and secured transactions issues, the Working Group recommended that increased efforts by both the Commission and the World Bank should be made to ensure coordination and to avoid duplication of efforts and inconsistent results, and to promote complementarity as required within the United Nations system. It was stated that it was important to recognize the value of the Commission's open process in which a broad scope of expertise in the world was involved.

## IV. PREPARATION OF A LEGISLATIVE GUIDE ON SECURED TRANSACTIONS

### CHAPTER VIII. PRE-DEFAULT RIGHTS AND OBLIGATIONS OF THE PARTIES (A/CN.9/WG.VI/WP.2/ADD.8)

#### A. Limitations

15. It was suggested that paragraph 7, referring to overreaching by the secured creditor, should be recast in more neutral terms. It was stated that the debtor in possession of the encumbered assets could also abuse its advantageous position. It was also observed that the reference to limitations based on public policy was sufficient in that regard and that the reference to overreaching could be deleted. In response to a suggestion that overreaching by the secured creditor should be discussed in paragraph 7 in more detail, it was noted that the matter should be discussed together with the issue of over-collateralization in the context of chapter III, dealing with the creation of the security right (see A/CN.9/WG.VI/WP.6/Add.3, para. 26).

#### B. Default rules

16. In order to avoid any confusion with the breach of contractual obligations (reflected with the term "default"), it was agreed that reference should be made to rules supplementing the security agreement or to dispositive rules rather than to default rules.

17. With respect to the reference to the maximization of the value of the encumbered assets in paragraph 13, the concern was expressed that it might inadvertently place on the secured creditor a burden that would outweigh any benefits. In order to address that concern, it was suggested that reference should be made to preservation of current value rather than to the maximization of the value of the assets. In that connection, it was also suggested that responsible behaviour on the part of those in control of the assets should be linked to the preservation of the value of the assets not only for the purpose of covering subsequent

default but also for the purpose of returning the assets to the debtor upon payment of the secured obligation.

### **C. Duty of care**

18. Several suggestions were made. One suggestion was that the changes proposed with respect to paragraph 13 should be made in paragraph 16 as well. Another suggestion was that the first example given in paragraph 17 be removed as it contradicted a common rule applicable to possessory security rights that the return of the encumbered assets resulted in the extinction of the security right.

19. Yet another suggestion was that deterioration of the value of the encumbered assets, whether in the case of possessory or non-possessory security rights, needed to be addressed by a specific rule. Such a rule could provide that the debtor would have to offer additional security or the secured creditor could treat such a deterioration of value as an event of default. It was stated that such a rule should create a right and not an obligation for the secured creditor to monitor the market value of the encumbered asset and to advise the debtor as to the proper course of action. It was observed, however, that, while such a rule might be appropriate and expected by the parties to certain transactions (e.g. relating to securities), it might not be appropriate and might surprise parties to other transactions (e.g. relating to the acquisition by a consumer of a personal computer). It was also observed that in either case devaluation was a matter that was normally dealt with in the security agreement and did not need to be addressed by supplementary rules.

20. In response to a question, it was said that no problem arose in the case of increase in the value of the encumbered assets, since the secured creditor had a right to claim only the amount of the secured obligation. After discussion, it was agreed that the matter could be discussed as another example of issues which the parties might wish to settle in the security agreement (see A/CN.9/WG.VI/WP.2/Add.8, para. 12).

### **D. Right to be reimbursed for reasonable expenses**

21. The concern was expressed that the second sentence of paragraph 18 might inadvertently preclude the secured creditor from charging to the debtor expenses other than reasonable expenses incurred in pursuance of the secured creditor's duty of care. In order to address that concern, the suggestion was made that that sentence should be deleted. On the other hand, it was stated that that sentence should be preserved since it clarified the first sentence. In response, it was pointed out that the second sentence of paragraph 18 might be read as going beyond the first sentence which dealt with expenses associated with the secured creditor's duty of care only. In order to bridge that difference, it was suggested that the matter might be left to be settled by the parties in the security agreement.

### **E. Duty to keep the encumbered assets identifiable**

22. The concern was expressed that, in its present formulation, paragraph 20 might inadvertently fail to protect

the debtor if the secured creditor commingled the encumbered assets with other assets. In order to address that concern, it was suggested that, in the case of fungible assets, reference should be made to the duty of the secured creditor to preserve assets of the same quantity or value.

### **F. Duty to take steps to preserve the debtor's rights**

23. It was suggested that paragraph 21 should clearly refer to the possibility that certain intangibles that were incorporated in documents of title could be subject to possessory security rights. It was also suggested that paragraph 21 should state further that the possession of the instrument created a duty of care both with respect to the instrument and to the right incorporated in it. As to the last sentence of paragraph 21, which dealt with a different issue, it was suggested that the notion of parties secondarily liable needed to be clarified.

### **G. Right to impute revenues to the payment of the secured obligation**

24. It was suggested that monetary proceeds should be distinguished from non-monetary proceeds in that the former could be applied to the payment of the secured obligation but the latter could not. The secured creditor should be able to hold non-monetary proceeds as encumbered assets. With respect to monetary proceeds, the secured creditor should be able to apply them to the payment of the secured obligation unless the secured creditor turned them over to the debtor.

### **H. Right to assign the secured obligation and the security right**

25. A number of concerns were expressed with respect to paragraph 24. One concern was that paragraph 24 might inadvertently give the impression that an agreement limiting the ability of the secured creditor to assign the secured obligation or the security right should be upheld. It was stated that such a result would be inconsistent with article 9, paragraph 1, of the United Nations Convention on the Assignment of Receivables in International Trade ("the United Nations Assignment Convention"), under which an assignment was effective notwithstanding any agreement limiting a creditor's right to assign its receivables. In order to address that concern, it was suggested that paragraph 24 should be revised to state that the security right should be transferred with the secured obligation.

26. Another concern was that paragraph 24 failed to recognize practices in which security rights were assigned separately from the obligations they secured. It was stated that that was normal practice in financing transactions, involving, for example, the transfer of a security right of a parent corporation in the assets of a subsidiary to a financing institution so as to ensure new credit to the subsidiary, or in transactions in which the secured creditor transferred its security right to a new creditor in order to ensure that the new creditor would have priority over the initial secured creditor. It was mentioned that in such situations the security right remained accessory to the secured obligation and



the obligations of the debtor did not change, while its rights could be enhanced through the accumulation of defences based on the underlying original contract but also on the contract transferring the security right. In that connection, some doubt was expressed. It was stated that, in some legal systems, an assignment of the security right separately from the secured obligation could affect the accessory character of the security right. In response, it was mentioned that such a result could be avoided by the appropriate analysis and recommendation in the draft Guide. It was also mentioned that such an assignment might create uncertainty as to the way in which the debtor could discharge its obligation. In response, it was pointed out that discharge remained subject to the underlying original transaction and the law applicable to it. The example was given of a law, under which, in the case of notice of the assignment to the debtor, payment should be made to the assignee, while, in the absence of notice, payment should be made to the assignor.

#### **I. Right to “repledge” the encumbered asset**

27. It was stated that the rule that the repledge could not be for a longer time than the pledge was an appropriate one and should be preserved. A number of suggestions were made, however, with respect to the formulation of that rule. One suggestion was that, as in some legal systems such a rule existed only with respect to securities, it would be useful to clarify that the rule in paragraph 25 applied to assets other than securities as well. Another suggestion was that paragraph 25 should discuss whether the new pledgee should have a right ranking ahead of the debtor to obtain the asset after payment of the secured obligation (to the initial pledgee who extended credit to the debtor).

#### **J. Right to insure against loss or damage of the encumbered asset**

28. It was stated that the issue of the deterioration of the encumbered assets should be discussed elsewhere since it involved a decline in their value and was not a risk against which insurance was normally available (see para. 19).

#### **K. Duty to account and to keep adequate records**

29. Differing views were expressed as to whether paragraph 31 reflected an appropriate rule. One view was that a duty to account and to keep adequate records should not be imposed on the debtor in the case of a non-possessory security right, if such a duty had not been created by the agreement of the parties. Another view was that such a rule was appropriate, whether or not it was foreseen in the security agreement, since the right in the encumbered assets extended to proceeds that included income generated by the assets. In response, it was stated, however, that that depended on whether civil fruits should be treated in the same way as proceeds, a matter that was still pending. On the other hand, it was said that, if such a duty was to be imposed on the debtor in the case of a non-possessory security right, it should also be imposed on the secured creditor in the case of a possessory security right.

#### **L. Right to use, mix, commingle and process the encumbered asset**

30. It was suggested that paragraph 34 should make it clear that, in the case of a disposition of the encumbered assets that might result in the extinction of the security right, the secured creditor might have a security right in the proceeds. Some doubt was expressed as to whether the matter should be addressed by way of a rule supplementing the security agreement or be left to be settled by the parties in their agreement.

#### **M. Duty to return encumbered assets upon payment of secured obligation**

31. It was suggested that a new paragraph should be added to discuss the duty of the secured creditor to return the encumbered asset to the debtor (in the case of a possessory security right) or to register a notice of release (in the case of a non-possessory security right). It was stated that that matter was briefly addressed in the summary and recommendations (see A/CN.9/WG.VI/WP.2/Add.8, para. 38).

#### **N. Summary and recommendations**

32. Several suggestions were made. One suggestion was that, as a matter of drafting, this part of the draft Guide should follow the structure of the general remarks that drew a distinction between possessory and non-possessory security rights, and between rights in tangible and intangible assets. Another suggestion was that a recommendation should be included with respect to rights and duties associated with intangible assets (e.g. receivables), incorporated in documents, such as negotiable instruments, that could be subject to possessory security rights.

33. Yet another suggestion was that, with respect to fungible assets, paragraph 37 should be recast to focus on the duty to maintain their quantity or value. Yet another suggestion was that the duty of the secured creditor to return the encumbered asset (or register a release notice; see para. 30) in the case of payment of the secured obligation, which was dealt with briefly in paragraph 38, should be discussed in a separate paragraph. While some doubt was expressed as to whether that matter needed to be discussed at all, it was felt that such a rule was not obvious and could usefully be discussed since in some legal systems the secured creditor could retain the encumbered assets even after payment of the secured obligation so as to secure payment of other obligations.

34. Yet another suggestion was that in paragraph 39 the term “apply” should be substituted for the term “impute”; that right should exist only in the case of default; and the reference to the retention of proceeds of the encumbered assets as additional security should be preserved to cover situations where non-monetary proceeds were involved that could not be applied to the payment of the secured obligation.

35. After discussion, the Working Group requested the secretariat to revise chapter VIII taking into account the views expressed and the suggestions made.

CHAPTER XI. CONFLICT OF LAWS AND  
TERRITORIAL APPLICATION  
(A/CN.9/WG.VI/WP.2/ADD.11)

**General remarks**

36. While some doubt was expressed as to whether the draft Guide, whose primary aim was to promote substantive law reform, should include any or detailed conflict of laws rules, it was agreed that without clear and detailed conflict of laws rules the draft Guide would be incomplete. It was stated that the draft Guide could not achieve its objectives, in particular, if it failed to provide certainty as to the law applicable to publicity and priority. It was also observed that, for that reason, modern secured transactions laws in a number of countries contained conflict of laws rules. To the extent that such rules were included in laws other than secured transactions laws, it was pointed out, they were based on substantial knowledge and expertise of the relevant commercial context.

37. In addition, it was said that the preparation of workable conflict of laws rules on matters relating to commercial transactions was impossible without an examination of the specific commercial context and the economic impact of such conflict of laws rules. The United Nations Assignment Convention and the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, adopted by the Hague Conference on Private International Law in December 2002, were mentioned as successful examples of such a joint commercial and conflict of laws approach.

38. In order to ensure that the same approach would be followed in the present context, it was agreed that the cooperation of the Hague Conference should be sought. It was stated that such a cooperation would allow an optimal use of resources and expertise available both in the field of substantive and conflict of laws rules that was necessary in order to prepare rules that would promote the economic objectives of the regime envisaged in the draft Guide. It was also agreed that the impact of insolvency on any conflict of laws rules should be considered in coordination with Working Group V (Insolvency Law).

39. With respect to the title of the chapter, it was suggested that it should refer only to conflict of laws, since the function of conflict of laws rules in defining the territorial scope of application of substantive law regime envisaged in the draft Guide did not need to be highlighted in the title.

40. As to the contents of chapter XI, a number of suggestions of a general nature were made. One suggestion was that the law applicable to security rights in goods in transit and in documents of title should also be discussed. Another suggestion was that the law applicable to securities should not be addressed as it was dealt with by a Convention of the Hague Conference and was the subject of current work carried out by the International Institute for the Unification of Private Law (UNIDROIT). There was broad support for all those suggestions. Yet another suggestion was that the limitations to the freedom of the parties to choose the law applicable to property rights

should be highlighted at the beginning of chapter XI (see para. 48).

41. After discussion, the Working Group decided that the draft Guide should include conflict of laws rules and proceeded to consider chapter XI focusing on the alternative rules set forth in the summary and recommendations.

**A. Law governing the creation, publicity and priority of a security right**

42. It was noted that under both alternatives 1 and 2, the creation, publicity and priority of a possessory security right was subject to the law of the State in which the encumbered asset was located (*lex rei sitae* or *lex situs*), while the creation, publicity and priority of a security right in intangible property was subject to the law of the State in which the grantor was located. Broad support was expressed for those rules.

43. In addition, it was noted that the difference between alternatives 1 and 2 lay in the fact that under alternative 1, the creation and publicity of a non-possessory security right in tangible property was subject to the law of the grantor's location, while the priority of such a right was subject to the *lex rei sitae*; and, under alternative 2, the creation, publicity and priority of a non-possessory security right in tangible property was subject to the *lex rei sitae*, while, if the right was in mobile goods, those matters were subject to the law of the grantor's location (or the law of the State from which their movement was controlled).

44. Differing views were expressed with respect to the points of difference between alternatives 1 and 2. One view was that, to the extent alternatives 1 and 2 differed, alternative 1 was preferable, since: it would result in a single law governing publicity of a non-possessory right in tangible property, while, under alternative 2, more than one law could govern the creation, publicity and priority of such a right in the case of goods located in more than one jurisdiction; goods tended to move more often than grantors; and alternative 1 did not require a special rule for mobile goods as alternative 2 did. Another view was that alternative 2 was preferable, since: it was structured around the generally acceptable *lex rei sitae* and included only limited exceptions, while alternative 1, with respect to the priority of non-possessory right in tangible property, departed from the *lex rei sitae* without sufficient justification and would result in different laws governing publicity and priority of such rights.

45. Another suggestion was that the creation, publicity and priority of a possessory security right should be governed by the *lex rei sitae*, while with respect to a non-possessory right those matters should be governed by the law of the grantor's location.

46. In response to a question, it was noted that neither alternative 1 nor alternative 2 was inconsistent with the United Nations Assignment Convention, since: article 22 of the Convention covered some creation-related issues with substantive law rules and, through the definition of priority (see article 5 (*h*)), referred all other creation, pub-

licity and priority issues to the law of the assignor's (i.e. the grantor's) location; articles 27 and 28 of the Convention dealt with contractual issues; article 29 dealt with the assignee-debtor relationship; and article 30 dealt with priority issues in a way that was consistent with both alternative 1 and 2. In addition, it was noted that, in the case of a retention of title clause, the grantor/debtor would be the buyer. Moreover, it was noted that the reference to negotiable instruments in alternative 1 was intended to include documents of title, such as bills of lading.

47. After discussion, it was agreed that the alternative rules as to the law governing the creation, publicity and priority of a security right should be recast so as to highlight their similarities, with respect to which there was general agreement in the Working Group, and their differences, with respect to which differing views had been expressed.

#### **B. Party autonomy with respect to the law governing the creation of a security right**

48. The Working Group went on to consider a suggestion that the creation of a security right (and the pre-default rights and obligations of the parties) might be governed by the law chosen by the parties to the security agreement. In support, it was stated that there was no reason to limit party autonomy with respect to the law applicable to the creation of a security right as long as the rights of third parties were not affected. It was also observed that the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, prepared by the Hague Conference, could provide a useful precedent of such an approach. In opposition, however, it was observed that, while there was no difficulty in allowing party autonomy to operate with respect to contractual rights, it would be very difficult to accept such an approach with respect to proprietary rights. It was also said that the distinction between contractual and proprietary matters in that respect was fundamental and could not be ignored. In addition, it was pointed out that the text of the Hague Conference mentioned above was different since it dealt with special transactions and allowed party autonomy to operate not in the relationship between the secured creditor and the debtor but rather in the relationship between the debtor and its intermediary.

#### **C. Subsequent change in the connecting factor**

49. It was noted that paragraph 25 dealt with the impact of a change in the connecting factor (e.g. in the location of the grantor or of the assets) on the law applicable. It was also noted that such a change could create particular problems if, for example, the grantor moved from a State that had no publicity system to a State with a publicity system such as the one envisaged in the draft Guide. In such a situation, with the grace period proposed, a secured creditor would have some time to meet the publicity requirements of the new jurisdiction. It was suggested that the objective of the grace period to establish a balance between pre-change and post-change rights should be explained in the draft Guide. In that connection, it was observed that the grace period provided a cut-off date for the due diligence burden of the parties. It was stated that the holders of pre-change rights should monitor the grantor

or the encumbered assets but not on a daily basis. Similarly, it was said, the holders of post-change rights should monitor their grantors or the relevant assets to discover whether they moved from one jurisdiction to another but not back to an indefinite period of time.

#### **D. Law governing the enforcement of a security right**

50. Differing views were expressed as to whether substantive matters affecting the enforcement of security rights should be subject to the law of the State where enforcement took place (*lex fori*; alternative 1), to the law governing creation and, possibly, priority (alternative 2), or to the law governing the contractual relationship of the creditor and the debtor (*lex contractus*; alternative 3). One view was that the *lex contractus* was preferable on grounds of economic efficiency. It was stated that the public policy of the forum State was sufficient to limit the application of the *lex contractus* to cases in which such application could produce unfair results for the grantor. It was also observed that alternative 1 would be the least preferable as, to the extent a party could choose the place of enforcement ("forum shopping") and thus possibly affect the rights of secured creditors, the value of assets as sources of credit would diminish. Another view was that enforcement involved by definition matters relating to public policy and should thus be left to the law of the State where enforcement took place. It was pointed out that, to the extent enforcement would be sought in jurisdictions where assets were located, there was no or only minimal risk of forum shopping. Yet another view was that the matter depended on the meaning of the term "substantive matters affecting the enforcement of the rights of a secured creditor". According to that view, if enforcement of the contract which gave rise to the secured obligation was meant, an approach based on party autonomy could be considered. If, however, enforcement of a security right was meant, there was no room for party autonomy. It was agreed that that matter needed to be further clarified.

#### **E. The impact of insolvency on the law applicable**

51. It was noted that, in the case of insolvency of the debtor or the third-party grantor, a number of issues arose, including which law governed the creation, publicity and enforcement of a security right, which law governed enforcement and whether the law applicable to those issues was affected by the stays or the effects of reorganization proceedings.

52. The Working Group agreed that the impact of insolvency on the law applicable (whether the assets were located in the jurisdiction where the insolvency proceeding was opened or in another jurisdiction) was a matter that could have broad implications for the insolvency proceedings and, therefore, should be addressed primarily in the draft Guide on Insolvency Proceedings.

53. It was generally considered, however, that while insolvency was bound to affect all individual enforcement actions, it should not change the law applicable to the creation, publicity and priority of a security right, wherever the encumbered assets were located.

54. It was suggested that those matters could usefully be discussed in a joint meeting of Working Groups V (Insolvency Law) and VI (Security Interests). Pending consideration of those matters by Working Group V and determination as to whether such a joint meeting would be necessary to discuss again the chapter of the draft Guide dealing with insolvency matters, the Working Group decided that it did not need to make a recommendation. The Working Group noted that, in any case, the matter might need to be considered by the Commission at its thirty-sixth session, to be held in Vienna from 30 June to 18 July 2003.

#### F. Scope of conflict of laws rules

55. The Working Group considered the question whether conflict of laws rules should be prepared with respect to security rights in other types of asset, such as bank deposits, letters of credit, securities and intellectual property rights. It was agreed that no rules should be prepared on security rights in assets excluded from the scope of the draft Guide, such as securities (as to intellectual property rights, see para. 90). With respect to bank deposits, it was suggested that they should be included as they were among the core commercial assets to be covered by the draft Guide (see, however, para. 90). As to letters of credit, the concern was expressed that any rules might overlap with existing rules.

56. It was agreed that the focus of the conflict of laws rules should be on core commercial assets, such as goods, inventory, receivables and bank deposits. Once agreement had been reached with respect to the rules applicable to those assets, the Working Group could consider whether conflict rules with respect to security rights in other types of asset might be necessary.

57. After discussion, the Working Group requested the secretariat to revise chapter XI, taking into account the views expressed and the suggestions made.

### CHAPTER XII. TRANSITION ISSUES (A/CN.9/WG.VI/WP.2/ADD.12)

#### General remarks

58. There was general agreement in the Working Group that the draft Guide should include clear recommendations on issues of transition from the old regime to the new regime envisaged in the draft Guide. It was stated that appropriate transition rules would facilitate the application of the new regime without undue interference with existing rights and thus enhance the acceptability and the success of the new regime. In addition it was said that, to the extent transition rules provided clear solutions that were fashioned to address specific secured transactions issues, they could better achieve that result than transition rules generally applicable in a State enacting legislation based on the draft Guide.

59. As to the structure of chapter XII, it was agreed that chapter XII should be recast to set forth the transition questions that should be addressed and to make recommenda-

tions concerning those questions. Such issues included: setting an effective date; the priority of pre-effective date rights; transition period for parties to pre-effective date transactions to take steps to preserve their rights; effectiveness of pre-effective date rights as between the parties; enforcement of pre-existing rights after the effective date.

60. However, the view was expressed that chapter XII represented a line of thought that presented two problems. One problem was that it failed to take into account the principle of non-retroactivity of the law. The other problem was that it was structured around a transition period that could not adequately protect the rights of pre-reform creditors.

61. An alternative line of thought would be that, in principle, the new law would not apply to pre-reform transactions except in a few prescribed situations. Exceptions mentioned included situations where a pre-reform transaction was invalid under the old law and valid under the new law; and the performance of a pre-reform transaction went beyond the effective date of the new law.

#### A. Effective date

62. It was agreed that the draft Guide should include a clear recommendation that the secured transactions legislation specify the date as of which it would enter into force ("effective date"). In addition, it was agreed that the draft Guide should provide guidance to States as to the considerations to be taken into account in the determination of the effective date. Several considerations were mentioned, including the following: the impact of the effective date on credit decisions; maximization of benefits to be derived from the new legislation; the necessary regulatory, institutional, educational and other arrangements to be made by the State; the status of the pre-existing law and other infrastructure; the harmonization of the new secured transaction legislation with other legislation; the content of constitutional rules with respect to pre-effective date transactions; and standard practice for the entry into force of legislation (e.g. on the first day of a month). Moreover, it was agreed that, while the draft Guide should mention those considerations, it did not need to recommend a specific time period, since its length would depend on those considerations and vary from country to country.

#### B. Transition period

63. It was agreed that the draft Guide should recommend that the secured transaction legislation allow some period of time for parties to transactions under the pre-effective date regime to take any steps necessary to preserve their rights ("transition period").

64. As to the combination of the effective date with the transition period, it was stated that the effective date of new legislation could be a few months after the date of its enactment or coincide with the date of enactment in which case a transition period should be established for parties to adjust their transactions. Another possible approach mentioned was to allow a few months until the new legislation entered into force and, at the same time, to introduce a transition period. Some preference was expressed for the

latter approach, provided that the time between enactment and entry into force would be short, while the transition period would be longer.

65. It was suggested that, within the transition period, parties should be allowed to take steps to preserve their rights but also to cancel pre-effective date contracts. The latter suggestion was objected to on the grounds that it would inadvertently result in upsetting existing relationships.

### C. Priority

66. It was suggested that the draft Guide should set out the questions relating to the impact of new legislation on priority issues and suggest possible answers. Such questions mentioned included: (i) which law applied to the priority between post-effective date rights; (ii) which law applied to the priority between pre-effective date rights; (iii) which law applied to the priority between post-effective date and pre-effective date rights.

67. It was widely felt that the answer to the first question mentioned above should be that the new law should apply. As to the second question, one view was that the answer would depend on the specific circumstances. If nothing had happened other than the effective date having been reached, the pre-reform law should apply. However, that might not be the case if an action occurred that might have affected priority even under the pre-reform regime (see A/CN.9/WG.VI/WP.2/Add.12, para. 9). Another view was that the pre-reform law should apply in all cases.

68. With respect to the third question mentioned above, it was agreed that the new law should apply as long as the holder of a right under the pre-reform law was given a period of time to ensure priority under the new law while during that period of time its priority was preserved (see A/CN.9/WG.VI/WP.2/Add.12, para. 10). It was stated that it should be made clear that the action to be taken by the holder of a right under the pre-reform law was unilateral and was aimed at ensuring priority under the new law. In response to a question, it was mentioned that third parties could be informed that a secured party on record was a holder of a right under the pre-reform law (whose priority went back to the time it had established priority under the pre-reform law) by special notice on the record. In response to another question, it was stated that if under the pre-reform law priority was based on the time of creation of a right, establishing that time would be a matter of evidence.

69. In the discussion, the suggestion was made that the draft Guide should also discuss the issue of which party should bear the cost of compliance with the new law. In that connection, it was stated that the cost of compliance should be as low as possible since it might affect the acceptability of the new law.

70. It was stated that, under the alternative approach proposed above (see paras. 60 and 61), in the case of a priority dispute between a pre-reform and a post-reform right, the pre-reform right would have priority according to the order of creation (if neither party had registered), or according to the order of registration (where both the pre-reform

and the post-reform creditor had registered), or if it was subsequently registered within the transition period or in any case (even if the post-reform right had been registered).

71. After discussion, the secretariat was requested to revise chapter XII, taking into account the views expressed and the suggestions made. The secretariat was also requested to include, either in chapter XI or in chapter XII, discussion and recommendations relating to transition with respect to conflict of laws rules.

72. Having completed the consideration of all the chapters of the first version of the draft Guide (A/CN.9/WG.VI/WP.2 and Add.1-12), the Working Group went on to consider the first chapters of the second version of the draft Guide (A/CN.9/WG.VI/WP.6 and Add.1-3). In order to ensure that it would have the time to consider chapter III (Basic approaches to security) and chapter IV (Creation), the Working Group decided to postpone consideration of chapter I (Introduction) and chapter II (Key objectives).

## CHAPTER III. BASIC APPROACHES TO SECURITY (A/CN.9/WG.VI/WP.6/ADD.2)

### A. Pledge

73. With respect to the discussion of the lender's liability for damage caused by encumbered assets, including environmental damage, in paragraph 12 of chapter III, it was suggested that the problem and the ways in which it could be addressed could be further explained if a few examples were to be mentioned of cases in which a lender taking possession, title or deemed control of an encumbered asset, either upon creation or foreclosure, should not be liable for damage caused by the asset. Examples mentioned included: holding title to goods through a negotiable instrument (bill of lading or warehouse receipt) without being involved in the management of the vessel or the warehouse; acting as limited partner (as opposed to general partner) in a limited partnership holding title in or control of the asset or the facility in which it is stored; taking control of the encumbered asset for the purpose of foreclosure, provided that the lender sold it at the earliest possible and commercially reasonable time; and acquiring title (as a result of obtaining or enforcing security) in an asset that was previously contaminated without the lender knowing or being able to know about it despite the reasonable steps taken by the lender. To the extent it clarified the impact of the lender's environmental liability on credit decisions, that suggestion was met with interest, although a concern was expressed with respect to the last of the examples mentioned.

74. However, differing views were expressed as to whether the draft Guide should include recommendations on lender's liability for environmental damage caused by the encumbered assets. One view was that it would be useful to include in the draft Guide such recommendations. It was stated that that matter posed major obstacles to certain financing transactions. It was also observed that the mere possibility that a lender might be exposed to liability for environmental damage was often sufficient to result

in the lender refusing to extend credit. It was also said that that problem could not be addressed through insurance because, to the extent it was available, insurance would not cover criminal liability nor loss of reputation. In addition, it was mentioned that there were only few countries in which the matter was addressed in legislation. The prevailing view, however, was that the draft Guide should not include such recommendations. It was stated that environmental liability raised fundamental public policy issues that were beyond the scope of the draft Guide. It was also observed that, in order to include such recommendations in the draft Guide, the Working Group would need to consider all the issues involved, including the impact of any recommendations on parties other than the lenders. It was also said that, in view of the substantial differences existing among the various legal systems, in particular with respect to environmental liability, it would be very difficult to reach agreement on any recommendations and, in any case, such an effort might divert attention from the main issues that needed to be addressed in the draft Guide.

75. After discussion, the Working Group agreed that the examples mentioned above could be included in the draft Guide to illustrate the impact of lender's liability for damage caused by the encumbered assets on the availability and the cost of credit, without any recommendations in that respect.

#### **B. Non-possessory security**

76. With respect to the last sentence of paragraph 21, the concern was expressed that it failed to take into account the fact that possession did not create the problem of "false wealth" since the existence of non-possessory rights was generally assumed. In order to address that concern, it was suggested that that sentence should be deleted. While it was agreed that "false wealth" associated with possession was a problem of declining importance in modern economies, which was admitted in paragraph 19, it was stated that that was due mainly to the existence of filing systems. It was, therefore, suggested that that sentence should be rather recast to emphasize the need for the draft Guide to address issues of publicity and priority, and to highlight the benefits of publicity by filing rather than by taking possession.

77. As to paragraph 23, it was suggested that it should clarify that selective regulation of non-possessory security rights only created difficulties in addressing conflicts of priority between possessory and non-possessory security rights.

#### **C. Security rights in intangible movable property**

78. It was suggested that the reference in paragraph 25 to intangibles being by definition incapable of physical possession should be included in the definition of "intangibles" in the terminology section of the draft Guide (see A/CN.9/WG.VI/WP.6/Add.1, section B). It was also suggested that the reference to "some legal systems" in the last sentence of paragraph 28 should be deleted since the fact that notification of the debtor might not be desirable for some reason was true irrespective of the legal system involved.

#### **D. Transfer of title for security purposes**

79. With respect to paragraph 31, it was suggested that the cost and efficiency was an additional feature of the transfer of title for security purposes that might be included. As to paragraph 33, it was noted that the last two sentences were intended to state that in a comprehensive security regime there was no need for title transfers as separate devices. The concern was expressed, however, that that statement might inadvertently appear as discouraging the use of transfer of title. In order to address that concern, it was suggested that the last two sentences of paragraph 33 should be deleted. That suggestion was objected to. It was stated that those sentences were descriptive and reflected the fact that title devices were developed in practice because law did not provide for non-possessory security rights. It was also observed that comprehensive security regimes accommodated title devices but treated them in the same way as security devices. After discussion, it was agreed that those sentences should be revised to better reflect their intended meaning and to clarify that transfer of title might play a role even in the context of a comprehensive security regime. Drafting suggestions made included deleting the word "modern", replacing the word "allowing" with the word "treating", and adding the word, "separate", before "security device".

#### **E. Retention of title**

80. While agreeing that the discussion of advantages and disadvantages of the retention of title was useful, the Working Group felt that it could be supplemented by the elaboration of further advantages and disadvantages. Additional advantages mentioned included that retention of title was cost-effective, it was suited to both short-term and long-term financing, and it gave rise to a security right for both the debtor and the creditor. Further disadvantages mentioned included that retention of title gave the seller a dominant position with respect to other creditors, it precluded the buyer from acquiring title until the full payment of the purchase price, it entailed a high due diligence cost in the absence of publicity, and it went beyond providing security for credit.

81. Differing views were expressed as to how retention of title should be treated in the regime envisaged in the draft Guide. One view was that it should be integrated in a comprehensive security regime and be treated as a security right. It was stated that such an approach appropriately recognized the usefulness of retention of title. It was also observed that the economic objective of encouraging supplier credit could be achieved by recognizing that, as long as it was publicized, retention of title could be given priority as of the day it was established ("super-priority"). In that connection, it was suggested that any recommendation to treat retention of title as a security device should be accompanied by another recommendation giving it super-priority.

82. Another view was that retention of title should not be treated as a security device, but be preserved as a sales transaction with special characteristics, its informality, cost-effectiveness and source of supplier credit as an alternative to bank credit. It was also observed that treating

retention of title as a security device might negatively affect its privileged position and reduce its efficiency. In response, it was said that even in a comprehensive security regime, retention of title had a useful role to play and had a privileged position to the extent that it had super-priority. It was also pointed out that, whether or not it was treated in the same way as a security device, it did not necessarily permit the creditor to separate the assets from the estate in the case of the debtor's insolvency. In addition, it was said that, in a country without a developed secured transaction law, the introduction of a comprehensive security regime might be the most efficient approach. Moreover, it was pointed out that that might not be the case for a country with a developed legal system if the cost of conversion of title devices to security devices were high.

83. Several specific suggestions were made. As to the two last sentences of paragraph 35, it was suggested that they should be deleted as they were based on an economic judgement that was inappropriate for the draft Guide. With respect to paragraph 38, it was suggested that it should clarify that some countries did not recognize that contractual retention of title clauses had effect as against third parties.

84. After discussion, it was agreed that the discussion of retention of title in chapter III should be revised to include further advantages and disadvantages and to better clarify the policy choices between a special regime for title devices and a regime in which title devices would be integrated in a comprehensive security regime.

#### **F. Uniform comprehensive security**

85. With respect to paragraph 43, it was suggested that it should emphasize the main characteristic of systems with uniform, comprehensive security, namely that they promoted substance over form and the objective of maximizing the availability of credit. As to paragraph 45, it was suggested that it should be revised to acknowledge that, in reforming their secured transactions laws, States could enact a single law dealing with both possessory and non-possessory security rights or leave in place their law on possessory security and enact a law dealing only with non-possessory rights. It was observed that merging the rules in one law promoted transparency but not at the cost of flexibility, since all the various devices were available for parties to use so as to address their needs. It was also pointed out that, in the case of an approach based on separate laws, States would need to ensure that they addressed conflicts of priority between rights governed by the various laws.

#### **G. Summary and recommendations**

86. With respect to the note after paragraph 48, recalling its decision that the draft Guide should include examples but not recommendations (see para. 75), the Working Group decided that the note could be retained in a summary form for further consideration of the matter at a future session.

87. As to paragraph 51, it was agreed that it should clarify that the regime envisaged in the draft Guide should deal with security rights in tangible and intangible assets, with

the exception of types of asset that were excluded. As a matter of drafting, it was suggested that the words "to this type of asset" should be substituted for the words "to this type of security".

88. With respect to securities that were excluded from the scope of the draft Guide, it was agreed that the draft Guide should make it clear that such exclusion did not mean that they could not be encumbered but rather that security rights in such assets would be subject to other legislation. Noting that that matter was addressed elsewhere in the draft Guide (see A/CN.9/WG.VI/WP.6/Add.1, para. 9), the Working Group agreed that a cross-reference should be included at the appropriate place in chapter III.

89. With respect to the note after paragraph 51, it was agreed that the principles of the United Nations Assignment Convention should be reflected in the draft Guide. In addition, it was agreed that other matters relating to security rights in receivables should also be addressed. In that connection, it was suggested that the next version of the draft Guide should discuss the rights of third-party debtors (e.g. debtors of receivables subject to a security right).

90. As to other assets, such as bank deposits, it was agreed that the decision as to whether they should be included in the draft Guide should be postponed until the Working Group had developed rules on the core commercial assets addressed in the draft Guide (i.e. goods, inventory and receivables). The Working Group agreed that the same approach should be followed with respect to intellectual property rights. It was stated that work on security rights in goods that were subject, e.g. to trademarks, could have an impact on intellectual property law. In that connection, a note of caution struck emphasizing the complexity of the issues involved and that any work in that respect would have to be coordinated with the work of other organizations, such as the World Intellectual Property Organization (WIPO).<sup>7</sup>

91. As to paragraphs 52 and 53, it was agreed that they should be replaced with two alternative recommendations in square brackets. The first alternative would provide for a comprehensive regime in which title devices that served security functions would be treated in the same way as security devices. The other alternative would provide a special regime for title devices separate from that applicable to security rights. A note of caution was struck that, in such a case, the relationship (e.g. priority) of title devices to security rights would need to be addressed. In that connection, it was suggested that the draft Guide should emphasize that both alternatives would accommodate title devices. As to the super-priority for title devices and its scope discussed in paragraph 53 and the note after paragraph 53, while broad support was expressed, it was agreed that it should be discussed in the chapter on priority. It was also agreed that the statement that treatment of transfer or retention of title as a security device did not prejudice their qualification for other purposes should be retained in that context.

<sup>7</sup>Ibid, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, paras. 354-356.

CHAPTER IV. CREATION  
(A/CN.9/WG.VI/WP.6/ADD.3)

**A. Introduction**

92. With respect to paragraph 1, it was suggested that, given that publicity should not be a requirement for effectiveness but only for priority, the reference to the security agreement not being “usually” sufficient to create a security right should be toned down.

**B. Accessory character of the security right**

93. While it was generally agreed that the fact that the security right was accessory to the secured obligation was a fundamental principle of secured transactions law and should be discussed, it was widely felt that that principle needed to be further explained. It was stated, for example, that with respect to revolving loan transactions, the principle could be explained by reference to enforcement. The security right was accessory to the secured obligation in the sense that it could not be enforced if there had not been any advance on the loan. In that connection, it was pointed out that, in revolving loan transactions, the accessory nature of security rights could also be explained by reference to the possibility that security rights could secure future advances and thus exist even before any advance had been made.

94. As to the accessory nature of title devices, it was observed that the matter was treated differently in the various legal systems. In any case, as that matter related to the treatment of title as security devices, it was agreed that its discussion should be deleted from paragraph 4. In that connection, the suggestion was made that the discussion of title devices might be consolidated at the end of each chapter or in one separate chapter.

**C. Limitations on types of obligations that could be secured**

95. With respect to paragraph 6, it was agreed that it should be revised to state that special regimes should not be prescribed for a broad variety of “transactions” rather than obligations in order to avoid creating the impression that a special regime on title devices could not encompass a broad variety of obligations.

**D. Varieties of obligations**

96. It was suggested that the last sentence of paragraph 7 should be revised to state that the only non-monetary obligation that a security right could not secure was an obligation that was not capable of conversion to money.

97. As to paragraphs 9 to 11, it was suggested that the current conceptual distinctions should be supplemented by examples of practical situations. Three practical situations were mentioned, the not so common situation where a security right was created for a pre-existing obligation that was owing, the very common situation where a security right was created for an obligation that was contracted for but was not yet owing and the situation that was common in continuing credit relationships where a security agreement was created to secure future advances. It was also sug-

gested that the second sentence of paragraph 11 should be deleted since it addressed a complex conceptual issue on which legal systems differed.

**E. Description**

98. With respect to paragraph 13, it was suggested that the notions of “all sums clauses” and “maximum amount clauses” should be further explained. It was also stated that reference should be made to the ability of the parties to agree on the maximum amount to be secured. As to paragraph 14, it was suggested that the last sentence should be expanded to outline advantages to the borrower from revolving credit transactions.

99. It was suggested that paragraph 15 should be either deleted or revised to refer to other law the matter of conversion of the secured obligation to local currency (e.g. law of contracts or regulatory law). It was stated that, in the absence of default and disposition of the encumbered asset, there was no need to convert the secured obligation to local currency. It was also observed that, even in the event of default and disposition, the issue of conversion should be left to the original contract from which the secured obligation arose and to the law governing the obligation. In practice, it was explained, the secured obligation and the proceeds of the disposition of the asset should be in the same currency.

**F. Assets to be encumbered**

100. Regarding paragraph 16, it was widely felt that the asset or its value, rather than title to it, was the object of the security right. It was agreed, however, that the matter could be reviewed once the Working Group had an opportunity to consider the issue of title as a requirement for the creation of a security right. It was also suggested that paragraph 16 should be limited to the principle that the grantor could not grant more rights than it had. It was also stated that the last sentence of paragraph 16 should be reconsidered as it appeared to be addressing an issue of priority and implying that the first creditor to acquire a security right had priority.

101. With respect to paragraphs 17 and 18, it was suggested that their order should be reversed. It was also suggested that the meaning of paragraph 18 could usefully be clarified by way of an example.

**G. Future assets**

102. It was suggested that the statement in the last sentence of paragraph 21 should be strengthened. It was also suggested that the descriptive character of paragraph 22 should be further emphasized to avoid giving the impression that it contained any recommendations.

103. In addition, it was suggested that in paragraph 23 only the first sentence should be retained to emphasize the importance of the ability to use future assets for obtaining credit. It was stated that the second sentence contained a statement that might not be fully correct and that the matter addressed in the third sentence essentially raised an issue of insolvency law that should be addressed either in the



draft Insolvency Guide or in the chapter on insolvency of the draft Guide on Secured Transactions. In any case, it was suggested that paragraph 23 was not the appropriate place for the discussion of the impact of secured credit on unsecured creditors.

#### **H. Assets not specifically identified**

104. It was stated that the identification of inventory by reference to its location, mentioned in paragraph 24, might inadvertently lead to the loss of security since inventory was likely to be moved.

105. As to paragraph 26, several suggestions were made. One suggestion was that the third sentence should be balanced by recognizing that competing creditors could settle priority conflicts among themselves by way of agreement. Another suggestion was that the fourth sentence should clarify that the limitation referred to did not deprive the unsecured creditor of the benefit of excess value after satisfaction of the secured obligation. Yet another suggestion was that the fourth sentence should explain that valuation of the encumbered asset would entail cost and time.

#### **I. Enterprise mortgage and floating charges**

106. It was suggested that the draft Guide should clarify that an enterprise mortgage or other equivalent right could include, inter alia, new assets, cash flow and immovables.

107. As to paragraph 31, it was suggested that it should be revised to dispel any doubt that competition between providers of credit, which in itself could reduce cost, might not be desirable.

108. After discussion, the Working Group requested the secretariat to revise paragraphs 1 to 33 of chapter III, taking into account the views expressed and the suggestions made.

#### **V. FUTURE WORK**

109. The Working Group noted that its fourth session was scheduled to take place in Vienna from 8 to 12 September 2003, subject to confirmation of those dates by the Commission at its thirty-sixth session.

### **D. Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the work of their first joint session (Vienna, 16-17 December 2002)**

**(A/CN.9/535) [Original: English]**

See part two II.F in this *Yearbook*.



## VII. POSSIBLE FUTURE WORK

### A. Current activities of international organizations in the area of public procurement: possible future work

(A/CN.9/539 and Add.1) [Original: English]

#### NOTE BY THE SECRETARIAT\*

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction .....	1-5
II. Current activities of international and regional organizations in the area of government procurement .....	6-35
A. World Bank .....	8-10
B. Asia-Pacific Economic Cooperation .....	11-13
C. European Community .....	14-18
D. Free Trade Area of the Americas .....	19-21
E. Common Market of the Southern Cone .....	22-23
F. North American Free Trade Agreement .....	24-29
G. Government procurement under the framework of the World Trade Organization .....	30-35

#### I. INTRODUCTION

1. In 1981, the United Nations Commission on International Trade Law (UNCITRAL), at its fourteenth session, decided that to further strengthen the coordinating role of the Commission, the secretariat should select, at appropriate intervals, a particular area for consideration and should submit a report focusing, *inter alia*, on the work already undertaken in that area, indicating topics suitable for legal unification and modernization.<sup>1</sup> The secretariat has selected the law of procurement of goods, construction and services for such a discussion by the Commission, as described below.

2. The UNCITRAL Model Law on Procurement of Goods, Construction and Services,<sup>2</sup> (hereinafter referred to as the "UNCITRAL Model Procurement Law"), which was adopted in 1994, contains procedures aimed at achieving competition, transparency, fairness, economy and efficiency in the procurement process and has proven to be an important international benchmark in procurement law

reform. Legislation based on or largely inspired by the UNCITRAL Model Procurement Law has been adopted by more than 30 jurisdictions in different parts of the world and the use of the UNCITRAL Model Procurement Law has resulted in widespread harmonization of procurement rules and procedures. The Commission may find it useful to consider the experience of law reform based on the UNCITRAL Model Procurement Law, together with issues that have arisen in the practical application of the Model Law since its adoption.

3. One area of experience concerns the increased use of electronic commerce for public procurement, including methods based on the Internet, which are capable of further promoting the objectives of procurement legislation. For example, in addition to being efficient, electronic auctions can increase transparency over traditional tendering, while information technologies can be harnessed to improve supplier information. It has been argued, however, that, while many electronic procurement practices can be accommodated through the interpretation of existing laws and rules, undesirable obstacles to the use of electronic commerce in procurement may still remain. Some such obstacles are related to electronic procurement procedures and may not be fully addressed by uniform legislation, in particular the UNCITRAL Model Laws on Electronic Commerce and on Electronic Signatures, that is based on the principle of functional equivalence of electronic and paper-based messages.

\*Submission of the present note by the secretariat of the United Nations Commission on International Trade Law was delayed owing to shortage of staff.

<sup>1</sup>*Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, para. 100.

<sup>2</sup>*Ibid.*, *Forty-ninth Session, Supplement No. 17 (A/49/17)*, annex I.

4. In addition, the Commission may wish to be informed about the activities of selected international and regional organizations in the area of government procurement since the adoption of the UNCITRAL Model Procurement Law in 1994. These activities reflect the growing importance of procurement regimes for the development of national economies and for regional and interregional integration. They also highlight the need for harmonized and modern models and for coordination of efforts by international bodies active in the field of procurement.

5. In view of the scarcity of its resources, the UNCITRAL secretariat is not submitting detailed comments on the above issues at this stage. Additional studies may be conducted if the Commission decides to consider the matter further.

## II. CURRENT ACTIVITIES OF INTERNATIONAL AND REGIONAL ORGANIZATIONS IN THE AREA OF GOVERNMENT PROCUREMENT

6. Government procurement is considered an important aspect of international trade by international lending institutions and international and regional trade institutions. This is evidenced by the development of regional and international regimes on government procurement since the adoption of the UNCITRAL Model Procurement Law. It is also evidenced by the recent activities of the major international lending institutions and international as well as regional trade institutions, to revise their respective regimes on government procurement in order to adapt them to new requirements so as to more effectively achieve their objectives.

7. This section contains summary information on the activities of selected international and regional organizations in the area of government procurement since the adoption of the Model Procurement Law. It is intended, in particular, to bring to the Commission's attention issues that have arisen in the area of government procurement, including in the practical application of the Model Law. The host of bilateral agreements that have been concluded in the area of government procurement since 1994 are outside the scope of the present report.<sup>3</sup>

### A. World Bank

8. Procurement of goods, works or services funded by the World Bank (comprising the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)) are carried out by the relevant government bodies of the State receiving loans or credits from the Bank. The World Bank has established rules, to be followed by borrowers for the procurement of goods, works and services in Bank-financed projects. These rules are detailed in the Guidelines for Procurement under IBRD Loans and IDA Credits (the

Procurement Guidelines) and in the Guidelines for Selection and Employment of Consultants by World Bank Borrowers (the Consultant Guidelines) (see [www.worldbank.org](http://www.worldbank.org)). These guidelines are incorporated by reference into the loan agreement for each specific project and are binding on the borrower. Additional instructions and guidance material on procurement are provided in the Bank's Procurement Manual and Consultants' Manual.

9. Over the last few years, the World Bank guidelines have undergone some fundamental revision. In both guidelines, new clauses have been introduced to reflect the Bank's increased focus on the issue of corruption and fraud in World Bank procurement. This focus is prompted by the Bank's identification of corruption as the single greatest obstacle to economic and social development, since corruption "undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends" (see [www1.worldbank.org/publicsector/anticorrupt](http://www1.worldbank.org/publicsector/anticorrupt)). Although the previous guidelines contained general measures to control corruption in Bank-financed projects, it became clear that the measures were not sufficient to detect and eradicate corruption. The revised guidelines therefore contain additional and specific measures to detect and eradicate corrupt or fraudulent practices in Bank-financed projects. Furthermore, new provisions have been added to the Consultant Guidelines to reflect the changing nature of the services required in Bank-financed procurement. These provisions are designed to place more emphasis on price in the selection of consultants, increase overall transparency in the selection process and provide incentives for local consulting firms in borrowing countries.

10. The World Bank and the African Development Bank are collaborating with regional institutions in Africa such as the *Union Economique et Monétaire Ouest Africaine* and the Common Market for Eastern and Southern Africa in regional public procurement reform projects in which the legal work is largely inspired by the UNCITRAL Model Procurement Law.

### B. Asia-Pacific Economic Cooperation

11. The Asia-Pacific Economic Cooperation (APEC) was formally established in 1989 with a view to promoting economic cooperation within the Asia-Pacific region. In November 1993, at a meeting held at Blake Island in the United States of America, the APEC leaders adopted a declaration on their economic vision, in which they laid the foundations for a community of Asia-Pacific economies, which would, inter alia, make cooperative efforts to promote free trade and investment (see [www.apecsec.org.sg](http://www.apecsec.org.sg)). In November 1994, at a summit in Bogor, Indonesia, APEC leaders adopted a declaration of common resolve, in which they announced a political commitment to achieve free and open trade and investment within the region, with a target date of liberalization of 2010 for industrialized member countries and 2020 for all others (see [www.apecsec.org.sg](http://www.apecsec.org.sg)). At the subsequent summit in Osaka, Japan, the APEC leaders adopted the Osaka Action Agenda, which provided that APEC would achieve its long-term goal of free and open trade and investment by encouraging voluntary liberalization in the region (see [www.apecsec.org.sg](http://www.apecsec.org.sg)).

<sup>3</sup>In the period covered by this report the European Community alone concluded bilateral agreements on government procurement with the following 13 countries: Bulgaria, Czech Republic, Estonia, Hungary, Israel, Latvia, Lithuania, Mexico, Poland, Republic of Korea, Romania, Slovakia and Slovenia. For details see, for instance, the "Report on negotiations regarding access to third country public procurement markets in the fields covered by directive 93/38", available at <http://simap.eu.int>, under "rules and guidelines".

12. In 1999, APEC completed a set of Non-binding Principles on Government Procurement. These Principles are designed to bring about a voluntary liberalization of government procurement markets throughout the Asia-Pacific region in accordance with the principles and objectives of the declaration adopted at Bogor, Indonesia. Members are exploring how best to implement the Principles and to bring their systems into conformity with them. Other issues of government procurement, such as electronic government procurement, are also under consideration.

13. After completing the Non-binding Principles, members of the APEC Government Procurement Expert Group agreed at a meeting in 2000 to carry out a voluntary review of their Individual Action Plans with respect to the Principle relating to transparency. Through this process, members are continuing to explore how best to implement the Principles and voluntarily to bring their systems into conformity with them. In addition, the Expert Group will work more closely with other APEC groups, in particular the Steering Group on Electronic Commerce and the Small and Medium Enterprises Working Group, looking at a number of issues, including paperless trading. At its meeting in Mexico in August 2002, the Expert Group almost completed its voluntary reviews of the Principle relating to accountability and procedural fairness. The Group also agreed to begin voluntary review of the Principle relating to value for money at its next session, in February 2003.

### C. European Community

14. In the European Community, two layers of regulations govern the award of public contracts. The first layer consists of the general provisions on free trade and competition, which are contained in the Treaty of Rome, the founding treaty of the European Community. These provisions are aimed at creating an internal market where goods, services and capital can freely move across the boundaries of the member States, by removing existing obstacles to trade in goods and services between member States and ensuring fair and non-discriminatory competition between different member States of the Community.<sup>4</sup> They also apply to the award of public contracts.<sup>5</sup> The second layer is composed of a series of six directives on government procurement, which transpose the general provisions on free trade and competition contained in the Treaty of Rome to the award of public contracts. These directives regulate the procedures for awarding major public contracts in the Community.<sup>6</sup>

<sup>4</sup>These provisions of the Treaty of Rome are contained in article 28 on the free movement of goods, article 43 on the right of establishment, article 49 on the freedom to provide services, article 56 on the freedom to move capital, and article 81 et seq. on the rules on competition.

<sup>5</sup>See, for instance, the UNIX case, in which the European Court of Justice held that the use of the term "UNIX" in a tender notice was contrary to the provision of the Treaty of Rome on the free movement of goods in the Community, since the flow of imports in intra-Community trade may be impeded by reserving the contract exclusively to suppliers intending to use the system specifically indicated (Case C-359/93, *Commission of the European Communities v Kingdom of the Netherlands*, [1995] *European Court Reports*, p. I-157).

<sup>6</sup>See, for instance, Directive 93/36 of 14 June 1993 (the Public Supplies Directive), [1993] O.J. L199/1, recital 9 to the preamble.

15. The European Community directives on government procurement fall into two broad groups. The first group relates to public sector directives, which cover procurement by public bodies in general such as the State, local and regional authorities, associations formed by the above bodies and bodies governed by public law. The award procedures for contracts in this sector are regulated by three discrete directives, which cover procurement of supplies, works and services, respectively.<sup>7</sup> These three directives are complemented by a further directive, which lays down certain minimum standards for systems for national remedies.<sup>8</sup> The second group relates to utilities sector directives, which regulate procurement by bodies engaged in certain activities in the sectors of water, transport, energy and telecommunications (known as "utilities activities").<sup>9</sup> A single directive, the Utilities Directive, regulates the award procedures for all contracts in the utilities sector, including contracts for goods, works and services.<sup>10</sup> As in the public sector, that directive is complemented by a Utilities Remedies Directive,<sup>11</sup> which lays down certain minimum standards for systems for national remedies.<sup>12</sup> Following

<sup>7</sup>Directive 92/50 of 18 June 1992 (the Public Services Directive), [1992] O.J. L209/1; Directive 93/36 of 14 June 1993 (the Public Supplies Directive), [1993] O.J. L199/1; and Directive 93/37 of 14 June 1993 (the Public Works Directive), [1993] O.J. L199/54.

<sup>8</sup>Directive 89/665 of 21 December 1989 (the Public Remedies Directive), [1989] O.J. L395/33, as amended by Directive 92/50 of 18 June 1992 (the Public Services Directive), [1992] O.J. L209/1.

<sup>9</sup>These activities are:

(a) Provision or operation of fixed networks intended to provide a service to the public in connection with the production, transport or distribution of:

(i) drinking water; or  
(ii) electricity; or  
(iii) gas or heat; or the supply of drinking water, electricity, gas or heat to such networks;

(b) The exploitation of a geographical area for the purpose of:

(i) exploring for or extracting oil, gas, coal or other solid fuels; or  
(ii) the provision of airport, maritime or inland port or other terminal facilities to carriers by air, sea or inland waterway;

(c) The operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable.

As regards transport services, a network shall be considered to exist where the service is provided under operating conditions laid down by a competent authority of a member State, such as conditions on the routes to be served, the capacity to be made available or the frequency of the service;

(d) The provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

<sup>10</sup>Directive 93/38 of 24 June 1993 (the Utilities Directive), [1993] O.J. L199/84.

<sup>11</sup>Directive 92/13 of 25 February 1992 (the Utilities Remedies Directive), [1992] O.J. L76/14.

<sup>12</sup>The rationale for regulating procurements of utility companies in a separate legal instrument was twofold. First, in some European Community member States, procuring entities operating in the utilities sector were governed by public law, in others by private law. For this reason, a different basis for coverage than by reference to their legal status, as under the public sector rules, was required to ensure a fair balance in the application of procurement rules in these sectors. Secondly, unlike the essentially administrative organizations governed by the public sector rules, procuring entities operating in the utilities sector typically had economic or industrial purposes. The obligations imposed upon utilities therefore had to be more flexible than the public sector rules in order to permit the procuring entities concerned to manage their procurement activities effectively in the light of their particular commercial circumstances. See recitals 8 et seq. to the preamble of Directive 93/38 of 24 June 1993 (the Utilities Directive), [1993] O.J. L199/84.

the conclusion of the Agreement on Government Procurement (GPA) by the European Community and its member States in 1994, both the public sector directives and the Utilities Directive were amended by two alignment directives<sup>13</sup> in order to align the directives with the requirements of the GPA.

16. The directives are designed to create an internal market, that is an area without internal frontiers in which goods, persons, services and capital can move freely between the member States, in the field of government procurement. To this end, the directives establish a comprehensive legal framework based on the principles of non-discrimination, transparency and competition.<sup>14</sup> The directives aim at ensuring that public contracts are awarded in the European Community in a transparent and non-discriminatory manner so that undertakings from member States other than that of the contracting entity have unfettered access to procedures for the award of public contracts and can effectively compete with domestic undertakings for these contracts.<sup>14</sup>

17. In 1996, the European Commission published a Green Paper on the Community public procurement rules,<sup>15</sup> which called for comments from entities involved in public procurement in the Community. While the Green Paper itself suggested that there would not be any major changes in the rules, the comments received have led the Commission to revise that view. In its follow-up communication to the Green Paper,<sup>16</sup> the Commission recognized that there was a need for an amendment of the existing legal framework. In 2000, it submitted two proposals for amendment of the public sector rules and the utilities sector rules, respectively.<sup>17</sup> In 2002, the Commission submitted two amended proposals,<sup>18</sup> which incorporated changes to the original proposals following discussions with the European Parliament under the co-decision procedure<sup>19</sup> of the Treaty establishing the European Community.<sup>20</sup>

<sup>13</sup>Directive 97/52 of 13 October 1997 (the Public Alignment Directive), [1997] O.J. L328/1; and Directive 98/4 of 16 February 1998 (the Utilities Alignment Directive), [1998] O.J. L101/1.

<sup>14</sup>See, for instance, Directive 93/38, recitals 1, 11 and 12 to the preamble.

<sup>15</sup>*Public Procurement in the European Union: Exploring the Way Forward*, Green Paper (27 November 1996, COM(96) 583 final).

<sup>16</sup>*Public Procurement in the European Union*, Commission Communication (11 March 1998, COM(98) 143 final).

<sup>17</sup>*Proposal for a Directive of the European Parliament and of the Council on the coordination of the procedures for the award of public supply contracts, public service contracts and public works contracts* (10 May 2000, COM(2000) 275 final); and *Proposal for a Directive of the European Parliament and of the Council on coordinating the procurement procedures of procuring entities operating in the water, energy and transport sectors* (10 May 2000, COM(2000) 276 final).

<sup>18</sup>*Amended proposal for a Directive of the European Parliament and of the Council on the coordination of the procedures for the award of public supply contracts, public service contracts and public works contracts* (6 May 2002, COM(2002) 236 final); and *Amended proposal for a Directive of the European Parliament and of the Council on coordinating the procurement procedures of procuring entities operating in the water, energy and transport sectors* (6 May 2002, COM(2002) 236 final).

<sup>19</sup>Article 251, Treaty establishing the European Community.

<sup>20</sup>With respect to the public sector, the Commission accepted, either entirely or in part, 63 of the 103 amendments adopted by the European Parliament. All amendments adopted by the European Parliament can be

18. The objective of the amended proposals is threefold. First, the proposals seek to simplify and clarify the existing European Community directives so as to make them clearer and more comprehensible to everybody who is involved in public procurement, either as a buyer or as a supplier. The second objective is to modernize the directives in order to adapt them to modern administrative requirements, recent developments in the economic environment (particularly the emergence of the information society and the gradual withdrawal of the State from certain economic activities, particularly in the sectors of water, energy, transport and telecommunications) and new purchasing techniques. Finally, the proposals seek to relax some of the provisions of the directives, which were considered too inflexible to achieve the objective of best value for money in procurement.

#### D. Free Trade Area of the Americas

19. The Free Trade Area of the Americas (FTAA) was established at a summit of the leaders of 34 countries in South, Central and North America in December 1994. In 1995, ministers responsible for trade of the 34 FTAA countries, meeting in Denver, Colorado, agreed to establish a free trade area in which barriers to trade would be progressively eliminated (see [www.ftaa-alca.org](http://www.ftaa-alca.org)). In 1998, the trade ministers, meeting in Costa Rica, approved the structure and general principles and objectives for the FTAA process and formally launched negotiations, including on the progressive removal of barriers to trade in government procurement markets in the free trade area (see [www.ftaa-alca.org](http://www.ftaa-alca.org)). The general principles and objectives guiding the construction of the FTAA process provide, for instance, that the decisions will be made by consensus; that the FTAA agreement will be consistent with the rules and disciplines of the World Trade Organization; that the initiation, conduct and outcome of the negotiations will be treated as parts of a single undertaking that will embody the rights and obligations as mutually agreed upon; and that special attention will be given to the needs, economic conditions (including transition costs and possible internal dislocations) and opportunities of smaller economies, to ensure their full participation in the FTAA process. At the end of 1999, at a meeting at Toronto, Canada, trade ministers instructed negotiating groups to begin drafting negotiating texts for each chapter of the FTAA agreement (see [www.ftaa-alca.org](http://www.ftaa-alca.org)). Those texts, including a draft chapter on government procurement, were submitted to trade ministers at a meeting at Buenos Aires in April 2001 (see [www.ftaa-alca.org](http://www.ftaa-alca.org)).

20. The negotiations on market access in the field of government procurement were launched on 15 May 2002, with the broad objective of expanding access to the government procurement markets of the FTAA countries. More specifically, the objectives are to achieve a normative framework that ensures openness and transparency of government pro-

found in document A5-0378/2001 at <http://eurparl.eu.int>. With respect to the utilities sector rules, the Commission accepted, either in their entirety or in part, and with reformulations where appropriate, 47 of the 83 amendments adopted by the European Parliament. All amendments adopted by the European Parliament can be found in document A5-0379/2001 at <http://eurparl.eu.int>.

curement processes, without necessarily implying the establishment of identical government procurement systems in all countries; to ensure non-discrimination in government procurement within a scope to be negotiated; and to ensure impartial and fair review for the resolution of procurement complaints and appeals by suppliers and the effective implementation of such resolutions.

21. The objectives and principles upon which the FTAA negotiations on market access in the field of government procurement are based are similar to the objectives and principles embodied in the UNCITRAL Model Procurement Law.

#### **E. Common Market of the Southern Cone**

22. The Common Market of the Southern Cone (MERCOSUR) was established by the Governments of Argentina, Brazil, Paraguay and Uruguay under the Treaty of Asunción (A/46/155, annex) on 26 March 1991. The four countries decided to establish a common market, which was to be in place by 31 December 1994. Hence, the Treaty of Asunción has been defined as a “framework treaty”, since it contains the fundamental elements for the creation of a common market and is based on the reciprocity of rights and duties of the States parties. In accordance with chapter I, article 1, of the Treaty, this market implies:

(a) Free movements of goods, services and factors of production (capital and labour), by means of, among other things, the elimination of customs duties and non-tariff restrictions on the movement of goods;

(b) Establishment of a common external tariff, undertaking a common trade policy vis-à-vis third States or groups of States and the coordination of positions in economic, trade, regional and international forums;

(c) Coordination of macroeconomic and sectoral policies between member States in the areas of foreign trade, agriculture, industry, fiscal and monetary issues, foreign exchange and capital, services, customs, transport and communications as well as others that are agreed upon, in order to ensure adequate conditions of competitiveness amongst member States;

(d) Commitment between member States to harmonize their legislation on relevant matters in order to strengthen the integration process.

23. The Treaty of Asunción does not include any provisions on government procurement. However, the governing bodies of MERCOSUR have been dealing with the issue in cooperation with other international entities. For example, the MERCOSUR countries have engaged in discussions with the European Union on a negotiating text for government procurement.<sup>21</sup> Taking into account the convenience and benefits that MERCOSUR would obtain from provisions on government procurement, especially in the light of work undertaken by both the World Trade Organization and APEC, MERCOSUR is considering the

inclusion of those two entities in its discussions. In addition, the Organization of American States is maintaining a list of American organizations working on provisions related to government procurement.

#### **F. North American Free Trade Agreement**

24. The North American Free Trade Agreement (NAFTA) (see [www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)) was signed on 17 December 1992 by the heads of State of Canada, Mexico and the United States of America and came into force on 1 January 1994. The Agreement contains a schedule for the elimination of most tariffs and reduction of non-tariff barriers, as well as comprehensive provisions on the conduct of business in the areas of investment, services, intellectual property, competition, cross-border movement of persons and government procurement.

25. The provisions of NAFTA on government procurement are contained in chapter 10 of the Agreement. The Agreement establishes a framework of rights and obligations, which is intended to expand trade within the NAFTA member countries. As set out in its preamble, the Agreement is designed, inter alia, to create an expanded and secure market for the goods and services produced in the territories of the member States; establish clear and mutually advantageous rules governing trade; ensure a predictable commercial framework for business planning and investment; and enhance the competitiveness of firms in global markets. Based on those principles, chapter 10 on government procurement is designed to expand trade within the NAFTA area by eliminating barriers to trade in national government procurement exceeding certain financial thresholds.

26. Parties are required to accord national treatment and most-favoured-nation status to suppliers of goods, services and construction services from other NAFTA countries. In addition, no party may treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership or discriminate against a locally established supplier on the basis that the goods or services offered by that supplier for the particular procurement are those of another party.

27. Detailed and complex requirements are laid down for tender procedures to be followed by procuring entities, designed to ensure transparency and non-discrimination throughout the entire tender process. The preferred method of tendering under the chapter is open tendering. However, under certain circumstances such as extreme urgency, a procuring entity may resort to limited tendering procedures, provided this will not favour domestic suppliers. Negotiations between a procuring entity and suppliers are generally forbidden, unless the invitation to participate indicated the purchaser's intent to do so or the purchaser determines that no specific tender is the most advantageous. In such cases, negotiations are to be used primarily to identify strengths and weaknesses in the various tenders.

28. Each Party is required to maintain a system allowing suppliers to submit bid protests concerning all aspects of the procurement process. The adjudication of bid

<sup>21</sup>See, for instance, the conclusions of the sixth meeting of the European Union-MERCOSUR biregional negotiations committee, at <http://europa.eu.int>.

protests must be conducted by a competent body with no substantial interest in the outcome of the procurement. The reviewing authority must have the power to delay the award of a contract pending resolution of the challenge, except where delay would not be in the public interest. Further, it must be responsible for recommending the appropriate remedy for a challenge. This recommendation may include re-evaluation of offers or termination or re-initiation of the procurement in question. Upon conclusion of a protest, the reviewing authority is authorized to make written recommendations to the purchaser concerning all aspects of its procurement process, including suggestions for revising its procedures to bring them into conformity with the chapter.

29. The parties are required to commence negotiations to expand the scope and coverage of chapter 10 of NAFTA before the end of 1998, with a view to further liberalizing their government procurement markets. In addition, the parties are required to establish a Committee on Small Business to help small businesses reap the benefits of the liberalized government procurement markets under NAFTA.

#### **G. Government procurement under the framework of the World Trade Organization**

30. The World Trade Organization was established on 1 January 1995 when the Agreement Establishing the World Trade Organization entered into force (see [www.wto.org](http://www.wto.org)). The stated aims of the organization are to create predictable and growing access to markets, to promote fair competition and to encourage development and economic reform by entering into arrangements directed to the substantial reduction of tariffs and other barriers to trade with a view to eliminating discriminatory treatment in international trade relations. The primary legal measures to abolish discriminatory trade practices under the Agreement are the most-favoured-nation obligation, the national treatment obligation<sup>22</sup> and obligations relating to transparency.<sup>23</sup> All three principles, adapted to the respective markets, are embodied in the various agreements under the World Trade Organization.

31. The main agreements under the auspices of WTO concerned with the regulation of procurement of goods and services for governmental consumption are the General Agreement on Tariffs and Trade of 1994 (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Government Procurement (GPA). GATT and

GATS are multilateral<sup>24</sup> agreements dealing with general aspects of trade in goods and services respectively. However, government procurement is effectively exempted from the non-discrimination disciplines of both GATT and GATS.

32. This disparity in the application of WTO disciplines was intended to be addressed by the plurilateral<sup>25</sup> WTO Agreement on Government Procurement, which establishes a legal framework of rights and obligations among the parties to GPA with respect to national laws, regulations, procedures and practices in the area of government procurement. This framework is aimed at achieving greater liberalization and expansion of trade and improving the international framework for the conduct of world trade. It is based on the principles of non-discrimination on the basis of nationality; transparency; open and effective competition; accountability and due process; and reciprocity with respect to the rights and obligations undertaken by the parties under the Agreement. However, of the well over 100 members of the World Trade Organization, GPA has attracted only 28 signatories so far, including the European Community and its 15 member countries as well as 3 members of the European Economic Area.<sup>26</sup>

33. In view of the limited membership of GPA, three activities have been launched in WTO to develop multilateral WTO rules on government procurement. First, the parties to GPA have agreed to launch an early review of GPA with a view to simplifying and improving it so as to make it more accessible to non-parties. Secondly, the parties to GATS have launched negotiations on government procurement with a view to extending the disciplines of GATS to government procurement of services. Thirdly, pursuant to the Singapore Ministerial Declaration, adopted at the first World Trade Organization Ministerial Conference, negotiations have been launched on developing elements for a multilateral agreement on transparency in government procurement. While the mandate of the first two exercises extends to non-discrimination and transparency, the mandate of the third exercise is limited to aspects of transparency.

34. In regard to work on transparency, despite intensive negotiations over a period of four years, significant differ-

<sup>22</sup>In general terms, the national treatment obligation provides for non-discrimination in favour of domestic industries in stipulating that World Trade Organization (WTO) members shall afford the same treatment to goods, services and suppliers of other WTO members as that afforded to the goods, services and firms of domestic origin. The most-favoured-nation obligation, on the other hand, requires non-discrimination between "foreign" WTO members in stipulating that any preferential treatment given to products, services or suppliers of one WTO member must also be given to the suppliers and "like" products or services of any other.

<sup>23</sup>In general terms, the rules on transparency put members under an obligation to publish their general measures on trade with a view to making them readily available to other WTO members and to domestic as well as foreign operators in the respective markets.

<sup>24</sup>See WTO Agreement, article II, paragraph 2. Multilateral WTO Agreements are agreements that form part of the so-called "single undertaking" of the Uruguay Round. Signatories are required to assume the rights and obligations arising from these agreements as a condition for becoming members of WTO. In contrast to previous GATT practice ("GATT à la carte") WTO members cannot opt out of individual agreements of the "single undertaking" as the rights and obligations flowing from those agreements are binding upon all WTO members.

<sup>25</sup>See WTO Agreement, article II, paragraph 3. Plurilateral WTO Agreements are agreements that do not form part of the single undertaking. Rather, they operate as agreements "on top" of the single undertaking and thus create obligations or rights only for those WTO members that have opted in.

<sup>26</sup>At the time of writing (March 2003), the following were parties to GPA: Austria, Belgium, Canada, Denmark, European Community, Finland, France, Germany, Greece, Hong Kong Special Administrative Region of China, Iceland, Ireland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Netherlands, Netherlands with respect to Aruba, Norway, Portugal, Republic of Korea, Singapore, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America. According to the WTO homepage at the time of writing, a number of countries were negotiating accession to GPA.



ences remained between the members of the Working Group on Transparency in Government Procurement leading up to the fourth World Trade Organization Ministerial Conference, held at Doha in 2001, and beyond. Some members argue that the negotiating mandate under the Singapore Declaration does not extend to carrying out negotiations on an agreement on transparency in government procurement and that the Group should confine its activities to the study phase of its mandate with a view to reaching a common understanding on the various elements of transparency. Furthermore, there is still a wide divergence of views on matters ranging from the scope and coverage of the future agreement to procurement methods and the requirements of domestic review procedures.

35. The Declaration of the World Trade Organization Ministerial Conference at Doha sought to address these formal and material issues. The declaration provides that negotiations will take place after the fifth Ministerial Conference, in 2003, on the basis of a decision to be taken, by explicit consensus, at that Conference on modalities of negotiations. Both adequate technical assistance and support for capacity-building will be provided during the negotiations and after their conclusion. On the scope of the negotiations, the Doha Declaration re-emphasizes that the negotiations will be limited to the aspects relating to transparency and therefore will not restrict the scope for countries to give preferences to domestic supplies and suppliers.

(A/CN.9/539/Add.1) [Original: English]

NOTE BY THE SECRETARIAT

ADDENDUM

CONTENTS

	<i>Paragraphs</i>
III. Issues related to the practical application of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.....	1-42
A. Procurement methods.....	4-24
1. Supplier lists.....	5-7
2. Procurement of services.....	8-9
3. Alternative methods of procurement.....	10-12
4. Community participation in procurement.....	13-14
5. Framework agreements.....	15
6. Electronic procurement.....	16-24
B. Evaluation and comparison of tenders.....	25-31
C. Remedies and enforcement.....	32-37
1. Scope of review.....	33-34
2. Review.....	35-37
D. Other points for consideration.....	38-42
IV. Conclusions and recommendations.....	43-45

III. ISSUES RELATED TO THE PRACTICAL APPLICATION OF THE UNCITRAL MODEL LAW ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES

1. The UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>1</sup> reflects the different legal traditions of the broad membership of the United Nations

Commission on International Trade Law (UNCITRAL), including States from all regions and of all levels of economic development, and is as a result acceptable to many and varied jurisdictions. As a “framework law”, the UNCITRAL Model Procurement Law sets out the essential minimum content of an effective procurement system, but does not set forth all rules and regulations that may be necessary to implement procurement procedures, as it is envisioned that enacting States will issue procurement regulations that may take into account specific and possibly changing national circumstances. Also, the inclusion of

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

options in the UNCITRAL Model Procurement Law ensures flexibility in the implementation of issues that are in practice treated differently from State to State.

2. In the light of experience in the application of the UNCITRAL Model Procurement Law and comments summarized below, some points relating to a possible review of the UNCITRAL Model Procurement Law may be worth consideration by the Commission. It has been suggested that review of the UNCITRAL Model Procurement Law in the light of those developments may assist the harmonization of national procurement rules and increase its appeal as a template for domestic procurement reforms, while effectively promoting the objectives of transparency, fairness and efficiency.

3. Several issues and problems identified in current procurement practice are briefly discussed in order to facilitate discussion in the Commission as to whether it would be desirable to consider a review of the UNCITRAL Model Procurement Law. Issues considered in the present note include aspects relating to the scope of the UNCITRAL Model Procurement Law; general provisions; procurement methods; alternative methods of procurement under the UNCITRAL Model Procurement Law; electronic procurement; evaluation and comparison of tenders; and remedies and enforcement.

#### A. Procurement methods

4. It is generally acknowledged that procedures in the UNCITRAL Model Procurement Law relating to open tendering, restricted tendering and requests for price quotations reflect best practices found in domestic public procurement regulations. However, comments have been made on several more specific issues discussed below.

##### 1. Supplier lists

5. It has been pointed out that the UNCITRAL Model Procurement Law does not address the subject of supplier lists (also known as qualification lists). Such lists identify selected suppliers and can be either mandatory or optional. Mandatory lists require registration of the supplier on the list as a condition of participation in the procurement, whereas, in the case of optional lists, a supplier may choose to register without prejudice to eligibility. Though lists vary in scope, registering a supplier on a list will typically involve an initial assessment of some qualifications, with others being assessed when a supplier is considered for specific contracts.

6. Observers have noted that the UNCITRAL Model Procurement Law allows procuring entities to use optional lists to choose firms to participate in some procurement methods that do not require advertising, such as restricted tendering, competitive negotiations, requests for proposals and single-source procurement. This may in practice result in the exclusion of non-registered suppliers. It has been noted that the UNCITRAL Model Procurement Law does not contain any controls over the use of such optional lists to ensure transparency and competition. Controls could for example consist of an obligation to publicize the existence of any list.

7. It has also been noted that although the UNCITRAL Model Procurement Law does not allow procuring entities to restrict access to procurement to suppliers registered on lists (i.e. mandatory lists), that practice, while not suitable for open tendering, may be efficient in relation to other procurement methods. Also, the relevance of supplier lists to electronic procurement techniques has been noted.

##### 2. Procurement of services

8. It has been suggested that, though flexible, the current "principal method for procurement of services" under chapter IV is not sufficiently differentiated to address different types of service. It has also been suggested that the procurement of services measurable on the basis of physical outputs could employ rigorous and objective selection methods instead of employing qualitative and negotiated methods. In that case, chapter IV of the UNCITRAL Model Procurement Law could then be limited to the selection of intellectual services that did not lead to measurable physical outputs, such as consulting and other professional services, the specificity of which could also be recognized in article 2 ("Definitions") of the UNCITRAL Model Procurement Law.

9. Observers have suggested that article 42 of the UNCITRAL Model Procurement Law could form the basis for a quality-based method of selection. It has also been noted that the exclusion of simultaneous and consecutive negotiations in the selection of proposals (arts. 43 and 44) would be beneficial to transparency. Further, it has been suggested that a budget-based selection method for well-defined services lending themselves to lump-sum contracts could be added to the methods provided in article 42. It has been observed that since it may not be cost-effective for consultants to be invited to submit proposals by open invitation, consideration could be given to providing for open solicitation of expressions of interest followed by short-listing as opposed to pre-qualification as envisaged in article 7, paragraph 1.

##### 3. Alternative methods of procurement

10. Suggestions have been made by at least one multi-lateral lending institution that it might be useful to review the need and conditions of use of some of the "alternative methods of procurement" set out in chapter V of the UNCITRAL Model Procurement Law.

11. The following suggestions have been made with respect to specific methods:

(a) "*Two-stage tendering*" (art. 46), instead of being categorized as an "alternative method", could be treated as a form of open tendering, aimed at refining specifications throughout the first stage of the process in order to achieve a transparent selection in the second stage;

(b) The grounds for "*restricted tendering*" (arts. 47 and 20) could be narrowed from "disproportionate cost of other procedures" and "limited number of suppliers" to the former only;

(c) "*Requests for proposals*" and "*competitive negotiation*" (arts. 48 and 49) are in practice often intended to

compensate for inadequacies in the preparation of specifications (and other descriptions of goods, construction or services) and evaluation criteria and more care in the preparation of the solicitation of tenders could facilitate achieving a similar end;

(d) The justifications for using “*single-source procurement*” could be narrowed in scope so as not to include extrinsic considerations such as transfer of technology, shadow-pricing or countertrade, as is currently the case under article 22, paragraph 2, of the UNCITRAL Model Procurement Law.

12. The Commission may wish to note, however, that the extensive consideration already given to these issues during the preparation of the UNCITRAL Model Procurement Law should be taken into account in any decision to reopen the debate.

#### 4. *Community participation in procurement*

13. It has been brought to the secretariat’s attention that a number of modern procurement systems provide for a selection method that draws on the participation of users. The method is used for the purpose of achieving social goals and a sustainable delivery of services in sectors unattractive to larger companies such as health, agricultural extension services and informal education.

14. In practice there are variations in the way community participation in procurement takes place. For example, utilization of local know-how and materials may be increased, labour-intensive technologies employed and other forms of participation of the community in the procurement may be called for. Where efficient, procurement procedures and specifications could be adapted to reflect these practices.

#### 5. *Framework agreements*

15. Observers have also noted that many national laws on procurement contain provisions on “framework agreements”, used when procuring entities require particular products or services over a period of time but do not know the exact quantities. Accordingly, it has been suggested that the UNCITRAL Model Procurement Law could usefully deal with situations such as these.

#### 6. *Electronic procurement*

16. It has been brought to the attention of the secretariat that procurement conducted through electronic means is rapidly increasing in popularity and is being considered under domestic laws and by the World Trade Organization (WTO) and the European Community. It has also been pointed out that recent documents issued by multilateral development banks on standards for assessing national procurement systems encourage the use of electronic means but do not provide guiding principles for regulation. In that light, specific comments and suggestions were made on ways of adapting the UNCITRAL Model Procurement Law to electronic procurement. The point was also made that in addition to dealing with a number of basic issues of electronic procurement, some guidance could usefully be provided on methods of electronic procurement.

#### (a) *Electronic communications*

17. It has been pointed out that the possibility of electronic tendering is not excluded under the UNCITRAL Model Procurement Law, in the sense that article 30, paragraph 5 (b), specifically provides that “a tender may alternatively be submitted in any other form specified in the solicitation documents that provides a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality”. Nevertheless, it has been suggested that it would be useful, perhaps even necessary, that a provision such as article 30 be accompanied by some detailed provisions dealing with authenticity, security and confidentiality.

18. It has also been commented that, in view of the spread of electronic tendering and its advantages, consideration could be given to including a provision permitting procuring entities to require electronic communications, including electronic tendering. Currently the UNCITRAL Model Procurement Law does not permit procuring entities to require use of electronic means by suppliers (arts. 9 and 30).

#### (b) *Electronic catalogues*

19. Comments have been made relating to the versatility and flexibility of electronic catalogues. Electronic catalogues can be electronic versions of traditional hard-copy catalogues or may incorporate electronic ordering facilities. Electronic catalogues are often operated through supplier lists (see above, paras. 5-7) or through framework arrangements (para. 15), which may be an additional reason for addressing supplier lists and framework agreements in the UNCITRAL Model Procurement Law.

#### (c) *Electronic auction*

20. With regard to electronic tendering techniques, comments have focused on an increasingly popular tendering process known as “reverse electronic auction”. Although suppliers participating in the auction do not know the identity of other suppliers, they have on-screen information on ranking or amount required to beat other suppliers’ offers.

21. While during the auction only prices can be compared, non-price criteria such as quality can be rated separately prior to the auction and then combined, using specialized auction software, with the information submitted in the auction so as to give each supplier’s overall standing.

22. It has also been noted that transparency would be increased if both information on other tenders and the outcome of the procedure were available to participants.

23. Some comments have been made on provisions that currently do not take into account the possibility of an electronic auction. For example, it has been noted that the UNCITRAL Model Procurement Law’s general tendering procedure, “open tendering”, assumes a single tendering stage. This is incompatible with “two-stage” electronic auctions in which the first stage is the rating by the purchaser of the relevant non-price aspects and the second stage is the

auction phase, in which the price and non-price aspects are combined to give overall ranking. It has also been noted that the practice of submitting tenders in writing in a sealed envelope is not compatible with an auction process. With regard to evaluation and comparison of tenders, it was pointed out that article 34, paragraph 1 (*a*), of the UNCITRAL Model Procurement Law prohibits changes to the price of tenders after submission and that, under article 34, paragraph 8, information on tenders must not be disclosed, both of which constitute an obstacle to using electronic auctions.

24. Comments were also made on whether it would be best to regulate electronic auctions as a version of traditional procurement methods or as a distinct method. It has been pointed out that treating such auctions as a version of traditional tendering would require the introduction of additional rules to address auctions' special features relating to tender confidentiality and two-phase evaluation, but that this could be more simple than treating electronic auctions as a separate tendering method requiring novel and specific provisions.

### B. Evaluation and comparison of tenders

25. It has been pointed out that, in order to make the outcome of the evaluation of tenders predictable from the perspective of the tenderer, it would be optimal to express tender evaluation criteria (art. 34, para. 4 (*b*)) in monetary terms or in the form of pass/fail requirements, that is, requirements set out by the procuring entity that the supplier must meet in order for its proposal to be considered acceptable for evaluation purposes.

26. Also, so as to increase the transparency of the selection process and exclude extrinsic considerations in the determination of the best value for money, the use of evaluation criteria such as shadow-pricing of foreign exchange and countertrade considerations should be limited. Article 34, paragraph 4 (*c*)(iii), of the UNCITRAL Model Procurement Law currently allows the taking into account of these considerations.

27. It has also been suggested that, in the case of open and restrictive tendering, as well as solicitation of price quotations, it would be appropriate to base the award on the determination of the lowest evaluated bid that is also substantially responsive to the bidding documents instead of on the lowest bid price (art. 34, para. 4 (*b*)(i)) or lowest evaluated tender (art. 34, para. 4 (*b*)(ii)).

28. Regarding the acceptance of the tender and entry into force of the contract, suggestions were made that consideration could be given to whether article 36 could address the cancellation of the process for failure of the contract to become effective.

29. Regarding preferences, it was brought to the attention of the secretariat that, while article 34, paragraph 4 (*d*), states that a procuring entity can grant a margin of preference for the benefit of domestic industries, it does not require that domestic regulations specify the maximum preference that can be granted. It has been noted that a provision to that effect would benefit transparency. The point has also been made that, given that paragraphs 4 (*c*)(iii) and 4

(*d*) of article 34 both appear to relate to preferences for domestic content, these could usefully be integrated.

30. The related point was made that granting domestic industry a margin of preference is preferable to the practice of excluding foreign bidders and that the latter option should only be resorted to when there are valid reasons for not granting a margin of preference. Also, transparency would benefit from a requirement to set out the conditions under which foreign bidders can be excluded.

31. The general comment was made that policies such as those outlined above relating to the use of procurement to promote industrial, social or environmental objectives should be acknowledged in the UNCITRAL Model Procurement Law so as to increase transparency and better control their operation.

### C. Remedies and enforcement

32. General comments have been made that stronger endorsement of the importance of independent review and more detailed guidance thereon could be given in the UNCITRAL Model Procurement Law or the accompanying Guide to Enactment. Other, more specific, comments have been on the scope of bid protest review, applicable standards and whether review should be carried out by an administrative or judicial body.

#### 1. Scope of review

33. Regarding review standards under the UNCITRAL Model Procurement Law, it has been suggested that the scope of provisions relating to exceptions to review (art. 52, para. 2) could be narrowed so as to permit review of decisions on the selection of procurement methods and rejection of all tenders. It was noted also that the "review by procuring entity" provided under article 53 could operate as an obstacle to rapid review. Also, it has been suggested that a minimum set of standard remedies could be included, possibly as an optional provision.

34. Further, concerning the scope of damages that can be awarded, it has been suggested that compensatory damages (art. 54, para. 3 (*f*)) should be limited to the cost of bid preparation and submission, because a broader definition might result in funding loss of future profit out of scarce government resources.

#### 2. Review

35. Concerning the institutional status of the domestic review body, comments have been made that adequate and independent administrative review, without going as far as judicial review, is sufficient. In that connection it has been pointed out that article XX, paragraph 6, of the WTO Agreement on Government Procurement, which sets out procedural requirements in relation to an independent administrative body, could be a useful model.

36. It has been suggested that, in order to assure the business community that a review will yield independent results, administrative review could be supplemented by judicial review, except in countries in which courts rou-

tinely review the validity of procurement decisions. In that connection it was noted that the courts of some States in Latin America can issue interim decisions suspending the award process. Comments were made that, in any case, the time frame of the review should be such that the reversal of an incorrect procurement decision would be feasible.

37. Another suggestion has been that the award of small contracts the selection and execution of which is conducted in close proximity to the procurement's intended users could be subject to reviews by users' associations at both the bidding stage and the contract acceptance stage.

#### D. Other points for consideration

38. In relation to qualification of suppliers, it has been pointed out that, although article 6, paragraph 1 (b)(i), of the UNCITRAL Model Procurement Law refers to "reputation" as a qualification criterion, reputation may not be an objective and transparent qualification criterion.

39. With regard to rules concerning documentary evidence provided by suppliers, it has been suggested that the scope of article 10 of the UNCITRAL Model Procurement Law could be limited to the documentation submitted by the winning bidder.

40. Concerning inducements from suppliers or contractors, it has been suggested that article 15 of the UNCITRAL Model Procurement Law might benefit from an expansion in scope so as to deal with the suspension of collusive bidders, bidders misrepresenting their qualifications or contractors in continuous breach of fundamental contract obligations.

41. With regard to the contents of solicitation documents, suggestions have been received that there may be scope for additional clarification in article 27 of the UNCITRAL Model Procurement Law; in particular, a "lot and package" approach (the practice of dividing the whole procurement into lots or portions that would constitute the minimum acceptable scope of a tender) could be referred to with more clarity in subparagraph (h) and subparagraph (i) could be modified so as to separate into different requirements the inclusion of taxes in the bid price and the inclusion of specific services.

42. Finally, it has been noted that providing guidance on the extent to which the UNCITRAL Model Procurement Law satisfied the requirements of the WTO Government Procurement Agreement could play a role in facilitating and promoting accessions to that Agreement.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

43. In the light of the above, the Commission may wish to consider whether it would be desirable to study the possibility of a review of the Guide to Enactment of the UNCITRAL Model Procurement Law or of the Model Procurement Law itself so as to increase its appeal as a template for domestic procurement reforms. The possibility of undertaking such a review should not be understood as a suggestion to re-open issues that have already been fully dealt with in the discussions leading to the adoption of the Model Procurement Law. Rather the intention would be to assess the opportunity of adjusting the Model Law in the light of new developments and practices (notably electronic procurement) or to deal with issues that were not discussed at that time.

44. If the Commission decides that such work in the area of procurement is desirable and feasible, it may wish to request the secretariat to engage in such consultations so as to prepare a document identifying the open issues, possibly with tentative indications of solutions. Thereafter, an intergovernmental working group might be entrusted with the review of the various issues mentioned in the present note and any other issues that were raised during the consultations. On that basis, the Commission would be able to take a decision on whether further work was warranted and if so what its scope should be.

45. As to the resources needed for any such work, the Commission may wish to take into account that Working Group I, which has completed its work in the area of privately financed infrastructure projects, could be convened to consider these issues.<sup>2</sup> The Commission may also wish to determine that Working Group I should cooperate closely with Working Group IV (Electronic Commerce) as regards the electronic commerce aspects of procurement legislation.

<sup>2</sup>As regards the resources of the secretariat of the Commission, it is hoped that the secretariat will be strengthened as from January 2004 so as to allow it to absorb the increased workload resulting from the expansion from three to six UNCITRAL working groups and from projects outside the working groups. In its resolution 57/19 of 19 November 2002, entitled "Enhancing coordination in the area of international trade law and strengthening the secretariat of the United Nations Commission on International Trade Law", the General Assembly requested the Secretary-General to consider measures to strengthen the secretariat of the Commission within the bounds of the resources available in the Organization, if possible during the current biennium and, in any case, during the biennium 2004-2005. In light of that resolution, the proposed programme budget for the biennium 2004-2005 (A/58/6 (Sect. 8)), includes a proposal for three new Professional and one administrative post in the secretariat of the Commission.

## B. Possible future work relating to commercial fraud

(A/CN.9/540) [Original: English]

### NOTE BY THE SECRETARIAT

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction .....	1-4
II. The extent of commercial fraud .....	5-11
III. The nature of commercial fraud .....	12-26
IV. The commercial law dimension of commercial fraud .....	27-63
A. Remedies .....	33-41
B. Interim measures of protection or attachment of funds .....	42-44
C. Risk allocation .....	45-46
D. Innocent third parties .....	47-48
E. Deterrence and education .....	49-50
F. The role of professionals .....	51-52
G. Third party intermediaries .....	53
H. Confidentiality of data .....	54
I. Electronic commerce and cybercrime .....	55-60
J. Insolvency .....	61-63
V. Recommendations for consideration by the Commission .....	64-70
A. An international colloquium .....	65-67
B. United Nations Convention against Transnational Organized Crime .....	68
C. Focus on the fraudulent dimensions of commercial activities in future work .....	69-70

#### I. INTRODUCTION

1. At its thirty-fifth session in 2002, the United Nations Commission on International Trade Law (UNCITRAL) considered a proposal that the secretariat prepare a study of fraudulent financial and trade practices in various areas of trade and finance for consideration at a future session of the Commission.<sup>1</sup>

2. At that session, the Commission was informed that fraudulent practices, which are typically international in character, had a significant adverse economic impact on world trade and negatively affected the legitimate devices used in world trade. It was noted that the incidence of these frauds was growing, particularly since the advent of the Internet had offered additional avenues to the perpetrators. It was observed that the consequences of commercial and financial fraud included the following: (1) the compromise of legitimate instruments of trade and commerce; (2) the misuse of international organizations; (3) the loss of confidence in the mechanisms of international monetary transfer; and (4) increased costs to international trade and

commerce. It was observed that authorities have had extensive and serious difficulties combating these schemes, stemming from a number of problems. The view was expressed that the Commission combined a governmental perspective with internationally recognized international expertise in international commerce along with a long-standing tradition of cooperation with international organizations in the private sector and collaboration with recognized international experts. Further, it was suggested that the Commission was well-placed to appreciate the workings of institutions of commerce and finance whose cooperation was essential for success, and many of the fraudulent schemes touched upon matters that had been specially addressed by texts elaborated by the Commission. It was proposed that the Commission request the secretariat to prepare a study of fraudulent financial and trade practices in order to describe the ways in which the risk of common types of fraud affected the value of contractual and financial commitments.<sup>2</sup>

3. At that session, the Commission noted that measures to counter the growing problem of financial and commercial fraud were of great concern to Governments, and that such

<sup>1</sup>Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17), paras. 279-290.

<sup>2</sup>Ibid., paras. 279-285.

fraud adversely affected the trust in the mechanisms of trade, finance and investment, causing a destabilizing effect on the markets. It was recognized that commercial entities from developing countries, inasmuch as they had limited experience with instruments of international trade, were particularly vulnerable and would benefit from information and advice as to how to avoid being defrauded. It was observed that the work of the Commission would also help States, intergovernmental and non-governmental organizations to design or adjust legislative and non-legislative private law regimes that were better suited to prevent fraudulent schemes. After discussion, the Commission agreed that it would be useful to prepare the proposed study for the consideration of the Commission, without at this stage committing the Commission to any action being taken on the basis of the study, and on the understanding that the work should only be undertaken to the extent that work did not claim resources needed for other projects on the Commission's agenda.<sup>3</sup> Based on these considerations, the secretariat convened a meeting of experts on 2-4 December 2002 in Vienna, Austria, at the headquarters of the Commission's secretariat to discuss this issue and to assist in drafting this note for the Commission.<sup>4</sup>

4. This note has been prepared pursuant to the considerations of the Commission. It considers the impact and significance of commercial fraud, the meaning and nature of commercial fraud, general issues of commercial law that are affected by commercial fraud, and possible courses of action that might be undertaken by the Commission.

## II. THE EXTENT OF COMMERCIAL FRAUD

5. Commercial fraud is a social and political phenomenon that has grown in recent years into a serious international problem. There are no accurate figures by which losses can be measured but assessments from experts and available anecdotal evidence suggest that commercial fraud is a serious drain on international commerce, with the potential for further losses.

6. Available figures are principally derived from reported court decisions, both civil and criminal. The figures that have been found indicate direct losses of billions of United States (US) dollars per year.<sup>5</sup> The difficulties with calculating exact amounts of losses are the following:

(a) Two difficulties with stating figures are that losses typically do not fall within one calendar year and that it is difficult to categorize cases and distinguish between commercial fraud, consumer fraud, and other types of similar activity. Nonetheless, attempts that have been made support the estimate given above. For one particular type of commercial fraud, "high yield" or "prime bank" fraud (see below, para. 25), losses internationally are conservatively estimated at US \$1 billion per year.<sup>6</sup> By another measure, the International Chamber of Commerce Austria (ICC Austria) estimates the losses from commercial fraud in Austria alone are the equivalent of 100,000 jobs per year;<sup>7</sup>

(b) Another difficulty in estimating the losses resulting from commercial fraud is that, in addition to the actual amounts lost, there are indirect costs such as the cost of investigation and prosecution, the cost of recovery, and the impact of losses on job supply and businesses. These losses are difficult to measure or estimate in individual cases, and even more difficult to measure or estimate in aggregate;

(c) An even greater obstacle to determining the extent of commercial fraud is the conclusion reached by informed observers that the number of instances and the amount of reported losses is greatly exceeded by the number of unreported losses.<sup>8</sup> Many victims of commercial fraud are reluctant to reveal losses because of embarrassment, the fear of exposing unfavourable information to competitors or lenders, or the conclusion that no recovery is possible or that the time and energy spent in seeking redress would exceed the amount likely to be recovered. Another factor in this reluctance may be due to the limited resources of the criminal justice system in some States, such that the justice system may not be capable of dealing adequately with commercial crime.

7. Despite the absence of precise statistical evidence, it may be credibly argued that commercial fraud has reached epidemic proportions. In addition to its potential for progress, the emergence of a global economy powered by computers and telecommunication technology has opened many destructive possibilities for commercial fraud. Fraudsters have been resourceful and inventive in making their schemes more flexible and attractive as well as more difficult to detect and prosecute.

February 2000, 1, 6-7), while banks lost \$US 600 million to RBG Metals Trading fraud (Documentary Credit World, June 2002, 6-7). There are numerous similar examples in the reported civil and criminal cases. In another reported instance, more than \$US 6 trillion in fraudulent United States "federal notes" were seized recently in Europe and Asia. Such notes are sold extensively and even "traded" throughout the world even though they are not issued by the United States Government and they are worthless. These examples have been chosen randomly, in order to illustrate the seriousness of the problem.

<sup>6</sup>James E. Byrne, *The Myth of Prime Bank Investment Scams* (Institute of International Banking Law & Practice, 2002), 297 pp., 12.

<sup>7</sup>This figure is based upon an estimate that the average for one position is 100,000 and that estimated losses are 3 billion for investment fraud, 1.5 billion for import-export fraud, 1 billion for project finance fraud, 3 billion for internal company fraud, 3 billion for corruption, 1.5 billion for espionage, and 700 million for shoplifting. This estimate also illustrates the difficulty inherent in attempting to define a discrete set of issues and a particular type of activity as commercial fraud.

<sup>8</sup>ICC Austria estimates that only between 5 to 10 per cent of losses are disclosed.

<sup>3</sup>Ibid., paras. 287 and 290.

<sup>4</sup>The secretariat wishes to acknowledge the work of the Institute of International Banking Law & Practice and its Director, Professor James E. Byrne, in the preparation of documents for the experts' meetings.

<sup>5</sup>In one case, *Komerčni Banka AS v. Stone and Rolls Ltd.* [Queen's Bench Division (Commercial Court) [2002] EWHC 2263 (Comm), [2002] All ER (D) 239 (Nov)], involving a lending and letter of credit scam touching the United Kingdom of Great Britain and Northern Ireland, the Czech Republic, and Austria, losses of \$US 400 million are estimated. This case is given by way of example, but is not isolated. For example, in *Nissho Iwai v. Korea First Bank*, No. 147/2002 (NY Ct. App. 2002) [US], involving Japan, Korea, and the United States of America, losses of \$US 75 million were incurred as a result of fraudulent inducement that led a bank to issue a letter of credit in an amount greater than the bank intended. In *Malaysian International Trading Corp. v. Interamerica Asia Pte. Ltd.* 2002-4 SLR 537, 2002 SLR LEXIS 156 [Singapore], \$US 75.1 million was lost in the sale of palm olein. In the series of Solo Industries fraud cases, \$US 300 million was lost (Andy Holder, "\$300m loss underlines the case for due diligence" Commercial Crime International,

8. In addition, there are strong indications that organized criminal elements have recognized commercial fraud as a source of significant income at relatively low risk and that they have begun to enter this field. For this reason, as well as its potential for the disruption of economies, commercial fraud offers an opportunity for global terrorism.

9. The threat of commercial fraud extends beyond direct and indirect losses to individual victims, however serious they may be. Commercial fraud has the potential to harm business reputations and destabilize industries, regions, the international banking system, financial markets, instruments of international commerce, international trade, and even nations. At this time, it has already had a deleterious impact on some smaller developing countries and, if unchecked, could threaten other countries.

10. The underlying causes of this growth in commercial fraud are manifold. They include the advances in technology and the globalization of commerce, including the internationalization of banking and finance. International commerce provides an ideal environment for commercial frauds in that it permits fraudsters to take advantage of both weaknesses in international systems designed for commercial interests acting in good faith and the difficulties inherent in pursuing civil or criminal actions in cross-border situations. Furthermore, current systems of banking and transport have not kept pace with the realities of modern commerce at the level of law and practice, and operate on the basis of interim measures instead of fundamental reforms. These temporary measures create opportunities for fraud.

11. While it would be useful to develop statistical information regarding the extent of commercial fraud and while such work should be encouraged, there is sufficient evidence of its size and impact to justify the conclusion that commercial fraud is an international problem of sufficiently serious proportion to warrant the considered attention of Governments and of the commercial community as to the nature of the problem and the need and possibilities for concerted action.

### III. THE NATURE OF COMMERCIAL FRAUD

12. It is not possible or necessary to define commercial fraud with precision. For the purposes of this note, it may be described as commercial conduct that seriously deviates from the acceptable range of commercial norms, using legitimate commercial forms illegitimately. It may have civil, regulatory, or criminal consequences and may also touch on matters more properly within the sphere of consumer law or regulation.

13. Commercial fraud need not involve affirmative conduct and, in some situations, may arise where silence or inaction is misleading and where there is an obligation of disclosure arising as a matter of law, commercial usage, or as a result of partial disclosures or representations.

14. The conduct that constitutes commercial fraud may resemble or also be actionable under general legal concepts, such as negligence or deliberate torts. While negligent conduct would not in itself constitute commercial

fraud, actions of extreme recklessness or wilful disregard of minimal acceptable commercial conduct would closely resemble commercial fraud. In some systems, the same conduct that would constitute commercial fraud may give rise to actions based on deliberate tortious conduct such as misrepresentation or deceit.

15. There is some uncertainty as to how the presence of commercial fraud is to be determined. In one approach, the existence of commercial fraud is said to be determined by the fraudulent intent of the perpetrator. Although this approach serves as a valid explanation of many cases involving commercial fraud, it is less useful in borderline situations where intent, in effect, is implied. Other approaches equate commercial fraud with the lack of good faith, although the value of that characterization may depend on the meaning and significance given to the notion of good faith. In all cases it may be said that the presence of bad faith would constitute commercial fraud, but the concept of bad faith is not universally known and is rarely defined with precision. Since the concept of lack of good faith is not precise, its use as a measure for commercial fraud sometimes serves as an explanation of a conclusion that commercial fraud has occurred rather than as a measure by which its presence can be determined, especially in borderline situations.

16. While there is no agreed typology of commercial fraud, there are commonly recognized patterns of commercial fraud that are useful in identifying it and in illustrating the issues that arise in attempting to distinguish it from other similar phenomena.

17. It is common for commercial fraud schemes to take advantage of the international nature of a transaction, and: (1) to misuse instruments of international commerce; (2) to use or rely on the international payment and banking systems; and (3) to involve some level of collaboration between several distinct persons appearing to act independently.

18. The greatest challenge for commercial law is to distinguish commercial fraud from a breach of contract or obligation.<sup>9</sup> The latter, while it is actionable and would result in legal damages, would not be understood to constitute commercial fraud. In this sense, the degree of the departure from accepted commercial norms assumes considerable importance. For commercial fraud, there must be a distinct departure from acceptable commercial norms.

19. For example, it is accepted that in commercial activities there will be situations where a party is in breach of a contractual obligation which itself could be understood as a departure from accepted commercial norms. Whether the breach is fraudulent depends upon the degree of the breach. Where the breach is not deliberate, typically there is no commercial fraud. Where the action is deliberate,

<sup>9</sup>Actions for breach of contract or obligation may also contain elements of fraud, but there are adequate legal remedies for breach of contract in the law of contracts or under the United Nations Convention on Contracts for the International Sale of Goods. The type of commercial fraud addressed by this note is activity that involves a serious deviation from commercial norms.



however, it is less clear whether there is commercial fraud. Where, for example, there is a deviation regarding the quality of the goods, it is likely that there is a breach of contract but no commercial fraud, even if the deviation is a deliberate act on the part of the seller. When there is a deliberate refusal to deliver goods in order to obtain a better price from another buyer, it is unclear whether there would be commercial fraud. Such conduct is a breach of contract, permitting avoidance in most cases, but would not generally be regarded as an instance of commercial fraud, absent additional circumstances. Similarly, a refusal on the part of a buyer to perform in order to take advantage of a better price would not be acceptable commercial conduct and would result in damages, but would not generally be regarded as commercial fraud. As a result, the extent or degree of the departure from acceptable commercial norms, while imprecise, is a practical measure of the existence of commercial fraud.

20. On the other hand, where the seller ships goods that have no commercial value whatsoever or where the buyer receives the goods and without any commercial justification evades payment, there is likely to be commercial fraud. Additional factors may make a non-fraudulent breach of contract a commercial fraud. For example, where there is a material misrepresentation regarding the quality of the goods and that misrepresentation cloaks a serious flaw in the goods that would render their use in violation of health or safety rules, there may be commercial fraud.

21. In addition, there may be commercial fraud in a general sense even where there is no breach as between the parties to a contract. For example, where there is the purchase and sale of an otherwise legal commodity that is controlled by criminal interests and that commodity is obtained without paying local taxes, the contracts of the buyers and sellers may be legitimate and not contain any indication of commercial fraud, but the entire chain of transactions itself is of concern to the commercial community as an instance of commercial fraud because it threatens the ability of legitimate producers who pay taxes to operate at competitive equality. In this sense in which there may be no civil remedy, the laundering of goods is nonetheless of equal concern with the laundering of funds that are obtained in circumvention of law.

22. Commercial transactions are often conducted by the use of documents representing the shipment, storage, inspection, or other facets connected with the delivery or production of goods. A forged document is generally understood to contain a forged signature or to have been altered improperly whereas a fraudulent document is one that is altogether false. The terms are often used interchangeably. Forgery or fraudulent documents will give rise to commercial fraud, sometimes even in situations where the goods themselves meet the requirements of the contract between buyer and seller. For example, where financing or payment is based on forged documents of title, the actual conformity of the goods is irrelevant. Moreover, where there is reliance on representations of a documentary character, the forged or fraudulent documents constitute commercial fraud whether or not the person proffering them is innocent of any knowledge of their fraudulent character.

23. Where financial instruments representing undertakings are used for a commercial transaction, their fraudulent inducement, issuance, or use for a commercially improper purpose also constitutes commercial fraud, as does their forgery, fraudulent creation, or modification.

24. Other examples of commercial fraud include:

(a) The misuse of securities, including government securities, in connection with a commercial transaction that were fraudulently obtained, forged, or fraudulent also constitutes commercial fraud;

(b) The misuse or abuse of transport or storage of goods, including related documents, also constitutes commercial fraud. Such fraud may occur through the shipment of non-existent or seriously defective goods that are misrepresented on the transport or storage document, through the forgery, fraudulent creation, or modification of the documents, or through the sale of the same cargo (existent or non-existent) represented by the documents to more than one buyer;

(c) False or fraudulent claims on insurance policies are another instance of commercial fraud;

(d) The abuse of financing systems to obtain funding where there are no assets or where the assets are pledged to more than one creditor without disclosure would constitute commercial fraud;

(e) The misuse of insolvency to hide or transfer assets in advance or to defraud creditors would constitute commercial fraud.

Any of these commercial frauds can be combined with other types of commercial fraud and can occur at any stage of the transaction from the outset of the bargaining to the performance of the transaction or payment.

25. In addition to these actions which are rooted in legitimate transactions, even though they are misused or distorted, there is a species of transaction that mirrors the world of legitimate commerce but which has no commercial dimension. While these transactions vary with regard to the nature of the investment or transaction, they promise disproportionate returns for risk-free investments based on yields supposedly received from trading on secret markets. These schemes, known as "high yield" or "prime bank" investment schemes, use the instruments and institutions of international business and banking in order to convince the victim to invest and sometimes enlist investors to solicit other investors, often returning some of the very funds invested to them as if they constituted the promised returns on the investment.

26. Another species of fraudulent scheme without any legitimate basis is one that solicits assistance and advance funds or bank account information from the victim in order to assist in transferring illicit funds from a given country for a percentage. While the typical victim of this scheme is a consumer, many businesses have been victimized as well. The consequences of this fraud and its close identification with certain countries have rendered it difficult for legitimate businesses and citizens of these countries to conduct legitimate business because of the suspicion attached to them.

#### IV. THE COMMERCIAL LAW DIMENSION OF COMMERCIAL FRAUD

27. It is common for commercial fraud to be punishable under criminal law. Indeed, there has been an expanding criminalization of misconduct that has increased the overlap between civil and criminal systems. As a result, the widespread assumption that commercial fraud is solely an issue for criminal law ignores or overlooks the commercial elements and implications of commercial fraud. In reality, however, commercial fraud is as much an issue for commerce and commercial law as it is for criminal law.

28. In many instances, it is difficult to delineate the border between criminal and commercial law with respect to commercial fraud. The same commercially fraudulent conduct may be at the same time the subject of civil actions and criminal actions. In addition, there may be a regulatory dimension to commercial fraud which adds a third possible source of actions. As a result, the response to commercial fraud could be either administrative, civil, or criminal or some combination thereof. Moreover, it is not uncommon for commercial fraud to affect the commercial sphere without any regulatory or criminal involvement.

29. Whatever the form or source of legal action, commercial fraud has a direct and immediate impact on commercial entities and commerce. The commercial dimension of commercial fraud includes its impact on victims, ongoing legitimate businesses, employees and their families, creditors, and the surrounding geographical area that would be affected by losses or closure of a business.

30. All of these aspects of commercial fraud have consequences and implications for commercial law. In particular, commercial law can afford through civil actions some means of redress to those entities affected by commercial fraud. Civil actions have certain advantages over criminal actions under some circumstances, including a different and usually lower standard of proof, greater speed in pursuing assets, and more flexibility in pursuing options.

31. Commercial law could also be an effective tool for the prevention and control of complex and rapidly moving cases of commercial fraud. Since commerce is the target and focus of commercial fraud, the commercial community is in an ideal position to work toward prevention, education, disruption, and investigation of commercial fraud.

32. While cooperation with criminal law enforcement and regulatory authorities should be encouraged, there is an important independent role for the commercial community and commercial law in preventing and combating commercial fraud.

##### A. Remedies

33. There is a certain convergence of criminal and civil systems with respect to the proceeds of commercial fraud in that in both systems of law the question arises of compensation to the victims of commercial fraud. It is in the calculation and determination of these amounts that difficulties and differences often arise. Indeed, commercial frauds are often designed to move funds across borders in

order to take advantage of difficulties, inconsistencies, and impracticalities between various countries and systems. In this respect, the perpetrators of commercial fraud often achieve a level of organization and cooperation that eludes those combating it.

34. One of the distinctions between a civil and a criminal remedy for commercial fraud is with respect to the sanction imposed. In the case of a civil action, monetary damages or specific performance will be awarded, whereas the primary characteristic of a criminal remedy is punishment, whether by fine, imprisonment, or both. With respect to regulatory actions, the penalties depend on the applicable law and may include elements of criminal and civil damages.

35. An important principle underlying civil damages in the case of commercial fraud should be to make the injured party whole. This may be accomplished either by enabling the injured party to have the benefit of the bargain when appropriate, or to restore to it funds lost, plus expenses, while permitting it to avoid the contract.

36. In civil cases of commercial fraud, courts tend to interpret the requirements for liability for damages more broadly than insisting on elements of damage theory that would otherwise be applicable in an action for ordinary breach of contract, such as requiring that damages be foreseeable. As a result, they are able to compensate third parties who may be harmed by commercial fraud.

37. In some legal systems, exemplary or punitive damages may be appropriately awarded in cases of commercial fraud. While such damages are regarded as only properly awarded to the State in some systems, in others it is recognized that they can be awarded to victims, although in every system where such an award is permitted, it is rarely granted in the case of truly commercial activity.

38. In many situations involving commercial fraud, however, there are insufficient funds to meet the competing civil claims from private parties. In such situations, it is necessary to allocate proceeds among the claimants. The process of allocating funds is often complicated by the international character of the commercial fraud and is affected considerably by the location of the funds. It is also affected by the practice of some fraudsters of paying some victims with funds taken from others, making later "investors" bear the losses.

39. Where there are parallel proceedings in different jurisdictions involving different victims and different governmental units, there is considerable opportunity for confusion, redundancy, and additional loss. There is a considerable advantage in communication between the various entities who are interested in recovery in a given case, and even greater advantages in fostering such cooperation and communication systematically within a given jurisdiction and in cross-border situations.

40. The relative priority of criminal and civil actions also raises important questions. There are advantages of speed in a civil action with respect to the seizure of funds before

they can be hidden or dispersed. Where a civil action commences and is followed by a criminal or regulatory action, there is a need for coordination between the actions. Such coordination may be different in the jurisdictions where civil action defers to criminal action.

41. Because commercial frauds are designed in part to take advantage of the inconsistencies between various systems and jurisdictions, coordination between those combating commercial fraud should occur and useful efforts by non-governmental entities should be encouraged to the discomfiture of the perpetrators.

### **B. Interim measures of protection or attachment of funds**

42. One of the most important tools in combating commercial fraud is the ability to obtain interim measures of protection in freezing or attaching funds. While rules regarding these measures differ, most legal systems have a mechanism by which a court can intervene in some fashion to preserve the status quo or to require that funds not be moved or disbursed. Arbitral tribunals are also increasingly using similar powers granted by regimes governing arbitration proceedings.<sup>10</sup> Such remedies could be of considerable value in cross-border situations and should be made available to the extent possible.

43. However, such tools can also be used as a means to gain unfair advantage or even as a means of commercial fraud. As a result, care must be exercised to determine whether such interim measures of protection are consistent with the allocation of risk as between the parties and the relative rights of the various parties, particularly where such measures are sought on an *ex parte* basis, i.e. without first hearing the party against whom the measure is directed.

44. For the same reasons, it is desirable that parties to arbitral proceedings are able to obtain orders for interim measures of protection from the arbitral tribunal, have access to courts for the purpose of obtaining court-ordered interim measures of protection, and for the enforcement of such decisions.

### **C. Risk allocation**

45. Parties commonly allocate the risk of commercial fraud expressly or such allocation is implicit in their agreements, commercial laws or rules of customary practice. Where such allocations exist, the risk should be placed where it can be controlled. Likewise, disclaimers or clauses for indemnities serve similar functions and are enforced absent unusual circumstances between commercial parties.

46. Insurance also represents an important means of allocating the risk of commercial fraud but can itself be a source or target of commercial fraud.

### **D. Innocent third parties**

47. It is not uncommon for third parties to be caught up in a commercial fraud. In such situations, it is necessary to determine their relative rights and entitlements. International commercial law has long recognized that innocent third parties who acted in good faith or without knowledge of commercial fraud and in accordance with ordinary business practices were to be given priority with respect to property that they purchased. Generally, this rule is essential to protect the integrity of markets and systems.

48. Nevertheless, the full extent and scope of the doctrine of innocent purchase together with its exceptions may require further study from the international community in a manner that elaborates the underlying principles that animate it.

### **E. Deterrence and education**

49. One of the most potent tools to avoid and defeat commercial fraud is the existence of systems that ensure transparency and accountability and that, when losses occur, enable the various resources of the victim to be marshalled to stabilize the situation and to recover losses. The commercial community is encouraged to have systems in place that reduce the risk of commercial fraud, and to have contingency plans in place to address problems of commercial fraud that may arise.

50. In addition, education regarding commercial fraud at all levels of commercial life is essential in combating it. In particular, it would be valuable to identify the patterns of commercial fraud and ascertain potential targets so as to structure programmes to warn and prepare potential victims. Such programmes should be encouraged and conducted not only at the local and national level but also at the international level.

### **F. The role of professionals**

51. Professionals such as attorneys, accountants and financial advisors are essential to modern commerce. As such, they assume disproportionate importance in regard to commercial fraud. Where they are vigilant, they are often able to identify the signs of fraudulent schemes (such as inconsistencies or implausibilities that are absent in legitimate transactions) before innocent parties are victimized.

52. One of the characteristics of many commercial frauds, however, has been the direct or indirect involvement of professionals who have lent their authority to the scheme. Where professionals engage in conduct that assists in carrying out fraudulent schemes, it is essential that the profession itself or regulatory authorities intervene in order to protect the integrity of the professional office, or that there be appropriate liability standards for professionals if they issue statements for a company involved in a fraud and those statements are relied upon by third parties who were defrauded.

### **G. Third party intermediaries**

53. Many commercial frauds depend on the unwitting support and assistance of intermediaries (such as banks, carriers, freight forwarders, etc.) whose role in commercial

<sup>10</sup>Working Group II (Arbitration) is currently considering the issue of interim measures of protection. Revised drafts of Article 17 of the UNCITRAL Model Law on International Commercial Arbitration were considered at the thirty-seventh session of the Working Group (A/CN.9/523).

transactions is necessarily and properly limited. While it would be damaging to international commerce in many cases to expand the obligation of such intermediaries, it would be useful to identify certain basic principles of commercial conduct that should be observed and enforced. One such rule is that no document should be issued without understanding its commercial significance. Lending one's name to a statement that makes no commercial sense is an invitation for it to be misused. Likewise, no commercial entity should make a statement that is known to be untrue. Such rules are not only a foundation of basic business morality but essential to avoid placing in the hands of fraudsters materials that will be used to the disadvantage of others and that may rebound to the ultimate regret of the person issuing it.

#### H. Confidentiality of data

54. There are numerous competing policies at stake in the confidentiality of data. With respect to the debate that surrounds these issues, however, it should be observed that any respect for the privacy of commercial data that is consistently used by fraudsters to hide or obscure the proceeds of commercial fraud requires careful re-examination.

#### I. Electronic commerce and cybercrime

55. The advent of electronic commerce has not only provided increased opportunities for legitimate business, but also increased opportunities for commercial fraud. While many of the means by which electronic commerce is used in a fraudulent manner are consumer-oriented, there are also uses that contribute to commercial fraud. One source of difficulty is that persons are able to find and deal with each other through electronic commerce at a distance without knowing the other party. In the past, such transactions would have commonly occurred through membership in a closed system in which there was a certain assurance of the authenticity of the counterparty and its legitimacy.

56. UNCITRAL has done important work in the area of electronic commerce but many of the systems by which counterparties can be verified are outside the realm of statute and legislation. The requisite degree of verification is a matter of private risk assessment. On the other hand, it is important that laws permit the creation of commercial systems of authentication of messages and verification of other aspects of the transaction, taking into account the protection of privacy rights.

57. The Internet, in particular, has permitted the use of names of entities or of similar entities in ways that could be misleading and the medium permits a wide publication and circulation of messages designed to commit fraud. Internet service providers have a potentially significant role to play in addressing the problem of harmful content of web sites, including, under certain circumstances, facilitating transmission of complaints to the proper public authorities and removing web sites that promote commercial fraud. It may be desirable to study this issue and, in any case, encourage voluntary efforts by Internet service providers and participants in electronic commerce. At this stage, however, it may be preferable for any efforts to be voluntary and for such efforts to be encouraged.

58. There is a link between commercial fraud and cybercrime. Cybercrime consists of three general areas of crime: (1) crimes in which a computer or computer system is the target (such as hacking or intrusion crimes), (2) crimes in which computers are the medium by which the criminal conduct is committed (such as use of a computer to e-mail fraudulent solicitations), and (3) crimes in which computers are used incidentally to the criminal offence (such as when fraudsters store evidence of the fraud on computers).

59. While the Internet and computer technology have increased the perpetration of traditional crimes (such as identity theft, intellectual property theft, copyright infringement, credit card fraud, software piracy, stalking, extortion and other crimes), they have also increased the threat to businesses and Governments via attacks on critical infrastructures (such as utilities, energy, transportation and communications).

60. These issues are linked to questions of cybercrime which, because of technological and communication developments, poses a serious threat to international commerce. The Council of Europe's 2001 Convention on Cybercrime,<sup>11</sup> which was drafted with the active cooperation of non-member States, deals with such crime and warrants consideration.

#### J. Insolvency

61. Insolvency can be used both to hide the proceeds of commercial fraud and to commit commercial fraud. In the former situation, the fraudster declares itself insolvent in one jurisdiction but the proceeds of commercial fraud are hidden in various other jurisdictions or fraudulently transferred to other related persons. Typically, these assets are difficult to find and secure. It should also be recognized that cross-border movement of the proceeds of crime also occurs without the formal declaration of insolvency but the result is identical, in that the person entitled to the proceeds is defrauded of its right to recovery. In the latter situation, the assets of a company that is about to declare itself insolvent are transferred or hidden, often to other jurisdictions, prior to the petition to commence insolvency proceedings and under the guise of payments made in the ordinary course of business in order to defraud creditors.

62. Where the proceeds of a commercial fraud are fraudulently transferred or hidden, there are various civil and criminal means by which they can be followed and obtained. There are relative advantages in terms of time and flexibility to both approaches and the various approaches that are available differ and sometimes conflict or interfere with one another from jurisdiction to jurisdiction. There is no catalogue of such remedies nor any harmonization of them, which makes this approach particularly attractive to fraudsters.

63. The UNCITRAL Model Law on Cross-Border Insolvency addresses some of these issues and provides a mechanism to address some of the methods of hiding assets in other jurisdictions by empowering an insolvency admin-

<sup>11</sup>Council of Europe, Convention on Cybercrime, ETS 185, 23 November 2001, published electronically at <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

istrator or judge in one jurisdiction to request the assistance of a court or insolvency administrator in another jurisdiction with regard to obtaining information or issuing interim relief. Additional mechanisms are either in place or being created by which criminal law authorities can trace and claim the proceeds of crimes including commercial fraud. Such mechanisms should be encouraged.

#### V. RECOMMENDATIONS FOR CONSIDERATION BY THE COMMISSION

64. In considering how to address the problems of commercial fraud, the Commission may wish to take into account the following possible steps.

##### A. An international colloquium

65. The growth and impact of commercial fraud suggest that there is a need by Governments and the international commercial community for greater attention to this problem and for collaboration among those seeking to expose and combat it. At present, no organization has been able to bridge governmental and private interests in a manner that fosters such collaboration on an international scale. In this respect, UNCITRAL, in view of its experience, reputation and working methods, which include close cooperation between Governments and non-governmental organizations, may fulfil such a role. Moreover, part of its mandate is coordination of such efforts in the field of international law and commerce.<sup>12</sup>

66. A vehicle by which such collaboration could be initiated could be to hold an international colloquium to address the various aspects of the problem of commercial fraud and to permit an exchange of views from various interested parties. Invitees would be Governments, intergovernmental organizations, and others engaged in combating commercial fraud. The Commission could invite the co-sponsorship of other interested United Nations bodies and others. Such a step could be structured so as to provide impetus for similar gatherings with the encouragement of UNCITRAL but without requiring the use of its resources. As a result, through a relatively modest investment of time and resources, collaboration among concerned organizations could be fostered. Moreover, such a gathering itself could lead to further efforts and proposals to UNCITRAL or other bodies.

67. Such a colloquium could also provide an opportunity for promoting exchanges of view with the criminal law and regulatory sectors that combat commercial fraud and an identification of those matters that can be coordinated or harmonized.

<sup>12</sup>General Assembly resolution 2205 (XXI).

##### B. United Nations Convention against Transnational Organized Crime

68. In view of the close relationship between the civil and criminal prosecution of commercial fraud, the Commission may wish to consider the United Nations Convention against Transnational Organized Crime and protocols thereto.<sup>13</sup> The behaviour proscribed under this Convention and the instruments established by it to combat transnational organized crime would typically encompass commercial fraud provided that it was punishable under national criminal law “by a maximum deprivation of liberty of at least four years or a more serious penalty”, pursuant to article 2 (b) defining “Serious crime”. The Commission, after considering the matter and on the basis of appropriate advice, in addition to calling to the attention of Governments the advantages of the Convention with respect to issues of commercial fraud, might also call to the attention of Governments the linkage between the criminal laws and the Convention so as to encourage them to bring instances of commercial fraud within the ambit of the Convention. Where commercial fraud falls within the definitional structure of the Convention, there are available to law enforcement authorities numerous tools on an international scale that would be of considerable use in cross-border commercial fraud.

##### C. Focus on the fraudulent dimensions of commercial activities in future work

69. Some of the texts of UNCITRAL have incidentally touched on issues of commercial fraud, such as the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the United Nations Convention on the Assignment of Claims in International Trade, the UNCITRAL Model Law on Cross-Border Insolvency, and the UNCITRAL Model Law on the Procurement of Goods, Construction, and Services. These issues were addressed because they were inherent in the topics under consideration. The Commission may wish to give these existing texts greater profile from the perspective of their usefulness in combating commercial fraud.

70. In addition, in its future work, these considerations may enable the Commission to give more deliberate consideration to the possibilities of commercial fraud in the areas in which it is preparing texts and to include in those texts appropriate measures that would address the problem.

<sup>13</sup>New York, 15 November 2000, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.



## VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of UNCITRAL continues publishing court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the Users Guide (A/CN.9/SER.C/GUIDE/1), published in 1993.

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat

UNCITRAL secretariat  
P.O. Box 500  
Vienna International Centre  
A-1400 Vienna  
Austria

Telephone (43-1) 26060-4060 or 4061  
Telex: 135612 uno a  
Telefax: (43-1) 26060-5813  
E-mail: [uncitral@uncitral.org](mailto:uncitral@uncitral.org)

They may also be accessed through the UNCITRAL homepage on the worldwide web (home page: <http://www.uncitral.org>)

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are sent by the secretariat to interested persons upon request, against a fee covering the cost of copying and mailing.





## IX. TRAINING AND ASSISTANCE

### Training and technical assistance

#### Note by the secretariat

(A/CN.9/536) [Original: English]

#### CONTENTS

	<i>Paragraphs</i>
I. Introduction .....	1-2
II. Importance of texts of the United Nations Commission on International Trade Law .....	3
III. Technical assistance in the preparation and implementation of legislation .....	4-6
IV. Seminars and briefing missions .....	7-9
V. Participation in other activities .....	10
VI. Internship programme .....	11-12
VII. Future activities .....	13-15
VIII. Financial resources .....	16-25

#### I. INTRODUCTION

1. Pursuant to a decision taken at the twentieth session of the United Nations Commission on International Trade Law (UNCITRAL),<sup>1</sup> held in 1987, training and assistance activities count among the high priorities of UNCITRAL. The training and technical assistance programme carried out by the secretariat under the mandate given by the Commission, in particular in developing countries and in countries with economies in transition, encompasses two main lines of activity: (a) seminars and briefing missions aimed at promoting understanding of international commercial law conventions, model laws and other legal texts; and (b) assistance to Member States with commercial law reform and adoption of UNCITRAL texts. As the ultimate goal of these activities is the adoption of UNCITRAL texts, they are an integral part of the Commission's legislative work.

2. The present note lists the activities of the secretariat subsequent to the issuance of the previous note submitted to the Commission at its thirty-fourth session, in 2002 (A/CN.9/515 of 23 April 2002), and indicates possible future training and technical assistance activities in the light of the requests for such services from the secretariat.

#### II. IMPORTANCE OF TEXTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

3. Increasing importance is being attributed by Governments, international organizations, including multi-lateral and bilateral aid agencies, and the private sector to the improvement of the legal framework for international trade and investment. UNCITRAL has an important function to play in that process because it has produced and promotes the use of legal instruments in a number of key areas of commercial law that represent internationally agreed standards and solutions acceptable to different legal systems. Those instruments include:

(a) In the area of sales, the United Nations Convention on Contracts for the International Sale of Goods<sup>2</sup> and the United Nations Convention on the Limitation Period in the International Sale of Goods;<sup>3</sup>

(b) In the area of dispute resolution, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>4</sup> (a United Nations convention adopted prior to the establishment of the Commission, but actively promoted by it), the

<sup>2</sup>Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.82.V.5), part I.

<sup>3</sup>Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974 (United Nations publication, Sales No. E.74.V.8), part I.

<sup>4</sup>United Nations, *Treaty Series*, vol. 330, No. 4739.

<sup>1</sup>Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17), para. 335.

UNCITRAL Arbitration Rules,<sup>5</sup> the UNCITRAL Conciliation Rules,<sup>6</sup> the UNCITRAL Model Law on International Commercial Arbitration,<sup>7</sup> the UNCITRAL Notes on Organizing Arbitral Proceedings,<sup>8</sup> and the UNCITRAL Model Law on International Commercial Conciliation;<sup>9</sup>

(c) In the area of government contracting, the UNCITRAL Model Law on Procurement of Goods, Construction and Services<sup>10</sup> and the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects;<sup>11</sup>

(d) In the area of banking, payments and insolvency, the United Nations Convention on the Assignment of Receivables in International Trade (General Assembly resolution 56/81, annex), the United Nations Convention on Independent Guarantees and Standby Letters of Credit (General Assembly resolution 50/48, annex), the UNCITRAL Model Law on International Credit Transfers,<sup>12</sup> the United Nations Convention on International Bills of Exchange and International Promissory Notes (resolution 43/165, annex) and the UNCITRAL Model Law on Cross-Border Insolvency;<sup>13</sup>

(e) In the area of transport, the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules),<sup>14</sup> and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade;<sup>15</sup> and

(f) In the area of electronic commerce and data interchange, the UNCITRAL Model Law on Electronic Commerce<sup>16</sup> and the UNCITRAL Model Law on Electronic Signatures.<sup>17</sup>

### III. TECHNICAL ASSISTANCE IN THE PREPARATION AND IMPLEMENTATION OF LEGISLATION

4. Technical assistance is provided to States preparing legislation based on UNCITRAL texts. Such assistance is provided in various forms, including review of preparatory drafts of legislation from the viewpoint of UNCITRAL texts, technical consultancy services and assistance in the preparation of legislation based on UNCITRAL texts, preparation

<sup>5</sup>*Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, para. 57.

<sup>6</sup>*Ibid.*, *Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 106.

<sup>7</sup>*Ibid.*, *Fortieth Session, Supplement No. 17 (A/40/17)*, annex I.

<sup>8</sup>*Ibid.*, *Fifty-first Session, Supplement No. 17 (A/51/17)*, chap. II.

<sup>9</sup>*Ibid.*, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I.

<sup>10</sup>*Ibid.*, *Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1)*, annex I.

<sup>11</sup>United Nations publication, Sales No. E.01.V.4.

<sup>12</sup>*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17)*, annex I.

<sup>13</sup>*Ibid.*, *Fifty-second Session, Supplement No. 17 (A/52/17)*, annex I.

<sup>14</sup>*Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978* (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I.

<sup>15</sup>A/CONF.152/13, annex.

<sup>16</sup>*Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I.

<sup>17</sup>*Ibid.*, *Fifty-sixth Session, Supplement No. 17 (A/56/17)*, annex II.

of regulations implementing such legislation and comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL texts embodied in national legislation. Another form of technical assistance provided by the secretariat consists of advising on the establishment of institutional arrangements for international commercial arbitration, including training seminars for arbitrators, judges and practitioners in the area. Training and technical assistance promote awareness and wider adoption of the legal texts produced by the Commission and are particularly useful for developing countries lacking expertise in the areas of trade and commercial law covered by the work of UNCITRAL. The training and technical assistance activities of the secretariat could thus play an important role in the economic integration efforts being undertaken by many countries.

5. In its resolution 57/17 of 19 November 2002, the General Assembly reaffirmed the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law and reiterated its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and regional development banks, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

6. In the same resolution, the General Assembly stressed the importance of bringing into effect the conventions emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions. The UNCITRAL secretariat is prepared to provide technical assistance and advice to those States, as well as to States that are in the process of revising their trade legislation.

### IV SEMINARS AND BRIEFING MISSIONS

7. The activities of UNCITRAL are typically carried out through seminars and briefing missions for government officials from interested ministries (such as trade, foreign affairs, justice and transport), judges, arbitrators, practising lawyers, the commercial and trading community, scholars and other interested individuals. Seminars and briefing missions are designed to explain the salient features and utility of international trade law instruments of UNCITRAL. Information is also provided on certain important legal texts of other organizations, for example, Uniform Customs and Practice for Documentary Credits and Incoterms of the International Chamber of Commerce.

8. Lectures at UNCITRAL seminars are generally conducted by one or two members of the UNCITRAL secretariat, experts from the host countries and, occasionally, external consultants. After the seminars, the secretariat maintains contact with seminar participants in order to provide the host countries with the maximum possible support during the process leading up to the adoption and use of UNCITRAL texts.

9. Since the previous session, the secretariat of the Commission has organized seminars in a number of States, which have typically included briefing missions. The following seminars were financed with resources from the Trust Fund for UNCITRAL symposiums:

(a) Belo Horizonte, Brazil (27-29 May 2002), seminar held in cooperation with the Arbitration Court of the State of Minas Gerais (approx. 350 participants);

(b) Florianopolis, Brazil (30 May 2002), seminar held in cooperation with the Federal University Law School (approx. 200 participants);

(c) Quito (4-5 July 2002), seminar held in cooperation with the Ministry of Foreign Affairs (approx. 60 participants);

(d) Guayaquil, Ecuador (8-9 July 2002), seminar held in cooperation with the Ministry of Foreign Affairs (approx. 80 participants);

(e) Dhaka (28 October 2002), seminar held in cooperation with the Government of Bangladesh and USAID (approx. 150 participants);

(f) Bangkok (20-22 November 2002), seminar held in cooperation with ESCAP and UNCTAD (approx. 100 participants);

(g) Ouagadougou (19-21 November 2002), seminar held in cooperation with the International Telecommunications Union (approx. 150 participants);

(h) Astana (3-4 February 2003), seminar held in cooperation with the University of Bremen and the *Deutsche Gesellschaft fuer Technische Zusammenarbeit* (GTZ) (approx. 150 participants);

(i) Hanoi (2-4 April 2003), seminar held in cooperation with the Ministry of Trade (approx. 25 participants).

## V. PARTICIPATION IN OTHER ACTIVITIES

10. Members of the UNCITRAL secretariat have participated as speakers in various seminars, conferences and courses where UNCITRAL texts were presented for examination and possible adoption or use. The participation of members of the secretariat in the seminars, conferences and courses listed below was financed by the institution organizing the events or by another organization. Participation to some of those seminars, conferences and courses was financed, partially or totally, with resources from the United Nations regular travel budget:

(a) Catholic University of Louvain and the University of Siena Symposium on International Insolvency (Brussels, 25-26 April 2002);

(b) 53rd Annual German Lawyers' Convention (Munich, Germany, 10 May 2002);

(c) 16th International Council for Commercial Arbitration (ICCA) Congress on International Commercial Arbitration (London, 13-15 May 2002);

(d) Colloquium on Authentic Electronic Acts sponsored by the Ministry of Justice and the National Centre for Scientific Research (Paris, 16 May 2002);

(e) International Bar Association Insolvency Y2K2: Boom or Bust Conference (Dublin, 27-28 May 2002);

(f) UN/ECE On-Line Dispute Resolution Expert Group Meeting (Geneva, 6-7 June 2002);

(g) Conference of the Association of Civil Law Experts (Athens, 17 June 2002);

(h) UNCTAD SITE Expert Meeting on Electronic Commerce Strategies (Geneva, 10-12 July 2002);

(i) Non Aligned Movement Centre for South-South Technical Cooperation Expert Meeting on Harmonizing National E-Commerce Laws in NAM Member Countries (Jakarta, 22-23 July 2002);

(j) Conference on Harmonization of International Trade Law and UNCITRAL, sponsored by the Singapore Academy of Law and the Attorney General's Office (Singapore, 25-26 July 2002);

(k) Meeting of the Committee of Uniform Mediation Law of the National Conference of Commissioners on Uniform State Laws (NCCUSL) (Tucson, Arizona, United States of America, 26 July 2002);

(l) Symposium on Registration of Security Interests, organized by the Centre for Commercial Law Studies of the Queen Mary University of London (London, 3 September 2002);

(m) UNIDROIT Study Group on Taking of Security in Securities Held with Intermediaries (Rome, 9-13 September 2002);

(n) UN/CEFACT Legal Group and UN/CEFACT Forum (Geneva, 9-13 September 2002);

(o) International Business Law Consortium Annual Retreat sponsored by the Centre for Legal Studies (Baden bei Wien, Austria, 13 September 2002);

(p) Seminar on Private Investment in Infrastructure sponsored by the European Centre for Peace and Development (Belgrade, 16-17 September 2002);

(q) Seminar on Legal and Regulatory Aspects of Electronic Commerce and Public Procurement sponsored by the International Development Law Organization (Rome, 20 September 2002);

(r) Third Edition of EUROARB Project Meeting sponsored by the Chambers of Commerce of several European States (Prague, 20-21 September 2002);

(s) UNIDROIT Congress on the Worldwide Harmonization of Private Law and Regional Economic Integration (Rome, 27-28 September 2002);

(t) Asian Development Bank Meeting on Promoting Regional Cooperation in Insolvency Law Reforms (Manila, 30 September-1 October 2002);

(u) 70th Anniversary of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (Moscow, 18 October 2002);

(v) International Bar Association 2002 Conference (Durban, South Africa, 20-23 October 2002);

(w) International Cotton Advisory Committee 61st Plenary Meeting (Cairo, 22 October 2002);

(x) Colloquium on the Work of UNCITRAL sponsored by the University of Social Sciences of Toulouse (Toulouse, France, 25 October 2002);

(y) Seminar on Legal Aspects of the Internet sponsored by JOBS/USAID Programme Bangladesh (Dhaka, 28 October 2002);

(z) Conference on Alternative Dispute Resolution for the 13 Countries of South Eastern Europe (Ljubljana, 6-7 November 2002);

(aa) Conference on Information Technology and Development of Infrastructure (Ljubljana, 14-15 November 2002);

(bb) International Trade Symposium, organized by the Korean International Trade Law Association (Seoul, 15-16 November 2002);

(cc) Seminar on Receivables Financing, organized by the University of Tokyo (Tokyo, 19 November 2002);

(dd) Commercial Law and Commercial Practice Seminar organized by the London School of Economics (London, 29-30 November 2002);

(ee) Conference on Security Interests in Securities Held with an Intermediary, organized by the Hague Conference on Private International Law (The Hague, 2-13 December 2002);

(ff) International Procurement Conference sponsored by the Cairo Regional Centre for International Commercial Arbitration (Cairo, 14-15 December 2002);

(gg) IMF Workshop and Conference on the Design of the Sovereign Debt Restructuring Mechanism (Washington, D.C., 21-22 January 2003);

(hh) World Bank Global Forum on Insolvency Risk Management (Washington, D.C., 28-29 January 2003);

(ii) Conference on the Draft Digest of Case Law on the United Nations Sales Convention sponsored by the University of Pittsburgh (Pittsburgh, Pennsylvania, United States of America, 7 February 2003);

(jj) University of Valencia Graduate Studies Programme Lecture on Maritime Law (Valencia, Spain, 17 February 2003);

(kk) Lectures on the Work of UNCITRAL sponsored by the European Centre for Peace and Development (Belgrade, 21-22 February 2003);

(ll) University of Valencia Graduate Studies Programme Lecture on the UNCITRAL Model Law on Conciliation (Valencia, Spain, 28 February 2003);

(mm) UNIDROIT Restricted Study Group on Harmonized Rules for Use of Securities Held with an Intermediary as Collateral (Rome, 11-14 March 2003);

(nn) Asian Development Bank Conference on RETA 5975: Promoting Regional Cooperation in the Development of Insolvency Law Reforms (Singapore, 17-18 March 2003);

(oo) International Insolvency Conference 2003 sponsored by the Ministry of Law (Singapore, 19-22 March 2003);

(pp) Seminar on Cross-Border Bank Insolvency Issues sponsored by the Swiss National Bank (Gerzensee, Switzerland, 26-28 March 2003);

(qq) International Trade Law Postgraduate Course, sponsored by the International Training Centre of the International Labour Organization (ILO) and the University Institute of European Studies (Turin, Italy, 2 April 2003);

(rr) Conference on the Enlarged European Union—Partner of the Developing World sponsored by *Internationale Weiterbildung und Entwicklung* (INWENT) (Berlin, 7-8 April 2003);

(ss) International Bar Association Conference on Insolvency and Investor Confidence: Challenges and Responses (Rome, 27-29 April 2003).

## VI. INTERNSHIP PROGRAMME

11. The internship programme is designed to give young lawyers the opportunity to become familiar with the work of UNCITRAL and to increase their knowledge of specific areas in the field of international trade law. During the past year, the secretariat has hosted ten interns from Argentina, Austria, Belgium, Germany, Italy, Mexico, Spain and Venezuela. Interns are assigned tasks such as basic or advanced research, collection and systematization of information and materials or assistance in preparing background papers. The experience of UNCITRAL with the internship programme has been positive. However, as no funds are available to the secretariat to assist interns to cover their travel or other expenses, interns have to be sponsored by an organization, university or government agency, or to meet their expenses from their own means. As a result, there is limited participation of interns from developing countries. In that connection, the Commission may wish to invite Member States, universities and other organizations, in addition to those that already do so, to consider sponsoring the participation of young lawyers, in particular from developing countries, in the United Nations internship programme with UNCITRAL.

12. The secretariat also occasionally accommodates requests by scholars and legal practitioners who wish to conduct research in the UNCITRAL law library for a limited period of time.

## VII. FUTURE ACTIVITIES

13. For the remainder of 2003, seminars and legal assistance briefing missions are being planned in Africa, Asia, countries with economies in transition in Eastern Europe and Latin America. Since the travel cost of training and technical assistance activities is not covered by the regular budget, the ability of the secretariat to implement those plans is contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for UNCITRAL symposiums.

14. As it has done in recent years, the secretariat has agreed to co-sponsor the next three-month international trade law postgraduate course to be organized by the University Institute of European Studies and the

International Training Centre of ILO in Turin. Typically, approximately half the participants are from Italy, with many of the remainder coming from developing countries. The contribution from the UNCITRAL secretariat to the next course will focus on issues of harmonization of laws on international trade law from the perspective of UNCITRAL, including past and current work.

15. Also, as it has done for the past seven years, the secretariat co-sponsored the tenth Willem C. Vis International Commercial Arbitration Moot in Vienna from 11 to 17 April 2003. The Moot is principally organized by the Institute of International Commercial Law at Pace University School of Law. With its broad international participation, involving 128 teams from 40 countries in 2003, it is seen as an excellent way to disseminate information about uniform law texts and teaching international trade law. This year, the secretariat offered a series of lectures on international sales and international trade financing issues to about 30 participants of the Moot.

### VIII. FINANCIAL RESOURCES

16. The secretariat continues its efforts to devise a more extensive training and technical assistance programme to meet the considerably greater demand from States for training and assistance, in keeping with the call of the Commission at its twentieth session for an increased emphasis both on training and assistance and on the promotion of the legal texts prepared by the Commission. However, as no funds for UNCITRAL seminars are provided for in the regular budget, expenses for UNCITRAL training and technical assistance activities (except for those which are supported by funding agencies such as the World Bank) have to be met from voluntary contributions to the Trust Fund for UNCITRAL symposiums.

17. At its thirty-fifth session, in view of the limited resources available to its secretariat, the Commission expressed strong concern that it could not fully implement its mandate with regard to training and assistance and that, without effective cooperation and coordination between the secretariat and development assistance agencies, international assistance might lead to the adoption of national laws that did not represent internationally agreed standards, including UNCITRAL conventions and model laws.<sup>18</sup>

18. In that connection, the Commission noted with appreciation that the General Assembly, pursuant to the recommendation of the Commission made at its thirty-fifth session,<sup>19</sup> requested the Secretary-General to consider measures to strengthen significantly the secretariat of the Commission within the bounds of the resources available in the Organization, if possible during the current biennium and, in any case, during the 2004-2005 biennium (resolution 57/19 of 19 November 2002). In that resolution, the General Assembly emphasized the need for higher priority to be given to the work of the Commission in view of the increasing value of the modernization of international trade

law for global economic development and, thus, for the maintenance of friendly relations among States and taking note of the favourable recommendation of the Office of Internal Oversight Services.<sup>20</sup>

19. The Commission may wish to note that the Secretary-General, in the proposed Programme Budget for the biennium 2004-2005 (document A/58/6 (sect. 8)), included a proposal for three new professional and one new secretarial post in the secretariat of the Commission.

20. Given the importance of extra-budgetary funding for the implementation of the training and technical assistance component of the UNCITRAL work programme, the Commission may again wish to appeal to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL symposiums, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the secretariat to meet the increasing demands from developing countries and States with economies in transition for training and legislative assistance. Information on how to make contributions may be obtained from the secretariat.

21. In the period under review, contributions were received from France, Greece and Switzerland. The Commission may wish to express its appreciation to those States and organizations which have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

22. In that connection, 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.

23. Since the establishment of the trust fund, contributions have been received from Austria, Cambodia, Cyprus, Kenya, Mexico and Singapore.

24. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the trust funds for UNCITRAL symposiums and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

25. In order to ensure full participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to the 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.

<sup>18</sup>Ibid, *Fifty-seventh Session, Supplement No. 17 (A/57/17)*, para. 250.

<sup>19</sup>Ibid., para 271.

<sup>20</sup>Ibid, para. 251.



## **X. STATUS OF UNCITRAL TEXTS**

### **Status of Conventions and Model Laws:**

**(A/CN.9/537) [Original: English]**

Not reproduced. The updated list may be obtained from the UNCITRAL secretariat or found on the Internet home page (<http://www.uncitral.org>).





*Part Three*

**ANNEXES**



# I. UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

## Foreword

The following pages contain a set of general recommended legislative principles entitled “legislative recommendations” and model legislative provisions (the “model provisions”) on privately financed infrastructure projects. The legislative recommendations and the model provisions are intended to assist domestic legislative bodies in the establishment of a legislative framework favourable to privately financed infrastructure projects. They are followed by notes that offer an analytical explanation to the financial, regulatory, legal, policy and other issues raised in the subject area. The user is advised to read the legislative recommendations and the model provisions together with the notes, which provide background information to enhance the understanding of the legislative recommendations and model provisions.

The legislative recommendations and the model provisions consist of a set of core provisions dealing with matters that deserve attention in legislation specifically concerned with privately financed infrastructure projects.

The model provisions are designed to be implemented and supplemented by the issuance of regulations providing further details. Areas suitable for being addressed by regulations rather

than by statutes are identified accordingly. Moreover, the successful implementation of privately financed infrastructure projects typically requires various measures beyond the establishment of an appropriate legislative framework, such as adequate administrative structures and practices, organizational capability, technical, legal and financial expertise, appropriate human and financial resources and economic stability.

It should be noted that the legislative recommendations and the model provisions do not deal with other areas of law that also have an impact on privately financed infrastructure projects but on which no specific legislative recommendations are made in the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects*.<sup>1</sup> Those other areas of law include, for instance, promotion and protection of investments, property law, security interests, rules and procedures on compulsory acquisition of private property, general contract law, rules on government contracts and administrative law, tax law and environmental protection and consumer protection laws. The relationship of such other areas of law to any law enacted specifically with respect to privately financed infrastructure projects should be borne in mind.

<sup>1</sup>United Nations publication, Sales No. E.01.V.4.

## Part One

### Legislative recommendations

#### I. GENERAL LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

##### *Constitutional, legislative and institutional framework*

(see chap. I, “General legislative and institutional framework”, paras. 2-14)

Recommendation 1. *The constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects should ensure transparency, fairness and the long-term sustainability of projects. Undesirable restrictions on private sector participation in infrastructure development and operation should be eliminated.*

##### *Scope of authority to award concessions*

(see chap. I, “General legislative and institutional framework”, paras. 15-22)

Recommendation 2. *The law should identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) that are empowered to award concessions and enter into agreements for the implementation of privately financed infrastructure projects.*

Recommendation 3. *Privately financed infrastructure projects*

*may include concessions for the construction and operation of new infrastructure facilities and systems or the maintenance, modernization, expansion and operation of existing infrastructure facilities and systems.*

Recommendation 4. *The law should identify the sectors or types of infrastructure in respect of which concessions may be granted.*

Recommendation 5. *The law should specify the extent to which a concession might extend to the entire region under the jurisdiction of the respective contracting authority, to a geographical subdivision thereof or to a discrete project, and whether it might be awarded with or without exclusivity, as appropriate, in accordance with rules and principles of law, statutory provisions, regulations and policies applying to the sector concerned. Contracting authorities might be jointly empowered to award concessions beyond a single jurisdiction.*

##### *Administrative coordination*

(see chap. I, “General legislative and institutional framework”, paras. 23-29)

Recommendation 6. *Institutional mechanisms should be established to coordinate the activities of the public authorities responsible for issuing approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provi-*

sions on the construction and operation of infrastructure facilities of the type concerned.

#### **Authority to regulate infrastructure services**

(see chap. I, "General legislative and institutional framework", paras. 30-53)

Recommendation 7. *The authority to regulate infrastructure services should not be entrusted to entities that directly or indirectly provide infrastructure services.*

Recommendation 8. *Regulatory competence should be entrusted to functionally independent bodies with a level of autonomy sufficient to ensure that their decisions are taken without political interference or inappropriate pressures from infrastructure operators and public service providers.*

Recommendation 9. *The rules governing regulatory procedures should be made public. Regulatory decisions should state the reasons on which they are based and should be accessible to interested parties through publication or other means.*

Recommendation 10. *The law should establish transparent procedures whereby the concessionaire may request a review of regulatory decisions by an independent and impartial body, which may include court review, and should set forth the grounds on which such a review may be based.*

Recommendation 11. *Where appropriate, special procedures should be established for handling disputes among public service providers concerning alleged violations of laws and regulations governing the relevant sector.*

## II. PROJECT RISKS AND GOVERNMENT SUPPORT

### **Project risks and risk allocation**

(see chap. II, "Project risks and government support", paras. 8-29)

Recommendation 12. *No unnecessary statutory or regulatory limitations should be placed upon the contracting authority's ability to agree on an allocation of risks that is suited to the needs of the project.*

### **Government support**

(see chap. II, "Project risks and government support", paras. 30-60)

Recommendation 13. *The law should clearly state which public authorities of the host country may provide financial or economic support to the implementation of privately financed infrastructure projects and which types of support they are authorized to provide.*

## Part Two

### Model legislative provisions

#### I. GENERAL PROVISIONS

##### **Model provision 1. Preamble**

(see recommendation 1 and chap. I, paras. 2-14)

WHEREAS the [Government] [Parliament] of [...] considers it desirable to establish a favourable legislative framework to promote and facilitate the implementation of privately financed infrastructure projects by enhancing transparency, fairness and long-term sustainability and removing undesirable restrictions on private sector participation in infrastructure development and operation;

WHEREAS the [Government] [Parliament] of [...] considers it desirable to further develop the general principles of transparency, economy and fairness in the award of contracts by public authorities through the establishment of specific procedures for the award of infrastructure projects;

[Other objectives that the enacting State might wish to state];

Be it therefore enacted as follows:

##### **Model provision 2. Definitions**

(see introduction, paras. 9-20)

For the purposes of this law:

(a) "Infrastructure facility" means physical facilities and systems that directly or indirectly provide services to the general public;

(b) "Infrastructure project" means the design, construction, development and operation of new infrastructure facilities or the rehabilitation, modernization, expansion or operation of existing infrastructure facilities;

(c) "Contracting authority" means the public authority that has the power to enter into a concession contract for the implementation of an infrastructure project [under the provisions of this law];<sup>1</sup>

(d) "Concessionaire" means the person that carries out an infrastructure project under a concession contract entered into with a contracting authority;

(e) "Concession contract" means the mutually binding agreement or agreements between the contracting authority and the concessionaire that set forth the terms and conditions for the implementation of an infrastructure project;

(f) "Bidder" and "bidders" mean persons, including groups thereof, that participate in selection proceedings concerning an infrastructure project;<sup>2</sup>

(g) "Unsolicited proposal" means any proposal relating to the implementation of an infrastructure project that is not sub-

<sup>1</sup>It should be noted that the authority referred to in this definition relates only to the power to enter into concession contracts. Depending on the regulatory regime of the enacting State, a separate body, referred to as "regulatory agency" in subparagraph (h), may have responsibility for issuing rules and regulations governing the provision of the relevant service.

<sup>2</sup>The term "bidder" or "bidders" encompasses, according to the context, both persons that have sought an invitation to take part in pre-selection proceedings or persons that have submitted a proposal in response to a contracting authority's request for proposals.

mitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(h) “Regulatory agency” means a public authority that is entrusted with the power to issue and enforce rules and regulations governing the infrastructure facility or the provision of the relevant services.<sup>3</sup>

**Model provision 3. Authority to enter into concession contracts**

(see recommendation 2 and chap. I, paras. 15-18)

The following public authorities have the power to enter into concession contracts<sup>4</sup> for the implementation of infrastructure projects falling within their respective spheres of competence: [the enacting State lists the relevant public authorities of the host country that may enter into concession contracts by way of an exhaustive or indicative list of public authorities, a list of types or categories of public authority or a combination thereof].<sup>5</sup>

**Model provision 4. Eligible infrastructure sectors**

(see recommendation 4 and chap. I, paras. 19-22)

Concession contracts may be entered into by the relevant authorities in the following sectors: [the enacting State indicates the relevant sectors by way of an exhaustive or indicative list].<sup>6</sup>

## II. SELECTION OF THE CONCESSIONAIRE

**Model provision 5. Rules governing the selection proceedings**

(see recommendation 14 and chap. III, paras. 1-33)

The selection of the concessionaire shall be conducted in accordance with model provisions 6-27 and, for matters not pro-

vided herein, in accordance with [the enacting State indicates the provisions of its laws that provide for transparent and efficient competitive procedures for the award of government contracts].<sup>7</sup>

### 1. Pre-selection of bidders

**Model provision 6. Purpose and procedure of pre-selection**

(see chap. III, paras. 34-50)

1. The contracting authority shall engage in pre-selection proceedings with a view to identifying bidders that are suitably qualified to implement the envisaged infrastructure project.

2. The invitation to participate in the pre-selection proceedings shall be published in accordance with [the enacting State indicates the provisions of its laws governing publication of invitations to participate in proceedings for the pre-qualification of suppliers and contractors].

3. To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of invitations to participate in proceedings for the pre-qualification of suppliers and contractors],<sup>8</sup> the invitation to participate in the pre-selection proceedings shall include at least the following:

(a) A description of the infrastructure facility;

(b) An indication of other essential elements of the project, such as the services to be delivered by the concessionaire, the financial arrangements envisaged by the contracting authority (for example, whether the project will be entirely financed by user fees or tariffs or whether public funds such as direct payments, loans or guarantees may be provided to the concessionaire);

(c) Where already known, a summary of the main required terms of the concession contract to be entered into;

<sup>3</sup>The composition, structure and functions of such a regulatory agency may need to be addressed in special legislation (see recommendations 7-11 and chap. I, “General legislative and institutional framework”, paras. 30-53).

<sup>4</sup>It is advisable to establish institutional mechanisms to coordinate the activities of the public authorities responsible for issuing the approvals, licences, permits or authorizations required for the implementation of privately financed infrastructure projects in accordance with statutory or regulatory provisions on the construction and operation of infrastructure facilities of the type concerned (see legislative recommendation 6 and chap. I, “General legislative and institutional framework”, paras. 23-29). In addition, for countries that contemplate providing specific forms of government support to infrastructure projects, it may be useful for the relevant law, such as legislation or regulation governing the activities of entities authorized to offer government support, to identify clearly which entities have the power to provide such support and what kind of support may be provided (see chap. II, “Project risks and government support”).

<sup>5</sup>Enacting States may generally have two options for completing this model provision. One alternative may be to provide a list of authorities empowered to enter into concession contracts, either in the model provision or in a schedule to be attached thereto. Another alternative might be for the enacting State to indicate the levels of government that have the power to enter into those contracts, without naming the relevant public authorities. In a federal State, for example, such an enabling clause might refer to “the Union, the states [or provinces] and the municipalities”. In any event, it is advisable for enacting States that wish to include an exhaustive list of authorities to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>6</sup>It is advisable for enacting States that wish to include an exhaustive list of sectors to consider mechanisms allowing for revisions of such a list as the need arises. One possibility to that end might be to include the list in a schedule to the law or in regulations that may be issued thereunder.

<sup>7</sup>The user’s attention is drawn to the relationship between the procedures for the selection of the concessionaire and the general legislative framework for the award of government contracts in the enacting State. While some elements of structured competition that exist in traditional procurement methods may be usefully applied, a number of adaptations are needed to take into account the particular needs of privately financed infrastructure projects, such as a clearly defined pre-selection phase, flexibility in the formulation of requests for proposals, special evaluation criteria and some scope for negotiations with bidders. The selection procedures reflected in this chapter are based largely on the features of the principal method for the procurement of services under the UNCITRAL Model Law on Procurement of Goods, Construction and Services, which was adopted by UNCITRAL at its twenty-seventh session, held in New York from 31 May to 17 June 1994 (the “Model Procurement Law”). The model provisions on the selection of the concessionaire are not intended to replace or reproduce the entire rules of the enacting State on government procurement, but rather to assist domestic legislators to develop special rules suited for the selection of the concessionaire. The model provisions assume that there exists in the enacting State a general framework for the award of government contracts providing for transparent and efficient competitive procedures in a manner that meets the standards of the Model Procurement Law. Thus, the model provisions do not deal with a number of practical procedural steps that would typically be found in an adequate general procurement regime. Examples include the following matters: manner of publication of notices, procedures for issuance of requests for proposals, record-keeping of the procurement process, accessibility of information to the public and review procedures. Where appropriate, the notes to these model provisions refer the reader to provisions of the Model Procurement Law, which may, mutatis mutandis, supplement the practical elements of the selection procedure described herein.

<sup>8</sup>A list of elements typically contained in an invitation to participate in pre-qualification proceedings can be found in article 25, paragraph 2, of the Model Procurement Law.

(d) The manner and place for the submission of applications for pre-selection and the deadline for the submission, expressed as a specific date and time, allowing sufficient time for bidders to prepare and submit their applications; and

(e) The manner and place for solicitation of the pre-selection documents.

4. To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of the pre-selection documents to be provided to suppliers and contractors in proceedings for the pre-qualification of suppliers and contractors],<sup>9</sup> the pre-selection documents shall include at least the following information:

(a) The pre-selection criteria in accordance with model provision 7;

(b) Whether the contracting authority intends to waive the limitations on the participation of consortia set forth in model provision 8;

(c) Whether the contracting authority intends to request only a limited number<sup>10</sup> of pre-selected bidders to submit proposals upon completion of the pre-selection proceedings in accordance with model provision 9, paragraph 2, and, if applicable, the manner in which this selection will be carried out;

(d) Whether the contracting authority intends to require the successful bidder to establish an independent legal entity established and incorporated under the laws of [the enacting State] in accordance with model provision 30.

5. For matters not provided in this model provision, the pre-selection proceedings shall be conducted in accordance with [the enacting State indicates the provisions of its laws on government procurement governing the conduct of proceedings for the pre-qualification of suppliers and contractors].<sup>11</sup>

#### **Model provision 7. Pre-selection criteria**

(see recommendation 15 and chap. III, paras. 34-40, 43 and 44)

In order to qualify for the selection proceedings, interested bidders must meet objectively justifiable criteria<sup>12</sup> that the contracting authority considers appropriate in the particular proceedings, as stated in the pre-selection documents. These criteria shall include at least the following:

<sup>9</sup>A list of elements typically contained in pre-qualification documents can be found in article 7, paragraph 3, of the Model Procurement Law.

<sup>10</sup>In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", paras. 48 and 49). See also footnote 14.

<sup>11</sup>Procedural steps on pre-qualification proceedings, including procedures for handling requests for clarifications and disclosure requirements for the contracting authority's decision on the bidders' qualifications, can be found in article 7 of the Model Procurement Law, paragraphs 2-7.

<sup>12</sup>The laws of some countries provide for some sort of preferential treatment for domestic entities or afford special treatment to bidders that undertake to use national goods or employ local labour. The various issues raised by domestic preferences are discussed in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", paras. 43 and 44). The *Legislative Guide* suggests that countries that wish to provide some incentive to national suppliers may wish to apply such preferences in the form of special evaluation criteria, rather than by a blanket exclusion of foreign suppliers. In any event, where domestic preferences are envisaged, they should be announced in advance, preferably in the invitation to the pre-selection proceedings.

(a) Adequate professional and technical qualifications, human resources, equipment and other physical facilities as necessary to carry out all the phases of the project, including design, construction, operation and maintenance;

(b) Sufficient ability to manage the financial aspects of the project and capability to sustain its financing requirements;

(c) Appropriate managerial and organizational capability, reliability and experience, including previous experience in operating similar infrastructure facilities.

#### **Model provision 8. Participation of consortia**

(see recommendation 16 and chap. III, paras. 41 and 42)

1. The contracting authority, when first inviting the participation of bidders in the selection proceedings, shall allow them to form bidding consortia. The information required from members of bidding consortia to demonstrate their qualifications in accordance with model provision 7 shall relate to the consortium as a whole as well as to its individual participants.

2. Unless otherwise [authorized by ... [the enacting State indicates the relevant authority] and] stated in the pre-selection documents, each member of a consortium may participate, either directly or indirectly, in only one consortium<sup>13</sup> at the same time. A violation of this rule shall cause the disqualification of the consortium and of the individual members.

3. When considering the qualifications of bidding consortia, the contracting authority shall consider the capabilities of each of the consortium members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

#### **Model provision 9. Decision on pre-selection**

(see recommendation 17 (for para. 2) and chap. III, paras. 47-50)

1. The contracting authority shall make a decision with respect to the qualifications of each bidder that has submitted an application for pre-selection. In reaching that decision, the contracting authority shall apply only the criteria that are set forth in the pre-selection documents. All pre-selected bidders shall thereafter be invited by the contracting authority to submit proposals in accordance with model provisions 10-17.

2. Notwithstanding paragraph 1, the contracting authority may, provided that it has made an appropriate statement in the pre-selection documents to that effect, reserve the right to request proposals upon completion of the pre-selection proceedings only from a limited number<sup>14</sup> of bidders that best meet the pre-selec-

<sup>13</sup>The rationale for prohibiting the participation of bidders in more than one consortium to submit proposals for the same project is to reduce the risk of leakage of information or collusion between competing consortia. Nevertheless, the model provision contemplates the possibility of ad hoc exceptions to this rule, for instance, in the event that only one company or only a limited number of companies could be expected to deliver a specific good or service essential for the implementation of the project.

<sup>14</sup>In some countries, practical guidance on selection procedures encourages domestic contracting authorities to limit the prospective proposals to the lowest possible number sufficient to ensure meaningful competition (for example, three or four). The manner in which rating systems (in particular quantitative ones) may be used to arrive at such a range of bidders is discussed in the *Legislative Guide* (see chap. III, "Selection of the concessionaire", para. 48). It should be noted that the rating system is used solely for the purpose of the pre-selection of bidders. The ratings of

tion criteria. For this purpose, the contracting authority shall rate the bidders that meet the pre-selection criteria on the basis of the criteria applied to assess their qualifications and draw up the list of bidders that will be invited to submit proposals upon completion of the pre-selection proceedings. In drawing up the list, the contracting authority shall apply only the manner of rating that is set forth in the pre-selection documents.

## 2. Procedure for requesting proposals

### **Model provision 10. Single-stage and two-stage procedures for requesting proposals**

(see recommendations 18 (for para. 1) and 19 (for paras. 2 and 3) and chap. III, paras. 51-58)

1. The contracting authority shall provide a set of the request for proposals and related documents issued in accordance with model provision 11 to each pre-selected bidder that pays the price, if any, charged for those documents.

2. Notwithstanding the above, the contracting authority may use a two-stage procedure to request proposals from pre-selected bidders when the contracting authority does not deem it to be feasible to describe in the request for proposals the characteristics of the project such as project specifications, performance indicators, financial arrangements or contractual terms in a manner sufficiently detailed and precise to permit final proposals to be formulated.

3. Where a two-stage procedure is used, the following provisions apply:

(a) The initial request for proposals shall call upon the bidders to submit, in the first stage of the procedure, initial proposals relating to project specifications, performance indicators, financing requirements or other characteristics of the project as well as to the main contractual terms proposed by the contracting authority;<sup>15</sup>

(b) The contracting authority may convene meetings and hold discussions with any of the bidders to clarify questions concerning the initial request for proposals or the initial proposals and accompanying documents submitted by the bidders. The contracting authority shall prepare minutes of any such meeting or discussion containing the questions raised and the clarifications provided by the contracting authority;

(c) Following examination of the proposals received, the contracting authority may review and, as appropriate, revise the initial request for proposals by deleting or modifying any aspect of the initial project specifications, performance indicators,

the pre-selected bidders should not be taken into account at the stage of evaluation of proposals (see model provision 15), at which all pre-selected bidders should start out on an equal standing.

<sup>15</sup>In many cases, in particular for new types of project, the contracting authority may not be in a position, at this stage, to have formulated a detailed draft of the contractual terms envisaged by it. Also, the contracting authority may find it preferable to develop such terms only after an initial round of consultations with the pre-selected bidders. In any event, however, it is important for the contracting authority, at this stage, to provide some indication of the key contractual terms of the concession contract, in particular the way in which the project risks should be allocated between the parties under the concession contract. If this allocation of contractual rights and obligations is left entirely open until after the issuance of the final request for proposals, the bidders may respond by seeking to minimize the risks they accept, which may frustrate the purpose of seeking private investment for developing the project (see chap. III, "Selection of the concessionaire", paras. 67-70; see further chap. II, "Project risks and government support", paras. 8-29).

financing requirements or other characteristics of the project, including the main contractual terms, and any criterion for evaluating and comparing proposals and for ascertaining the successful bidder, as set forth in the initial request for proposals, as well as by adding characteristics or criteria to it. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 26 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated in the invitation to submit final proposals;

(d) In the second stage of the proceedings, the contracting authority shall invite the bidders to submit final proposals with respect to a single set of project specifications, performance indicators or contractual terms in accordance with model provisions 11-17.

### **Model provision 11. Content of the request for proposals**

(see recommendation 20 and chap. III, paras. 59-70)

To the extent not already required by [the enacting State indicates the provisions of its laws on procurement proceedings that govern the content of requests for proposals],<sup>16</sup> the request for proposals shall include at least the following information:

(a) General information as may be required by the bidders in order to prepare and submit their proposals;<sup>17</sup>

(b) Project specifications and performance indicators, as appropriate, including the contracting authority's requirements regarding safety and security standards and environmental protection;<sup>18</sup>

(c) The contractual terms proposed by the contracting authority, including an indication of which terms are deemed to be non-negotiable;

(d) The criteria for evaluating proposals and the thresholds, if any, set by the contracting authority for identifying non-responsive proposals; the relative weight to be accorded to each evaluation criterion; and the manner in which the criteria and thresholds are to be applied in the evaluation and rejection of proposals.

### **Model provision 12. Bid securities**

(see chap. III, para. 62)

1. The request for proposals shall set forth the requirements with respect to the issuer and the nature, form, amount and other principal terms and conditions of the required bid security.

2. A bidder shall not forfeit any bid security that it may have been required to provide, other than in cases of:<sup>19</sup>

(a) Withdrawal or modification of a proposal after the deadline for submission of proposals and, if so stipulated in the request for proposals, before that deadline;

<sup>16</sup>A list of elements typically contained in a request for proposals for services can be found in article 38 of the Model Procurement Law.

<sup>17</sup>A list of elements that should be provided can be found in chapter III, "Selection of the concessionaire", paragraphs 61 and 62, of the *Legislative Guide*.

<sup>18</sup>See chapter III, "Selection of the concessionaire", paragraphs 64-66.

<sup>19</sup>General provisions on bid securities can be found in article 32 of the Model Procurement Law.

(b) Failure to enter into final negotiations with the contracting authority pursuant to model provision 17, paragraph 1;

(c) Failure to submit its best and final offer within the time limit prescribed by the contracting authority pursuant to model provision 17, paragraph 2;

(d) Failure to sign the concession contract, if required by the contracting authority to do so, after the proposal has been accepted;

(e) Failure to provide required security for the fulfilment of the concession contract after the proposal has been accepted or to comply with any other condition prior to signing the concession contract specified in the request for proposals.

**Model provision 13. Clarifications and modifications**

(see recommendation 21 and chap. III, paras. 71 and 72)

The contracting authority may, whether on its own initiative or as a result of a request for clarification by a bidder, review and, as appropriate, revise any element of the request for proposals as set forth in model provision 11. The contracting authority shall indicate in the record of the selection proceedings to be kept pursuant to model provision 26 the justification for any revision to the request for proposals. Any such deletion, modification or addition shall be communicated to the bidders in the same manner as the request for proposals at a reasonable time prior to the deadline for submission of proposals.

**Model provision 14. Evaluation criteria**

(see recommendations 22 (for para. 1) and 23 (for para. 2) and chap. III, paras. 73-77)

1. The criteria for the evaluation and comparison of the technical proposals<sup>20</sup> shall include at least the following:

- (a) Technical soundness;
- (b) Compliance with environmental standards;
- (c) Operational feasibility;
- (d) Quality of services and measures to ensure their continuity.

2. The criteria for the evaluation and comparison of the financial and commercial proposals<sup>21</sup> shall include, as appropriate:

- (a) The present value of the proposed tolls, unit prices and other charges over the concession period;
- (b) The present value of the proposed direct payments by the contracting authority, if any;
- (c) The costs for design and construction activities, annual operation and maintenance costs, present value of capital costs and operating and maintenance costs;
- (d) The extent of financial support, if any, expected from a public authority of [the enacting State];
- (e) Soundness of the proposed financial arrangements;
- (f) The extent of acceptance of the negotiable contractual terms proposed by the contracting authority in the request for proposals;
- (g) The social and economic development potential offered by the proposals.

<sup>20</sup>See chapter III, "Selection of the concessionaire", paragraph 74.

<sup>21</sup>See chapter III, "Selection of the concessionaire", paragraphs 75-77.

**Model provision 15. Comparison and evaluation of proposals**

(see recommendation 24 and chap. III, paras. 78-82)

1. The contracting authority shall compare and evaluate each proposal in accordance with the evaluation criteria, the relative weight accorded to each such criterion and the evaluation process set forth in the request for proposals.

2. For the purposes of paragraph 1, the contracting authority may establish thresholds with respect to quality, technical, financial and commercial aspects. Proposals that fail to achieve the thresholds shall be regarded as non-responsive and rejected from the selection procedure.<sup>22</sup>

**Model provision 16. Further demonstration of fulfilment of qualification criteria**

(see recommendation 25 and chap. III, paras. 78-82)

The contracting authority may require any bidder that has been pre-selected to demonstrate again its qualifications in accordance with the same criteria used for pre-selection. The contracting authority shall disqualify any bidder that fails to demonstrate again its qualifications if requested to do so.<sup>23</sup>

**Model provision 17. Final negotiations**

(see recommendations 26 (for para. 1) and 27 (for para. 2) and chap. III, paras. 83 and 84)

1. The contracting authority shall rank all responsive proposals on the basis of the evaluation criteria and invite for final negotiation of the concession contract the bidder that has attained the best rating. Final negotiations shall not concern those contractual terms, if any, that were stated as non-negotiable in the final request for proposals.

2. If it becomes apparent to the contracting authority that the negotiations with the bidder invited will not result in a concession contract, the contracting authority shall inform the bidder of its intention to terminate the negotiations and give the bidder reasonable time to formulate its best and final offer. If the contracting authority does not find that proposal acceptable, it shall terminate the negotiations with the bidder concerned. The contracting authority shall then invite for negotiations the other bidders in the order of their ranking until it arrives at a concession contract or rejects all remaining proposals. The contracting authority shall not resume negotiations with a bidder with which negotiations have been terminated pursuant to this paragraph.

<sup>22</sup>This model provision offers an example of an evaluation process that a contracting authority may wish to apply to compare and evaluate proposals for privately financed infrastructure projects. Alternative evaluation processes are described in chapter III, "Selection of the concessionaire", paragraphs 79-82, of the *Legislative Guide*, such as a two-step evaluation process or the two-envelope system. In contrast to the process set forth in this model provision, the processes described in the *Legislative Guide* are designed to allow the contracting authority to compare and evaluate the non-financial criteria separately from the financial criteria so as to avoid situations where undue weight would be given to certain elements of the financial criteria (such as the unit price) to the detriment of the non-financial criteria. In order to ensure the integrity, transparency and predictability of the evaluation stage of the selection proceedings, it is recommended that the enacting State set forth in its law the evaluation processes that contracting authorities may use to compare and evaluate proposals and the details of the application of this process.

<sup>23</sup>Where pre-qualification proceedings have been engaged in, the criteria shall be the same as those used in the pre-qualification proceedings.



### 3. Negotiation of concession contracts without competitive procedures

#### **Model provision 18. Circumstances authorizing award without competitive procedures**

(see recommendation 28 and chap. III, para. 89)

Subject to approval by [*the enacting State indicates the relevant authority*],<sup>24</sup> the contracting authority is authorized to negotiate a concession contract without using the procedure set forth in model provisions 6 to 17 in the following cases:

(a) When there is an urgent need for ensuring continuity in the provision of the service and engaging in the procedures set forth in model provisions 6 to 17 would be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the contracting authority nor the result of dilatory conduct on its part;

(b) Where the project is of short duration and the anticipated initial investment value does not exceed the amount [of [*the enacting State specifies a monetary ceiling*]] [set forth in [*the enacting State indicates the provisions of its laws that specify the monetary threshold below which a privately financed infrastructure project may be awarded without competitive procedures*]];<sup>25</sup>

(c) Where the project involves national defence or national security;

(d) Where there is only one source capable of providing the required service, such as when the provision of the service requires the use of intellectual property, trade secrets or other exclusive rights owned or possessed by a certain person or persons;

(e) In cases of unsolicited proposals falling under model provision 23;

(f) When an invitation to the pre-selection proceedings or a request for proposals has been issued but no applications or proposals were submitted or all proposals failed to meet the evaluation criteria set forth in the request for proposals and if, in the judgement of the contracting authority, issuing a new invitation to the pre-selection proceedings and a new request for proposals would be unlikely to result in a project award within a required time frame;<sup>26</sup>

<sup>24</sup>The rationale for subjecting the award of the concession contract without competitive procedures to the approval of a higher authority is to ensure that the contracting authority engages in direct negotiations with bidders only in the appropriate circumstances (see chap. III, "Selection of the concessionaire", paras. 85-96). The model provision therefore suggests that the enacting State indicate a relevant authority that is competent to authorize negotiations in all cases set forth in the model provision. The enacting State may provide, however, for different approval requirements for each subparagraph of the model provision. In some cases, for instance, the enacting State may provide that the authority to engage in such negotiations derives directly from the law. In other cases, the enacting State may make the negotiations subject to the approval of different higher authorities, depending on the nature of the services to be provided or the infrastructure sector concerned. In those cases, the enacting State may need to adapt the model provision to these approval requirements by adding the particular approval requirement to the subparagraph concerned, or by adding a reference to provisions of its law where these approval requirements are set forth.

<sup>25</sup>As an alternative to the exclusion provided in subparagraph (b), the enacting State may consider devising a simplified procedure for request for proposals for projects falling thereunder, for instance by applying the procedures described in article 48 of the Model Procurement Law.

<sup>26</sup>The enacting State may wish to require that the contracting authority include in the record to be kept pursuant to model provision 26 a summary of the results of the negotiations and indicate the extent to which those results differed from the project specifications and contractual terms of the original request for proposals, and that it state the reasons therefor.

(g) In other cases where the [*the enacting State indicates the relevant authority*] authorizes such an exception for compelling reasons of public interest.<sup>27</sup>

#### **Model provision 19. Procedures for negotiation of a concession contract**

(see recommendation 29 and chap. III, para. 90)

Where a concession contract is negotiated without using the procedures set forth in model provisions 6-17 the contracting authority shall:<sup>28</sup>

(a) Except for concession contracts negotiated pursuant to model provision 18, subparagraph (c), cause a notice of its intention to commence negotiations in respect of a concession contract to be published in accordance with [*the enacting State indicates the provisions of any relevant laws on procurement proceedings that govern the publication of notices*];

(b) Engage in negotiations with as many persons as the contracting authority judges capable<sup>29</sup> of carrying out the project as circumstances permit;

(c) Establish evaluation criteria against which proposals shall be evaluated and ranked.

### 4. Unsolicited proposals<sup>30</sup>

#### **Model provision 20. Admissibility of unsolicited proposals**

(see recommendation 30 and chap. III, paras. 97-109)

As an exception to model provisions 6 to 17, the contracting authority<sup>31</sup> is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 21 to 23, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

<sup>27</sup>Enacting States that deem it desirable to authorize the use of negotiated procedures on an ad hoc basis may wish to retain subparagraph (g) when implementing the model provision. Enacting States wishing to limit exceptions to the competitive selection procedures may in turn prefer not to include the subparagraph. In any event, for purposes of transparency, the enacting State may wish to indicate here or elsewhere in the model provision other exceptions, if any, authorizing the use of negotiated procedures that may be provided under specific legislation.

<sup>28</sup>A number of elements to enhance transparency in negotiations under this model provision are discussed in chapter III, "Selection of the concessionaire", paragraphs 90-96, of the *Legislative Guide*.

<sup>29</sup>Enacting States wishing to enhance transparency in the use of negotiated procedures may establish, by specific regulations, qualification criteria to be met by persons invited to negotiations pursuant to model provisions 18 and 19. An indication of possible qualification criteria is contained in model provision 7.

<sup>30</sup>The policy considerations on the advantages and disadvantages of unsolicited proposals are discussed in chapter III, "Selection of the concessionaire", paragraphs 98-100, of the *Legislative Guide*. States that wish to allow contracting authorities to handle such proposals may wish to use the procedures set forth in model provisions 21-23.

<sup>31</sup>The model provision assumes that the power to entertain unsolicited proposals lies with the contracting authority. However, depending on the regulatory system of the enacting State, a body separate from the contracting authority may have the responsibility for entertaining unsolicited proposals or for considering, for instance, whether an unsolicited proposal is in the public interest. In such a case, the manner in which the functions of such a body may need to be coordinated with those of the contracting authority should be carefully considered by the enacting State (see footnotes 1, 3 and 24 and the references cited therein).

**Model provision 21. Procedures for determining the admissibility of unsolicited proposals**

(see recommendations 31 (for paras. 1 and 2) and 32 (for para. 3) and chap. III, paras. 110-112)

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be potentially in the public interest.<sup>32</sup>
2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications<sup>33</sup> and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the concept or technology contemplated in the proposal.
3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

**Model provision 22. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights**

(see recommendation 33 and chap. III, paras. 113 and 114)

1. Except in the circumstances set forth in model provision 18, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 6 to 17 if the contracting authority considers that:
  - (a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and
  - (b) The proposed concept or technology is not truly unique or new.
2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to

<sup>32</sup>The determination that a proposed project is in the public interest entails a considered judgement regarding the potential benefits to the public that are offered by the project, as well as its relationship to the Government's policy for the infrastructure sector concerned. In order to ensure the integrity, transparency and predictability of the procedures for determining the admissibility of unsolicited proposals, it may be advisable for the enacting State to provide guidance, in regulations or other documents, concerning the criteria that will be used to determine whether an unsolicited proposal is in the public interest, which may include criteria for assessing the appropriateness of the contractual arrangements and the reasonableness of the proposed allocation of project risks.

<sup>33</sup>The enacting State may wish to provide in regulations the qualification criteria that need to be met by the proponent. Elements to be taken into account for that purpose are indicated in model provision 7.

paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

**Model provision 23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights**

(see recommendations 34 (for paras. 1 and 2) and 35 (for paras. 3 and 4) and chap. III, paras. 115-117)

1. If the contracting authority determines that the conditions of model provision 22, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 6 to 17. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4.<sup>34</sup>
2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [the enacting State indicates a certain amount of time].
3. If no proposals in response to an invitation issued pursuant to paragraph 2 are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.
4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 19. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its infrastructure needs, the contracting authority shall request the submission of proposals pursuant to model provisions 10 to 17, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 22, paragraph 2.

## 5. Miscellaneous provisions

**Model provision 24. Confidentiality**

(see recommendation 36 and chap. III, para. 118)

The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussions, communications and negotiations between the contracting authority and a bidder pursuant to model provisions 10, paragraph 3, 17, 18, 19 or 23, paragraphs 3 and 4, shall be confidential. Unless required by law or by a court order or permitted by the request for proposals, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party.

<sup>34</sup>The enacting State may wish to consider adopting a special procedure for handling unsolicited proposals falling under this model provision, which may be modelled, *mutatis mutandis*, on the request-for-proposals procedure set forth in article 48 of the Model Procurement Law.

**Model provision 25. Notice of contract award**

(see recommendation 37 and chap. III, para. 119)

Except for concession contracts awarded pursuant to model provision 18, subparagraph (c), the contracting authority shall cause a notice of the contract award to be published in accordance with [the enacting State indicates the provisions of its laws on procurement proceedings that govern the publication of contract award notices]. The notice shall identify the concessionaire and include a summary of the essential terms of the concession contract.

**Model provision 26. Record of selection and award proceedings**

(see recommendation 38 and chap. III, paras. 120-126)

The contracting authority shall keep an appropriate record of information pertaining to the selection and award proceedings in accordance with [the enacting State indicates the provisions of its laws on public procurement that govern record of procurement proceedings].<sup>35</sup>

**Model provision 27. Review procedures**

(see recommendation 39 and chap. III, paras. 127-131)

A bidder that claims to have suffered, or that may suffer, loss or injury due to a breach of a duty imposed on the contracting authority by the law may seek review of the contracting authority's acts or failures to act in accordance with [the enacting State indicates the provisions of its laws governing the review of decisions made in procurement proceedings].<sup>36</sup>

### III. CONTENTS AND IMPLEMENTATION OF THE CONCESSION CONTRACT

**Model provision 28. Contents and implementation of the concession contract**

(see recommendation 40 and chap. IV, paras. 1-11)

The concession contract shall provide for such matters as the parties deem appropriate,<sup>37</sup> such as:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire (see chap. IV, para. 1);

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract (see recommendation 5);

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 30 (see recommendations 42 and 43 and model provision 30);

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 31 to 33 (see recommendations 44 and 45 and model provisions 31 to 33);

(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority (see recommendations 46 and 48);

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility (see recommendation 52);

(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users (see recommendation 53 and model provision 38);

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the services are provided in accordance with the applicable legal and contractual requirements (see recommendations 52 and 54, subpara. (b));

(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations (see recommendation 54, subpara. (a));

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled (see chap. IV, paras. 73 to 76);

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons (see recommendation 56);

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project (see recommendation 58, subparas. (a) and (b));

(n) Remedies available in the event of default of either party (see recommendation 58, subpara. (c));

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control (see recommendation 58, subpara. (d));

<sup>35</sup>The content of such a record for the various types of project award contemplated in the model provisions, as well as the extent to which the information contained therein may be accessible to the public, are discussed in chapter III, "Selection of the concessionaire", paragraphs 120-126, of the *Legislative Guide*. The content of such a record for the various types of project award is further set out in article 11 of the Model Procurement Law. If the laws of the enacting State do not adequately address these matters, the enacting State should adopt legislation or regulations to that effect.

<sup>36</sup>Elements for the establishment of an adequate review system are discussed in chapter III, "Selection of the concessionaire", paragraphs 127-131, of the *Legislative Guide*. They are also contained in chapter VI of the Model Procurement Law. If the laws of the enacting State do not provide such an adequate review system, the enacting State should consider adopting legislation to that effect.

<sup>37</sup>Enacting States may wish to note that the inclusion in the concession contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.

(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination (*see recommendation 61*);

(q) The manner for calculating compensation pursuant to model provision 47 (*see recommendation 67*);

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire (*see recommendation 69 and model provisions 29 and 49*);

(s) The rights and obligations of the parties with respect to confidential information (*see model provision 24*).

**Model provision 29. Governing law**

(*see recommendation 41 and chap. IV, paras. 5-8*)

The concession contract is governed by the law of [*the enacting State*] unless otherwise provided in the concession contract.<sup>38</sup>

**Model provision 30. Organization of the concessionaire**

(*see recommendations 42 and 43 and chap. IV, paras. 12-18*)

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [*the enacting State*], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the concession contract consistent with the terms of the request for proposals.

**Model provision 31. Ownership of assets<sup>39</sup>**

(*see recommendation 44 and chap. IV, paras. 20-26*)

The concession contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

<sup>38</sup>Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the *Legislative Guide* (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also *Legislative Guide*, chap. VII, "Other relevant areas of law", paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of an infrastructure project (see generally *Legislative Guide*, chap. VII, "Other relevant areas of law", sect. B).

<sup>39</sup>Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see *Legislative Guide*, "Introduction and background information on privately financed infrastructure projects", paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 20-26). Irrespective of the host country's general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire's ability to create security interests in project assets for the purpose of raising financing for the project (*ibid.*, paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an

(a) Assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;

(b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and

(c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract.

**Model provision 32. Acquisition of rights related to the project site**

(*see recommendation 45 and chap. IV, paras. 27-29*)

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with (*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*).

**Model provision 33. Easements<sup>40</sup>**

(*see recommendation 45 and chap. IV, para. 30*)

*Variant A*

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

*Variant B*

1. The concessionaire shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire, upon expiry or termination of the concession contract or at any other time.

<sup>40</sup>The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 30-32).

2. Any easements that may be required for the implementation of the project shall be created in accordance with [*the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest*].

**Model provision 34. Financial arrangements**

(see recommendations 46, 47 and 48 and chap. IV, paras. 33-51)

1. The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the concession contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].<sup>41</sup>

2. The contracting authority shall have the power to agree to make direct payments to the concessionaire as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services.

**Model provision 35. Security interests**

(see recommendation 49 and chap. IV, paras. 52-61)

1. Subject to any restriction that may be contained in the concession contract,<sup>42</sup> the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*the enacting State*].

**Model provision 36. Assignment of the concession contract**

(see recommendation 50 and chap. IV, paras. 62 and 63)

Except as otherwise provided in model provision 35, the rights and obligations of the concessionaire under the concession con-

tract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service.

**Model provision 37. Transfer of controlling interest<sup>43</sup> in the concessionaire**

(see recommendation 51 and chap. IV, paras. 64-68)

Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given.

**Model provision 38. Operation of infrastructure**

(see recommendation 53 and chap. IV, paras. 80-93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2))

1. The concession contract shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

(a) The modification of the service so as to meet the demand for the service;

(b) The continuity of the service;

(c) The provision of the service under essentially the same conditions for all users;

(d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

2. The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

**Model provision 39. Compensation for specific changes in legislation**

(see recommendation 58, subpara. (c), and chap. IV, paras. 122-125)

The concession contract shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

<sup>41</sup>Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the *Legislative Guide* as "tariffs", may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see chap. II, "Project risks and government support", paras. 30-60). The cost at which public services are provided is typically an element of the Government's infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of "reasonableness", "fairness" or "equity" (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 36-46).

<sup>42</sup>These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

<sup>43</sup>The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.

**Model provision 40. Revision of the concession contract**

(see recommendation 58, subpara. (c), and chap. IV, paras. 126-130)

1. Without prejudice to model provision 39, the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

- (a) Changes in economic or financial conditions; or
- (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides; provided that the economic, financial, legislative or regulatory changes:
  - (a) Occur after the conclusion of the contract;
  - (b) Are beyond the control of the concessionaire; and
  - (c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes.

**Model provision 41. Takeover of an infrastructure project by the contracting authority**

(see recommendation 59 and chap. IV, paras. 143-146)

Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

**Model provision 42. Substitution of the concessionaire**

(see recommendation 60 and chap. IV, paras. 147-150)

The contracting authority may agree with the entities extending financing for an infrastructure project and the concessionaire to provide for the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.<sup>44</sup>

<sup>44</sup>The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.

**IV. DURATION, EXTENSION AND TERMINATION OF THE CONCESSION CONTRACT****1. Duration and extension of the concession contract****Model provision 43. Duration and extension of the concession contract**

(see recommendation 62 and chap. V, paras. 2-8)

The duration of the concession shall be set forth in the concession contract. The contracting authority may not agree to extend its duration except as a result of the following circumstances:

- (a) Completion delay or interruption of operation due to circumstances beyond either party's reasonable control;
- (b) Project suspension brought about by acts of the contracting authority or other public authorities;
- (c) Increase in costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs without such extension; or
- (d) [Other circumstances, as specified by the enacting State].<sup>45</sup>

**2. Termination of the concession contract****Model provision 44. Termination of the concession contract by the contracting authority**

(see recommendation 63 and chap. V, paras. 14-27)

The contracting authority may terminate the concession contract:

- (a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;
- (b) For compelling<sup>46</sup> reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;
- (c) [Other circumstances that the enacting State might wish to add in the law].

**Model provision 45. Termination of the concession contract by the concessionaire**

(see recommendation 64 and chap. V, paras. 28-33)

The concessionaire may not terminate the concession contract except under the following circumstances:

- (a) In the event of serious breach by the contracting authority or other public authority of their obligations in connection with the concession contract;
- (b) If the conditions for a revision of the concession contract under model provision 40, paragraph 1, are met, but the parties have failed to agree on a revision of the concession contract; or

<sup>45</sup>The enacting State may wish to consider the possibility for the law to authorize a consensual extension of the concession contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority pursuant to model provision 26.

<sup>46</sup>Possible situations of a compelling reason of public interest are discussed in chapter V, "Duration, extension and termination of the project agreement", paragraph 27, of the *Legislative Guide*.

(c) If the cost of the concessionaire's performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, such as those referred to in model provision 28, subparagraphs (h) and (i), and the parties have failed to agree on a revision of the concession contract.

**Model provision 46. Termination of the concession contract by either party**

(see recommendation 65 and chap. V, paras. 34 and 35)

Either party shall have the right to terminate the concession contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties shall also have the right to terminate the concession contract by mutual consent.

**3. Arrangements upon termination or expiry of the concession contract**

**Model provision 47. Compensation upon termination of the concession contract**

(see recommendation 67 and chap. V, paras. 43-49)

The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

**Model provision 48. Wind-up and transfer measures**

(see recommendation 66 and chap. V, paras. 37-42 (for subpara. (a)) and recommendation 68 and chap. V, paras. 50-62 (for subparagraphs. (b)-(d))

The concession contract shall provide, as appropriate, for:

- (a) Mechanisms and procedures for the transfer of assets to the contracting authority;
- (b) The compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority;

(c) The transfer of technology required for the operation of the facility;

(d) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(e) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

**V. SETTLEMENT OF DISPUTES**

**Model provision 49. Disputes between the contracting authority and the concessionaire**

(see recommendation 69 and chap. VI, paras. 3-41)

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.<sup>47</sup>

**Model provision 50. Disputes involving customers or users of the infrastructure facility**

(see recommendation 71 and chap. VI, paras. 43-45)

Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

**Model provision 51. Other disputes**

(see recommendation 70 and chap. VI, para. 42)

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.
2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

<sup>47</sup>The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects.





## II. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS

---

### Summary record of the 758th meeting

Monday, 30 June 2003, at 10 a.m.

[A/CN.9/SR.758]

*Temporary Chairman:* Mr. Sekolec (Secretary of the Commission)

*Chairman:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 10.15 a.m*

#### OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN opened the thirty-sixth session of the Commission.

#### ELECTION OF OFFICERS

2. The TEMPORARY CHAIRMAN said that the Eastern European Group, whose turn it was to nominate a candidate for the office of Chairman of the Commission, did not wish to make a nomination. The Western European and Other States Group would therefore nominate a candidate. Three vice-chairmen and a rapporteur would be elected later in the session.

3. Ms. SABO (Canada) nominated Mr. Wiwen-Nilsson (Sweden) for the office of Chairman. His experience as Chairman of the Working Group on Privately Financed Infrastructure Projects and as an expert with UNCITRAL meant that he was well qualified to chair the Commission.

4. Ms. OCHIENG (Kenya), Mr. MEENA (India), Ms. VEYTIA PALOMINO (Mexico), Mr. LEBEDEV (Russian Federation) and Mr. YEPES ALZATE (Colombia) seconded the nomination.

5. *Mr. Wiwen-Nilsson (Sweden) was elected Chairman by acclamation and took the Chair.*

#### ADOPTION OF THE AGENDA (A/CN.9/519)

6. Mr. SEKOLEC (Secretary of the Commission), referring to paragraph 56 of the provisional agenda (A/CN.9/519), said that agenda items 4 and 5 were scheduled to be covered in the first week of the session. Under item 4, the task before the Commission was to finalize the draft UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects in all six official languages with a view to adopting the

text at the beginning of the second week of the session. Under item 5, the Commission was to approve the key objectives, general features and structure of the draft *UNCITRAL Legislative Guide on Insolvency Law*. Discussions on that item should focus on substantive issues; questions of drafting could be referred to the Working Group on Insolvency Law, with a view to preparing a final version of the *Legislative Guide* in time for the Commission's 2004 session.

7. The Commission's use of the resources allocated to it for the session was being monitored, with particular attention paid to the amount of meeting time allocated but not utilized. While the Commission should feel free to break for informal consultations where necessary, the number of such breaks should be minimized.

8. *The agenda was adopted.*

#### FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (A/CN.9/521, A/CN.9/522 and Add.1 and 2, A/CN.9/533 and Add.1-7)

9. The CHAIRMAN drew the attention of the Commission to paragraph 2 of document A/CN.9/522/Add.1, which outlined three options with regard to the relationship between the draft model legislative provisions and the legislative recommendations contained in the *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (A/CN.9/SER.B/4). The Commission might wish to defer a decision on those options until the end of its deliberations.

10. A drafting group would be responsible for ensuring consistency among the different language versions of the model provisions; he therefore invited representatives of the six official

languages from among the members of the Commission to volunteer to participate in the group's meetings. Matters of translation would not then need to be discussed in plenary.

11. Mr. ESTRELLA FARIA (Secretariat) said that document A/CN.9/522 contained notes explaining why the formulation of some of the model provisions approved by the Working Group on Privately Financed Infrastructure Projects differed slightly from that of the legislative recommendations contained in the *Legislative Guide*. The concordance table contained in document A/CN.9/522/Add.2 showed the relationship between the model provisions and the legislative recommendations. The model provisions had been circulated to members for comment, and it would be the task of the Commission to discuss the comments received. The Commission would also have to decide among the three options mentioned in paragraph 2 of document A/CN.9/522/Add.1. If it decided to adopt the terminology approved by the Working Group for the model provisions, the terminology used in the *Legislative Guide* might need to be adjusted accordingly. For example, the term "concession contract" was used in the model provisions, whereas the term "project agreement" was the one used in the *Legislative Guide*.

12. The CHAIRMAN, noting that any proposals contained in documents A/CN.9/533 and Add.1-7 would be considered rejected unless discussed and adopted in plenary, invited members to comment on the draft model legislative provisions contained in document A/CN.9/522/Add.1.

#### Contents

13. The CHAIRMAN proposed that consideration of the table of contents should be deferred until a later stage in the Commission's deliberations.

14. *It was so decided.*

#### Foreword

15. Mr. WALLACE (United States of America), referring to a comment by the International Finance Corporation contained in document A/CN.9/533/Add.1, proposed that a sentence should be added to the last paragraph of the Foreword to advise legislators explicitly that, when they enacted laws relating to privately financed infrastructure projects, they should bear in mind that the model provisions and the *Legislative Guide* did not deal with the full array of laws, such as tax laws, that might affect such projects. The precise formulation of such a sentence should be determined by the drafting group, perhaps along the lines of the wording: "In this connection, legislators will wish to bear in mind the relationship of these other areas of law to any law which is enacted specifically with respect to privately financed infrastructure projects."

16. The CHAIRMAN said he took it that the Commission agreed in principle that a sentence to that effect, the wording of which would be finalized by the drafting group, would be added to the Foreword.

17. *It was so decided.*

#### Part One

##### Legislative recommendations

18. The CHAIRMAN suggested that consideration of Part One should be deferred for the time being.

19. *It was so decided.*

#### Part Two

##### Draft model legislative provisions on privately financed infrastructure projects

##### I. General provisions

##### Model provision 1. Preamble

20. Mr. WALLACE (United States of America) referred the Commission to paragraph 4 of document A/CN.9/533/Add.6, containing his country's comments on the Preamble and suggesting a slight change of language recommended to his delegation by the Committee on Project Finance of the Association of the Bar of the City of New York. The proposal was to divide the first preambular paragraph into two paragraphs, the first of which would read: "WHEREAS, the [Government] [Parliament] of ... considers it desirable to establish a legislative framework favourable to private investment in public infrastructure; and", thereby emphasizing at the outset the explicit purpose of the legislation and aligning it more closely with the Foreword and paragraph 4 of the Introduction to the *Legislative Guide*.

21. The CHAIRMAN noted that the United States proposal referred to "private investment", whereas the focus was on private financing.

22. Mr. FONT (France) said that the legislative provisions had been the subject of lengthy discussions in the Working Group and had, for the most part, met with consensus and resulted in a balanced text. While the text could be improved, he was loath to reopen topics already discussed at length. It was his understanding that the purpose of the current discussion was to examine the texts rapidly and iron out any imperfections.

23. Ms. SABO (Canada) said that, in the light of the remarks by the representative of France and the Chairman's comments regarding the terms "financing" and "investment", her delegation favoured retaining the Preamble as currently worded.

24. Mr. MEENA (India) said that the proposals referred to two separate documents, one containing model legislative provisions for publicly financed infrastructure projects, and the other containing legislative recommendations (the *Legislative Guide*). Different as they were in purpose, they dealt with the same subject and were bound to create confusion. He therefore proposed merging them into a single document, with one chapter devoted to guidelines and another to the provisions. Should that proposal be unacceptable, the relationship between the two should be clearly spelled out in the Preamble to the legislative provisions.

25. The CHAIRMAN said that, while noting the suggestion, he would prefer it to be discussed once all the options had been considered, at which time it would be clear which recommendations had not been covered.

26. Mr. WALLACE (United States of America) said that in the light of the various comments, his delegation would withdraw its proposal.

27. *Model provision 1 was approved and referred to the drafting group.*

##### Model provision 2. Definitions

28. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) said that, while he too was reluctant to reopen discussion on minor topics, it was important to decide on a definition of the word "concession". His organization thus wished to propose adoption of the definition formulated by the European

Union, which was contained in a European Commission interpretative communication dated 12 April 2000, a definition to be found in document A/CN.9/533.

29. Mr. WALLACE (United States of America) said his delegation now agreed with the delegation of France that things should be left alone as far as possible; hence its retreat from its earlier proposal. The matter raised by UIA had not been uncontroversial within the European Union. The terminology used in the Introduction to the *Legislative Guide* and the definitions contained in model provision 2 revealed a subtle and elaborate arrangement of concepts and terms which had been achieved through a lengthy process of trial and error. It was too late to tamper with the vocabulary and pointless to attempt at that late stage to define all the various terms used.

30. Mr. ESTRELLA FARIA (Secretariat) said there had been a good reason for omitting a definition of the term “concession” from the *Legislative Guide*. That definition would be so contentious as to take as long to draft as the *Legislative Guide* itself. Early on in the deliberations, even those States that now appeared to have achieved consensus within the European Union had held fairly conflicting views on the definition. For instance, a continuing bone of contention was the extent of the risk that must be assumed in order for an act to constitute a concession. How much more difficult would it be, then, for consensus to be reached among States unfamiliar with the two main legal systems reflected in the European Commission’s definition. Furthermore, certain delegations had refused from the outset to entertain the possibility of unilateral concessions, while others had contended that under their legislative systems concessions were always unilateral. Consequently, a conscious decision had been taken to leave the task of a definition to the various lawmakers. It would be very difficult, even inappropriate, for the Commission to attempt to find a definition acceptable to all the various legislative systems represented therein.

31. The CHAIRMAN said he took it there was no support for the proposal made by UIA.

32. *Model provision 2 was approved and referred to the drafting group.*

*Model provision 3. Authority to enter into concession contracts; Model provision 4. Eligible infrastructure sectors*

33. Mr. DE CAZALET (Observer for the Union Internationale des Avocats–UIA) said it was well-nigh impossible to establish by law exactly who was or was not competent to grant a concession. The same was true of the eligible infrastructure sectors (model provision 4). There could be no single law modifying the many laws connected with concessions. Neutral provisions should be adopted, as proposed by his organization in document A/CN.9/533.

34. Mr. WALLACE (United States of America), disagreeing, said that in many countries there was a legal vacuum and it was unclear which particular agency, ministry or public authority was empowered to grant concessions. Model provisions 3 and 4 were merely invitations to legislatures to focus on the issue. Indeed, footnote 5 to model provision 3 invited enacting States to consider various alternative means of granting concessions. Model provision 3 was essential to the integrity of the model provisions as a whole.

35. Ms. SABO (Canada) said she saw no need for any amendment to model provision 3, which should be retained as currently worded.

36. Mr. MURREY (United Kingdom) supported the views expressed by the delegations of the United States and Canada.

The model provision was just that and it should remain as flexible as possible in seeking to provide guidance to those countries that wished to use it in making their own laws.

37. The CHAIRMAN said he took it that the Commission wished the texts to be retained in their current form.

38. *Model provisions 3 and 4 were approved and referred to the drafting group.*

## II. Selection of the concessionaire

### *Model provision 5. Rules governing the selection proceedings*

39. Mr. YEPES ALZATE (Colombia) said that as presently drafted, model provision 5 appeared to offer the possibility of forgoing the pre-selection stage, provided the desiderata of transparency and efficiency were met. Could the secretariat explain?

40. Mr. ESTRELLA FARIA (Secretariat) said that the original legislative recommendation had contained a requirement that the bidder should demonstrate that it met the pre-selection criteria. That was reflected in model provision 6, paragraph 1, which stipulated that the contracting authority “shall engage in pre-selection proceedings”. That requirement was implicit in the system as originally conceived for the *Legislative Guide*, and it had been the understanding of the Working Group, when formulating model provision 6, that a pre-selection procedure would always be followed for the large-scale infrastructure projects envisaged by the draft.

41. Mr. WALLACE (United States of America) said the reference to “bid security” should be deleted from the penultimate sentence of footnote 7, since bid securities were now covered in model provision 12.

42. Mr. ESTRELLA FARIA (Secretariat) said that the matter would be rectified.

43. *Model provision 5 was approved and referred to the drafting group.*

### *Model provision 6. Purpose and procedure of pre-selection*

44. Mr. WALLACE (United States of America) drew attention to the suggestion, in the comments by his Government (A/CN.9/533/Add.6), that the words “or operated” should be inserted in paragraph 3 (a) following “built or renovated”.

45. Ms. VEYITIA PALOMINO (Mexico) said that the concept of operation seemed already to be covered in model provision 2, subparagraph (b) of which referred to “the rehabilitation, modernization, expansion or operation of existing infrastructure facilities”.

46. Mr. MITROVIĆ (Observer for Serbia and Montenegro) supported the United States proposal. However, as construction and renovation could take place at the same time, paragraph 3 (a) should read “a description of the infrastructure facility to be built, renovated or operated”. It was also important to distinguish clearly between a project and a facility.

47. Mr. WALLACE (United States of America) said that the suggestion by the representative of Mexico was well taken. Paragraph 3 (a) of model provision 6 could be amended to read simply “a description of the infrastructure project;”.

48. Mr. ESTRELLA FARIA (Secretariat) said that while the proposal would result in a more elegant text, it would necessitate some consequential redrafting of the remainder of the paragraph, for structural reasons.

49. Ms. PERALES VISCASILLAS (Spain) said that the drafting group could be asked to consider how best to incorporate the proposal by the representative of the United States in the existing wording of paragraph 3 (a).

50. Ms. SABO (Canada) also favoured retaining the term “facility”, given its structural function. However, the proposal by the representative of the United States to add the word “operated” made good sense, and the drafting group should be asked to come up with a syntactically acceptable formulation.

51. The CHAIRMAN said he took it that the suggestions by the representatives of Spain and Canada were acceptable.

52. *On that understanding, model provision 6 was referred to the drafting group.*

*Model provision 7. Pre-selection criteria*

53. *Model provision 7 was approved and referred to the drafting group.*

*Model provision 8. Participation of consortia*

54. Mr. WALLACE (United States of America) drew attention to the comments by his Government (A/CN.9/533/Add.6, paragraph 16). According to model provision 8, notwithstanding the exceptions to that rule envisaged in footnote 13, each member of a consortium, whether a company or an individual, could belong to only one consortium. However, if a consortium failed to win the desired concession, for financial or other reasons, a company which was already a member of that consortium might wish to join another consortium. His delegation sought assurances that the language of model provision 8 did not exclude that possibility.

55. Mr. ESTRELLA FARIA (Secretariat) said that the purpose of the model provision was to prevent an entity from participating in two consortia simultaneously. In the circumstances described by the representative of the United States, the consortium having failed to win the concession, there would then be nothing to prevent the entity in question from joining another consortium, since there would be no conflict of interest.

56. Mr. WALLACE (United States of America) suggested clarifying the point by adding, at the end of the first sentence of paragraph 2, the words “at the same time”.

57. Mr. MARKUS (Observer for Switzerland) supported that proposal. The rationale for prohibiting participation in more than one consortium was explained in footnote 13, but was not clear from the text itself.

58. *Model provision 8, as amended, was approved and referred to the drafting group.*

*Model provision 9. Decision on pre-selection;*

*Model provision 10. Single-stage and two-stage procedures for requesting proposals;*

*Model provision 11. Content of the request for proposals*

59. *Model provisions 9, 10 and 11 were approved and referred to the drafting group.*

*Model provision 12. Bid securities*

60. Mr. WALLACE (United States of America) said that model provision 12, on bid securities, was relatively novel, and was intended to prevent frivolous bids. However, in the circumstances envisaged, it was extremely unlikely that bids would be made

frivolously, because the projects in question were very large and the bidder would often have committed millions of dollars to the proposal. Under model provision 12, in certain circumstances the bid security would be forfeited. He had no objection to the circumstances envisaged in paragraph 2 (a), (d) and (e), but had doubts regarding those envisaged in subparagraphs (b) and (c). With regard to the former, the selected bidder might wish to withdraw because of a change in the situation, in spite of the sums already expended, in which case the second and third bidders would remain. As for failing to formulate a best and final offer (subparagraph (c)), the reason might be the pressure exercised by the contracting authority to proceed. Since the bidder would already have spent a great deal of money, there was bound to be a good reason for not finalizing the offer within the time limit. Was it really the Commission’s intention that the bid security should be forfeited if the negotiations did not proceed in those circumstances?

61. The CHAIRMAN said that the bid security was intended to ensure the validity of the bid until the expiry of the time limit. The rules applicable to each selection procedure would be laid down in the request for proposals. Therefore, the bid security would be forfeited only if the withdrawal took place within the period of its validity. A bidder who proceeded to the final negotiations would not be forced to accept anything going beyond the conditions laid down in the proposal, which were fully controlled by the bidder when the proposal was submitted. In the absence of the rule in paragraph 2 (c), the bidder would be able simply to walk away from the procedure.

62. Mr. MARRONE LOAIZA (Observer for Panama) stressed that the inclusion of a model provision on bid securities was of fundamental importance to the developing countries, for whom time was of the essence, particularly where private financing was involved. It was therefore essential to prevent the withdrawal of bidders for reasons which could not be justified.

63. Mr. WALLACE (United States of America) said he fully accepted that view and had no wish to impede the swift negotiation and conclusion of bids. He nevertheless had misgivings concerning the question of bid securities. He felt, for instance, that model provision 12, paragraph 2 (b), was somewhat ambiguous, if only because the word “final” could be construed to mean the final part of the final negotiations. Paragraph 2 (c) of that provision, however, seemed to pose a greater problem, as its language was inconsistent with model provision 17, paragraph 2, in which the word “terminate” was used for the first time, to imply that the contracting authority could place pressure on a bidder to formulate its best and final offer in circumstances which, moreover, although “apparent” to the contracting authority, might not be apparent to the bidder.

64. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) fully concurred with the views expressed by the two previous speakers. As currently drafted, model provision 12, paragraphs 2 (b) and (c), represented an invitation to enter into some form of final negotiation, as did model provision 17. That late stage of the bid process, however, should be devoted solely to clarifying all the final offers already made, particularly since any further negotiation would not be conducive to transparency. He would therefore prefer to replace those two paragraphs with a more general provision which simply stated that any failure to comply with the provisions of the request for proposals would result in forfeiture of the bid security.

65. The CHAIRMAN suggested that the difficulty highlighted by the representative of the United States was resolved by the words “best and final offer”, which indicated that the bidder could submit the offer of its choosing, and thus remained in full control of the situation.

66. Mr. WALLACE (United States of America) said it was clear from the first sentence of model provision 17, paragraph 2, that the bidder was not in full control of the situation. He tended to favour the proposal for a more general provision made by the observer for the Union Internationale des Avocats, as it was more likely to achieve the desired objective than the present version of model provision 12.
67. Mr. ESTRELLA FARIA (Secretariat) confirmed that the *Legislative Guide* contained no provision on bid securities, the assumption having been that such matters would be covered by the general procurement regime applicable in each individual country. In drafting the model legislative provisions, however, it had been felt that a specific provision on bid securities might be warranted under that type of selection procedure, particularly in the situations referred to in model provision 12, paragraphs 2 (b) and (c). The solutions reflected in those paragraphs, which had been proposed by experts and approved by the Working Group at its most recent session, assumed that a certain degree of negotiation would take place at that stage because it was inherent in the selection method recommended. Paragraph 2 (c) referred solely to cases where a bidder failed or refused to formulate a best and final offer. Although the wording of model provision 17, paragraph 2, might give the impression that a bidder could be pressurized into submitting a contract acceptable to the contracting authority, it was clear from model provision 12, paragraph 2 (c), that the bidder was under no obligation other than to submit a final proposal within the prescribed time limit. In other words, the cross-reference in that paragraph to model provision 17, paragraph 2, related only to the prescribed time limit and not to the content of the offer. Any best and final offer received within that time limit would not therefore lead to loss of the bid security.
68. The CHAIRMAN added that model provision 12 was simply intended to limit the situations leading to forfeiture of the bid security, which were dependent on rather more specific rules arising out of the request for proposals and the proposals themselves.
69. Mr. WALLACE (United States of America) said that, in the light of the discussions, his delegation was inclined to think that the current wording of model provision 12, paragraph 2 (b), was acceptable, particularly in view of the linkage made to model provision 17, paragraph 1. By contrast, the current wording of model provision 12, paragraph 2 (c), was unacceptable, as it could lead to a situation in which model provision 17, paragraph 2, was invoked to place pressure on the bidder to tailor the content of its offer to meet the requirements of the contracting authority. It should therefore be reworked in such a way as to ensure that model provision 17, paragraph 2, was not open to any such abuse.
70. The CHAIRMAN suggested that the problem could be overcome by rewording the phrase “a best and final offer”, in model provision 12, paragraph 2 (c), to read “its best and final offer”.
71. Mr. WALLACE (United States of America) said that the Chairman’s suggested amendment failed to make it sufficiently clear that a requirement to formulate a best and final offer did not imply a requirement to formulate an offer acceptable to the contracting authority.
72. Mr. FONT (France) said that model provisions 12 and 17 were clearly linked. He took it that the representative of the United States would subsequently discuss his Government’s comments on model provision 17 (A/CN.9/533/Add.6) in further detail. He failed to understand, however, why the relatively clear bid procedure established in that provision should be called into question. He also supported the secretariat’s view that model provision 12, paragraph 2 (c), ensured that the bidder was placed under no obligation as to the content of its bid.
73. Mr. WALLACE (United States of America) said that, having reflected further on the matter, his delegation favoured deleting the word “final” from model provision 12, paragraph 2 (b). It also endorsed the Chairman’s suggested alteration to the wording of paragraph 2 (c). As the observer for Panama had pointed out, bidders should not be given any opportunity to protract the process unduly, a practice that could escalate into extremely costly disputes. Model provision 12, paragraph 2 (c), should be redrafted to take into account the comments made by the Chairman and the secretariat.
74. Mr. ESTRELLA FARIA (Secretariat) said that the problem was rooted in the linkage made between model provision 12, paragraph 2 (c), and model provision 17, paragraph 2. He therefore suggested that the words “failure to formulate” in the former should be replaced by the words “failure to submit” in order to avoid any doubt that the essential issue was the time limit. He also suggested that the second sentence of model provision 17, paragraph 2, might be amended to read: “If the contracting authority finds the final offer unacceptable, it shall terminate the negotiations with the bidder concerned.”
75. Mr. WALLACE (United States of America) said that the suggestions made by the secretariat constituted acceptable solutions to the problem.
76. The CHAIRMAN said the suggestion appeared to be that the word “final” should be deleted from model provision 12, paragraph 2 (b), and that a reference to the time frame should be inserted in the second sentence of model provision 17, paragraph 2.
77. Mr. ESTRELLA FARIA (Secretariat) pointed out that the first sentence of model provision 17, paragraph 2, contained the words “reasonable time”, so that a reference to the time frame in the second sentence was superfluous. Any emphasis on the content of the offer could be avoided by amending the second sentence in accordance with his earlier suggestion.
78. Mr. FONT (France) asked whether model provision 12, paragraph 2 (b), would still fall within the scope of model provision 17, which was entitled “Final negotiations”, if the word “final” were to be deleted.
79. The CHAIRMAN pointed out that, in the title of model provision 17, the word “final” indicated the existence of a procedure which ended with negotiations. The deletion of the word from provision 12, paragraph 2 (b), posed no problem, as the provision contained a specific reference to model provision 17.
80. Mr. FONT (France), supported by Mr. WALLACE (United States of America), said that in his view the inclusion or deletion of the word “final” made no difference.
81. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) stressed that, in accordance with paragraph 83 of the *Legislative Guide*, final negotiations were extremely limited in scope and allowed no room for a final and best offer to be made at the end of the bid process. It was extremely dangerous to introduce an alternative procedure which was entirely inconsistent with paragraph 83 of the *Legislative Guide*, insofar as it could lead to a situation in which final offers were unlikely to be made during the actual bid process.
82. Mr. ESTRELLA FARIA (Secretariat) agreed that the procedure was a new refinement introduced since the approval of the *Legislative Guide*. It was clear from the structure of the recommended selection procedure, however, that the best and final offers in question related only to a fairly limited range of matters which were still open for negotiation at that late stage and

excluded any element which was in itself a criterion for evaluating the ranking of offers.

83. The CHAIRMAN said that, under the technical procedure outlined in model provision 12, situations in which a bidder subsequently withdrew from the proposal on the basis of which it had been selected for negotiation were already covered under paragraph 2 (a). The bid was a legally binding document which was backed by the bid security in order to prevent the bidder

from withdrawing. The provision should be read in conjunction with paragraph 84 of the *Legislative Guide*. In the absence of any further comments, he would take it that the Commission wished to refer model provision 12 to the drafting group for finalization.

84. *Model provision 12 was approved and referred to the drafting group.*

*The meeting rose at 12.30 p.m.*

### Summary record of the 759th meeting

Monday, 30 June 2003, at 2 p.m.

[A/CN.9/SR.759]

*Chairman:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 2.05 p.m.*

FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/521, A/CN.9/522 and Add.1 and 2, A/CN.9/533 and Add.1-7)

#### *Model provision 13. Clarifications and modifications*

1. Ms. VEYTIA PALOMINO (Mexico), drawing attention to her Government's comments in paragraph 4 of document A/CN.9/533/Add.4, said that, particularly where economic or technical proposals were concerned, the source of any request for clarification might be of material interest to other bidders. It was not clear from the text as it stood, however, that the contracting authority was under no obligation to inform the participants who the other bidders were, given that such information might affect the amount of the bid. She also wondered how the provision that a deletion, modification or addition should be communicated to the bidders could be reconciled with the confidentiality provided for in model provision 24. Lastly, it was not clear whether deletions, modifications and additions could be communicated orally or whether they had to be in writing.

2. The CHAIRMAN said that the requirement for communications to be in writing was implicit in the phrase "in the same manner" in the last sentence, since requests for proposals would necessarily be in writing.

3. Mr. ESTRELLA FARIA (Secretariat) said that, in formulating the model provision, the Commission and the Working Group had aimed to cover two aspects of the issue: specific procedures, including the selection of infrastructure concessionaires; and the general procurement regime in the country concerned, to which reference was made in model provision 5 and the footnote thereto. The basis for the model provision was article 9, paragraph 1, of the UNCITRAL Model Law on Procurement of Goods, Construction and Services, in which the requirement for communications to be in writing was implicit. The text could, however, be made more explicit. With regard to the question of confidentiality as to the source of requests, the contractual authority was under no obligation to disclose the origin of the request, as was clear from article 28, paragraph 1, of the Model Law on Procurement.

4. Ms. VEYTIA PALOMINO (Mexico) said that her principal concern related to the identity of the bidders. In her experience, confidentiality was crucial. If bidders knew who their competi-

tors were, they could adjust their bids accordingly. She therefore proposed that the phrase "without being obliged to disclose the identities of the other bidders" should be added at the end of the model provision.

5. Mr. WALLACE (United States of America) said that the procedure suggested by the representative of Mexico was both unusual and unwise. The essence of the system of competitive bidding was that sealed bids were opened in the presence of the other bidders, whose identity would in any case already be known if a pre-bid conference had been held, as recommended in the Model Law. The possibility of Governments dealing secretly with faceless bidders should be avoided at all costs. A clear distinction should be drawn between the identity of the bidders and the content of communications.

6. Mr. MARRONE LOAIZA (Observer for Panama) concurred. The Mexican system clearly differed from most others. In his country, the identity of bidders was made public in the interests of transparency, thereby avoiding corruption.

7. Ms. VEYTIA PALOMINO (Mexico) said that, even in a system under which the identity of the bidders was known, it was desirable to avoid disclosing the originator of a request for clarification, since bidders, knowing who their competitors were, would be reluctant to show their own hands.

8. The CHAIRMAN said that the model provision did not suggest that the identity of the originator of a request for clarification should be disclosed, only the clarification itself. It thus seemed to him that the text could safely remain as it stood.

9. *Model provision 13 was approved and referred to the drafting group.*

#### *Model provision 14. Evaluation criteria*

10. Mr. YEPES ALZATE (Colombia) asked for clarification of the term "present value", which appeared in paragraphs 2 (a) and (b) of the model provision.

11. The CHAIRMAN said that the term referred to costs that would arise at a future date, which were calculated on the basis of present value.

12. *Model provision 14 was approved and referred to the drafting group.*

*Model provision 15. Comparison and evaluation of proposals*

13. *Model provision 15 was approved and referred to the drafting group.*

*Model provision 16. Further demonstration of fulfilment of qualification criteria*

14. Ms. VEYTIA PALOMINO (Mexico) said that the text of the model provision should be tightened up so as to cover situations in which one member of a consortium failed to demonstrate its qualifications or to fulfil its obligations. For instance, one member of the consortium might be using a subcontractor which defaulted.

15. Mr. MARRONE LOAIZA (Observer for Panama) said that the model provision should also set a limit on the number of times that qualifications could be requested. Otherwise, the procedure was open to abuse: a contracting authority could place obstacles in the path of a consortium whose membership had changed by constantly asking it to demonstrate again its qualifications.

16. The CHAIRMAN said that the concern raised by the observer for Panama was covered by the phrase “in accordance with the same criteria used for pre-selection”.

17. Mr. ESTRELLA FARIA (Secretariat) said that the phrase cited by the Chairman had been included in the text in response to the very issue raised by the representative of Mexico: such procedures were often protracted and it might become necessary to require bidders to demonstrate again their qualifications.

18. Mr. MARRONE LOAIZA (Observer for Panama) said that the secretariat’s point was self-evident, but that a limit should be set to the number of times an authority might request qualifications. The number should be limited to three.

19. The CHAIRMAN said that the issue was not how many times qualifications were requested but whether the criteria remained consistent. It would not be in the contracting authority’s interest to protract the procedure indefinitely.

20. Mr. WALLACE (United States of America) said that the concern raised by the observer for Panama related to abuse of process and redress could therefore be sought under the laws of the country concerned. As for the point raised by the representative of Mexico, the conditions governing consortia were clearly set out in model provision 8, paragraph 1. It followed that the reference in model provision 16 must be both to the consortium and to its individual members.

21. Ms. VEYTIA PALOMINO (Mexico) said she remained concerned about the situation—which had often occurred—in which one of the partners in a consortium, having already met the qualification criteria, delegated responsibility to another partner, which had not met those criteria.

22. The CHAIRMAN said that the phrase “any bidder”, in the first sentence, could be replaced by the phrase “any member of a consortium”; but that it should be borne in mind that the bidder itself might have met the criteria, even if a subcontractor, for example, had failed. He personally would prefer to leave the text unchanged, or with only a further definition of a bidder.

23. Mr. LUKAS (Austria) concurred. Model provision 2 (f) contained a clear definition of a bidder. Even if one member of the consortium failed, the group as a whole could meet the criteria.

24. Mr. WALLACE (United States of America) said that the representative of Mexico was rightly concerned about a different

situation: one in which the partners in a consortium changed. The problem was, however, covered by model provisions 2 (f), 8, paragraph 1, and 16; or, if it was not, only relatively minor drafting changes would be required.

25. The CHAIRMAN said he took it that the text could remain unchanged.

26. *Model provision 16 was approved and referred to the drafting group.*

*Model provision 17. Final negotiations*

27. Mr. WALLACE (United States of America) proposed two amendments to paragraph 1: in the first sentence, the word “final” should be deleted before “negotiations”, while at the beginning of the second sentence the same word should be replaced by “these”.

28. Mr. FONT (France) pointed out that the word “final” appeared in the titles of model provision 17 and of legislative recommendation no. 26. He could see no reason for deleting it.

29. Mr. JIANG JIE (China), also referring to paragraph 1, proposed that the word “final” should be deleted from the phrase “final request for proposals”.

30. Mr. WALLACE (United States of America) said that the reason for the use of the word “final” in the phrase referred to by the representative of China was that there could be a two-stage procedure for requesting proposals.

31. Ms. SABO (Canada) said it would be wiser to retain the word, since, in model provision 13 for example, the text contemplated modifications to initial requests for proposals.

32. Mr. JIANG JIE (China) said that he took the point, but doubted whether, in practice, the provision would often apply, as it was not common for a proposal to be amended. In any case, an amended proposal was still a proposal.

33. Mr. BOUWHUIS (Observer for Australia) asked whether the penultimate sentence of paragraph 2 meant that a contracting authority was required to negotiate with all of the remaining bidders.

34. Mr. ESTRELLA FARIA (Secretariat) said that the Working Group’s intention had been that the contracting authority could choose how many bidders on its list it wished to negotiate with. However, the provision prevented the contracting authority from reverting to a bidder with whom negotiations had ended.

35. Mr. WALLACE (United States of America) expressed doubts concerning the interpretation put on the provision by the secretariat. A contracting authority negotiated with all the bidders that had reached the threshold, in order of their ranking. As for whether a contracting authority could revert to an earlier bidder, such a practice was unlawful in his country. On the other hand, it would seem not unreasonable to adopt that approach if, for example, the fourth-ranked bidder made a much less attractive proposal at a price that was not significantly lower. On balance, however, he felt that the practice should be avoided as being an abuse of the negotiation process.

36. Ms. VEYTIA PALOMINO (Mexico) said that there were circumstances in which a contracting authority might wish to revert to a bidder that had previously been disqualified. The possibility of reverting to a previous bidder should be left open. In some countries domestic legislation obliged the contracting authority to follow a particular procedure, which might involve introducing new elements into the contract at a later stage.

37. Mr. ESTRELLA FARIA (Secretariat) said that the Commission had felt some disquiet at the idea that negotiations should be conducted at all at that stage: the situation was different from traditional tendering. The Commission's thinking was, however, constantly evolving. The original idea, derived from the Model Law on Procurement, had been to limit the scope for negotiations: out of the three approaches covered by the Model Law in articles 42-44, namely, selection without negotiation, simultaneous negotiations or consecutive negotiations, the Commission had preferred the last as being the most transparent. The same approach had been adopted in chapter III, paragraphs 83 and 84, of the *Legislative Guide*. If, however, the Commission wished to move towards the simultaneous-negotiations approach, the secretariat would need clear instructions as to the changes to be made to any future edition of the *Legislative Guide*.

38. Mr. BOUWHUIS (Observer for Australia) said he would welcome a clarification in the text to show that the contracting authority need not work its way through an entire list of bidders. He therefore proposed that some such wording as "which it may do without having to negotiate with all the remaining bidders" should be added at the end of the penultimate sentence of paragraph 2.

39. Mr. FONT (France) expressed his gratitude to the secretariat for reminding the Commission of the genesis of the model provision and the reason why the consecutive-negotiations approach had been adopted. His delegation would be reluctant to introduce references to simultaneous negotiations, which might confuse the picture.

40. Mr. MEENA (India) proposed that the words "best and", before the words "final offer" at the end of the first sentence of paragraph 2, should be deleted. Whether an offer was the best was irrelevant; what counted was that it was final.

41. Mr. WALLACE (United States of America) said that the expression "best and final offer" was a term of art. Furthermore, the Commission should bear in mind the provisions of model provision 18 (f), which contemplated failures under model provision 17 in a way that might be relevant to some of the issues currently under discussion. He agreed with the representative of France that the Commission should stand by its original view on the question of consecutive negotiations. Lastly, regarding the suggestion by the observer for Australia, the way the system worked was that all bidders that had reached the threshold were entitled to enter into negotiations. If a Government wished to limit the number of bidders with which it had to negotiate, it should raise the threshold from the outset.

42. Mr. YEPES ALZATE (Colombia) said that it could be seen from document A/CN.9/522/Add.2 that the text of model provision 17, paragraph 1, omitted the words "on the basis of the evaluation criteria set forth in the request for proposals", to be found in the corresponding legislative recommendation (no. 26).

43. Mr. ESTRELLA FARIA (Secretariat) said that the omission was the result of negligence on the part of the secretariat.

44. The CHAIRMAN said he took it that the phrase "on the basis of the evaluation criteria" was to be inserted in paragraph 1, thereby ensuring consistency with model provision 15, paragraph 1, and that the Commission wished to reject the other substantive amendments proposed.

45. Thus amended, model provision 17 was approved and referred to the drafting group.

*The meeting was suspended at 3.40 p.m. and resumed at 4.00 p.m.*

*Model provision 18. Circumstances authorizing award without competitive procedures*

46. Mr. MEENA (India) said that the model provision should be seen in the light of a State's constitutional framework. Thus, in India, the constitutional right to equality also extended to government contracts. The phrase "subject to constitutional law" should therefore be included somewhere in the model provision.

47. The CHAIRMAN said that the question of constitutionality was of great importance and was addressed in the *Legislative Guide* and legislative recommendations. Obviously, the model provisions must be in line with the constitution, but constitutional provisions differed so widely from country to country that it was impossible to be specific. Moreover, it would be a mistake to attach a proviso concerning constitutional law to one model provision alone.

48. *Model provision 18 was approved and referred to the drafting group.*

*Model provision 19. Procedures for negotiation of a concession contract;*

*Model provision 20. Admissibility of unsolicited proposals;*

*Model provision 21. Procedures for determining the admissibility of unsolicited proposals*

49. *Model provisions 19, 20 and 21 were approved and referred to the drafting group.*

*Model provision 22. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights*

50. Mr. BOUWHUIS (Observer for Australia) said that the situation envisaged in paragraph 1 (b) seemed already to be covered by paragraph 1 (a).

51. Mr. ESTRELLA FARIA (Secretariat) said that there might be situations in which a truly unique or new concept or technology was not the subject of exclusive rights owned or possessed by the proponent.

52. *Model provision 22 was approved and referred to the drafting group.*

*Model provision 23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights*

53. *Model provision 23 was approved and referred to the drafting group.*

*Model provision 24. Confidentiality of negotiations*

54. Mr. JACOBSON (United States of America) said that the model provision was both too broad and too restrictive. On the one hand, the third sentence forbade the disclosure by any party to the negotiations of information "that it has received", while making no reference to information that it had provided. According to that formulation, information on the bidder's price, for example, could be disclosed. On the other hand, the list of those to whom information could be disclosed was too restrictive: the list could also include co-bidders in the consortium, affiliates of the bidder or government agencies. Rather than attempting to compile an exhaustive list, it would be preferable to insert the wording: "with exceptions as permitted in the request for proposals or as already negotiated with the contracting authority".

55. Mr. ESTRELLA FARIA (Secretariat) said that the representative of the United States appeared to imply that information disclosed voluntarily should be confidential. However, no diffi-



culty had ever arisen in that connection. As for the proposed amendment, the representative's concern was already covered by the phrase "without the consent of the other party".

56. Mr. JACOBSON (United States of America) said that, even if his proposal was unacceptable, he would prefer to see the list replaced by some indication that there could be additions to the list of persons exempt from the prohibition on disclosure.

57. Ms. SABO (Canada) said that her delegation found the list acceptable, since it included the essential actors. Consent could in any case be obtained where necessary.

58. Mr. ESTRELLA FARIA (Secretariat) said that the source of the *Legislative Guide*, namely, the Model Law on Procurement, had clearly been intended to prevent the disclosure of trade secrets for other purposes but contained no rule preventing collusion. That was a different matter altogether, one that should be dealt with by the general procurement regime of the enacting State, and that had not been discussed by the Commission in the context of disclosure.

59. The CHAIRMAN said that the phrase "unless required by law" reduced the scope for flexibility, since the model provision would itself be a part of the law. He suggested that the phrase "or by a court order" should be replaced by the phrase ", by a court order or permitted by the request for proposals".

60. Mr. DEWAST (Observer for the European Lawyers Union) said that the distinction drawn between information received and information provided was artificial, since all the information received by one party must have been provided by the other party and was automatically confidential.

61. Mr. MURREY (United Kingdom) said that, as it stood, the text could imply that a bidder was not entitled to disclose even information that it had itself communicated. If that was the intended meaning, the words "that it has received" should be replaced by the phrase "known to it" or "in its possession". If not, the text could be left as it stood.

62. Mr. SCHÖFISCH (Germany) said that the core of the model provision was the second sentence, which provided for the confidentiality of information, whether received or provided. The third sentence merely specified who was exempt from that requirement. It went without saying that a provider of information could disclose it to whomsoever it wished.

63. In response to a question by the CHAIRMAN, Mr. ESTRELLA FARIA (Secretariat) said that specific technologies envisaged by the contracting authorities, for example, could not be disclosed; whereas it would be unreasonable to promote bidders from disclosing price information to their lenders. If the pro-

hibition on disclosure were extended to all information provided, negotiation would become impossible.

64. Mr. VELÁSQUEZ ARGAÑA (Paraguay) suggested that the provision should specifically cover both information received and that provided, given that both types of information might be required by the courts.

65. The CHAIRMAN said that the thinking underlying the suggestion that information provided should be included in the prohibition on disclosure was that collusion between bidders should be prevented. That eventuality, however, was covered by other legislation, such as anti-trust laws and European Union competition rules.

66. Mr. SCHÖFISCH (Germany) said that, whereas the second sentence was a blanket prohibition on disclosure of information received and provided, the third restricted the prohibition to information received. He proposed that the third sentence should be divided into two, the first of which would deal with information received and provided, while the second could provide for exceptions to the prohibition on disclosure of information received.

67. Ms. PERALES VISCASILLAS (Spain) said it could be inferred from paragraph 118 of chapter III of the *Legislative Guide* that the intention of model provision 24 was to protect the bidder. Nothing, however, prevented that bidder from disclosing information it had itself provided, for instance, in the context of other selection proceedings.

68. Mr. WALLACE (United States of America) suggested that the model provision should revert to the simpler language of recommendation 36, with an additional sentence authorizing any bidder to disclose information provided by itself in the course of those negotiations.

69. The CHAIRMAN said that the confidentiality, not only of negotiations, but of all information, needed to be protected throughout the duration of the procedure. It was important to ensure confidentiality of technical information provided by bidders, yet the use of such information could not be restricted, since they might need it in other projects. As for the preferability of recommendation 36, the intention of the model provision had been to take a step beyond that recommendation. Some additions should, however, be made, including a provision on the time limit for confidentiality to be observed. He suggested that the Commission should defer a decision in order to allow time for further reflection.

70. *It was so decided.*

*The meeting rose at 5 p.m.*

## Summary record of the 760th meeting

Tuesday, 1 July 2003, at 9.30 a.m.

[A/CN.9/SR.760]

Chairman: Mr. Wiwen-Nilsson. (Sweden)

The meeting was called to order at 9.40 a.m.

FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued) (A/CN.9/521, A/CN.9/522 and Add.1 and 2, A/CN.9/533 and Add.1-7)

*Model provision 24. Confidentiality of negotiations (continued)*

1. The CHAIRMAN pointed out that confidentiality was dealt with in chapter III of the *Legislative Guide*, not only in paragraph 118, but also in paragraphs 125 and 126. Paragraph 125 dealt with the separate issue of confidential trade information of suppliers and contractors, and both aspects should be considered.

2. Mr. JACOBSON (United States of America) said that, in the light of further consultations, his delegation proposed the deletion of the first sentence, which read, "The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders". That deletion could be offset by the insertion of language dealing with the protection of trade secrets and commercially sensitive information in model provision 28. He further proposed the insertion in the third sentence of the phrase "or permitted by the terms of the request for proposals", after the words "court order"; and the deletion of the phrases "apart from its agents, subcontractors, lenders, advisers or consultants," and "that it has received" from that sentence.

3. Ms. SABO (Canada) said that the proposed amendment appeared essentially to reduce what was stated as a rule in model provision 24 to a term to be negotiated in the concession contract. Was she right in thinking that the United States proposal would leave the exceptions currently enumerated in the third sentence to be negotiated by the parties to the contract?

4. Mr. JACOBSON (United States of America) said the exceptions would be encompassed by the last phrase, namely, "without the consent of the other party".

5. Mr. SCHÖFISCH (Germany) expressed support for the proposal by the representative of the United States.

6. Ms. PERALES VISCASILLAS (Spain) said her delegation's only reservations regarding the United States proposal concerned the deletion of the first sentence. To move it to model provision 28 would transform the contracting authority's legal obligation not to disclose confidential information into a merely contractual obligation. She therefore proposed retaining the sentence, as currently worded, at the beginning of model provision 24.

7. The CHAIRMAN supported the previous speaker's view, on the grounds that the issue of confidentiality needed to be addressed before the contract was entered into, whereas model provision 28 referred to the situation that obtained once the contract had taken effect.

8. Ms. SABO (Canada), supporting the remarks of the two previous speakers, said that it might be in the bidder's interest for there to be a legislated obligation on the part of the State to ensure confidentiality.

9. Mr. JACOBSON (United States of America) said the main purpose of his delegation's proposal had been to ensure that the paragraph dealt exclusively with negotiations, as indicated by the heading. However, he would not press the point.

10. The CHAIRMAN suggested that deletion of the words "of negotiations" from the heading might solve that problem, since the substance should determine the heading, rather than the other way round. The text would thus read:

"The contracting authority shall treat proposals in such a manner as to avoid the disclosure of their content to competing bidders. Any discussion, communications and negotiations between the contracting authority and a bidder pursuant to [model provisions 10, paras. 3, 17, 18, 19 or 23, paras. 3 and 4] shall be confidential. Unless required by law or by a court order, or permitted by the terms of the request for proposals, no party to the negotiations shall disclose to any other person any technical, price or other information in relation to discussions, communications and negotiations pursuant to the aforementioned provisions without the consent of the other party."

11. Ms. VEYtia PALOMINO (Mexico) said she supported the proposed amendments, since they reflected the spirit of the legislative recommendations and the *Legislative Guide*. She pointed out that the International Institute for the Unification of Private Law (UNIDROIT), in its Principles of International Commercial Contracts, had determined that confidentiality applied only to matters deemed confidential by the bidder, leaving the contracting authority at liberty to disclose other information to third persons.

12. The CHAIRMAN said he took it that there was agreement on the proposed amendments to the text and heading of model provision 24.

13. *Model provision 24, as amended, was approved and referred to the drafting group.*

*Model provision 25. Notice of contract award*

14. *Model provision 25 was approved and referred to the drafting group.*

*Model provision 26. Record of selection and award proceedings*

15. Mr. DE CAZALET (Observer for the Union Internationale des Avocats–UIA) proposed the addition in the first line, in square brackets and italics, after the words "contracting authority", of the words "or any specified body, organization, ministerial department or agency", which would enable records also to be kept in a centralized location, thus facilitating other contracting authorities' access to useful material.

16. Mr. BOUWHUIS (Observer for Australia) said that the term "contracting authority" seemed to be sufficiently broad to preclude the need to mention other specified bodies.

17. Mr. WALLACE (United States of America) said that since the term “contracting authority” had been defined in model provision 2 and the term “public authorities” appeared in model provision 3, the words “the contracting authority or other public authority” should be used, in the interest of consistency.

18. Mr. ESTRELLA FARIA (Secretariat) said that the UIA proposal, while not incompatible with, was slightly different from, the current content of the provision, which dealt not with registration, but with the need for the entity conducting the procedure to keep records as the procedure progressed. The UIA proposal introduced a totally new feature, namely, the transfer of information to another entity and its registration elsewhere. The secretariat’s suggestion was that if the Working Group wished to adopt the proposal, it should do so in italics and in square brackets.

19. Mr. WALLACE (United States of America) said he saw no reason why provision should not be made for the possibility of keeping a second set of records.

20. Ms. SABO (Canada) said that the objective was to give clear guidance to Governments wishing to adopt legislation in that area. The subject under discussion was the keeping of records arising in the course of the process; the contracting authority was the logical entity to do so; and she saw no need to include an entire array of new possibilities. The point was a minor one, and the existing text should be retained.

21. Mr. WALLACE (United States of America) agreed.

22. Mr. DE CAZALET (Observer for the Union Internationale des Avocats–UIA) said that the point was one of real substance. In his organization’s experience, ministries often refused to disclose a concession agreement directly, even to World Bank missions. If proceedings for breach of contract were to be instituted, it was necessary to know what exactly had been signed. While in some countries such agreements were published in the *Official Gazette*, in others their whereabouts were unknown.

23. The CHAIRMAN said that while the point was a valid one, it need not be settled at that juncture, especially since such matters were covered by the last sentence of the Foreword to the *Legislative Guide*. His understanding was that delegations preferred to retain the model provision as it stood.

24. *Model provision 26 was approved without amendment and referred to the drafting group.*

*Model provision 27. Review procedures*

25. *Model provision 27 was approved and referred to the drafting group.*

### III. Construction and operation of infrastructure

*Model provision 28. Contents of the concession contract*

26. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said it was unclear as to the legal difference between the French terms “contrat de concession” and “accord de concession”. However, there was a marked difference between a concession contract provided for by law and a simple agreement drawn up by the parties in the light of their needs. Accordingly, in the interest of clarity, chapter III should begin with a model provision stating that execution of the infrastructure project was governed by “a concession contract or other agreement entered into by the parties”, so as to provide for both categories. The term “infrastructure project” was in any case not a legal concept, but one taken from the world of economics and industry: the Commission, being a juridical body, should find an appropriate juridical term.

Furthermore, the title of chapter III, “Construction and operation of infrastructure”, did not truly reflect its content, certain aspects of which could equally well be addressed in chapter IV.

27. The CHAIRMAN said the remarks of the observer for Serbia and Montenegro touched upon a fundamental issue which the Commission had as yet been unable to resolve, owing to the differing approaches of countries to projects of that type. The term originally chosen for the *Legislative Guide* had been “project agreement”, to be understood in the light of national constitutional and legal requirements. In the English version of the consolidated final draft, the term “concession contract” was used consistently. The drafting group should be asked to look for any inconsistencies in the other language versions.

28. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said the French version used both the term “contrat” and the term “accord”. First, with regard to the contents of the concession contract, its essential features included the construction of new works and the renovation and modernization of existing works. Model provision 28 should also refer to the purpose for which the concession was operated and the conditions applying to its operation. Secondly, the words “and the time limit for performance” should be inserted at the end of subparagraph (a). For the contracting authority, the period of time within which the works or services would begin to yield benefits to consumers was a matter of great importance.

29. Thirdly, he noted that the list of matters to be provided for in the concession contract did not include payment to the contracting authority, although it was standard practice for the concessionaire to make some payment to the contracting authority, whether as a fixed or a variable amount, calculated in the latter case as a percentage of the profit or revenue earned from the works. For that purpose, a report on the financial results of the project must be available, and provision of such a report should be made obligatory. Lastly, subparagraph (q) threatened to open a Pandora’s box, as there was endless scope for dispute in the calculation of compensation due by way of loss of profit if a contract was cancelled or failed to materialize.

30. The CHAIRMAN said the list in model provision 28 was not intended to be exhaustive. Subsequent model provisions dealt with most of the points raised by the observer for Serbia and Montenegro; for example, the question of income from the project was dealt with in model provision 34, termination of the contract in model provisions 43 to 46, and the consequences of termination in model provision 47. The text had to be read as a whole.

31. Mr. WALLACE (United States of America) said the observer for Serbia and Montenegro had put his finger on a real problem, and had reacted to the text in much the same manner as had the Association of the Bar of the City of New York. It was important to consider how an intelligent layman would read the text. It was of course too late to revert to a discussion of the terms of the contract. However, the intention had been to align the title of chapter III with that of chapter IV of the *Legislative Guide*, and he assumed that would be done in due course. As for the contents of the contract, it was clear from the *chapeau* of model provision 28 that the checklist in subparagraphs (a) to (r) of matters to be covered was non-exhaustive. The points not covered, to some of which attention had been drawn in document A/CN.9/533/Add.6, could usefully be provided for by adding a subparagraph (s) on confidentiality; a subparagraph (t) referring to other matters covered in model provisions 34–51; and either a subparagraph (u) covering all other matters, such as undisclosed infrastructure facility defects and applicable environmental conditions, or else a note explaining that the list was illustrative rather than exhaustive.

32. Ms. SABO (Canada) asked for confirmation that the question of whether the list should be exhaustive or merely illustrative had been thoroughly discussed in the Working Group.

33. The CHAIRMAN said it was his recollection that it had been agreed not to draw up an exhaustive list of the contents of the concession contract.

34. Mr. ESTRELLA FARIA (Secretariat) referred to paragraphs 144 and 145 of the report of the Working Group (A/CN.9/521) from which it could be seen that the Working Group had favoured an indicative rather than an exhaustive list of matters for possible inclusion in the concession contract.

*The meeting was suspended at 10.45 a.m. and resumed at 11.10 a.m.*

35. Mr. FONT (France) suggested that to clarify the nature of the list, a footnote could be inserted stating that it was indicative only and might include other important elements such as confidentiality (model provision 24) and operation of infrastructure (model provision 38).

36. Ms. YUAN JIE (China) suggested that the contents of the concession contract could be dealt with in chapter II.

37. Mr. WALLACE (United States of America) said he could accept the inclusion of a footnote to model provision 28, as suggested by the representative of France. The footnote should possibly refer to the subsequent model provisions. It might also be desirable to include a separate paragraph on confidentiality. On an editorial matter, a reference to model provision 29 should be included in subparagraph (r).

38. Mr. SCHÖFISCH (Germany) said it was already clear from the wording of the *chapeau* to model provision 28 that the list of matters to be covered in the concession contract was not exhaustive. He was not in favour of further lengthening what was already an over-long list, because the length tended to create the impression that it was in fact exhaustive. The problem could be solved by inserting a brief footnote, as already suggested.

39. Mr. WALLACE (United States of America) agreed with the representative of Germany. The footnote need only refer to subsequent paragraphs, without citing them by number.

40. Mr. FONT (France) suggested that the footnote might read: "The list included in this provision is not exhaustive. Other model provisions not mentioned in the list may also be included".

41. Ms. SABO (Canada) said it was important to strike the right balance by singling out the essential elements of the concession contract without creating an exhaustive list. Of the items which seemed to require specific mention, confidentiality seemed to be a core requirement. It should perhaps be included in the list in model provision 28, while reducing the overall number of items enumerated in the list.

42. Ms. YUAN JIE (China) suggested that the problem could be concisely solved by using the words "including, but not limited to" in the *chapeau*, thus obviating the need for any footnote.

43. The CHAIRMAN asked for further views regarding the substantive content of the footnote favoured by some as a means of addressing the fact that the list in model provision 28 was not exhaustive.

44. Mr. LEBEDEV (Russian Federation) suggested an alternative approach, namely encompassing the entire content of the current model provision 28 within a first paragraph and adding a

second paragraph worded to the effect that the matters listed in the first paragraph were not exhaustive and that parties could therefore agree on other matters, including those referred to in subsequent model provisions. In his view, footnotes were not an ideal way of dealing with legislative matters, which should instead be addressed in the body of the text. He also agreed that the model provision could be simplified by retaining only the most important matters currently listed, thus rendering the text more amenable to inclusion in national legislation. His comments, however, were applicable only if further work was to be done on the text.

45. The CHAIRMAN said that care should be taken not to reopen a discussion regarding the content of the list, which represented a compromise of views already expressed during the course of lengthy debate.

46. Mr. LEBEDEV (Russian Federation) reiterated that his comments were applicable only in the event that work on the text was to continue. Nevertheless, he maintained his view that the list was too long for the purposes of a legislative text.

47. The CHAIRMAN asked for views as to whether it was preferable to use a footnote or a second paragraph to indicate that the list of matters was not exhaustive.

48. Mr. MEENA (India) said he did not favour the option of a footnote, and instead suggested that the *chapeau* should end with the phrase "which may also include matters such as:". As the word "include" was universally interpreted to mean that something was not exhaustive, his suggested solution would dispel any doubts as to whether or not the list was exhaustive.

49. The CHAIRMAN asked whether there was agreement that, in addition to indicating the non-exhaustive nature of the list, a further objective was to indicate the presence of other elements by including a reference to subsequent model provisions and other matters.

50. Mr. LEBEDEV (Russian Federation) endorsed the suggestion made by the representative of India, which would make it even clearer than it already was that the list was not exhaustive. His earlier suggestion of a second paragraph had been intended to indicate that matters addressed in subsequent model provisions might also be provided for in the concession contract.

51. Mr. WALLACE (United States of America) subscribed to the views expressed by the representative of the Russian Federation, which closely mirrored his own delegation's initial proposal. Nevertheless, the option of a footnote was, in his view, also acceptable for the reason that the provision was not legislation but a model intended to provide explanatory material for the legislature. It was also important to bear in mind the educational purpose of that material, namely, to offer guidance to inexperienced legislators. In that regard, the information suggested by the representative of the Russian Federation was vital and could easily be incorporated in a footnote.

52. The CHAIRMAN said that in that case the legislature would be required to add to any non-exhaustive list mentioned in a footnote. The model provision should indicate, not that the legislature was required to produce an exhaustive list, but that the contracting authority had the freedom to make additions to the list. The educational aspect was beside the point.

53. Mr. WALLACE (United States of America) said that subsequent model provisions, such as model provision 31, were clearly not indicative, but prescriptive.

54. The CHAIRMAN agreed that they were prescriptive in regard to the content of the concession contract. Nevertheless, the

original aim of model provision 28 had been to provide a non-exhaustive list of issues important for the purposes of the concession contract. While it was essential to provide for other matters specifically mentioned in subsequent model provisions, scope should also be given for the addition of any further matters not covered by any of the model provisions. Unless the footnote made it sufficiently clear that the contracting authority was not bound by the list, being free to add to it, the legislator would gain the wrong impression.

55. Mr. SCHÖFISCH (Germany) endorsed the Chairman's comments and those of the United States representative. Although the legislature should ideally write the model provisions into law in their entirety, it also retained the freedom to depart from that model. In his view, the addition of either a footnote or a second paragraph would therefore satisfactorily resolve the issue. If pressed to choose, however, he would opt for the addition of a second paragraph, although the further addition of a footnote indicating that the national legislature was free to alter the list would offer the perfect solution.

56. The CHAIRMAN suggested that the matter could be left to the drafting group.

57. Mr. LUKAS (Austria) fully concurred with the German delegation's view but disagreed that the matter should be left to the drafting group. The Commission should itself decide whether the material should appear in a footnote or in a second paragraph, his own preference being for the latter.

58. Ms. PERALES VISCASILLAS (Spain) agreed that the matter should not be left to the drafting group. In her view, the wording of the *chapeau* of model provision 28 was already perfectly clear and required no amendment or second paragraph. She would, however, be amenable to the inclusion of a footnote, if necessary.

59. Mr. MITROVIĆ (Observer for Serbia and Montenegro) suggested that the words "as well as other matters, including those referred to in this document" should be inserted at the end of model provision 28, after subparagraph (r).

60. The CHAIRMAN said that various suggestions had been made as to how to incorporate a reference to subsequent provisions and other matters: it could be included in a footnote; a new subparagraph could be added; or the phrase proposed by the observer for Serbia and Montenegro could be added at the end of the provision.

61. Mr. VALLADÃO (Brazil) said that his delegation preferred to keep the existing version of model provision 28. There was no need to expand the *chapeau*, because everyone agreed that the expression "such as" indicated that the list of items was not exhaustive. Furthermore, a footnote might mislead the reader.

62. The CHAIRMAN, noting that there was general agreement on the substantive point that the expression "such as" indicated that the list was not exhaustive and also on the point that any footnote would not form part of a law but would serve merely to communicate information to the legislator, wondered whether it was really necessary to indicate in model provision 28 that other provisions also dealt with matters that should be included in the concession contract. The model provisions as a whole were sufficiently prescriptive.

63. Mr. MURREY (United Kingdom), expressing agreement with the comments made by the representatives of Brazil and Canada, said it was inevitable that the inclusion of a list of examples would give rise to discussions about which examples should be mentioned and which omitted. However, the wording of the

provision made it very clear that the list was not exhaustive. While the existing structure of the provision should be maintained, he would not object to the addition of one or two specific items, such as references to confidentiality and subsequent model provisions, if the Commission as a whole so wished.

64. Mr. ESTRELLA FARIA (Secretariat) said that, when the *Legislative Guide* had been prepared, there had initially been no suggestion that the law should contain a list of items such as that contained in model provision 28. The *Guide* had indicated that it was advisable for the legislator not to make the law too specific, because questions of detail could more easily be dealt with in individual project agreements. A general reference to the fact that the law of some countries might include such a list of items had been added to the *Guide* only at a relatively late stage in the preparation of the *Guide*. The Commission had then decided that it would be useful to have a set of model provisions, and the Working Group had drafted the provisions on the basis of the legislative recommendations. Document A/CN.9/522 contained a lengthy section on model provision 28, explaining which part of the *Guide* had provided the basis for each part of the provision.

65. Although the Working Group had expressed general dissatisfaction that the list of items in model provision 28 was so long, every discussion on the matter had actually resulted in still more items being added to the list in order to cover areas that seemed to be neglected. It would be difficult to delete any items at that late juncture, as proposed by the representative of Canada, because very few of them were mentioned elsewhere in the model provisions.

66. Mr. RWANGAMPUHWE (Rwanda) agreed with the representative of Brazil that the provision could be left in its existing form, although perhaps the phrase "provide for" could be amended to read "provide, inter alia, for". That would make it even clearer that the parties could add other items to the list if they wished.

67. Mr. WALLACE (United States of America) said that the length of the discussion showed that the model provision, as currently drafted, was far from perfect. Nevertheless, in the interests of reaching a conclusion relatively quickly, his delegation could agree to approve the provision in its existing form. However, while the amendments proposed by his delegation with regard to confidentiality and matters referred to elsewhere in the model provisions were minimal and would improve the provision somewhat, it would withdraw its proposals for specific examples such as the environment.

68. The reason for referring in model provision 28 to subsequent provisions was that those provisions covered crucial aspects of the concession contract, and the user might otherwise wonder why only some of those aspects were mentioned in model provision 28. However, he acknowledged that any legislator who read further than model provision 28 would realize that there were other issues to be taken into consideration.

69. The CHAIRMAN said that he had heard no objection to including a reference to confidentiality. However, it seemed unnecessary to add a reference to other matters, since to do so would merely be to repeat what was stated in the *chapeau*.

70. Mr. WALLACE (United States of America) said that, while it might not be absolutely logical, in the light of the wording of the *chapeau*, to add a reference to other matters, the Commission had a commendable tradition of producing texts that were not only logical but also educational and easy to use.

71. The CHAIRMAN pointed out that the *Legislative Guide* served the educational purposes mentioned by the previous

speaker and that the Foreword to the model provisions advised the user to read the provisions in conjunction with the *Guide*. He suggested that the existing wording of model provision 28 should be retained, with the addition of a new subparagraph referring to the extent to which information should be treated as confidential.

72. Mr. LUKAS (Austria) expressed support for the Chairman's proposal. He also pointed out that a reference to subsequent provisions, as proposed by the representative of the United States, could be misleading to the user because model provision 28 was based on the principle of party autonomy, whereas some of the other provisions referred to public interest issues.

73. Ms. SABO (Canada), expressing support for the Chairman's proposal, said that, in the light of the amendments which had been made to model provision 24, it might be necessary to refer to that provision in model provision 28. However, that question could be referred to the drafting group.

74. Mr. JIANG JIE (China) proposed that the title of model provision 28 should be amended to read "General contents of the concession contract". The merit of adding the word "general" was that the provision could be coordinated with subsequent model provisions which dealt with concession contracts in greater detail.

75. Ms. SABO (Canada), supported by Mr. SCHÖFISCH (Germany) and Mr. FONT (France), said that, since the model provision contained a list of specific items, it would not make sense to add the word "general" to the title. However, since the issue was not a substantive one, it could be referred to the drafting group.

76. Mr. VALLADÃO (Brazil) said that his delegation did not object strongly to the proposal made by the representative of China, but would prefer to leave the title unchanged.

77. Mr. WALLACE (United States of America) suggested that the words "contents of" could be deleted, so that the title would read "The concession contract".

78. The CHAIRMAN said that, as the wording of the title was not a substantive issue, he would take it that the Commission agreed not to amend it.

79. *It was so decided.*

80. Referring to an earlier proposal by the delegation of China to move model provision 28 from the beginning of chapter III to the end of chapter II, the CHAIRMAN said that such an amendment would be illogical because the title of chapter II was "Selection of the concessionaire". He would therefore take it that the Commission wished to reject that proposal.

81. *It was so decided.*

82. *Model provision 28 was approved and referred to the drafting group.*

#### *Chapter III—Title*

83. The CHAIRMAN, referring to the title of chapter III of the model provisions, said that the title of chapter IV of the *Legislative Guide*, "Construction and operation of infrastructure:

legislative framework and project agreement", on which chapter III was based, had not been used in its entirety as the title of chapter III because it would be inappropriate to use the expression "legislative framework" in the text of an actual law. It had been proposed to amend the title of chapter III by adding a reference to the concession contract, so as to bring it more closely into line with the title of chapter IV of the *Legislative Guide*.

84. Mr. GÓMEZ (Observer for Venezuela) proposed that the title should read "Construction and operation of infrastructure: the concession contract" to reflect the fact that the concession contract was referred to throughout the model provisions.

85. Mr. WALLACE (United States of America) said he favoured the wording "The concession contract and construction and operation of infrastructure".

86. Mr. HIDALGO CASTELLANOS (Mexico) proposed that the phrase "pursuant to a concession contract" should be added to the end of the title.

87. In response to a question by the CHAIRMAN, Mr. ESTRELLA FARIA (Secretariat) suggested that chapter III should simply be entitled "The concession contract", since the concession contract was the subject of all the model provisions in the chapter, and because the Commission had not, in any case, been entirely happy with the title of chapter IV of the *Legislative Guide*.

88. Mr. SCHÖFISCH (Germany) expressed his delegation's support for the suggestion made by the representative of the secretariat.

89. The CHAIRMAN said he took it that the Commission wished to amend the title of chapter III to read "The concession contract".

90. *The title of chapter III, as amended, was approved and referred to the drafting group.*

#### *Model provision 29. Governing law*

91. *Model provision 29 was approved and referred to the drafting group.*

#### *Model provision 30. Organization of the concessionaire*

92. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) proposed that the expression "concession contract" in the second sentence of the provision should be replaced by "request for proposals" because, at the time the concession contract was signed by the concessionaire, the amount of capital would already be known and the statutes approved. He also proposed that the phrase "and significant changes therein" should be deleted. Furthermore, it should be noted that chapter IV also dealt with the concession contract.

93. The CHAIRMAN said that, since the provision dealt with the concession contract, the words "concession contract" should not be deleted, although the Commission might wish to add a reference to the request for proposals in the second sentence.

*The meeting rose at 12.30 p.m.*

## Summary record of the 761st meeting

Tuesday, 1 July 2001, at 2 p.m.

[A/CN.9/SR.761]

*Chairman:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 2.10 p.m*

FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (*continued*) (A/CN.9/521, A/CN.9/522 and Add.1 and 2, A/CN.9/533 and Add.1-7)

*Model provision 30. Organization of the concessionaire (continued)*

1. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) said that, in the light of the earlier discussion, he proposed adding the words “in the request for proposals and” before “in the concession contract” at the end of the last sentence.

2. Ms. SABO (Canada) asked whether all of the requirements mentioned would be known at the time of the request for proposals or whether some would be known only after the negotiations. In the latter case, her delegation would support the addition proposed by the observer for UIA. However, model provision 30 might not be the most appropriate place to refer to requirements that should be contained in the request for proposals.

3. The CHAIRMAN said that the content of the request for proposals with regard to contractual terms was covered in model provision 11 (*c*). He suggested that the end of the model provision should read, “... shall be set forth in the concession contract, consistent with the content of the request for proposals”.

4. *Model provision 30, as amended, was approved and referred to the drafting group.*

*Model provision 31. Ownership of assets;*

*Model provision 32. Acquisition of rights related to the project site*

5. *Model provisions 31 and 32 were approved and referred to the drafting group.*

*Model provision 33. Easements*

6. Mr. WALLACE (United States of America) asked the secretariat to explain the rationale behind the alternative wordings “shall [have] [be granted]”, in the first line of the model provision.

7. Mr. ESTRELLA FARIA (Secretariat) said that, as the footnote indicated, the alternatives were intended to capture the various ways in which the concessionaire could acquire easements, as they had emerged from a study of numerous national legislations. In the first scenario, the concessionaire would negotiate them directly with the owners of adjacent property. In the second, it would receive them from the Government or other contracting authority, that either purchased the easement directly or acquired it compulsorily. In the third scenario, reflected for the most part in sector-specific legislation, the law itself granted easements to an operator for a particular type of infrastructure and empowered it to transit through adjacent property. The reference to the underlying legislation on easements would give enacting States the freedom to deal with issues such as procedure and compensation.

8. Mr. WALLACE (United States of America) said that the meaning of the wording remained unclear, since it was not specified how and by whom the right was to be granted.

9. The CHAIRMAN said that the meaning was clarified by the phrase “in accordance with” and the italicized text in square brackets that followed.

10. Mr. WALLACE (United States of America) said that if the right was already provided for in law, the alternatives were unnecessary.

11. The CHAIRMAN said that the text in square brackets spelled out that any rights enjoyed by public utility companies and infrastructure operators under those laws must also be extended to the concessionaire.

12. Mr. LUKAS (Austria) said it was not clear whether the model provision merely drew attention to national easement legislation, or whether something more was intended.

13. Mr. SCHÖFISCH (Germany) said that if the purpose was to stipulate that the concessionaire should enjoy the same rights as public utility companies under national legislation, the wording should be: “The concessionaire has the right ...”.

14. Mr. VALLADÃO (Brazil) proposed the wording “The concessionaire will be given the right to ...”.

15. Mr. ESTRELLA FARIA (Secretariat) suggested that amendment of the words “laws that govern easements” to read “laws that govern the acquisition and enjoyment of easements” might go some way towards clarifying the text.

16. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said that to grant the concessionaire easements in accordance with the provisions of national legislation might be tantamount to denying it that right, where no provision therefor existed in national legislation.

17. Mr. SCHÖFISCH (Germany) said that the normative “shall” required national legislators to ensure that national legislation did indeed make provision for that right.

18. Mr. WALLACE (United States of America) said that, as currently drafted, model provision 33 was so compressed as to be ambiguous. It should be redrafted along the lines of the analogous model provision 32.

19. Mr. RWANGAMPUHWE (Rwanda) asked whether the model provision was intended to protect the interests of third parties or those of the concessionaire; the latter should not enjoy more rights than the former.

20. Mr. ESTRELLA FARIA (Secretariat) agreed that the model provision attempted to cram too much meaning into a very short sentence, by simultaneously seeking to ensure that the rights of the concessionaire, the contracting authority and third parties were protected.

21. The CHAIRMAN, referring to the comment by the representative of the United States, noted that model provision 32 derived from the first sentence of legislative recommendation 45, whereas model provision 33 derived from the second sentence of that recommendation.

22. Mr. PARK WHON-IL (Observer for the Republic of Korea) proposed the wording "The concessionaire shall be entitled to enter upon, transit through ...". Whether the granting of easements was appropriate or necessary depended on the applicable national legislation.

23. Ms. PERALES VISCASILLAS (Spain) proposed redrafting the beginning of the provision to read "The concessionaire's right to ...", and replacing the words "in accordance with" in the third line with the phrase "shall be determined by ...".

24. Mr. POLIMENI (Italy) said that two diametrically opposed alternatives were being proposed: either, that the contracting authority should assist the concessionaire in obtaining such right; or, that a direct right should be conferred on the concessionaire. In line with its written comment contained in paragraph 12 of document A/CN.9/533/Add.1, his delegation favoured redrafting model provision 33 on the basis of paragraph 1 of model provision 32, so as to provide that the contracting authority had an obligation to make available to or assist the concessionaire in obtaining such right. The model provision should clearly spell out that easements should be compulsorily acquired by the contracting authority simultaneously with the project site.

25. The CHAIRMAN said that legislative recommendation 45 did not envisage a change in existing laws, but stated only that the law *might* empower the concessionaire to exercise such rights. Accordingly, the model provision should perhaps deal only with instances in which such a right existed. It might be preferable to state simply that "The concessionaire shall have such rights to the extent that they are provided for in the legislation".

26. Mr. ESTRELLA FARIA (Secretariat) said that alignment of model provision 33 with model provision 32 would automatically bring it closer to the wording of recommendation 45. He proposed a version containing two paragraphs, the first of which might have two variants. The first variant, similar to paragraph 1 of model provision 32, might read: "The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire in obtaining the right to enter upon, transit through or do work or fix installations upon property of third parties, ...". The remainder of the current text of paragraph 1 would be unaltered.

27. The second variant, which might appear in square brackets for the benefit of countries for which it might be the more natural choice, would read: "The concessionaire shall have the right to enter upon, ...", followed by the remainder of the current text of paragraph 1. Paragraph 2 would be very similar to the current paragraph 2 of model provision 32 and would read: "Any compulsory acquisition of easements that may be required under this model provision shall be carried out in accordance with ...", followed by the language currently contained in square brackets in paragraph 2 of model provision 32, with the possible addition of a reference to statutory easements.

28. Mr. BOUWHUIS (Observer for Australia) said that if the provision was not intended to grant easements but, rather, to refer to the law and procedure already existing within the State, model provision 33 could be deleted and the phrase "including with regard to easements" added at the end of paragraph 1 of model provision 32.

29. The CHAIRMAN said that since paragraph 1 of model provision 32 dealt with the project site itself while easements referred to land adjacent to the site, that proposal might pose drafting problems. Furthermore, since easement was a somewhat technical term that might have no exact equivalent in other countries, it was desirable for model provision 33 to spell out what was to be understood by the term.

30. Mr. LUKAS (Austria) said that the main issue appeared to be whether the concessionaire, as a private entity, could directly benefit from a statutory easement. Since the *Guide* stated that it could, his delegation supported the secretariat's proposal.

31. Mr. RWANGAMPUHWE (Rwanda) said his delegation continued to be concerned about who would benefit from the model provision.

32. The CHAIRMAN said that although the concessionaire would be the prime beneficiary, the granting of the easement would also be in the public interest of the host State. While third parties' interests must also be protected by law, those interests need not be spelled out in the model provision.

33. Mr. RWANGAMPUHWE (Rwanda) said the problem was that, although the easement was "obtained", the concession might not be perpetual.

34. Mr. FONT (France), pursuing the point made by the representative of Rwanda, said that easements could not be "obtained" in the same way as could the rights related to the project site referred to in model provision 32, paragraph 1, as that would imply permanent ownership of the easements.

35. The CHAIRMAN suggested the term "enjoyed".

36. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said it should be borne in mind that the easement attached to the land and not to the concessionaire; when the land changed ownership, the easement was transferred with it.

37. The CHAIRMAN suggested that, if there was consensus on the general structure and approach, the model provision could safely be referred to the drafting group.

38. Ms. SABO (Canada) said that easement was a concept in private law, which in her country encompassed two systems: civil law and common law. The term "easement", used in the English version, reflected only common law, whereas the model provision called for a juridically neutral word that also covered civil law. The English text should perhaps refer both to "servitudes" and to "easements", thereby making it more accessible to legislators from English-speaking countries with a civil law tradition.

39. Mr. WALLACE (United States of America) said that the English term "servitude" was extremely narrow. A second term could perhaps be added in the French version.

40. Mr. ESTRELLA FARIA (Secretariat) explained that, following a lengthy debate on the issues, it had been decided that it would be confusing if two English terms were rendered by a single term in other language versions. The term "easements" was sufficiently loose to be applicable to any legal system.

41. *Model provision 33, as amended, was approved and referred to the drafting group.*

*Model provision 34. Financial arrangements*

42. Mr. JACOBSON (United States of America) said that, while model provision 34 derived from recommendations 46 and 47, it



should also reflect recommendation 48, the content of which was not adequately covered in model provision 28 (*f*).

43. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) said that since the phrase “The concessionaire shall have the right to charge” did not specify who must make the payment, the cross-reference to recommendations 46 and 47 below the heading should simply read “[see recommendations 46-48 ...]”.

44. Mr. ESTRELLA FARIA (Secretariat) said it could be seen from paragraph 129 of document A/CN.9/505 that the Working Group had decided not to include a specific model provision reflecting legislative recommendation 48, and that the provision on financial arrangements should be limited to the concessionaire’s right to collect tariffs and fees.

45. Mr. JACOBSON (United States of America) asked why the Working Group had come to that decision.

46. Mr. ESTRELLA FARIA (Secretariat) said the Working Group had taken the view that payments which might be made by the contracting authority were a contractual rather than a statutory matter. However, the Working Group had not always taken an orthodox approach to the dividing line between contractual and statutory matters, as was demonstrated by several of the model provisions.

47. Mr. POLIMENI (Italy) asked whether the second sentence of model provision 34 was necessary, since it reproduced a phrase in model provision 28 (*f*).

48. Mr. VALLADÃO (Brazil) said that model provision 34 seemed to prescribe the nature of the relationship that had to exist between the concessionaire and the contracting authority and was biased in favour of the concessionaire. He therefore proposed that the model provision should read: “The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or the services it provides, in accordance with the concession contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees”.

49. Mr. ESTRELLA FARIA (Secretariat), replying to the question raised by the representative of Italy, said that the participants in the Working Group had represented different legal systems that took different approaches to the dividing line between contractual and statutory matters. In some countries a statutory right for the contracting authority to make direct payments had to be created. The Working Group had therefore decided, as a compromise, to include the reference to methods and formulas for the establishment and adjustment of tariffs and fees both in model provision 34 and in model provision 28 (*f*).

50. The CHAIRMAN said that various options had been suggested with regard to model provision 34. It could be amended so as also to refer to the statutory right to make direct payments to the concessionaire, as proposed by the representative of the United States; or else amended along the lines proposed by the representative of Brazil. Alternatively, the existing text could be kept, either with the sole addition of a reference to legislative recommendation 48, or without any changes at all.

51. Mr. WALLACE (United States of America) pointed out that, if legislative recommendation 48 were not mentioned in model provision 34, it could nonetheless be preserved in Part One as one of the set of legislative recommendations that had not been superseded by a model provision.

52. Mr. FONT (France) said that the title of model provision 34, “Financial arrangements”, was too broad in scope because the

text of the model provision mentioned only tariffs and fees. Payments that might be made by the contracting authority were mentioned only in model provision 28 (*f*). He therefore proposed that the title of model provision 34 should be changed to “Tariffs or fees for use of the facility and provision of services”. Such a change would make it unnecessary to amend the text of either model provision 34 or model provision 28 (*f*).

*The meeting was suspended at 3.30 p.m. and resumed at 4 p.m.*

53. Mr. MURREY (United Kingdom) said that some sort of provision was needed to allow for direct payments from contracting authorities or public authorities to concessionaires. The United Kingdom railways had been privatized by means of legislation, and a provision for scheduled payments from the Government to the train operating companies had been built into the contracts. Without that provision, the scheme would never have got off the ground. He therefore supported the proposal made by the representative of the United States.

54. Mr. FONT (France) pointed out that the possibility of direct payments from the contracting authority was already covered by model provision 28 (*f*).

55. The CHAIRMAN said that, if the delegation of France did not oppose the inclusion of a reference to such payments in model provision 34, a new paragraph based on legislative recommendation 48 could be added, to read: “The contracting authority shall have the power to agree to make direct payments to the concessionaire as a substitute for, or in addition to, tariffs or fees to be paid by the users”. If the Commission were to approve that change, it would no longer be necessary to amend the title of the model provision, as proposed by the representative of France.

56. Ms. PERALES VISCASILLAS (Spain) expressed support for the Chairman’s proposal.

57. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said that a distinction should be drawn between model provisions of a mandatory nature, which set forth the legal system applying to concessions, and model provisions related to contracts, which identified particular questions for the parties to settle and possible ways of settling them. Model provision 34 fell into the first category, whereas model provision 28 (*f*) fell into the second category.

58. The CHAIRMAN said that the text he had proposed for model provision 34 was consistent with model provision 28 (*f*). If he heard no objection, he would take it that the Commission wished to approve the model provision, with the addition of a second paragraph, as he had suggested, and with the amendment proposed by the representative of Brazil.

*59. Model provision 34, as amended, was approved and referred to the drafting group.*

#### *Model provision 35. Security interests*

60. Mr. WANAMI (Japan), drawing the Commission’s attention to the phrase “subject to any restriction that may be contained in the concession contract”, in paragraph 1 of model provision 35, pointed out that, in some countries, the restriction on the right to create security interests pursuant to a contract was effective only in personam and not in rem—in other words, only as between the parties to the contract, and not as against third parties. In such cases, if the concessionaire created security interests over its immovable property in contravention of such a restriction, it would, of course, be liable for any resulting damage, but, the creation of the security interest would still be valid. If the restric-

tion had effect only in personam, the parties would be able to agree on it irrespective of the first phrase of paragraph 1, in which case the phrase could be deleted. However, if the restriction had effect in rem, the phrase should be retained.

61. The CHAIRMAN said that the phrase was meant to indicate that, even if the law granted the parties a general entitlement to create securities, the concession contract might take a more restrictive approach.

62. Mr. WALLACE (United States of America), referring to his delegation's comments in document A/CN.9/533/Add.6, said that legislative recommendation 49, on which model provision 35 was based, stated that the concessionaire should have the right to create security interests without prejudice to any rule of law that might prohibit the creation of security interests in public property. The restriction relating to public property was covered by paragraph 3 of model provision 35. The legislative recommendation mentioned no other restrictions, in accordance with the Commission's decision that, with respect to non-public property, the investor or developer should have the right to create security interests in order to attract domestic or foreign private capital. The first phrase of paragraph 1 therefore went further than legislative recommendation 49, and he agreed with the representative of Japan that it should be deleted, along with footnote 41.

63. Mr. VALLADÃO (Brazil) said that the question of security interests was a very delicate one in municipal law. Therefore, notwithstanding the provision in paragraph 3, he would prefer to keep the existing wording of paragraph 1.

64. The CHAIRMAN said that if the first phrase of paragraph 1 were deleted, the paragraph would not allow for any restrictions on the right to create security interests, whereas in practice such restrictions were not uncommon. Security did not necessarily entail the possibility of selling or splitting the project assets, but was a defensive mechanism to prevent other parties from gaining access to the assets. In the case of public services, restrictions might be placed on the right to create security in order to maintain continuity of the service.

65. Mr. JACOBSON (United States of America) said his delegation acknowledged that some restrictions on the right to create security interests were necessary. However, the first phrase of model provision 35, paragraph 1, might be taken to endorse restrictions of a very broad nature. Perhaps a compromise solution would be to define more precisely in paragraph 1 the types of restriction which the Commission wished to endorse.

66. The CHAIRMAN pointed out that the first phrase of paragraph 1 did not endorse restrictions that might be imposed by the contracting authority, but restrictions that might be contained in the concession contract. Since both parties were involved in negotiating the terms of the contract, the concessionaire would be able to reject any restrictions that would make it impossible to finance the project.

67. Mr. JACOBSON (United States of America) said that, if the restrictions were too great, no contract would be concluded at all. The model provision should therefore give the legislature some guidance as to what types of restriction, if any, would be appropriate.

68. Mr. SCHÖFISCH (Germany), expressing support for the Chairman's remarks, said it was for the parties to the contract to agree on any restrictions. He would welcome an example of a unacceptable restriction.

69. Mr. JACOBSON (United States of America) said that an appropriate balance was needed in order to attract capital. An

example of an acceptable restriction was one stating that no enforcement of security could occur without 30 days' prior notice. However, a restriction stating that no security interest could be foreclosed without the prior written consent of the contracting authority was of a more fundamental nature, of the sort which, as his delegation understood it, the *Legislative Guide* aimed to discourage.

70. The CHAIRMAN said that the discussion in section E of chapter IV of the *Legislative Guide*, and also footnote 41 in the model provisions, made sufficiently clear the types of restriction that were envisaged.

71. Mr. ESTRELLA FARIA (Secretariat) said that the wording of legislative recommendation 49 was slightly unclear because it reflected the Commission's efforts to accommodate the concerns of all delegations. As the Chairman had pointed out, the *Legislative Guide* contained an extensive discussion of the right to create security interests and possible restrictions on that right. Paragraph 53 of chapter IV of the *Guide* incorporated almost verbatim a formulation requested by one particular delegation, as recorded in paragraph 158 of the report on the thirty-second session of the Commission (A/54/17), one which the Commission had tried to capture in legislative recommendation 49. However, as had been pointed out by the delegation of the United States, the difficulty the Commission now faced was how to ensure that the legislative language in model provision 35 was sufficiently clear to be adopted in a statute while still reflecting accurately the content of legislative recommendation 49 and the general policy assumptions in the *Legislative Guide*.

72. Mr. VALLADÃO (Brazil) proposed that the phrase "subject to any restriction that may be contained in the concession contract" should be deleted from paragraph 1 of the model provision and that the phrase "the concessionaire has the right" could be replaced by the phrase "the concessionaire, if this is foreseen in the concession contract, has the right ...". The rest of the paragraph would remain unchanged.

73. Mr. DEWAST (Observer for the European Lawyers Union), expressing support for the suggestion made by the representative of Brazil, said that the issue of restrictions did not need to be a problem to the extent that they were agreed by both parties.

74. The CHAIRMAN said there seemed to be general agreement that some restrictions on the right to create security interests were necessary.

75. Mr. JACOBSON (United States of America) proposed that the phrase "which is deemed appropriate by the parties" should be added after the words "concession contract" in the first phrase of paragraph 1 of the model provision, so as to avoid the implication that any type of restriction was acceptable.

76. The CHAIRMAN, supported by Mr. DEWAST (Observer for the European Lawyers Union), said he wondered whether anything was to be gained by adding that phrase, since the concessionaire would not agree to any restrictions that it deemed inappropriate.

77. Mr. FONT (France), expressing agreement with the Chairman's remarks, said that his delegation could accept the amendment to the model provision proposed by the representative of Brazil, but would prefer to keep the existing version.

78. Mr. JACOBSON (United States of America) withdrew his delegation's proposed amendment.

79. The CHAIRMAN said he took it that the Commission wished to approve model provision 35 without amendment.

80. *Model provision 35 was approved and referred to the drafting group.*

*Model provision 36. Assignment of the concession contract;*  
*Model provision 37. Transfer of controlling interest in the concessionaire*

81. Mr. LEBEDEV (Russian Federation) asked whether the expression “shall set forth”, in the second sentence of model provision 36, meant that the conditions mentioned had to be set forth in every concession contract, or that a concession contract could be assigned to a third party only if the text of the contract so provided.

82. Mr. ESTRELLA FARIA (Secretariat) said that the Working Group had discussed at length whether the word “may” or “shall” should be used in the second sentence of model provision 36, and had eventually opted for the word “shall”. That might appear to be inconsistent with the word “may” in the first sentence; however, that wording had been the only way of reconciling the widely differing views expressed in the Working Group on the issue of assignment. The first sentence was intended to accommodate the view of certain delegations that, as a general rule, concession contracts should not be assigned to third parties. The second sentence provided that, in certain circumstances, the contracting authority was obliged to give its consent to an assignment of the concession contract.

83. The CHAIRMAN said that the phrase “shall set forth” also appeared in the second sentence of model provision 37, where it reflected the fact that, in practice, concessionaires insisted on having the right to transfer the controlling interest to third parties in certain circumstances.

84. Mr. WALLACE (United States of America) said that, if the text was genuinely ambiguous, it should be corrected; otherwise it should be left unchanged. He suggested that the words “if any”,

set off by commas, could be added after the word “conditions” in both model provisions.

85. Mr. DEWAST (Observer for the European Lawyers Union) pointed out that if the conditions were set forth in the concession contract, as stipulated in the second sentence, that meant that the parties had reached agreement on them. He therefore saw no problem with the current wording.

86. The CHAIRMAN said that the addition of the words “if any” would be irrelevant from the contracting authority’s point of view because the conditions mentioned were in the interests of the contracting authority. Some conditions would always have to be fulfilled before the contracting authority gave consent. In that light, perhaps the real question was whether the first sentence of each model provision was superfluous.

87. Mr. VALLADÃO (Brazil), referring to model provision 37, said that footnote 42 explained very clearly what was meant by “controlling interest”. Referring to the United States proposal, he wondered whether the addition of the words “if any” was really necessary since, if there were no conditions, the provision would not be applicable anyway. Moreover, their inclusion would create the impression that, in most cases, there were no conditions to be fulfilled before the contracting authority gave consent.

88. Mr. WALLACE (United States of America) withdrew his suggestion.

89. Mr. LEBEDEV (Russian Federation) said that, having heard the explanation by the representative of the secretariat, he now had a somewhat better understanding of the meaning of the words “shall set forth”, at least as agreed by the Working Group.

*The meeting rose at 5 p.m.*

## Summary record of the 762nd meeting

Wednesday, 2 July 2003, at 9.30 a.m.

[A/CN.9/762]

*Chairman:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 9.40 a.m.*

FINALIZATION AND ADOPTION OF THE DRAFT  
UNCITRAL MODEL LEGISLATIVE PROVISIONS ON  
PRIVATELY FINANCED INFRASTRUCTURE PROJECTS  
(*continued*) (A/CN.9/521, A/CN.9/522 and Add.1 and 2,  
A/CN.9/533 and Add. 1-7)

*Model provision 36. Assignment of the concession contract (continued);*  
*Model provision 37. Transfer of controlling interest in the concessionaire (continued)*

1. Mr. LEBEDEV (Russian Federation) repeated his earlier request for clarification: did the words “shall set forth” in model provision 36, repeated in model provision 37, mean that every concession contract must contain the conditions governing the assignment of the rights and obligations of the concessionaire?

2. The CHAIRMAN said that, in the English version of the text, the word “shall” always had normative force.

3. Ms. SABO (Canada) agreed. In conventional drafting practice, “shall” always denoted an obligation.

4. Mr. LEBEDEV (Russian Federation) said the Russian version did not convey that meaning. The drafting group should be asked to ensure its consistency with the English version.

5. Mr. POLIMENI (Italy) said that both model provisions contained conditions to be stipulated in the concession contract. However, model provision 28 also contained a list of other points to be included in the contract if the parties so chose. Perhaps a footnote should be appended to model provision 28, stating that other elements to be included in the contract were set forth in model provisions 36 and 37.

6. The CHAIRMAN said that as the discussion on model provision 28 had been concluded, no further amendments would be considered.

7. *Model provisions 36 and 37 were approved and referred to the drafting group.*

*Model provision 38. Operation of infrastructure*

8. *Model provision 38 was approved and referred to the drafting group.*

*Model provision 39. Compensation for specific changes in legislation*

9. Mr. WALLACE (United States of America) asked for confirmation that the parties were free to provide for compensation in the event of a substantial increase in the cost of performance or a substantial reduction in its value, but not if the change was less than "substantial". Where would the ceiling be set?

10. Mr. ESTRELLA FARIA (Secretariat) said that model provision 39 aimed to reflect the policy set out in paragraphs 122 to 125 of chapter IV of the *Legislative Guide*, rather than the somewhat compressed formulation in legislative recommendation 58 (c). Some legal systems set a minimum threshold for the cumulative amount of loss which would trigger a revision of the concession contract. The term "substantial" was therefore intended to indicate a general framework within which the parties could exercise party autonomy under the contract.

11. *Model provision 39 was approved and referred to the drafting group.*

*Model provision 40. Revision of the concession contract*

12. Mr. WALLACE (United States of America) noted that model provisions 39 and 40 were both based on legislative recommendation 58 (c), which provided for compensation in the event of legislative changes "or other changes in the economic or financial conditions that render the performance of the obligation substantially more onerous than originally foreseen". In model provision 40, paragraph 1 (c), that wording was expanded to refer to changes "of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences". By definition, such changes could not be specific to the project concerned. The question of when a State should be responsible for the impact of general regulatory or legislative measures on a particular project or investor was a very delicate issue. However, it was impossible for an investor to be aware in advance of every potential change in circumstances in a particular country. How did the language of model provision 40, paragraph 1 (c), square with legislative recommendation 58? Did it not impose a greater limitation on the rights of the investor than had been intended in the legislative recommendation?

13. Mr. ESTRELLA FARIA (Secretariat) said that when adopting the *Legislative Guide*, the Commission had decided to establish a framework for exercise of the right of revision of the contract. That framework was explained in chapter IV, paragraph 129: "It may be desirable to provide in the project agreement that a change in circumstances that justifies a revision of the project agreement must have been beyond the control of the concessionaire and of such a nature that the concessionaire could not reasonably be expected to have taken it into account at the time the project agreement was negotiated or to have avoided or overcome its consequences". It had been felt that when the concept was framed in legislation, it would be misleading to retain only the general wording of legislative recommendation 58 without including those conditions, which, incidentally, were similar to those laid down for dealing with hardship in the United Nations Convention on Contracts for the International Sale of Goods and

in the UNIDROIT Draft Principles for International Commercial Contracts. Similar conditions for the exercise of the right of revision in certain circumstances were found in municipal law.

14. *Model provision 40 was approved and referred to the drafting group.*

*Model provision 41. Takeover of an infrastructure project by the contracting authority*

15. *Model provision 41 was approved and referred to the drafting group.*

*Model provision 42. Substitution of the concessionaire*

16. Mr. DEWAST (Observer for the European Lawyers Union) said the language of model provision 42 appeared to indicate that substitution could be arranged by agreement between the contracting authority and the lenders. If that was so, the result would be that the contracting authority and the lenders could deprive the concessionaire of its rights without its consent. He doubted whether that was really the Commission's intention. A distinction must be drawn between the substitution arrangement and its exercise. The arrangement for substitution must have the consent of the concessionaire, whereas the actual exercise of substitution would take place on the initiative of the lenders and with the authorization of the contracting authority, whether or not the concessionaire consented to it. His organization's comment on the provision was published in document A/CN.9/533/Add.3. He proposed amending the text of model provision 42 by inserting, after the words "The contracting authority may agree", the words "with the concessionaires in the project agreement, and".

17. Mr. WALLACE (United States of America) said there was no doubt that the concessionaire was free to protect itself, both in the initial concession contract and in its loan agreements with the lenders. Was the observer for the European Lawyers Union proposing a tripartite agreement between the concessionaire, the lenders and the contracting authority, or was he suggesting that the concessionaire must give its consent at the moment when the lender was contemplating exercising its step-in rights?

18. Mr. DEWAST (Observer for the European Lawyers Union) said he was envisaging the first of those two scenarios. The concessionaire would not be able to prevent the exercise of substitution, which would take effect at the initiative of the lenders and with the authorization of the contracting authority.

19. Mr. FONT (France) said his understanding of the proposed amendment was that the substitution mechanism should be the subject of a clause in the concession contract, which would specify the conditions for the exercise of substitution. The concessionaire could of course raise the objection that the conditions had not been met, but could not oppose the substitution if they had indeed been met. It would be possible to find an appropriate form of words, either by adopting the amendment suggested by the observer for the European Lawyers Union, or by drawing from the wording of legislative recommendation 60. The chosen wording should indicate that the concession contract had to provide for a mechanism whereby the contracting authority could agree with the concessionaire on arrangements for substitution, given that the lenders were not parties to the concession contract and that agreement must be reached separately with them.

20. The CHAIRMAN said that step-in rights did not necessarily have to be included in the concession contract. The lenders should have some flexibility in that regard. He suggested rewording model provision 42 to begin: "The contracting authority may agree with the concessionaire and the entities extending financing for an infrastructure project and with the concessionaire to

provide for substitution ...”, thereby emphasizing that the arrangement was made in advance.

21. Mr. PARK WHON-IL (Observer for the Republic of Korea) asked whether, in the event of the lender availing itself of its separate right under model provision 35, paragraph 2, that would constitute a substitution. It was the practice of Korean banks to accept a fiduciary transfer of the shares of the concessionaire if it failed to repay its creditors, thereby taking over the management of the concession.

22. Mr. ESTRELLA FARIA (Secretariat) said that according to the *Legislative Guide*, a substitution might take place if a concessionaire defaulted on the loan agreement and the lender sought to foreclose on the security interests held in its shares. A substitution might also occur at the initiative of the contracting authority, if it was dissatisfied with the quality of the services provided by the concessionaire, regardless of whether the latter remained solvent. The situation contemplated in model provision 35, paragraph 2, would not necessarily constitute a substitution.

23. The CHAIRMAN said he would take it that the Commission agreed to his suggested amendment.

24. *Model provision 42, as amended, was approved and referred to the drafting group.*

#### IV. Duration, extension and termination of the concession contract

##### *Model provision 43. Duration and extension of the concession contract*

25. Mr. WALLACE (United States of America) said attitudes to the duration of the concession contract had evolved since the start of work on the topic of privately financed infrastructure projects. The notion of a concession in perpetuity, or of a 99-year renewable arrangement, would have seemed inconceivable at a time when there was relatively little experience of build-operate-transfer projects. However, once Governments had decided to privatize services such as telephone networks or power generation, it would seem absurd to award the contract to a government ministry. The present wording of model provision 43 reflected those earlier attitudes, which went hand in hand with shorter contracts of 5 to 20 years. Paragraph 1 (c), pursuant to which the term of the contract could be extended in “[*other circumstances, as specified by the enacting State*]” carried a footnote explaining that the enacting State might extend the contract “for compelling reasons of public interest”. The term “compelling” had been criticized in the initial drafting stage as being too restrictive, as well as carrying unknown legal implications. In any case, it was perhaps time to take a more open-minded approach to the matter of the term of the concession contract.

26. Mr. ESTRELLA FARIA (Secretariat) said that a majority in the Commission had been opposed to the extension of project agreements, as was reflected in chapter V, paragraphs 6, 7 and 8, of the *Legislative Guide*, the content of which was diametrically opposed to the thrust of the remarks by the United States representative and of the written comments submitted on the subject by Italy in document A/CN.9/533/Add.1. If extensions of the concession contract were to be permitted, the Commission would be required either to authorize the destruction of the remaining copies of the *Legislative Guide* and produce a new version of those particular paragraphs, or else to issue a corrigendum.

27. Mr. MARKUS (Observer for Switzerland) pointed out that the title of chapter IV was inconsistent with the title of chapter III, which, following the recent discussion by the Commission, had been amended to “The concession contract”. He therefore

suggested that the title of chapter III should be further amended to read “Contents of the concession contract” or that the heading of chapter IV should be deleted so that its contents became part of chapter III. On the other hand, titles should ideally continue to reflect those used in the *Legislative Guide*, which included references to duration, extension and termination.

28. Mr. POLIMENI (Italy) drew attention to Italy’s proposal, contained in document A/CN.9/533/Add.1, to modify footnote 44 by replacing the words “for compelling reasons of public interest” with the words “under certain specific circumstances (such as specified in the concession contract)”, the reasons for which had already been eloquently expounded by the United States representative. Even without modification, however, the footnote admitted the possibility of an extension of the concession contract. He was therefore not entirely persuaded that his proposal would result in a conflict with the *Legislative Guide*. Moreover, it should be possible to introduce minor changes to the footnote without engendering any conflict with the policy set forth in the *Legislative Guide*.

29. Mr. ESTRELLA FARIA (Secretariat), responding to a request from the CHAIRMAN, said that, as stated in chapter V, paragraph 6, of the *Legislative Guide* and in paragraph 212 of the report of the Commission on the work of its thirty-second session (A/54/17), extensions could be authorized only under exceptional circumstances defined by law. Model provision 43 had been drafted in such a way as to offer the maximum flexibility within the limits of that policy.

30. The CHAIRMAN said that the footnote used the word “authorizing”, which he took to refer to an authorization by the law; in which case the footnote reflected the policy encompassed in the *Legislative Guide*.

31. Mr. POLIMENI (Italy) said that the Italian proposal was not intended to detract from the right of individual States to impose statutory limits and conditions concerning the possibility of extension. Furthermore, the footnote referred to consensual extension, thus allowing for the involvement of the law and of both parties to the contract. He reiterated the concern of the United States representative that the phrase “compelling reasons of public interest” was too restrictive, as the term “exceptional circumstances” could include reasons other than those of public interest.

32. Mr. ESTRELLA FARIA (Secretariat) said that the *Legislative Guide* did not address the issue of compelling reasons of public interest, which had only arisen with the addition of paragraph 1 (c) of model provision 43. Thereupon, in order to ensure that the enacting State remained as restrictive as possible in expanding the list of circumstances under which the term of the concession might be extended, the Working Group had introduced, in the footnote, the notion of “compelling reasons of public interest”.

33. Mr. FONT (France) said his delegation was not in favour of increasing the flexibility of the conditions relating to the possibility of extending the concession contract. The purpose of the concession contract was to create new competition, and upon its expiry a new competitive procedure should be initiated.

34. Mr. WALLACE (United States of America) said that the desired restriction could be accomplished by inserting in the footnote the words “in the law” after “authorized”, followed by the wording contained in the Italian proposal. It was a profound mistake to treat States in a condescending manner, and the use of the word “compelling” was unnecessarily restrictive.

35. The CHAIRMAN said that the freedom to contract allowed to both parties as a result of such wording would violate the policy set forth in the *Legislative Guide*, although the problem could be

remedied if the footnote were instead to state that the extension of the contract was pursuant to events specified in the law, bearing in mind that the contracting authority might choose only one of several events authorized by the law.

36. Mr. WALLACE (United States of America) maintained that sufficient discipline was ensured by adding the words “in the law”, which made it clear that the State was required to specify the circumstances in which the concession contract could be extended.

37. Mr. LUKAS (Austria), endorsing the view expressed by the French representative, said he did not support any change in the wording of the footnote. The *Legislative Guide* and other procurement laws were based on the principle of competition, which was the reasoning behind the very narrow wording of the footnote. Any extension of the concession contract by simple agreement of the parties violated that principle.

38. The CHAIRMAN said he took it that the critical issue was the existence of an identified public interest. He also assumed that the United States suggestion aimed at widening the scope for events other than those listed in paragraphs 1 (a), (b) and (c) was acceptable only if the public interest remained paramount.

39. Mr. LUKAS (Austria) said that the word “compelling”, which was misleading in the context, should be deleted. In his view, the main concern was to maintain the reference to the public interest.

40. Mr. WALLACE (United States of America) said that deletion of the word “compelling” would moderate the extremely negative tone of the wording.

41. Mr. FONT (France) said that, if the word “compelling” were to be deleted, the footnote should, as far as possible, reflect the policy set forth in the *Legislative Guide*. He therefore proposed inserting, after the word “authorizing”, the words “, where this is provided by law,”.

42. The CHAIRMAN said that the words “by the law” might give the impression that reference was being made to other laws, whereas the words “in the law” implied a specific reference to the law dealing with concession contracts.

43. Mr. FONT (France) said it was immaterial which law was referred to. What was important was to spell out that the circumstances in which the State was able to authorize an extension must be provided for in law.

44. The CHAIRMAN said that the wording “in the law” was preferable, in view of the original intent and the approach adopted in the *Legislative Guide* that any right of extension should be based in a specific law.

45. Mr. POLIMENI (Italy) said that deletion of the word “compelling” was an acceptable solution if it eliminated the most damaging effects of the current wording of the footnote. The wording “possibility for the law to authorize” might offer a clearer solution than the words “in the law”.

46. Mr. MARKUS (Observer for Switzerland) said he was reluctant to agree to deletion of the word “compelling” unless it was replaced by another qualifying word, such as “important” or “overriding”, since the absence of a qualifier might create the mistaken impression that the contracting authority was exceptionally acting in the public interest, whereas the truth of the matter was that it must always do so. He could also accept the deletion of the words “in the public interest”, provided that the word “reasons” remained qualified.

47. Mr. WALLACE (United States of America) said that, just as the word “compelling” was too restrictive, the word “important” was too neutral and ambiguous. In view of the aim of promoting competition and achieving transparency, his suggestion was that the word “compelling” should be deleted and the words “as justified in records” added after “in the public interest”. Governments would then be required to justify their actions in records that were readily accessible to relevant parties and institutions.

48. Mr. LUKAS (Austria) supported the United States proposal, which, in his view, addressed the various concerns expressed. The word “compelling” could safely be deleted without replacing it with another qualifying word: as the principle of competition was itself in the public interest, any extension of the concession contract must also be in the public interest.

49. Mr. MEENA (India) said he had doubts about the reasons for inclusion of the footnote, particularly since the encouragement of consensual extensions was not merely unfavourable to competition but could even lead to a monopoly. On that basis, either the footnote should be deleted entirely, or it should discredit such notions by specifying that the enacting State could not authorize a consensual extension.

50. The CHAIRMAN said that, in his personal view, the footnote had been devised as a way of providing a very small loophole that would slightly counterbalance the extremely restrictive nature of model provision 43. The loophole thus provided, however, was confined to matters in the public interest, which included the avoidance of monopolies.

51. Mr. ESTRELLA FARIA (Secretariat) said that the historical reason for the compromise represented by the footnote was explained in paragraphs 207 and 208 of the report of the Working Group on the work of its fifth session (A/CN.9/521).

52. The CHAIRMAN suggested that, in the light of the discussion, the footnote should be amended to read: “The enacting State may wish to consider the possibility for the law of authorizing a consensual extension of the concession contract pursuant to its terms, for reasons of public interest as justified in records.”

53. Mr. LEBEDEV (Russian Federation) said that the Russian version of the text required further clarification. In that version, the title of model provision 43 referred to the duration and extension of the concession contract. Paragraph 1 appeared to state that, in certain cases, the term of the concession contract *must* be extended, whereas paragraph 2 stated that in some circumstances it *might* be extended. The reference to “consensual extension”, however, appeared only in the footnote and it was not clear whether the extension referred to in paragraphs 1 and 2 was based on the agreement of both parties, on the request of one party or, alternatively, whether it was automatic. By contrast, the basis for the termination of the concession contract covered in model provisions 44, 45 and 46 was quite clear.

54. The CHAIRMAN said that paragraph 1 of the model provision provided for an extension of the concession contract in the circumstances listed in that paragraph, while paragraph 2 mentioned further circumstances in which the concession contract might be extended. The model provision did not, therefore, envisage any automatic extension of the concession contract.

55. Mr. LEBEDEV (Russian Federation) said that paragraph 1 referred to the extension of the term of the concession contract, while the title of the provision referred to the extension of the concession contract itself. Extension of the contract itself would probably be agreed between the parties in the circumstances mentioned in both paragraph 1 and paragraph 2. If that were the case, it was not made clear in the text, at least in the Russian version.

56. The CHAIRMAN said that, in legal practice, the procedure for extending a concession contract consisted of a sequence of steps. First, the law provided a framework for determining whether the contracting authority was empowered to agree to the extension of the contract. Secondly, the concession contract should contain provisions with regard to the duration of the contract, formulated as rights and obligations of the parties. Thirdly, if the relevant circumstances existed, the contracting authority should agree to extend the contract; if it did not agree to do so, the concessionaire would have access to the courts or arbitration to obtain an extension. The wording of the provision might require amendment in order to reflect that sequence of events more clearly.

57. Mr. ESTRELLA FARIA (Secretariat) said that the use of a reflexive verb in paragraph 1 of the Russian version might indeed suggest more strongly than in the other language versions that the contract could be extended automatically. That was not, however, the intended meaning. Moreover, it was not clear from the provision whether the concessionaire had a statutory right to an extension of the contract even if the contract did not provide for that right or failed to mention one of the circumstances in which the right existed. Those questions applied to the provision in general, not only to the Russian version.

58. Mr. WALLACE (United States of America) said that, in practice, the problems mentioned by the representative of the Russian Federation would probably be resolved along the lines described by the Chairman. However, in legislative terms the provision was unclear.

*The meeting was suspended at 11 a.m. and resumed at 11.30 a.m.*

59. Mr. LUKAS (Austria) said that his delegation shared the concern expressed by the representative of the Russian Federation. As drafted, paragraphs 1 and 2 of model provision 43 appeared to refer not only to different reasons for extension, but also to different extension procedures. That impression could be dispelled if the text of paragraph 2 were moved to paragraph 1, to form a new subparagraph (d).

60. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said that the model provision merely set out the circumstances in which the concession contract might be extended; other matters, such as procedure, were covered by the governing law. The model provisions could not deal with every possible situation. For example, one party might request an extension of the contract or both parties might agree that an extension was needed. Another possibility was that one party might request an extension and the other not agree to it; such a dispute might be the subject of an arbitral or other decision imposing an extension for a certain period of time and the payment of damages by the party which had not accepted the decision. All of those eventualities fell within the remit of the governing law or the dispute settlement mechanism.

61. Mr. ESTRELLA FARIA (Secretariat) said that paragraph 1 (c) of the model provision was intended to deal with the issue raised by the observer for Serbia and Montenegro. The law could not specify all the circumstances that might justify an extension of the concession contract, but it could mention some by way of illustration. Other circumstances could be specified by the enacting State under paragraph 1 (c).

62. Mr. SCHÖFISCH (Germany) said it was the understanding of his delegation that any extension of the concession contract had to be the subject of consensus between the parties. However, consensus was not mentioned in the main body of the model provision; the only reference thereto was the phrase “consensual

extension” in footnote 44. That might be taken to mean that the contract could be extended unilaterally. He therefore proposed that a reference to consensus should be added in paragraph 1, and also in paragraph 2.

63. Mr. JIANG JIE (China), endorsing the comments made by the representatives of the Russian Federation and Austria, said that the model provision should cover not only the circumstances in which a contract could be extended and the reasons and procedures for extension, but also the duration of the extension. That last point was omitted from the current version of the provision. He also supported the proposal to incorporate paragraph 2 into paragraph 1, since it, too, described a set of circumstances in which the contract could be extended.

64. Mr. VALLADÃO (Brazil), noting that there was broad agreement on the substance of model provision 43, said that his delegation supported the proposal to incorporate paragraph 2 into paragraph 1.

65. The CHAIRMAN suggested that paragraph 2 should become paragraph 1 (c), with the opening phrase “the term of the concession contract may further be extended” deleted from it. The existing paragraph 1 (c) would become paragraph 1 (d). It should also be made clear that the model provision did not give the concessionaire the right to extend the contract. That could be reflected by some such wording as: “The contracting authority may not agree to extend the concession contract except as a result of the following circumstances ...”. A phrase should also be added to the provision stating that the term of the contract could be extended only for a period justified by the circumstances mentioned.

66. Mr. FONT (France) supported the proposal to incorporate paragraph 2 into paragraph 1. Referring to the comments made by the representative of China, he noted that the model provision failed to mention not only the duration of the extension, but also—notwithstanding the reference to “duration” in its title—the initial duration of the contract. The first paragraph of the provision should stipulate that the duration of the concession contract should be specified in the contract, having regard to the characteristics of the project and the need to allow the concessionaire to obtain a reasonable return on its investment. The circumstances in which the duration might be extended consensually could be covered in a second paragraph incorporating, *mutatis mutandis*, the amendments proposed by the representatives of Austria and China.

67. Mr. SCHÖFISCH (Germany), noting that the discussions so far had centred on cases where the concessionaire wished to extend the concession contract, pointed out that the model provision should also deal with cases where the contracting authority wished to extend the contract. The existing version of the provision could be taken to imply that, if the contracting authority wished to extend the contract, the concessionaire had to comply. It should be made clear that any extension must be based on a consensus between the parties.

68. The CHAIRMAN said that the word “consensus” could be problematic in some legal systems. It might be necessary to create a right of the concessionaire to extend the contract in certain circumstances.

69. Ms. SABO (Canada), referring to the proposal made by the representative of France, said that it would be difficult to draft a provision on the duration of the concession contract because of the extremely broad range of types of contract that would need to be covered. Consequently, the title of section IV and its subsection 1 should be amended. As for the amendment to paragraph 1 suggested by the Chairman, the inclusion of the word “agree”

would make it implicit that both parties must consent to the extension of the contract. The drafting group could finalize the precise wording.

70. The CHAIRMAN, referring to the proposal made by the representative of France, pointed out that model provision 28, subparagraph (p), referred to the duration of the concession contract. He wondered whether it would therefore be acceptable not to refer to the initial duration in model provision 43.

71. Mr. FONT (France), while acknowledging the concern expressed by the representative of Canada, said that model provision 28 created no obligation to include in the concession contract any of the matters listed in that provision. It would therefore be possible for two parties to conclude a contract the duration of which was not stipulated. While the precise duration naturally depended on the individual contract, it was vital to establish the principle that the duration should be stipulated.

72. Mr. MARRONE LOAIZA (Observer for Panama) expressed support for the remarks by the representative of Canada. The duration of the concession contract varied depending on the nature of the contract and the specific requirements of the country in question at the time the contract was concluded. The contracting authority should have the option of extending the contract if it found performance to be satisfactory. The contract might be extended by agreement of the parties or for reasons of force majeure.

73. The CHAIRMAN said that everyone appeared to agree that the model provisions could not determine the precise duration of the concession contract. It might be argued that they should stipulate that the duration had to be specified; however, even that might not be necessary because, in practice, concessionaires would want to ensure that the duration was specified so as to be able to calculate the return on their investment.

74. Mr. FONT (France) said that it did not make sense to mention the extension of the duration unless the initial duration had been specified.

75. Mr. VALLADÃO (Brazil) proposed that the concerns of the representative of France could be reflected without the addition of a new paragraph. The *chapeau* of paragraph 1 could be amended to commence with the words: "The term of the concession contract, which usually starts with its signature by the parties ...". The rest of the *chapeau* would remain unchanged.

76. Mr. ESTRELLA FARIA (Secretariat) said that a separate provision to the effect that the duration of the concession contract must be specified could be contemplated. It would be possible to draw on legislative recommendation 61, which had eventually been relegated to model provision 28 by the Working Group on the grounds that the matter was a contractual one.

77. Parameters for setting the desirable duration were covered in paragraphs 2 to 5 of chapter V of the *Legislative Guide*. The Working Group had agreed only that it would be unreasonable for a law to establish a duration, since it might depend on any number of factors. The question now was which of those parameters should apply; to mention any one of them could be construed as attributing lesser importance to the others.

78. Mr. WALLACE (United States of America), supported by Mr. LUKAS (Austria), said it was too late to reconsider the philosophy underlying the duration of concession agreements. The title of chapter IV and the heading of model provision 43 were troubling in that they referred to "duration" without containing any normative provision in that regard. The most economical solution would be to take account of recommendation 61 by

rewording the first sentence to read, "The duration of the concession shall be stipulated in the concession contract. It shall not be extended except ...".

79. Ms. PERALES VISCASILLAS (Spain) supported the proposed amendment. The duration of the concession contract and, where applicable, of its extension, must be specified.

80. Ms. SABO (Canada) said that model provision 28 would then state that the contract *should* contain a provision concerning the duration, whereas model provision 43 would state that it *must* contain such a provision. The simplest solution would be to delete the word "duration" from the title and headings.

81. Ms. VEYTIA PALOMINO (Mexico) said there was no need to repeat in model provision 43 the indirect reference to duration contained in model provision 28 (p).

82. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said the most logical course was to delete all references to "duration" from the section and to focus on extension and termination. Duration was just one of many conditions of a concession contract covered in model provision 28.

83. Mr. FONT (France) supported the United States proposal to insert a short sentence stating that the duration of the concession must be stipulated in the contract.

84. Mr. MARKUS (Observer for Switzerland) said that, while his delegation supported the United States proposal, it still shared Canada's concern. The Commission might wish to clarify the relationship between model provision 28 and the mandatory requirements set forth in model provision 43.

85. The CHAIRMAN suggested that a mere reference to durations in an introductory paragraph corresponding to legislative recommendations 61 and 62, would remove the inconsistency.

86. Mr. LEBEDEV (Russian Federation) said that, while he could support the United States proposal, the remarks of the representative of Canada were justified. The current wording referred only to cases in which duration had been stipulated in the contract itself. The question was whether it was essential to establish the duration of each and every contract, since, in practice, the parties might wish to agree on the duration as the work progressed. Hence, the more logical solution was to delete the word "duration" from the title and heading. If the United States proposal was preferred, it would change the legal substance of the concession contract, by making it mandatory for the duration to be fixed in advance.

87. The CHAIRMAN suggested that, as a compromise, a new first sentence, stipulating the need for the duration to be fixed in the contract, could be inserted; and the paragraph could end with the phrase, "and only to the extent justified by the reasons for the extension".

88. Mr. LUKAS (Austria) asked how that suggestion addressed the concern expressed by the Canadian delegation.

89. Ms. SABO (Canada) said that, while her delegation could live with the proposal, model provision 43 should perhaps also cover contracts for which no term had been set.

90. Mr. ESTRELLA FARIA (Secretariat) said that, as a matter of policy, the Commission had always opposed indefinite or perpetual concessions.

91. Mr. BOUWHUIS (Observer for Australia) said that if the only unresolved issue was whether to leave open the possibility



for indeterminate contracts, the first sentence in the United States proposal might begin, “Where the concession contract sets out its term of duration ...”.

92. The CHAIRMAN said it was neither the policy of the *Legislative Guide* nor in the spirit of model provision 43 to provide for indeterminate contracts, which did not occur in the real world.

93. Mr. WALLACE (United States of America) said the current text was acceptable, because it referred to the stipulation as to duration in model provision 28 (*p*). Alternatively, the title of section IV could be amended to refer only to extension and termination, and the first line reworded to read, “The term of the concession contract shall not be extended except ...”, implying a fixed duration but not stating where it was specified, and avoiding inconsistency with model provision 28 (*p*).

94. The CHAIRMAN said he had sensed an emerging consensus that the paragraph might begin, “The concession contract shall set forth its duration ...”. The concerns expressed by the delegation of the Russian Federation could then be addressed in a sentence that read: “The contracting authority may not agree to extend the duration of the concession contract, as stipulated in model provision 28 (*p*), except as a result of the following circumstances: ...”. That sentence would be followed by subpara-

graphs (*a*) and (*b*) as currently worded; current paragraph 2 would become subparagraph (*c*); and subparagraph (*c*) would become subparagraph (*d*), ending with the phrase “and only to the extent justified by the reasons for the extension”.

95. Mr. DE CAZALET (Observer for the Union Internationale des Avocats—UIA) supported the proposal of the representative of France to include a provision on duration. Private-sector financing of infrastructure projects involved heavy investment, and duration was the most crucial constraint facing investors.

96. Mr. LUKAS (Austria) said that, while he supported the Chairman’s suggestion, the inconsistency with model provision 28 remained. If all the matters referred to in model provision 28 were merely recommendations to which the parties might or might not agree, that must be spelled out in model provision 43.

97. Mr. POLIMENI (Italy) said that the problem of consistency with model provision 28 also arose in connection with other model provisions. He again suggested that consideration should be given to insertion of a footnote to model provision 28, stating that some of the conditions it contained might be covered in other provisions that made them mandatory.

*The meeting rose at 12.30 p.m.*

## Summary record of the 763rd meeting

Wednesday, 2 July 2003, at 2 p.m.

[A/CN.9/SR.763]

*Chairman:* Mr. Wiwen-Nilsson. (Sweden)

*The meeting was called to order at 2.10 p.m.*

FINALIZATION AND ADOPTION OF THE DRAFT  
UNCITRAL MODEL LEGISLATIVE PROVISIONS ON  
PRIVATELY FINANCED INFRASTRUCTURE PROJECTS  
(*continued*) (A/CN.9/521, A/CN.9/522 and Add.1 and 2,  
A/CN.9/533 and Add.1-7)

*Model provision 43. Duration and extension of the concession contract (continued)*

1. Mr. MEENA (India) said that, unlike model provision 28, model provision 43 made stipulation of the term of the concession contract a mandatory requirement. That inconsistency could be resolved by replacing the words “as stipulated”, in paragraph 1, with the words “if stipulated”.

2. Mr. POLIMENI (Italy), supported by Ms. SABO (Canada), Mr. LUKAS (Austria), Mr. FONT (France), Mr. MARKUS (Observer for Switzerland) and Mr. WANAMI (Japan), suggested that the problem of inconsistency could be resolved without further substantive discussion by adding to model provision 28 a footnote, to read: “Enacting States should be aware that some of the matters listed in this model provision 28 are obligatory pursuant to subsequent model provisions.”

3. The CHAIRMAN said he took it that the Commission agreed to the proposal of the representative of Italy to add a footnote to the *chapeau* of model provision 28, as a means of resolving any potential conflict between model provision 28 and other model provisions.

4. *It was so decided.*

5. Mr. ESTRELLA FARIA (Secretariat), responding to a request for clarification by Mr. WALLACE (United States of America) concerning the significance of the format of subparagraph (*c*), said that italicized text in square brackets served three different purposes. The first was to indicate cross-references to other model provisions. The second was to indicate an instruction to enacting States as to how to implement a particular provision. In the third instance, of which subparagraph (*c*) was an example, the square-bracketed text was italicized to distinguish it from contentious text, and covered other, unspecified circumstances.

6. Mr. WALLACE (United States of America), responding to a request for clarification from Mr. FONT (France), said that his earlier proposal to add the words “as justified in records” at the end of footnote 44, which he had understood already to have been accepted by the Commission following considerable discussion of the subject, had been intended to allay any fear that the transparency referred to in the *Legislative Guide* might otherwise be compromised.

7. The CHAIRMAN said he took it that the Commission wished to approve the amendment to footnote 44 proposed by the representative of the United States.

8. *Model provision 43, as amended, was approved and referred to the drafting group.*

## Chapter III—Title (resumed)

9. The CHAIRMAN recalled that, at the previous meeting, the observer for Switzerland had drawn attention to a conflict between the amended title of chapter III and the title of chapter IV, and had proposed further amending the title of chapter III to read “Contents of the concession contract”.

10. Mr. JIANG JIE (China) said that a still more appropriate title would be “Contents and implementation of the concession contract”.

11. *The title of chapter III, as further amended, was approved and referred to the drafting group.*

*Model provision 44. Termination of the concession contract by the contracting authority;*

*Model provision 45. Termination of the concession contract by the concessionaire;*

*Model provision 46. Termination of the concession contract by either party*

12. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said that, with regard to termination, model provisions 44 and 45 placed the concessionaire in a more advantageous position than the contracting authority. For instance, the concessionaire could terminate the contract if the parties had failed to agree on a revision thereof, whereas the contracting authority was not accorded that right. In legal systems in which contracts were terminated at the discretion of a court or an arbitration body, practical difficulties would arise if the concessionaire believed that the conditions for a revision of the concession contract had been met and the court or arbitration body decided otherwise.

13. Mr. ESTRELLA FARIA (Secretariat) said it had been the Commission’s intention to ensure that the contracting authority had wider powers to terminate the contract than did the concessionaire. The circumstances under which the concessionaire could terminate a contract were restricted to those set forth in model provision 45 and in chapter V, paragraph 28, of the *Legislative Guide*. The involvement of a third party, such as a competent court, was not a requirement under all legal systems.

14. Mr. WALLACE (United States of America), drawing attention to the comment by Italy contained in paragraph 16 of document A/CN.9/533/Add.1, proposed that the word “compelling”, currently enclosed in square brackets, should be retained in model provision 44, subparagraph (b). Accordingly, footnote 45 would also be retained.

15. Mr. POLIMENI (Italy) supported the proposals.

16. Mr. MARKUS (Observer for Switzerland) agreed that the word “compelling” should be retained in order to ensure that the threshold for termination of the concession contract remained high. In his delegation’s view, the decision on whether to retain or to delete the accompanying footnote should, however, be made in the context of the discussion of chapter V.

17. In response to a question from Mr. VALLADÃO (Brazil), Mr. ESTRELLA FARIA (Secretariat) said that the decision to remove the word “compelling” from other model provisions had been made with a view to allowing for greater flexibility, whereas in model provision 44 the word “compelling” was intended to make the provision more restrictive.

18. The CHAIRMAN said he took it that the proposal to delete the square brackets from the word “compelling” and from footnote 45 was acceptable to the Commission.

19. *It was so decided.*

20. Mr. RWANGAMPUHWE (Rwanda) said that the word “reasonably”, in subparagraph (a) of model provision 44, was too vague, and could lead to difficulties of interpretation. The same was true of the word “reasonable”, in model provision 46.

21. Mr. ESTRELLA FARIA (Secretariat) said that the term was one that the Commission had often used in other legislative texts, albeit not one recognized to the same degree by all legal systems. The model provisions under discussion aimed to provide a general legislative framework and would not be implemented in a vacuum. In developing the *Legislative Guide*, the Commission had taken account of the fact that most concession contracts contained detailed clauses relating to termination, designed to indicate clearly the extent of the concessionaire’s duty to perform its obligations in situations such as force majeure.

22. Mr. RWANGAMPUHWE (Rwanda) said that the circumstances covered by model provisions 44 to 46 did not include force majeure, for which more explicit provision should perhaps be made. The performance of obligations under the concession contract was a matter for interpretation by an arbitration body or court.

23. The CHAIRMAN said that the word “reasonably” was intended to lower the threshold of anticipation concerning the performance of obligations under the concession contract.

24. Mr. WALLACE (United States of America) said that, paradoxically, the standard for failure set in subparagraph (a) of model provision 44 in the case of termination of the concession contract appeared to be less stringent than that set in model provision 41 in the case of the temporary takeover of an infrastructure project by the contracting authority. That ambiguity would be removed if subparagraph (a) were to exclude any mention of reasonable expectation and refer only to the failure of the concessionaire to perform its obligations.

25. The CHAIRMAN said that model provisions 41 and 44 addressed different situations and timescales. The contracting authority would be in a less advantageous position if subparagraph (a) were to exclude any mention of reasonable expectation, as it would then be deprived of the opportunity to terminate the contract on the basis of the anticipated failure of the concessionaire to perform its obligations.

26. Mr. WALLACE (United States of America) said that in the event of the “serious failure” mentioned in model provision 41, a much simpler procedure would be immediately to terminate the concession contract pursuant to model provision 44.

27. The CHAIRMAN said that, if the concessionaire repeatedly failed to correct any breaches, the contracting authority could terminate the concession contract by invoking model provision 44 (a). As had been borne out by the discussions of the Working Group, the temporary takeover of an infrastructure project by the contracting authority was a much more controversial issue.

28. Ms. SABO (Canada) said that, in the absence of a provision along the lines of model provision 41, the contracting authority would have no option but to terminate the concession contract if the concessionaire was temporarily prevented from performing its obligations, a step which might be in neither party’s interest. In that light, the different standards set in the two model provisions posed no difficulty.

29. Mr. MURREY (United Kingdom) supported the Canadian delegation’s view. The suspension of a contract was often a precipitate reaction to a crisis, whereas the termination of a contract

was the predictable outcome of a process involving a number of stages. It was therefore correct that model provision 41 should impose more rigorous requirements than did model provision 44.

30. Mr. SCHÖFISCH (Germany) agreed. A serious failure on the part of the concessionaire did not necessarily mean that it could no longer be reasonably expected to perform its obligations at a later stage. He therefore saw no contradiction between model provisions 41 and 44.

31. Ms. PERALES VISCASILLAS (Spain) said that she too saw no contradiction between the two provisions. The problem of interpretation of the words “no longer be reasonably expected” might be resolved by consulting the corresponding provision of the Vienna Convention on the Law of Treaties.

32. Mr. ESTRELLA FARIA (Secretariat) said that the model provisions had been based on the language used in the legislative recommendations, which was perhaps not as rigorous as was necessary for legislative texts. Nevertheless, the situations envisaged under model provisions 41 and 44 were clearly distinct; in the first case, the situation was judged to be temporary, whereas in the second it was judged to be permanent enough to justify termination of the contract.

33. Mr. RWANGAMPUHWE (Rwanda) said that the wording of subparagraph (a) allowed for a subjective evaluation of the situation, thus providing scope for the contracting authority to terminate the contract without due cause. The provision should be more rigorously drafted in order to eliminate that element of flexibility.

34. The CHAIRMAN asked whether it would be a feasible solution to delete the word “reasonably” from subparagraph (a) of model provision 44.

35. Mr. VALLADÃO (Brazil) proposed that, having regard to the concerns expressed in connection with the wording of subparagraph (a), it should be amended to read: “In the event that it is established that the concessionaire will not be able or willing to perform its obligations, ...”.

36. The CHAIRMAN pointed out that in many jurisdictions the use of the word “established” would place too high a burden of proof on the contracting authority, whereas the intent had been to reduce the burden of proof by providing for anticipation of breach or failure on the part of the concessionaire.

37. Mr. SCHÖFISCH (Germany) said he was hesitant to delete the word “reasonably”. First, it was not unusual to find that word in legislative texts and any dispute as to its interpretation could be referred to the courts. Secondly, even if it were deleted, differences of opinion would still arise concerning the ability or willingness of the concessionaire to perform its obligations.

38. Ms. SABO (Canada) said that the wording of the text had been discussed at great length by the Working Group. To delete the word “reasonably” would allow the contracting authority too much leeway, while the wording proposed by the representative of Brazil would impose too heavy a burden of proof upon it.

39. Mr. WALLACE (United States of America) said it was not for the contracting authority subjectively to anticipate any breach. On the contrary, anticipatory breach referred to an act on the part of the concessionaire that would lead a court objectively to conclude that it would be unable to perform its obligations in the future. He favoured the Brazilian proposal, which could be simplified even further if subparagraph (a) were simply to state: “In the event that the concessionaire will not be able or willing to perform its obligations, ...”. The word “will” provided an element

of anticipation, whereas the word “reasonably” left scope for subjectivity and even abuse on the part of the contracting authority.

40. The CHAIRMAN said that, as pointed out by the representative of the United States, the criterion of reasonable expectation was one that could be objectively determined by a court. That being so, he would take it that the Commission wished to approve model provision 44 as currently worded, subject to the deletion of the square brackets from subparagraph (b) and from footnote 45.

41. *It was so agreed.*

42. *Model provisions 44, 45 and 46 were approved and referred to the drafting group.*

*Model provision 47. Financial arrangements upon expiry or termination of the concession contract;*

*Model provision 48. Wind-up and transfer measures*

43. Mr. MITROVIĆ (Observer for Serbia and Montenegro) said that the title of model provision 47 referred to expiry or termination of the concession contract, whereas the text referred only to termination. He therefore proposed that the words “expiry or” should be deleted from the title.

44. Furthermore, model provision 47 required that the contract “shall” stipulate how compensation was to be calculated, whereas the corresponding legislative recommendation required only that it “should” so stipulate. He therefore further proposed replacing the word “shall” by “may”.

45. Mr. FONT (France) supported the proposal to amend the title of model provision 47.

46. Mr. WALLACE (United States of America), supported by Ms. PERALES VISCASILLAS (Spain), said that the words “expiry of” should not be deleted from the title of model provision 47. Instead, a replacement to compensation on the occasion of expiry should be added to the text.

47. Ms. PERALES VISCASILLAS (Spain), supported by Mr. FONT (France) and Mr. WALLACE (United States of America), said that the title of model provision 47 would more accurately reflect the content of the provision if the words “financial arrangements” were replaced with “compensation”.

48. Mr. WALLACE (United States of America) pointed out that model provision 48, subparagraph (a), did not address the compensation mentioned in legislative recommendation 66, to which the model provision corresponded.

49. Mr. ESTRELLA FARIA (Secretariat) said that no deliberate decision had been taken by the secretariat to omit any part of the legislative recommendations. As stated in its relevant report (A/CN.9/505, para. 160) and indicated in paragraph 100 of the note by the secretariat contained in document A/CN.9/522, the Working Group had expressly rejected as undesirable a model provision which addressed the matters of an essentially contractual nature dealt with in legislative recommendation 66. A general reference to the matter had also been included in model provision 48, subparagraph (a), which, however, pursuant to the wishes of the Working Group, did not contain a reference to compensation. If the Commission wished to reverse the decision of the Working Group, the substance of legislative recommendation 66 could be incorporated either by expanding the list in model provision 28 or by expanding the final part of model provision 48, subparagraph (a), to read: “... where appropriate, and the compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new con-

cessionaire or purchased by the contracting authority upon expiry or termination of the project agreement”.

50. The CHAIRMAN suggested adding a new subparagraph (e) reproducing the wording of legislative recommendation 66, beginning with the words “the compensation ...”.

51. Mr. LEBEDEV (Russian Federation) said that, since model provision 47 dealt only with termination, the order of the words “expiry” and “termination”, in the title of chapter IV, section 3, should be reversed. As already proposed, the words “expiry or” would be deleted from the heading of model provision 47, and the issue of expiry would be covered by the newly proposed subparagraph (e).

52. Ms. SABO (Canada) said that a decision on the question of titles was likely to be contingent on the outcome of the future discussion of the three options, spelled out in paragraph 2 of document A/CN.9/522/Add.1, concerning the relationship between the model provisions and the legislative recommendations.

53. In response to a question from Ms. PERALES VISCASILLAS (Spain), Mr. ESTRELLA FARIA (Secretariat) said that the Working Group had decided to include the words “costs incurred” in model provision 47, despite their absence from legislative recommendation 67, on the grounds that the reference in that legislative recommendation to works performed and lost profits was too narrow to cover all of the elements mentioned in chapter V, paragraph 43, of the *Legislative Guide*.

54. The CHAIRMAN said that, subject to the outcome of the discussions referred to by the Canadian delegation, he took it that the Commission wished to approve the proposals to amend the title of chapter IV, section 3, to read “Arrangements upon termination or expiry of the concession contract”; to amend the heading of model provision 47 to read “Compensation upon termination of the concession contract”; and to add a subparagraph (e) to model provision 48, reproducing the language of recommendation 66.

55. *Model provisions 47 and 48 and the title of chapter IV, section 3, as amended, were approved and referred to the drafting group.*

*The meeting was suspended at 3.50 p.m. and resumed at 4.05 p.m.*

*Model provision 49. Disputes between the contracting authority and the concessionaire*

56. *Model provision 49 was approved and referred to the drafting group.*

*Model provision 50. Disputes involving customers or users of the infrastructure facility*

57. Mr. MITROVIĆ (Observer for Serbia and Montenegro) proposed that, in the title of the model provision, the word “disputes” should be replaced by “claims”, so as to bring it into line with the content of the provision.

58. Mr. WALLACE (United States of America) said that any discussion of titles should be deferred pending the discussion concerning the three options, as pointed out earlier by the representative of Canada.

59. The CHAIRMAN said that the title was in any case fully appropriate, as the mechanisms referred to in the model provision would come into play only in the event of a dispute, and not in cases where claims were freely paid by customers.

60. Mr. MARKUS (Observer for Switzerland) pointed out that paragraph 44 of chapter VI of the *Legislative Guide* further referred to the dispute settlement role played in some countries by regulatory agencies. Such agencies should perhaps be mentioned in the model provision or in a footnote, together with the UNCITRAL Model Law on International Commercial Conciliation, enacted in 2002.

61. The CHAIRMAN said that, in accordance with the mandate of the Commission, the content of legislative recommendation 71 had been faithfully transformed into model provision 50, which therefore required no change.

62. *Model provision 50 was approved and referred to the drafting group.*

*Model provision 51. Other disputes*

63. *Model provision 51 was approved and referred to the drafting group.*

*Relationship between the draft model provisions and the legislative recommendations contained in the Legislative Guide*

64. The CHAIRMAN invited the Commission to consider the three options set forth in paragraph 2 of document A/CN.9/522/Add.1, concerning the relationship between the draft model provisions and the legislative recommendations contained in the *Legislative Guide*. The first option would be to retain both the legislative recommendations and the model provisions, upon their adoption, as two parallel texts. The second option would be to replace the legislative recommendations in their entirety with the model legislative provisions. The third option would be to replace only those legislative recommendations in respect of which the Commission had adopted model legislative provisions.

65. Mr. WALLACE (United States of America) said that, as already agreed by the Working Group in its extensive discussions on the subject, the guiding criterion should be the utility of the final product. Accordingly, he favoured the third option of a consolidated version in which only those legislative recommendations in respect of which the Commission had not adopted model legislative provisions were retained. Different typefaces could perhaps be used to highlight the distinction between the model legislative provisions and those legislative recommendations which had not been replaced. It would also be useful if the information contained in the footnotes discussed by the Commission were to be combined with the *Legislative Guide* in some way. Chapter titles should be harmonized and the paragraphs numbered consecutively throughout the *Legislative Guide*, instead of only within each individual chapter. For reasons of practicality, existing stocks of the *Legislative Guide* should be exhausted before the consolidated version of the texts was produced. Information could also be made available on the UNCITRAL web site, which users should be encouraged to access.

66. Mr. ESTRELLA FARIA (Secretariat), responding to a question from Ms. PERALES VISCASILLAS (Spain) concerning the ultimate fate of the *Legislative Guide*, said that any changes to the text would require a mandate from the Commission. Regardless of the option selected, however, some editing of the text would be necessary in the interest of consistency with the model provisions. If the Commission decided to opt for a single consolidated text, copies of the *Legislative Guide* could continue to be distributed until stocks were exhausted, in order to avoid wastage. In the interim, a corresponding number of copies of the model legislative provisions could be issued as a supplement, together with a note indicating that a new edition of the *Guide* incorporating editorial changes and the model legislative provisions was being prepared for future publication. If the

Commission decided against a single text, the *Legislative Guide* and the model legislative provisions would simply be issued as two separate documents.

67. Ms. PERALES VISCASILLAS (Spain) emphasized the need for a strategic decision. Drawing attention to the Spanish comments on the subject, contained in document A/CN.9/533/Add.2, she reiterated her delegation's preference for the first option, namely, two parallel texts, with an explanatory preface or preamble explaining the connection between them. If, however, it was decided to undertake a substantial revision of the *Guide*, her delegation would, like the United States delegation, favour the third option.

68. Mr. SCHÖFISCH (Germany) said that the option of a consolidated text was the ideal solution but might diminish the capacity of the secretariat to deal with other more important projects, in which case the first option would be a satisfactory alternative.

69. Mr. ESTRELLA FARIA (Secretariat) said that the publication of a United Nations document required other resources in addition to those provided by the UNICITRAL secretariat, which had neither the human nor the financial resources to produce a new edition of the *Legislative Guide* in time for the next session of the Commission. It did, however, have sufficient resources to print a supplement containing the model legislative provisions. In addition, a consolidated text of the legislative recommendations and the model provisions could be posted on the UNCITRAL web site in the relatively near future.

70. Ms. SABO (Canada) said that her delegation's preferred long-term solution was to include the *Legislative Guide*, the legislative recommendations and the model provisions in a single text. Its preferred interim solution would be to reproduce the legislative recommendations along with the model provisions. Perhaps over the next two years the secretariat could prepare a draft of an amended *Guide*, which could be presented to a working group of the Commission if any substantive issues arose as a result of the adjustments made with a view to bringing the text into conformity with the model provisions.

71. Mr. ESTRELLA FARIA (Secretariat) said that no such working group was envisaged in view of the costs that would be entailed. Perhaps the adjusted text could be posted on the web site for comment by the Commission. In any event, the secretariat would need to know the views of the Commission concerning the form the product should take.

72. Ms. SABO (Canada) said that her delegation's preference was in any case for the *Legislative Guide* to be updated by the secretariat, which was amply qualified to carry out that task. The important point was that the *Guide* and the legislative recommendations should continue to be useful. While the separate publication of the model provisions was a good interim solution, ultimately all the legislative recommendations, the *Legislative Guide* and the model provisions should appear as a single publication.

73. Mr. WALLACE (United States of America) said that the legislative recommendations should be replaced by the corresponding model provisions, wherever applicable, in any document produced as a short-term solution. Otherwise, others would simply take that task upon themselves. The sooner the model provisions were published, the more useful they would be, and the more they would redound to the Commission's credit.

74. The CHAIRMAN said that the short-term option of using the current *Legislative Guide* in parallel with a text containing the model provisions would save costs. The question then arose as to which option would be used in publishing information on

the web site, as that approach would probably be mirrored by the long-term strategy.

75. Mr. ESTRELLA FARIA (Secretariat) said that the approach adopted would depend on whether the Commission decided to replace the legislative recommendations with model provisions where both dealt with the same matter. If the Commission decided to proceed in that manner, the first publication of the model legislative provisions would contain the footnote proposed in paragraph 4 of document A/CN.9/522/Add.1. In that case, the document could very quickly be posted on the web site together with the report of the Commission on its thirty-sixth session. The Commission would need to indicate clearly whether it agreed with the secretariat's tentative identification of the remaining and superseded legislative recommendations, as indicated in documents A/CN.9/522 and A/CN.9/522/Add.1. A consolidated document would take much longer to produce.

76. Mr. SCHÖFISCH (Germany) said that cost and human resources were important factors to be taken into account. It was for legislatures to decide whether or not to use the 2003 model provisions, which were obviously a development of the *Legislative Guide* produced in 2001. Consequently, there was no need to merge the model provisions with the legislative recommendations.

77. Mr. POLIMENI (Italy) said that the legal meaning of the word "replacement" was unclear in the present context. The introductory text accompanying the model provisions should therefore provide a factual account of their development. An interim publication of the model provisions along with the text of the legislative recommendations which had not been replaced would pose no problem, particularly as the existing *Legislative Guide* could be consulted by any national legislator wishing to read the legislative recommendations in their entirety.

78. Mr. BELLENGER (France) said that the *Legislative Guide* was a cohesive document, whereas to consolidate the various texts would result in a heterogeneous document. The legislative recommendations were also valuable in view of their explanatory function, which the model provisions lacked. He therefore favoured the first option.

79. Mr. LEBEDEV (Russian Federation) said his delegation shared the view of the United States representative that the results of the Commission's work should be made available as soon as possible. The publication of the model provisions as a separate document was therefore a sound idea. The remaining question was whether the model provisions should be supplemented by those legislative recommendations which had not been transformed into model provisions. In the short term, the text of the model provisions could be published with or without the remaining legislative recommendations currently contained in part one of document A/CN.9/522/Add.1. A long-term strategic solution should perhaps be considered as a separate issue, and at a later date.

80. Mr. WALLACE (United States of America) said that, as the legislative recommendations in question were already contained in that document, no extra cost would be incurred in publishing them in conjunction with the model provisions. It would therefore be both practical and useful to do so as soon as possible.

81. The CHAIRMAN suggested that the Commission should defer a decision concerning the three options until the meeting scheduled to take place on the morning of 7 July.

82. *It was so decided.*

*The meeting rose at 5 p.m.*

## Summary record of the 764th meeting

Thursday, 3 July 2003, at 9.30 a.m.

[A/CN.9/SR.764]

*Chairman:* Mr. Wiwen-Nilsson (Sweden)

*The meeting was called to order at 9.40 a.m.*

PRELIMINARY APPROVAL OF DRAFT UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW (A/CN.9/529, 530, 534 and 535, A/CN.9/WG.V/WP.63 and Add.1-17; A/CN.9/519, paras. 8-11)

1. The CHAIRMAN drew the Commission's attention to paragraph 10 of the annotated provisional agenda (A/CN.9/519), from which it could be seen that, at its twenty-eighth session, Working Group V (Insolvency Law) had recommended that the Commission should approve the scope of the draft *Legislative Guide on Insolvency Law* as responsive to the mandate given to the Working Group; give preliminary approval to the key objectives, general features and structure of insolvency regimes as set forth in the introductory chapters thereof; direct the secretariat to make the draft *Guide* available to member States, relevant intergovernmental and non-governmental international organizations and private sector and regional organizations for comment; and direct the Working Group to complete its work on the draft *Guide* and present it to the Commission in 2004 for finalization and adoption.

2. He invited the secretariat to provide a general introduction to the draft *Legislative Guide on Insolvency Law* (A/CN.9/WG.V/WP.63 and Add.1-17).

3. Ms. CLIFT (Secretariat) said that the purpose of seeking the Commission's preliminary approval of the draft *Legislative Guide* was to complete the draft *Guide* as soon as possible, in view of the strong demand for a product that could be used as a key reference in insolvency law reform work. Indeed, for the past two years, the draft *Guide* had been used for that purpose in its current form by a number of countries and international organizations, all of which were eager to learn of the Commission's decisions concerning the issues covered therein. With that in mind, Working Group V (Insolvency Law) had felt that it would be useful to request the Commission to consider the parameters and policy underpinnings of the draft *Guide* with a view to its approval in principle. A consolidated product could then be circulated for comment to Governments, international organizations and experts by the end of 2003 with a view to its finalization and adoption at the Commission's thirty-seventh session, in 2004. Although the Working Group had not yet considered all the points contained in the draft *Guide*, it nevertheless felt that its consideration of the core content was now complete enough for the Commission to be able to consider the basic policy points which had been agreed.

4. The various financial crises of the 1990s had exposed weaknesses in the insolvency debtor-creditor laws of the affected countries and in the structure of the international financial system. As a result, the effectiveness and efficiency of insolvency laws and practices had become a recurring theme in a number of international forums and it had been increasingly recognized that there was a serious and urgent need to strengthen national insolvency regimes, not only as a means of crisis prevention but also of crisis management. Work on the subject had therefore been undertaken by a number of international groups and organizations, such as the Group of 22, the International Monetary Fund (IMF), the Asian Development Bank, the European Bank for Reconstruction and Development and the World Bank.

5. In 1999, the Commission had received a proposal from Australia to undertake work on harmonization of substantive insolvency law, a proposal that had been motivated partly by the Commission's successful conclusion of the UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, and partly by a recognition of the opportunity offered by the UNCITRAL process to negotiate an instrument truly representative of the international community. The proposal had been based on a report produced in April 1998 by the Working Group on International Financial Crises established by the Group of 22, and the key principles and features identified in that report, which had subsequently come to form the basis of the draft *Guide's* introductory chapters and, in particular, of its key objectives.

6. In December 1999, the Commission had decided to convene an exploratory meeting of a working group to consider, inter alia, the feasibility of undertaking the work proposed and issues of scope and content. In considering what project, if any, should be undertaken, the work of the other organizations was to be closely examined to determine how value could be added to existing work.

7. The Working Group had discussed a number of possible forms of instrument, including a comparative study of insolvency laws and practices; model statutory provisions on a limited range of topics; a blueprint or route map, including treatment of the socio-economic choices that might need to be made in designing an insolvency law; and a guide which could outline practice and policy choices, setting out the advantages and disadvantages of the different choices and their implications for different legal systems.

8. The Working Group had noted that each of those types of instrument might not, of itself, completely satisfy the requirements of each and every topic that might need to be addressed. Instead, a combination of different approaches, each addressing specific topics, might be needed.

9. In July 2000, Working Group V (Insolvency Law) had been entrusted with the preparation of a comprehensive statement of key objectives and core features of strong insolvency debtor-creditor regimes, including consideration of out-of-court restructuring; and with the preparation of a legislative guide containing flexible approaches to the implementation of those objectives and features, including a discussion of the alternative approaches possible and the perceived benefits and drawbacks of such approaches.

10. Recognizing the need to capitalize upon the work of other organizations, and to avoid duplication of effort, as well as the importance of coordination and cooperation with other international organizations, the Commission, the International Federation of Insolvency Professionals (INSOL) and the International Bar Association (IBA) had convened a Global Insolvency Colloquium in December 2001 to discuss the work of the other international organizations and identify the key objectives and core elements that should be addressed.

11. Participants had noted that the core elements could not be viewed in isolation and must all interact if the insolvency regime were to function smoothly and efficiently and itself interact with a country's economic and commercial law.

12. At that meeting, it had been recommended that the Commission should await the completion of the World Bank's work on its *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* before commencing any work on its own account. The World Bank had completed its report in April 2001, and the first meeting of the Working Group had been held in July 2001.
13. The Commission had then requested several organizations to draft an outline or "template" of the issues that should be addressed under the 13 or so core topics identified by the Colloquium. Those templates had formed the basis of the first draft of the *Guide*, which had been considered in July 2001.
14. Text had been developed at Working Group meetings held in December 2001, May and December 2002, and February 2003; at expert group meetings and, intersessionally, at rounds of informal consultations on the documents. The Working Group had involved broad participation of member and observer States, and of intergovernmental and non-governmental organizations. Thus, the draft *Guide* was a synthesis of different approaches to insolvency law discussed in the commentary, and represented a broad consensus of views. It did not reflect the insolvency system of any particular country, but rather the major trends in the development of insolvency law over the last decade.
15. As to the organization of the *Guide*, in order to give effect to the Working Group's mandate, the material was arranged in two parts. Part one included: (a) a statement of key objectives of effective and efficient insolvency regimes; (b) introductory material on types of insolvency proceedings, including liquidation and reorganization, or, more precisely, formal reorganization proceedings under the insolvency law, informal reorganization processes and processes involving both formal and informal elements, such as expedited reorganization proceedings; and also administrative processes; (c) the structure of the insolvency regime, or, in other words, the arrangement of the different processes and proceedings within the insolvency law; and (d) the institutional framework, a subject which would in due course be relocated from its current position in chapter IV to the introductory chapters.
16. Part one also included a glossary of terms. In a technically diverse area such as insolvency law, the existing terminology could be a barrier to discussion and understanding. It could also pose difficulties of translation into the six working languages of the United Nations. To assist the translators and interpreters of the United Nations, as well as readers of the future *Guide*, definitions of terms used in the draft *Guide* had been included in the glossary, and an attempt had been made to use terms that were not specific to any particular legal system or legal family, such as "insolvency representative", "insolvency proceedings" and "reorganization".
17. The substantive or operative part of the draft *Guide* was contained in part two, each chapter of which comprised two sections. The first section was a general commentary in which alternative policy options and approaches to different issues were considered, including the impact of socio-economic factors and, as far as possible, the advantages and disadvantages of each individual approach. The first section of each chapter also attempted to make a comparative analysis of provisions and precedents in national legislation and in international instruments. The second section of each chapter, entitled "Recommendations", provided varying levels of guidance to the content of legislative provisions. In some cases, the recommendations reflected a general consensus on a single approach—for instance, in respect of application of the stay; while on other issues, they identified the key points to be addressed in order to deal effectively with certain topics and referred to different approaches that might be taken—for instance, with regard to the debtor's ongoing role in reorganization.
18. As indicated in paragraph 10 of the provisional agenda (A/CN.9/519), the Working Group had reviewed addenda 3 to 14 to document A/CN.9/WG.V/WP.63, thus covering recommendations 11 to 165, which would be renumbered in the final version of the draft *Guide*, as there were no recommendations 1 to 10. The remaining part of addendum 14, addenda 15, 16 and 17, as well as addenda 1 and 2, had yet to be reviewed. However, the Working Group was of the view that it had completed its review of the core substance of the draft *Guide*, as contained in addenda 3 to 14. The remaining addenda were due to be considered at the next session of the Working Group, scheduled to take place in the first week of September 2003, with a view to the circulation to Governments of a consolidated draft of the *Guide* towards the end of 2003. At a further session, currently scheduled to take place in March 2004, the Working Group would consider the comments received and also finalize its own consideration of the draft *Guide* with a view to achieving a satisfactory product by the time the Commission came to consider the draft *Guide* at its session in 2004.
19. The CHAIRMAN thanked the secretariat for its presentation and invited the Commission to express its general views on the draft *Guide* before commenting on the various chapters in sequential order.
20. Mr. UTTERSTRÖM (Sweden) said that his delegation was extremely satisfied with the quality of the draft *Guide*, which was both comprehensive and well balanced. He would be suggesting only a few very minor amendments.
21. Mr. OLIVENCIA RUIZ (Spain) said that he very much welcomed the progress achieved by the Working Group and the quality of the documentation prepared by the secretariat. He had followed all insolvency-related work with great interest, particularly as the activities of the Working Group had coincided with a major reform of Spain's insolvency laws. As a result of that reform, two new and thoroughly modern laws had been approved and were expected to enter into force by September 2004 replacing the current legislation, which dated back to 1829. The reform process had relied heavily on the work of the Commission; in particular, the draft *Guide* had been inspirational. The Working Group and the secretariat had been kept abreast of developments in Spain's reform of its insolvency laws and had expressed the view that the outcome was fully consistent with the latest thinking on the subject. The success of that legal reform process would be attributable in no small part to the work of the Commission and the Working Group.
22. Mr. BELLENGER (France), expressing preliminary approval of the broad principles of the draft *Legislative Guide*, said that his delegation nonetheless had some reservations about specific aspects of the text. The Working Group had completed its review of the chapters contained in documents A/CN.9/WG.V/WP.63/Add.3-13 and would need at least its two remaining sessions, if not more, to review the remaining chapters. Differences of opinion persisted on a number of the provisions recommended by the secretariat.
23. His delegation could give its full approval on some specific points: the balance between reorganization and liquidation, the need for a judicial or administrative authority to monitor the acts of debtors and of the insolvency representative, the right of the debtor to be heard, the establishment of a "suspect period" for irregular acts that occurred prior to the proceedings, and the overall ranking of creditors. However, the debate on many matters, in particular expedited reorganization proceedings, was not yet closed.
24. The general principles on which the draft *Guide* was based should be defined in a flexible and broad way, and the defini-

tions in the glossary should be as precise as possible. The Commission should for the moment limit itself to approving the general principles behind the draft *Guide* rather than aiming to approve whole sections of the text. It should also request the Working Group to continue its review of the draft *Guide*.

25. Mr. BURMAN (United States of America), commending the secretariat's work on the draft *Guide*, said that the extensive input received from various countries, organizations and experts in insolvency law was a testament to the importance of the Commission's work. He hoped that the *Guide* would be widely publicized in the appropriate circles. The Commission should approve the major principles of the draft *Guide*, on most of which there was already a large degree of consensus. Indeed, a number of countries were already using the draft *Guide* and were taking account of the changes made to it in the Working Group. Nonetheless, much work remained to be done on refining the text at the forthcoming sessions of the Working Group. His delegation would be proposing some minor adjustments to the more general aspects of the *Guide*, in particular the sections contained in document A/CN.9/WG.V/WP.63/Add.2.

26. As a further illustration of the importance of the Commission's work, he noted that his Government was on the point of adopting a new bankruptcy code which incorporated the UNCITRAL Model Law on Cross-Border Insolvency, and that the code had been redrafted so as to incorporate the Model Law in its entirety as a new chapter. He hoped that other countries would take similar action to put the work of the Commission to practical use.

27. Mr. LEBEDEV (Russian Federation) said that the draft *Legislative Guide* enabled countries that were working on their insolvency laws to take account of international trends in the context of economic globalization. He welcomed the fact that attention was being paid to the work of other relevant organizations in the preparation of the draft *Guide*. Since the work was still in progress, it was difficult to make specific judgements about the text at the present stage.

28. He would like to know when the draft *Guide* would be circulated to member States and relevant organizations for comment, as recommended in paragraph 10 of the annotated provisional agenda (A/CN.9/519), and what time frame was envisaged for receipt of comments. He also wished to know whether the comments would be considered by the Working Group or by the Commission itself. In the latter case, at which session of the Commission would they be submitted? Lastly, he asked whether the finalization and adoption of the draft *Guide* were scheduled for the thirty-seventh session of the Commission in 2004 or for a later session.

29. Mr. SEKOLEC (Secretary of the Commission) said that the aim was to produce a revised version of the draft *Guide* towards the end of 2003. That text would then be circulated to Governments and international organizations, whose comments would be submitted to the Commission at its thirty-seventh session. It was hoped, however, that some comments would be provided in time for the Working Group's session in March 2004. The Working Group would aim to have the final draft ready for consideration and adoption at the thirty-seventh session of the Commission, and would advise on how much time should be allocated to that task.

30. Mr. OH SOO-KEUN (Observer for the Republic of Korea) said that his delegation could approve in general terms the sections of the draft *Guide* contained in A/CN.9/WG.V/WP.63/Add.2, although it had some minor reservations as to some of the wording. It was important to ensure an equal degree of depth and breadth in the explanations given in each chapter of

the draft *Guide*, and he wondered whether the two remaining Working Group sessions would allow sufficient time to ensure that all the chapters were equally comprehensive. If necessary, his delegation would be happy to give its views on which chapters should be accorded priority.

31. He would also like to know whether or not the Working Group had decided to place all the recommendations together in a separate chapter. Lastly, referring to the final page of the document containing the list of contents (A/CN.9/534), he asked whether the Working Group had decided to include a separate chapter on the subject of applicable law governing in insolvency proceedings or whether that question was still open for discussion.

32. Ms. CLIFT (Secretariat) said that the format of the draft *Legislative Guide* was still to be discussed. Different opinions had been expressed on whether the recommendations should be grouped in a separate chapter at the beginning or whether they should be dispersed at the appropriate places throughout the draft *Guide*. She would welcome further views on the issue.

33. The document on applicable law governing in insolvency proceedings (A/CN.9/WG.V/WP.63/Add.17) had been made available at the previous session of the Working Group but had not been formally discussed. The Working Group would need to decide at its next session whether applicable law should be included in the draft *Guide* and, if so, whether the relevant section should contain recommendations or only a commentary without recommendations. Another alternative would be to work on the subject of applicable law as a separate project altogether.

34. Mr. YEPES ALZATE (Colombia) said that the development of the draft *Legislative Guide* was particularly important for his country. In recent years, the Government had adopted provisional legislation on insolvency in response to the region's economic difficulties. However, that legislation was becoming obsolete and it would soon be necessary to adopt new laws. Colombian legislators were therefore keenly awaiting the results of the Commission's work on the draft *Guide*.

35. Substantive issues dealt with in the draft *Guide* should be discussed in detail in the Working Group. He hoped that, at the appropriate stage, the secretariat would provide assistance to his country and others of the region, to ensure that the draft *Guide* was widely disseminated and that its recommendations were properly incorporated into each country's national legislation.

36. Ms. JASZCZYNSKA (Observer for Poland) said that, although the draft *Legislative Guide* was not yet complete, it had already assisted her country in preparing its new law on insolvency, which had been adopted and would enter into force on 1 October 2003. The new law replaced all the country's previous laws on insolvency and bankruptcy. It incorporated an updated version of the banking law and new regulations covering areas such as liquidation and reorganization proceedings, out-of-court reorganization proceedings and international aspects of insolvency, all of which were based on the draft *Guide*.

37. Ms. DRZYMALA (Canada) said that, although there were still improvements to be made to the draft *Guide*, it was already proving useful for many countries. Her delegation would continue to participate in the activities of the Working Group and hoped that the draft text would be completed as swiftly as possible.

38. Mr. MURREY (United Kingdom), expressing his delegation's wholehearted support for the work being done on the draft *Legislative Guide*, said that an effective insolvency regime was vital to promote business and investment confidence. It was heartening to hear concrete examples of how various countries had



drawn on the Commission's valuable work. However, some work remained to be done, and his delegation fully supported the recommendations of the Working Group in that regard, as set out in paragraph 10 of the annotated agenda (A/CN.9/519).

39. Mr. REDMOND (Observer for the American Bar Association) said that at an early stage in its work the Working Group on Insolvency Law had established the principles necessary for developing an effective reorganization procedure, which had led to a recognition that no single procedure could ensure effectiveness, and that an accumulation of proceedings and processes was needed. The involvement of such a large number of countries and international organizations in the compilation of the draft *Guide* had generated a truly international product that would be well received by the world community.

40. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) said that the Commission's work on the draft *Legislative Guide* would make an important contribution to the development of international standards for corporate insolvency, which were crucial to the work of IMF. In general terms, the standards reflected the direct and important relationship between an orderly and effective insolvency system on the one hand and the stability of the financial system on the other. More specifically, when IMF held discussions with its member States, not only on the subject of insolvency but also on more general matters of economic and legal policy, it was helpful to be able to point to the existence of standards that had been expressly recognized by the international community. Those standards were also, of course, helpful to the member States themselves in implementing reforms in that area.

41. Work on insolvency issues was being conducted in a number of forums; IMF itself had done some work in that area a few years previously. There was a clear need for convergence on a single set of standards that would be applicable to all countries, irrespective of their level of economic development. Those standards needed to be sufficiently flexible to accommodate countries' different legal traditions, but also sufficiently specific to provide meaningful guidance. The work on the draft *Guide* was continuing in the right direction and IMF looked forward to its completion.

42. Mr. SEKOLEC (Secretary of the Commission) stressed the very important contribution IMF had made to the current process from its inception. The observer for IMF had stressed the value of international standards when international agencies assisted States in modernizing their insolvency regimes. In seeking to create such standards, the Commission needed to work in coordination with organizations such as IMF and the World Bank. It was therefore to be hoped that the World Bank and IMF would heed the request made by the Legal Counsel of the United Nations that they should declare the future *Legislative Guide* to be one such international standard, possibly in conjunction with other texts, such as the World Bank's *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*.

43. Mr. MEENA (India) said that the work done by the Working Group had already been the inspiration for numerous national and international legislative initiatives, providing States with crucial guidance in that area. It was gratifying that the Working Group had finalized the major portion of the draft *Legislative Guide*. The Commission should confine itself to approval of the main principles on which the Working Group had already achieved consensus.

44. Ms. YUAN JIE (China) congratulated the Working Group and the secretariat on the remarkable progress achieved in the area of international insolvency law. China had profited from and applied the expertise and wisdom displayed in the Commission,

and would be sending representatives of its competent authorities to the next session of the Commission.

*The meeting was suspended at 11.05 a.m. and resumed at 11.45 a.m.*

45. Mr. BURMAN (United States of America) welcomed the comments made by the Secretary on the urgent need for coordination between the work of the Commission and that of other bodies, including the World Bank and IMF. The comments of the observer for IMF had also been highly constructive. It was important to achieve a single set of workable standards as a guideline for developments in the field of international insolvency law. To that end, his delegation would in due course be making some proposals for additional language.

46. The product of the Commission's work, involving as it did many countries, experts and organizations in an open and transparent process, should clearly be established as a principal element of a single international standard. In the immediate aftermath of the current session, representatives should bring the scope of the Commission's work and the magnitude of its achievements to the attention of national ministries and experts working with the other bodies involved, and in particular IMF and the World Bank, with a view to ensuring an appropriate level of coordination among the various interested bodies. Such collaboration might be the single most effective tool for genuine progress.

47. Ms. SABO (Canada) said her delegation agreed on the urgent need for coordination. The World Bank, IMF and the Commission shared a common objective and should work together to achieve it. However, different bodies adopted different approaches, and one of the strengths of the Commission's approach was that it was a transparent process involving experts from member States working in the field towards the development of a globally acceptable international standard.

48. Mr. YEPES ALZATE (Colombia) said that, given the importance of international communication for familiarizing States with the important international standards being developed by the Commission, it might wish to consider, once the *Legislative Guide* had been completed, holding an international colloquium at which member States could learn about the new international standards, with the participation of experts, including representatives of IMF and the World Bank.

49. Mr. SEKOLEC (Secretary of the Commission), referring to the need to develop international standards for the reform of insolvency law, said that IMF and the World Bank assisted States in strengthening their economic, financial and business stability by establishing a series of standards which they then actively promoted. However, for a text to be declared an international standard it must meet specific conditions; in particular, it must have been elaborated in a universal, inclusive and transparent process taking all interests into account, and especially those of the developing countries. The Commission's texts in general, and the text currently before the Commission in particular, met those conditions.

50. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) said that international standards on insolvency would be vital to the work of the Fund. In its work, IMF applied not only its own standards but also standards set by other specialized institutions. IMF did not consider that a unified set of international insolvency standards had as yet been developed. However, it hoped that the result of the Commission's important project, coupled with the past work of the World Bank and IMF itself, would be embraced by the international community, and that IMF could then apply it in its own insolvency work, just as

it had employed standards developed by other institutions in other areas. How the Commission's work would be combined with that done in other forums would have to be decided as the draft *Guide* neared completion. Nonetheless, the work being done on the *Legislative Guide* was an important contribution to what she hoped would ultimately constitute the standards governing insolvency.

51. Mr. LEBEDEV (Russian Federation) welcomed the remarks by the secretariat and the observer for the International Monetary Fund concerning cooperation between the Commission and other bodies, which should be reflected in the report on the session. Cooperation should not be confined to the drafting of texts, but should extend to the broader task of disseminating international trade law and standards concerning insolvency, inter alia, through colloquiums and symposiums.

52. Mr. SEKOLEC (Secretary of the Commission) said that the Commission regularly organized judicial colloquiums in conjunction with the International Federation of Insolvency Professionals (INSOL), as a means of disseminating information on cross-border insolvency and insolvency law. The next such colloquium would be held in Las Vegas, United States, in September 2003. Before finalizing the Model Law on Cross-Border Insolvency, the Commission had held colloquiums with judges and judicial authorities in order to obtain their views on the most appropriate solutions for inclusion in that Model Law.

53. Mr. BELLENGER (France) counselled caution. The *Guide* had been envisaged, not as a true international standard, but as a tool for the use of countries which lacked a body of rules in the field of insolvency, with a view to assisting them in a cooperation and development perspective. Its adoption as an international standard would not be consistent with that initial intention, particularly as, while the mandate of the Commission was to develop international trade law, insolvency was primarily a matter for municipal law.

54. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) said it was not the intention of IMF to establish a standard, but to recognize standards already established by the international community. The most important feature of any international standard was its acceptance by the international community as a whole, not only by developed and developing countries alike, but also by the private sector and professionals active in the work of the Commission.

*Part one: Designing the structure and key objectives of an effective and efficient insolvency regime*  
(A/CN.9/WG.V/WP.63/Add.2)

55. The CHAIRMAN invited the Commission to consider the text of part one of the draft *Legislative Guide*.

56. Ms. CLIFT (Secretariat) explained that the material contained in document A/CN.9/WG.V/WP.63/Add.2 had been considered by Working Group V (Insolvency Law) at one of its 2002 sessions, and had since been revised to reflect the discussions held at that time. Comments by members of the Commission on the drafting, or suggestions for additions or amendments on matters of substance, would be welcome, and would be incorporated in the report on the thirty-sixth session and made available to participants in the September 2003 session of the Working Group.

57. In setting out the key objectives of a future insolvency law, the draft *Guide* sought to identify the basic building blocks of an insolvency regime and to provide a preamble to the core elements discussed in Part Two. Despite the differences in approach from country to country, there was broad agreement on the objectives

that should underpin an effective and efficient insolvency regime. Such a regime must be compatible with the domestic legal system and avoid conflict with the general principles of law on which it was based. It was therefore essential to consider how such a regime would interact with other aspects of a country's legal system. The *Guide* discussed how to achieve a balance between various competing factors.

58. The order in which the key objectives were set out in the draft was not intended to reflect a hierarchy of importance; they could be re-ordered if the Commission so wished. The first key objective (para. 4) was to maximize the value of assets in order to facilitate higher distributions to creditors as a whole and reduce the burden of insolvency. In so doing, a balance had to be struck between the various processes available for resolving a particular debtor's financial difficulties, such as rapid liquidation and longer-term efforts to reorganize the business which might ultimately generate more value for creditors; while also taking account of the need for new investment to preserve or improve the value of assets, as well as of its implications and cost for existing stakeholders. Maximizing the value of assets also had implications for the roles played in the insolvency process by the insolvency representative and others and the extent of their discretion to take certain actions.

59. The second key objective was to strike a balance between liquidation and reorganization (para. 5). Both the Working Group and the global colloquium had focused on the importance of including a reorganization procedure in an insolvency law, and of adopting as flexible an approach as possible as between liquidation and reorganization, to allow for conversion between the two with a view to achieving the best possible result for the individual debtor.

60. The third key objective was to ensure equitable treatment of similarly situated creditors (para. 6). That objective was based on the notion that in collective proceedings, creditors with similar legal rights should be treated equally, receiving a distribution on their claim in accordance with their relative priority and interests. Equitable treatment did not however require equality of treatment for all creditors. Their treatment should reflect their relationship with the debtor, although that became less relevant in the absence of a contractual relationship with the debtor, for instance in the case of claims for damage. The policy of equitable treatment permeated many aspects of an insolvency law, including application of the stay or suspension, avoidance provisions, classification of claims, and voting procedures in reorganization.

61. The fourth objective was to provide for timely, efficient and impartial resolution of insolvency (para. 7). The draft *Guide* emphasized the need for the proceedings to move quickly and efficiently. Rapid action also served other objectives, such as maximizing the value of assets, while impartiality supported the objective of equitable treatment. For certain parts of the regime, it was important to impose time limits.

62. The fifth objective was to prevent premature dismemberment of the debtor's assets by individual creditor actions, so as to avoid reducing the pool of assets available to settle other claims (para. 9). A stay of creditor action should be as broad as possible to cover all types of creditor, especially secured creditors.

63. The sixth objective was to provide for a transparent and predictable procedure containing incentives for gathering and dispensing information (para. 10). Transparency and predictability were important not only for those involved in the insolvency process, whether creditors, debtors, the insolvency representative or the courts, but also for potential lenders and those involved at

the pre-insolvency stage in assessing the risks associated with their position. An insolvency law should contain as much information as possible about other laws which might affect the conduct of the insolvency proceedings. In both reorganization and liquidation, sufficient information should be available to key players to ensure that they could make the decisions required of them on an informed basis.

64. The seventh objective was to recognize existing creditor rights and establish clear rules for the ranking of priority claims (para. 12). Recognition and enforcement within the insolvency process of the differing rights of creditors outside that process would create certainty in the market and facilitate the provision of credit. Rules for the ranking of priorities must be clear and consistently applied, in order to create confidence in the process and ensure that all participants could take appropriate steps to manage risk.

65. Lastly, the eighth objective was to establish a framework for cross-border insolvency. To that end, adoption of the Model Law on Cross-Border Insolvency was recommended. It was envisaged that the Model Law, together with its *Guide to Enactment*, should form an integral part of the *Legislative Guide on Insolvency Law*.

66. The CHAIRMAN reminded the Commission that the purpose of discussing the draft *Guide* at the present juncture was to seek agreement in general terms on the key principles and objectives, without amending the text. The secretariat would take note of any comments made.

67. Mr. SEKOLEC (Secretary of the Commission) said that following the next session of the Working Group in September 2003, the draft *Guide* would be circulated with a request for comments, which would be used by the secretariat to prepare subsequent draft texts for the Working Group and the Commission. Comments by Governments were helpful to the Commission, but were often rather lengthy. It should be borne in mind that, if long comments were submitted on the draft, it might not be possible to translate them. It was instead suggested that they could be factored in to the draft. That procedure would save resources, but would have the disadvantage that the comments would not be available in full to the Commission. He therefore appealed to Governments to be as succinct as possible in their comments. An alternative method would be for submissions to be divided into two parts, one addressed to the secretariat to assist it in its preparation of the text, the other for the attention of the Commission itself.

*The meeting rose at 12.30 p.m.*

### Summary record of the 765th meeting

Thursday, 3 July 2003, at 2 p.m.

[A/CN.9/SR.765]

*Chairman:* Mr. Wiwen-Nilsson. (Sweden)

*The meeting was called to order at 2.15 p.m.*

PRELIMINARY APPROVAL OF DRAFT UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW (*continued*) (A/CN.9/529, 530, 534 and 535; A/CN.9/WG.V/WP.63 and Add.1-17)

*Part one: Designing the structure and key objectives of an effective and efficient insolvency regime (continued)* (A/CN.9/WG.V/WP.63/Add.2)

1. The CHAIRMAN invited the Commission to comment on the secretariat's earlier presentation of the key objectives of an effective and efficient insolvency regime, contained in paragraphs 3 to 18 of document A/CN.9/WG.V/WP.63/Add.2.

2. Mr. BURMAN (United States of America) said that the part of the *Guide* that dealt with the key objectives, general features and structure of an insolvency regime had met with virtually unanimous agreement in the Working Group and had not changed substantively since.

3. Mr. REDMOND (Observer for the American Bar Association), supported by Ms. DRZYMALA (Canada), said that during the review of the key objectives, there had been consensus among practitioners, experts and academics that the list of objectives contained all the necessary components and encompassed both common law and civil law jurisdictions.

4. Mr. OLIVENCIA RUIZ (Spain), supported by Mr. BURMAN (United States of America) said that the use of the word "firstly" in the second sentence of paragraph 1 implied that the list was hierarchical, which was not the case. His delegation would prefer to see

a more systematic ordering of the range of interests to be accommodated. It also proposed that the possibility of a unitary insolvency proceeding resulting either in liquidation or in reorganization—as described in paragraph 58 and as recently adopted by his Government—should also be spelled out in paragraph 2, which currently referred to liquidation and reorganization as alternative proceedings. He also proposed including, among the incentives referred to at the end of paragraph 2, the judicial formalization of out-of-court agreements, as a means of expediting the reorganization.

5. Ms. VEYTIA PALOMINO (Mexico) said she shared the concerns expressed by the representative of Spain regarding the word "firstly". As currently drafted, paragraph 1 was unbalanced and biased in favour of the debtor, particularly as creditors faced a number of judicial obstacles, especially in cases of cross-border insolvency.

6. Mr. MATSUSHITA (Japan), referring to key objective 5, said the last sentence of paragraph 9 implied that a stay should be imposed both on unsecured and on secured creditors in all types of proceeding, including liquidation proceedings. While in some liquidation cases the business might still be viable and could be salvaged as a going concern, when a debtor opted for liquidation, at least in its own jurisdiction, the business was no longer viable and had to be liquidated piecemeal, so that a stay on secured creditors made no sense. He therefore proposed adding, at the end of the last sentence, the phrase "when a stay is imposed on secured creditors in reorganization proceedings".

7. On key objective 7, he said that, notwithstanding the assertion in paragraph 12 that priorities should not reflect social and

political concerns, protection of wage claims was sufficiently important to be taken into account in the ranking of priority claims. Protection of damage claimants, referred to in the second sentence of paragraph 6, was also very important. He hoped that those comments would be taken into account by the Working Group at its next session.

8. The CHAIRMAN said he would take it that the Commission approved in principle sections A and B of part one, chapter I, of the draft *Guide*, dealing with the key objectives and the balancing of those objectives, as a basis for the future work of the Working Group.

9. *It was so decided.*

10. Ms. CLIFT (Secretariat) said that chapter I, section C, entitled “General features of an insolvency regime”, identified the substantive issues that would be the key components of part two (para. 19 (a) to (k)), while paragraph 20 noted the need to consider how an insolvency law related to other substantive laws and whether the insolvency regime would modify them. Paragraph 21 dealt with the institutional framework.

11. Chapter II, “Types of insolvency proceedings”, introduced liquidation and formal and informal reorganization proceedings discussed elsewhere in the *Guide*. It was pointed out in the introductory part that neither liquidation nor reorganization should be fixed and inflexible proceedings, and that the former might involve more than the piecemeal sale of the debtor’s assets. A reorganization process should also be broadly defined in order to cover a range of arrangements present in existing insolvency laws.

12. Section A explained what was meant by liquidation and provided other terms used to describe it, and paragraph 27 established a virtually universal concept of the term. Paragraph 28 laid down some of the economic bases for including a liquidation process in an insolvency law.

13. Section B, on reorganization, dealt first with formal reorganization proceedings, i.e. those conducted under the insolvency law, and explained why it was felt they should be included. Paragraph 34 identified some key elements of a reorganization process. Paragraph 35 noted that the benefits of reorganization were increasingly accepted and that many insolvency laws now included formal reorganization provisions.

14. Informal reorganization processes were discussed in paragraphs 37 to 51. Although the focus of the *Guide* was on legislative provisions, it had been deemed important to introduce informal reorganization processes and their applications, partly as a lead-in to expedited reorganization proceedings; partly because of the growing recognition of the usefulness of such out-of-court processes; and also in order to provide some rules and guidelines developed internationally to facilitate their conduct. Paragraphs 53 and 54 briefly introduced reorganization processes combining out-of-court negotiations and some component of formal reorganization proceedings, discussed in more detail in part two, chapter V B.

15. Section C (paras. 56 and 57) briefly introduced administrative processes, developed to address particular cases of systemic failure. Section D dealt with the structure of the insolvency regime. It focused principally on parallel proceedings, in which the applicant opted either for liquidation or for reorganization, as opposed to the unitary proceeding to which the representative of Spain had referred. Although the *Guide* might appear to presuppose parallel proceedings, it was not necessarily the intention to recommend that an insolvency regime should follow that structure; it had simply been easier to organize the material in that way. Material could later be included on the differences between parallel and unitary proceedings.

16. Mr. SCHÖFISCH (Germany) proposed deleting the German terms “Konkursverfahren” and “Vergleichsverfahren” from paragraphs 26 and 30 respectively, since they had been replaced in Germany’s new insolvency law by the single term “Insolvenzverfahren”.

17. Mr. MARKUS (Observer for Switzerland) said that, unlike Germany, Switzerland still used the term “Vergleichsverfahren” in the context of reorganization. Accordingly, the term should be retained.

18. Mr. OH SOO-KEUN (Observer for the Republic of Korea) proposed that the lists of terms in paragraphs 26 and 30 should be deleted, so as to minimize the risk of misunderstandings. His delegation also had reservations as to the appropriateness of the title of section C, “Administrative processes”.

19. Mr. UTTERSTRÖM (Sweden) said that even if the list of general features of an insolvency regime contained in paragraph 19 was not meant to be exhaustive, creditor participation should be mentioned. His delegation proposed the insertion of the words “participation of the creditors in the process and the ...” before the word “ranking” in subparagraph (j).

20. Mr. BURMAN (United States of America) said that, while he endorsed the comment by the observer for the Republic of Korea concerning the appropriateness of the title of section C, it was nevertheless important that the material referred to in paragraphs 56 and 57 should be reflected in the draft *Guide*, even though those procedures were not employed in all countries and their modalities were still being developed.

21. Mr. RWANGAMPUHWE (Rwanda) said that the title of section C, “Administrative processes”, could lead to confusion, since in certain countries there was a considerable overlap between administrative and political processes.

22. Mr. UTTERSTRÖM (Sweden) proposed that the language of the second and third sentences of paragraph 28, which was somewhat categorical, should be rendered as flexible as that of the second and third sentences of paragraph 31, which emphasized the long-term perspective.

23. Mr. BELLENGER (France) said that informal reorganization processes, and especially “expedited proceedings”, should not be seen as a parallel mechanism to collective procedures. Much of the document consisted of an overly detailed and extensive description of procedures dealt with in other chapters.

24. Mr. BURMAN (United States of America) noted that certain international financial institutions considered the development of the procedures set out in paragraphs 37 to 39 to be the single most important recent contribution to bringing greater stability to countries under financial and economic stress. Without those procedures, the finance capital would simply not be forthcoming.

25. Ms. CLIFT (Secretariat) said that the discussion on informal reorganization processes was lengthy mainly because it was not discussed in other parts of the *Guide*, which were devoted to formal liquidation and reorganization. If the present location of the discussion accorded it undue prominence, it could be relocated elsewhere, for instance in the chapter on reorganization. It had been included because it constituted a record of important recent developments.

26. Mr. OH SOO-KEUN (Observer for the Republic of Korea), supporting the French delegation’s position, said his delegation doubted whether the lengthy explanation of the informal reorganization process would be very helpful to the legislator. It

implied that the Commission recommended the inclusion of informal processes in national legislation, which begged the question of whether they were truly informal.

27. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) said that, while the title “Administrative processes” might be confusing, nevertheless, in many recent economic crises, the existence of purely out-of-court processes, often supported by Governments, had made a significant contribution to the rehabilitation of the corporate sector, given that normal institutional mechanisms could not have adequately dealt with the volume of cases that would otherwise have had to be referred to the courts. “Pre-packaged” procedures, too, were a valuable way of addressing difficulties in the financial system. Careful consideration must also be given to the underlying institutional framework when designing insolvency reforms, as the effectiveness of an insolvency system was fundamentally dependent on a strong legal framework and, in particular, on the existence of a strong and independent judiciary. Accordingly, in designing reforms, careful account must be taken of institutional underpinnings such as the judiciary, the insolvency representative, receivers, and institutions involved in the sale of assets.

28. Mr. REDMOND (Observer for the American Bar Association) said that, in the view of practitioners, the Working Group should focus on two areas: first, identification of the available structures; and secondly, the fact that many countries’ reorganization processes were so protracted as to fail to avert the company’s demise. Hence, “pre-packaged” procedures needed to be discussed in detail by the Working Group, and readers of the *Guide* must be able to grasp what those processes entailed.

29. Mr. RWANGAMPUHWE (Rwanda) said that the administrative processes referred to by the observer for IMF could encourage authoritarian action by the creditors, the State, or both, and also, possibly, by the international financial institutions, in order to precipitate liquidation or reorganization at the expense of the debtor, small creditors, or workers. What measures were taken to protect those persons’ rights in informal reorganization processes?

30. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) explained that the informal administrative processes to which she had been referring were entirely voluntary. The inter-national financial institutions’ interest was in corporate rehabilitation to secure financial recovery and a return to economic growth. Informal processes enabled companies to return to viable production and regularize their relationship with creditors without the need for recourse to the formal court system, which, because of its protracted nature, tended to undermine those economic objectives. Recent initiatives in Indonesia and Thailand had adopted the “London Approach” rules, whereby the State encouraged debtors and creditors voluntarily to abide by the principles it had itself drafted. IMF encouraged any action that facilitated corporate-sector recovery and a post-crisis return to normal production, and thus supported all such governmental initiatives.

31. Ms. CLIFT (Secretariat) said the administrative processes described in the draft *Guide* were not seen as a key component of an insolvency regime. They operated where there were systemic problems, mainly in the banking sector, and should be distinguished from informal reorganization proceedings, which were not meant to supplant the formal liquidation or reorganization regime, but to facilitate voluntary reorganization. The extent of multinational involvement would depend on the company’s creditor or debtor status. Failure to reach a voluntary agreement would result in the commencement of formal proceedings, with all the limitations and restrictions they entailed.

32. Mr. BURMAN (United States of America) said that informal processes were also a valuable tool for protecting small creditors and workers’ jobs. Unless new financing could be made available at very short notice, the corporation’s demise would almost invariably follow. The ultimate aim of the new, innovative approaches was to save jobs and protect small creditors.

33. Mr. OH SOO-KEUN (Observer for the Republic of Korea) asked whether the fact that the draft *Guide* dealt with informal administrative processes meant that States were recommended to include provisions relating to those processes in their insolvency laws. To the best of his knowledge, successful informal processes such as the “London Approach” had no statutory provisions, whereas approaches that had statutory provisions had been less successful.

34. The CHAIRMAN pointed out that in paragraph 57 it was stated that administrative processes would not be discussed in detail in the *Guide*. Accordingly, there would be no recommendation that they should be adopted in national legislation.

35. Mr. BELLENGER (France) said that while informal processes were useful, care must be taken to avoid establishing a system parallel to the formal system. Except in the case of systemic problems, informal processes should not replace formal court proceedings. In certain countries, processes were already too informal for comfort.

*The meeting was suspended at 3.45 p.m. and resumed  
at 4.10 p.m.*

36. Mr. OLIVENCIA RUIZ (Spain) agreed that formal proceedings must not be replaced by out-of-court processes. While out-of-court reorganization, requiring unanimity, might be appropriate where only a single creditor was involved, unanimity was hard to achieve where there were a number of creditors. An out-of-court agreement, being a contract, had effect only as between those concluding it, and those excluded might be hostile to the settlement reached. A solution was offered by the new Spanish insolvency law, which provided for the formalization of pre-insolvency out-of-court settlements. If the debtor submitted an agreement proposal obtained out of court and supported by a significant number of creditors, it could then be processed as an expedited proceeding accepted by the creditors and approved by the court, thus obtaining all the effects of a judicial agreement and offering an incentive to reach agreements out of court.

37. Mr. BURMAN (United States of America) said the draft *Guide*’s proposal for informal restructuring was quite close to the Spanish model, in that it required judicial approval, so that the same standards would be applied as for an ordinary reorganization.

*List of contents (A/CN.9/534)*

38. Ms. CLIFT (Secretariat) said the list of contents provided an overview of the content of the *Legislative Guide* and indicated the scope of the issues addressed under the core headings and the extent of the recommendations. Delegations might wish to comment on the ordering of the various parts of the text.

*Part two: Core provisions of an efficient and effective insolvency regime*

39. Ms. CLIFT (Secretariat) said that the core topics contained in part two had been initially identified in the IMF, World Bank and Asian Development Bank reports and had been confirmed by the December 2000 Global Insolvency Colloquium. Although listed sequentially, the core provisions must of course interact if the insolvency regime was to function smoothly and efficiently.

Nor could they be developed in isolation from other relevant elements of economic and commercial law or of general national legislation. There were important linkages with effective debt-enforcement mechanisms, and with labour law, laws relating to setoff and netting, and debt-equity conversion. Some of those linkages had been noted in the commentary to the *Guide*, as had the need to balance some of those issues with the achievement of insolvency goals.

## Chapter II. Application and commencement

### *Eligibility and jurisdiction (A/CN.9/WG.V/WP.63/Add.3)*

40. Ms. CLIFT (Secretariat) said the *Guide* recognized that an insolvency law must be broad in scope and cover all debtors engaged in commercial activities. It contained some discussion of the coverage of individuals engaged in such activities, noting that in certain countries they might be dealt with under insolvency regimes that addressed non-commercial activities. While one reason for the focus on commercial activities was the Commission's mandate, another was the need to focus on the commercial nature of insolvency and therefore to include both legal and natural persons. It had also been noted that in many jurisdictions and countries individuals engaged in commercial activities, and that, accordingly, to exclude them from the scope of the *Guide* might detract significantly from its usefulness.

41. The draft *Guide* recognized the possible need for a different insolvency regime for specially regulated entities such as banks and insurance companies, which might well be dealt with in an entirely separate regime or through special provisions included in a general insolvency law. While the recommendation to include State-owned enterprises in a commercial insolvency regime might be controversial in some countries, the general view had been that where State-owned enterprises operated as commercial entities, they should be subject to the same insolvency law as other commercial entities.

42. With regard to jurisdiction, the *Guide* addressed the question of the degree of connection to a State required in order for the debtor to be subject to its insolvency regime, so as to cover the admittedly rare situations in which that connection was relevant. In that connection, the discussion contained in paragraphs 8 to 13 was based largely on the various tests—centre of interests, establishment, and presence of assets—used in the Model Law on Cross-Border Insolvency and other texts such as European Council Regulation No. 1346/2000 on insolvency proceedings.

43. In response to a request for clarification by the CHAIRMAN, she said that the revised version of documents A/CN.9/WG.V/WP.63/Add.3-14 and recommendations 11-165 would be made available to Governments towards the end of 2003. The material contained in the remaining addenda would be discussed by the Working Group in September 2003 and subsequently revised.

44. The CHAIRMAN invited comments on documents A.CN.9/534 and A/CN.9/WG.V/WP.63/Add.3.

45. Ms. PERALES VISCASILLAS (Spain), referring to document A/CN.9/534, proposed that the order of the words "key objectives" and "structure" should be reversed in the title of part one, so as to reflect the actual order in which the two issues were dealt with.

46. Mr. RWANGAMPUHWE (Rwanda) reiterated his proposal that administrative processes should not be accorded the same

status as formal proceedings. They could be mentioned merely as an exception to the rule.

47. The CHAIRMAN said it was his understanding that there had been a consensus that the Working Group would reconsider the emphasis that should be given to out-of-court processes. However, the various comments on the subject had been noted by the secretariat.

### *Application and commencement criteria (A/CN.9/WG.V/WP.63/Add.4)*

48. Ms. CLIFT (Secretariat) said that the key points of addendum 4 were that both debtors and creditors should be permitted to make applications for commencement, in respect of both liquidation and reorganization proceedings. As to the applicable criteria, the draft *Guide* recommended that the two tests should be as close as possible. An application by the debtor should be based on its general inability to pay its debts as they matured or the fact that its liabilities exceeded the value of its assets. The *Guide* sought to combine two different tests in order to facilitate early and relatively simple commencement. It recognized a number of disadvantages in commencement criteria based on the balance-sheet standard, but deemed that standard useful when combined with the liquidity standard. The intention was to encourage the adoption of the two tests in combination. As for the functioning of the application for commencement, the *Guide* acknowledged that there were jurisdictions in which such an application automatically commenced the proceedings, obviating the need for the court to determine whether commencement criteria had been satisfied. However, some insolvency laws required the court to determine whether the criteria had been met before proceedings could commence. The recommendation recognized the possibility of either approach. Where a court decision was required, however, the court was encouraged to make it expeditiously in order to avoid the substantial implications that could arise for the debtor where there was a significant delay between application and commencement.

49. On the procedural issues, the *Guide* recognized the need for provision of adequate notice of the commencement of proceedings, both generally and to individual creditors, and drew a distinction between debtor applications and creditor applications: where the application was made by the debtor, creditors must be notified only upon the commencement of proceedings; whereas debtors must be notified of the applications made by creditors or other parties, since if all creditors were notified of a debtor application, the debtor could nonetheless be adversely affected in the event that the proceedings did not commence. The *Guide* also discussed whether the timing of a commencement decision should be fixed or whether the court should merely be encouraged to make a speedy decision.

50. Mr. HIDALGO CASTELLANOS (Mexico) asked whether the creditor's right to apply for commencement was already reflected in the *Guide*

51. Ms. CLIFT (Secretariat) said that recommendations 18 and 21 recommended that debtors, creditors and other parties should be allowed to apply for commencement of both liquidation and reorganization proceedings. While there might be circumstances in which other parties, such as government authorities, might have an interest in commencing proceedings, the *Guide* discouraged the use of such proceedings for the attainment of social policy goals; hence the limited treatment accorded to that aspect of the question.

*The meeting rose at 4.55 p.m.*

## Summary record of the 766th meeting

Friday, 4 July 2003, at 9.30 a.m.

[A/CN.9/SR.766]

*Chairman:* Mr. Wiwen-Nilsson. (Sweden)

*The meeting was called to order at 9.40 a.m*

PRELIMINARY APPROVAL OF DRAFT UNCITRAL LEGISLATIVE GUIDE ON INSOLVENCY LAW (*continued*) (A/CN.9/529, A/CN.9/530, A/CN.9/534; A/CN.9/WG.V/WP.63 and Add.1-17)

*Part two: Core provisions of an efficient and effective insolvency regime (continued)*

*Chapter III. Treatment of assets on commencement of insolvency proceedings*

*A. Assets to be affected (A/CN.9/WG.V/WP.63/Add.5)*

1. Ms. CLIFT (Secretariat) said that addendum 5 covered what assets would be affected by the commencement of insolvency proceedings and the formation of the insolvency estate. Different insolvency regimes dealt with the question of the estate in a variety of ways. The Working Group had decided to keep the terminology simple by using the phrase “insolvency estate” to cover all of them.

2. The draft *Guide* noted that the identification of assets and their treatment would determine the scope and conduct of the proceedings and, particularly in the case of reorganization, would have a significant bearing on the likely success of those proceedings. The Working Group had therefore taken the view that the definition of “insolvency estate” should be as broad as possible and that, particularly in the light of the UNCITRAL Model Law on Cross-Border Insolvency, all the assets of the debtor, including foreign assets, should be included in the estate. The issue of how to recover foreign assets for the benefit of the proceedings would be addressed in the provisions on cross-border insolvency or governed by the Model Law in those countries that had adopted it.

3. The section on assets to be included in the estate contained a general definition of assets and also covered foreign assets and assets owned by a third party that were in the possession of the debtor at the time of commencement of the proceedings. In particular, the draft *Guide* recommended that secured assets should be included in the estate because, if they were not included, it might be impossible to achieve the goals of the insolvency proceedings, especially in the case of reorganization. However, the draft *Guide* noted that, where secured assets were included in the estate and were therefore subject to the effects of commencement of proceedings, certain protections might be required.

4. The *Guide* also noted some general exclusions from the insolvency estate, particularly in the case of natural person debtors. Assets necessary for the debtor to earn a living, its personal and household assets, and other assets necessary to meet the basic domestic needs of the debtor and its family should be excluded from the estate. In some cases, international human rights obligations also affected the question of which assets would be excluded.

5. Mr. REDMOND (Observer for the American Bar Association) said that the section of the draft *Guide* contained in the document before the Commission was detailed and well presented. However, paragraph 65, which stated that the estate

would include the assets of the debtor as at the date of commencement of insolvency proceedings, did not cover the treatment of assets that were acquired in the period between the application for commencement and the commencement itself or that were transferred fraudulently or on a preferential basis. The Working Group should therefore consider whether the estate should include the assets of the debtor as of the date of application for commencement.

6. Mr. OLIVENCIA RUIZ (Spain), referring to paragraph 57 of the document, said that the concept of administering and disposing of assets should be explained more clearly. It was not so much a question of protecting assets or making sure that they did not disappear, but rather of managing them and maintaining or even enhancing their value. In some countries, legal title over the debtor’s assets was transferred to the designated official, whereas in others the debtor continued to be the legal owner of the assets but its powers to administer or dispose of them were limited. In Spain, both options were possible. Where title over the assets was retained by the debtor, it was not clear to what extent the debtor’s power to administer and dispose of the assets would be circumscribed. In Spain, clearly defined rules governed those matters.

*B. Protection and preservation of the insolvency estate (A/CN.9/WG.V/WP.63/Add.6)*

7. Ms. CLIFT (Secretariat) said that chapter III, section B, of the draft *Guide* dealt with protection and preservation of the insolvency estate, and in particular with the application of a stay or suspension. While many insolvency laws recognized that a protective mechanism was needed to ensure that the value of the insolvency estate was not diminished by the actions of the various parties in interest, they adopted different approaches to the scope of that mechanism and the time of its application. The draft *Guide* adopted the approach that the stay or suspension should be as wide as possible, applying to all remedies and proceedings against the debtor and its assets, and restraining both unsecured and secured creditors in both liquidation and reorganization proceedings. The section on the scope of the stay was based on the relevant provisions of articles 19 and 20 of the UNCITRAL Model Law on Cross-Border Insolvency, with some additions that were specific to domestic insolvency law, in particular the references to perfection or enforcement of security interests and to contract termination.

8. After lengthy discussions on the timing of application of the stay, the Working Group had agreed that the stay should apply automatically on commencement of proceedings, once a decision had been made that the debtor satisfied the commencement criteria. The Working Group had discussed whether the stay should apply at the time of application for commencement, but had decided that that could result in damage to the debtor’s business, particularly if proceedings were not subsequently commenced. However, the Working Group had broadly acknowledged the need to protect assets between the time of application and commencement, and the draft *Guide* therefore provided for the application of provisional measures.

9. Secured creditors were to be included in the scope of the stay, subject to certain protections, especially where there was a likelihood of diminution in value of the secured asset. However, there were some exceptions to that general rule, for example, where the provision of such protection would be overly burdensome for the estate, or where the secured asset was not needed for reorganization or, in the case of liquidation, for the sale of the business as a going concern, or where the secured asset was of no value to the estate. In those instances, the draft *Guide* discussed possible remedies, including relief from the stay. The draft *Guide* also noted that exceptions to the application of the stay might be needed in the context of financial market transactions. In the case of liquidation, it was recommended that the stay on secured creditors should apply for a limited period of time, whereas in the case of reorganization, the time period could be significantly longer to allow for proposal and approval of the reorganization plan.

10. Mr. SEKOLEC (Secretary of the Commission) pointed out that, under the World Bank *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, a stay applied as of the time of application for commencement, which was a different approach from that adopted by the draft *Guide*. The Commission needed to consider how to ensure consistency between the two texts on that point.

11. Mr. JOHNSON (Observer for the World Bank), noting that discussions were already under way between the World Bank and the Commission with a view to achieving consistency between the two texts, said that the World Bank had developed its set of Principles for use in the preparation of reports on the observance of standards and codes in the financial system under a joint World Bank and International Monetary Fund (IMF) programme. Work on the Principles had begun in 1999 as a result of the financial crises in Asia and other regions of the world and had culminated in the approval of the Principles by the World Bank's Board of Directors in 2001.

12. Shortly thereafter, the Working Group on Insolvency Law had begun its work on the draft *Legislative Guide*, which was intended to give countries specific technical assistance in reforming their legislation. The World Bank Principles, by contrast, were broader in scope, aimed at assessing systems for creditor rights and insolvency, including their institutional and regulatory frameworks—areas not covered by the draft *Guide*. The World Bank was currently finalizing the text of the Principles, while the Working Group was trying to ensure that all areas where the draft *Guide* and the Principles diverged were identified for further consideration.

13. The World Bank had taken the view that the stay should apply from the time of application for commencement rather than from the time of commencement itself; but the Principles contained no reference to provisional measures to cover the period between application and commencement. The World Bank might consider incorporating a reference to provisional measures in the Principles, so as to bring them more closely into line with the draft *Guide* on the issue of timing of application of the stay.

14. Ms. SABO (Canada), noting that the work of the World Bank, IMF and the Commission shared a common objective, said that, although the instruments each body produced were different in certain respects, it was important to ensure that they were as complementary as possible, and also acceptable to users. The Commission's method of working, which involved incorporating input from a broad range of government representatives and experts in the field, often resulted in texts that were more easily tailored to the specific situation in each country. She therefore welcomed the suggestion that it might be possible to adjust the World Bank Principles to reflect the Commission's broader approach.

15. Mr. LEBEDEV (Russian Federation), noting that General Assembly resolution 57/19 referred to the need for coordination among international organizations working in the field of international trade law, said that it would be useful for the collaboration between the Commission, the World Bank and other organizations to be mentioned in the report on the current session. It was important, in the course of that collaboration, to avoid not only duplication of work but also divergences between the recommendations of the Commission and those of other organizations working in the same area.

16. Mr. BURMAN (United States of America) said his delegation shared the view that it was important not only to achieve coordination and avoid duplication, but also to work conscientiously towards consistency and, above all, compatibility. What was needed was a single set of standards and guidelines. Perhaps representatives of the World Bank, IMF and the Commission should consult with a view to reaching an understanding, which could then be relayed to the Commission during its consideration of agenda item 17, on coordination and cooperation. With the World Bank's Principles nearing finalization, he strongly advocated discussion of compatibility and harmonization issues so as to facilitate the Working Group's discussions at its September 2003 meeting.

17. Mr. SEKOLEC (Secretary of the Commission) added that the following week Mr. Hans Corell, Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations, would be addressing the Commission on a number of legal issues, including cooperation between the World Bank, IMF and the Commission in the area of insolvency law.

18. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) said that IMF fully agreed on the need for convergence around a single set of standards. An appropriate balance must be found between flexibility of standards to accommodate divergent legal traditions and specificity in order to provide meaningful guidance to countries and institutions. Accordingly, IMF looked forward to further cooperation with the World Bank and the Commission with a view to achieving that goal.

#### C. Use and disposition of assets (A/CN.9/WG.V/WP.63/Add.7)

19. Ms. CLIFT (Secretariat) said that, although it was generally recognized that an insolvency law should not unduly interfere with the rights of third parties or secured creditors, insolvency proceedings would often require assets in the possession of the debtor that were being used in the debtor's business at the time of commencement of proceedings to continue to be used or disposed of in order to enable the goal of those proceedings to be realized. To that end, an insolvency law would need to consider endowing participants with certain powers relating to the use, sale or other disposition of the assets of an estate.

20. The *Guide* recommended that the use or disposition should be permitted in the ordinary course of business, without the need for a court hearing, but that court approval should be required if the use or disposition could not be considered to be in the ordinary course of business. However, as yet it provided little guidance as to what the ordinary course of business entailed. For the disposition of assets outside the ordinary course of business, both public and private sales should be permitted, provided that the creditors received adequate notice of the sale and that, in the case of public auctions, the sale was publicized in a manner likely to come to the attention of the interested parties.

21. Sales to related parties, as defined in the glossary, while not prohibited, might require careful scrutiny. The *Guide* also provided that secured assets could be sold free and clear of inter-



ests, provided that notice of the sale was given, that the secured creditor had the opportunity to object to the proposed sale, and that the priority of interests in the proceeds of the sale was preserved. That approach provided greater certainty for purchasers and should enable higher prices to be achieved.

*D. Treatment of contracts (A/CN.9/WG.V/WP.63/Add.8)*

22. Ms. CLIFT (Secretariat) said that the document dealt with the treatment of contracts so as to achieve maximum value and successful reorganization. That might involve taking advantage of those contracts that were beneficial and contributed value to the insolvency estate and rejecting those that were burdensome or contributed no value. In so doing, a balance would need to be struck between upholding general contract law principles and the factors justifying interference with established contractual principles. The *Guide* specifically addressed those contracts in which both parties still had outstanding obligations, since contracts fully performed by one party would generally be dealt with in the context of claims.

23. The *Guide* recognized that where contract provisions allowed for termination in the event of an insolvency, that event would obviously include commencement of proceedings, but might also include the filing of an application for commencement or some other related event. Allowing a termination provision to take effect might result in essential contracts becoming unavailable for insolvency proceedings, especially in the case of reorganization. While it was not yet a general feature of insolvency laws to include provisions allowing termination clauses to be overridden, the *Guide* nevertheless took the view that the insolvency law might provide that such clauses were unenforceable as against the insolvency representative. It also recognized that the insolvency representative must have powers with respect to the continuation and rejection of contract performance, and specified the mechanism to be followed to that end.

24. The *Guide* also noted that the ability to assign contracts could have significant benefits for the estate even though such assignment might raise issues of commercial predictability and possible prejudice to the counterparty. As in the case of contract termination, many contracts included provisions restricting the possibility of assignment. Insolvency laws took different approaches to the enforceability of such assignment clauses: some provided that such clauses could be overridden, while others provided that, where there was a non-assignment clause, it should be given effect. The *Guide*, however, recommended that the insolvency law might permit assignment, provided that to do so would be beneficial to the estate. The *Guide* also stated that as long as certain conditions were met the court could approve the assignment even without the consent of the counterparty. It also recognized that exceptions to the general powers to continue, reject or assign contracts might be required for certain specific types of contract, including labour contracts, insurance contracts, contracts for irreplaceable services, contracts for personal services, contracts for the making of a loan, and financial transactions.

25. Mr. OLIVENCIA RUIZ (Spain) said that workers were creditors not only in their capacity as wage-earners but also as holders of jobs that needed to be maintained and protected. Accordingly, his delegation wished to know how far the *Guide* would go in providing exceptions in the case of labour contracts, given the protection they afforded to employees.

26. Ms. CLIFT (Secretariat) said that paragraph 148 of the draft *Guide*, as well as the section on priorities and distribution, contained a brief discussion of labour contracts. The International Labour Organization (ILO) had participated in the Working Group's discussion on the topic and the general consensus had been that since such contracts involved not only diverse national

laws but also obligations under international treaties and conventions, to do more than raise them as a particularly complex issue exceeded the scope of the *Guide*. One solution would be to make clear in the relevant paragraphs the reasons why the *Guide* did not enter into detail on the subject.

27. Mr. BURMAN (United States of America) said there had been general concurrence in the Working Group that, given the existence of the relevant ILO and other conventions, the *Guide* could not deal in detail with the very complex issues raised by the treatment of labour contracts. Nonetheless, the materials currently contained in the *Guide* concerning restructuring, refinancing and accelerated procedures all aimed at similar results. For instance, in the absence of accelerated procedures, innumerable jobs were lost.

28. Mr. JIANG JIE (China) said that, since labour issues were an important factor in the application of insolvency laws in his own country, it was to be hoped that the Working Group would provide appropriate recommendations to meet the needs of countries such as his own in dealing with labour issues.

*E. Avoidance proceedings (A/CN.9/WG.V/WP.63/Add.9)*

29. Ms. CLIFT (Secretariat) said that, while noting that many of the transactions typically subject to avoidance powers were perfectly normal and acceptable when they occurred outside an insolvency context, the *Guide* recognized the value of including avoidance proceedings in an insolvency law in order to preserve the integrity of the estate and ensure a fair allocation of the debtor's assets for the benefit of all creditors. It recognized three key types of transaction that should be subject to avoidance: those intended to defeat, hinder or delay creditors; undervalued transactions; and those that created a preference in favour of a particular creditor.

30. As in other sections, the *Guide* also made specific reference to security interests, recognizing that while they might be valid in accordance with the law under which they were created, they might nevertheless be subject to avoidance proceedings on the same basis as any other contract. The reason was that, as the Commission would be aware, security interests were the subject of a parallel project. At a later point in her presentation, she would inform the Commission of the steps being taken to achieve consistency and convergence between the two projects.

31. Recognizing the central role played by the insolvency representative in conducting avoidance proceedings, the *Guide* also recognized that there were laws that allowed creditors to commence avoidance proceedings and that there were circumstances in which an insolvency representative might decide not to commence an avoidance proceeding because it was too complex or was unlikely to return value to the estate. In such situations, the *Guide* recommended that the insolvency representative or the court should approve the commencement. To be particularly avoided was a situation in which the insolvency representative had responsibility for management of the conduct of the proceedings but was unaware of other actions that creditors might be taking concerning those proceedings. It was thus felt that the insolvency representative should have a role in approving creditor commencement of avoidance proceedings.

32. The *Guide* discussed procedural issues such as length and calculation of the suspect period, the criteria to be devised for avoidance of certain contracts, the burden of proof and the use of presumptions and defences that might be available to avoidance proceedings. For the most part, the *Guide* did not arrive at a conclusion on how to address those issues, but simply pointed to the need to do so.

33. Mr. REDMOND (Observer for the American Bar Association), commenting on paragraph 159, noted that the suspect period might begin either prior to the application for commencement, or prior to the commencement itself. The Working Group should consider the effect of those two alternatives. The suspect period was supposed to be short, but if the debtor were to delay the commencement in order to orchestrate the extinguishment of the suspect period, it would then not be possible to review previous financial transactions. The Working Group should consider that issue in the context of preferential or fraudulent transactions. More generally, it should discuss the possible adverse effects of a stay upon the actions to be taken between application and commencement.

34. Mr. BURMAN (United States of America) said it would be helpful for the Working Group to have some observations from delegations on their jurisdictions' understanding of the concept of undervalued transactions, as discussed in paragraph 166.

*The meeting was suspended at 10.55 a.m. and resumed at 11.25 a.m.*

*F. Setoff, netting and financial contracts*  
(A/CN.9/WG.V/WP.63/Add.9)

35. Ms. CLIFT (Secretariat) said the topic of setoff and netting had proved extremely controversial in the Working Group. No agreed view was set out either in the commentary or in the recommendations; however, a further proposal on the matter was set forth in the report of the Working Group on the work of its twenty-eighth session (A/CN.9/530). The Working Group had been in favour of protecting rights of setoff validly exercised prior to the commencement of insolvency proceedings, subject to the application of avoidance provisions. There had also been a degree of support for the right of setoff to be subject to the stay, again with certain exceptions. It had been agreed that the scope of the draft provisions on setoff and netting would need to be considered. Subsequently, a small group of experts had met in order to formulate a further text on the subject for consideration by the Working Group at its September 2003 meeting. In view of the time frame for completion of the *Guide*, the Working Group would need to reach a final decision on the topic at that meeting.

36. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) said that IMF regarded setoff and netting as vitally important for the functioning of the international financial system and the stability of the financial markets. It was essential to provide certainty in respect of the close-out and netting of obligations arising under financial contracts. The Fund had therefore participated in the recent meeting of experts from a number of jurisdictions, and hoped that an agreed recommendation on the matter would emerge from the Working Group. In IMF's view, insolvency laws should seek to leave undisturbed contractual rights which permitted the close-out and netting of obligations promptly after the commencement of insolvency proceedings. It recognized that the aim of providing certainty in that area was achieved in a variety of ways in different jurisdictions: in some systems, for instance, there was a need for a special carve-out to achieve certainty in respect of setoff and netting. In view of the huge volume of contracts on the financial markets, the main requirements were those of certainty and predictability.

37. Mr. SIGAL (United States of America) agreed. International capital markets traded billions of dollars a day and needed contracts to be predictable and reliable. Any disruption of those markets could trigger a domino effect, threatening financial institutions and countries' financial stability. It was therefore important for the Working Group to come to a conclusion on the topic of setoff and netting at its September 2003 meeting.

38. Mr. MURREY (United Kingdom) said it would be desirable to have some basic guiding principles on the subject. However, because of the complexity of the financial markets and of the laws governing insolvency in different countries, prescriptive solutions would not be attractive to those seeking reform.

39. Mr. REDMOND (Observer for the American Bar Association) said that it was important to address setoff and netting in a manner comprehensible to practitioners, so as to avoid any disruption of international capital markets.

*Chapter IV. Participants and institutions*

*A. The debtor* (A/CN.9/WG.V/WP.63/Add.10)

40. Ms. CLIFT (Secretariat) said that, as already noted, the material on institutions would in due course be relocated to the opening chapters of the *Guide*. Furthermore, the Working Group had decided that the material on the institutional framework should comprise only the existing commentary, and that no recommendations should be made in respect thereof.

41. The role of the debtor tended to differ as between liquidation and reorganization. In liquidation the debtor was generally displaced, although in some circumstances its ongoing participation might be desirable in order to provide advice to the insolvency representative or to take responsibility for day-to-day operations, especially where the business was to be sold as a going concern.

42. The debtor's role was clearly more important in the case of reorganization. The advantages and disadvantages of a continuing role for the debtor in such cases were set out in the commentary, with an explanation of three possible approaches. Under one approach, the debtor remained in control of the business, a pattern sometimes called "the debtor in possession". The second approach was to displace the debtor altogether. The third lay between those two extremes: an insolvency representative was appointed, and could exercise some level of supervision over the debtor. The draft *Guide* did not express any preference as between the three alternatives. It did however note that the debtor had a right to be heard in the insolvency proceedings and to participate in the decision-making process, especially in a reorganization, as well as a right of access to information relevant to the conduct of the proceedings. Natural persons also had a right to retain personal and other property.

43. With regard to the obligations of the debtor, the draft *Guide* identified a need for the debtor to cooperate with the court and the insolvency representative, particularly since many of its duties had to be performed by the latter. The debtor should be required to provide certain information to the insolvency representative or to the court concerning its business and its financial circumstances, to enable an assessment to be made of its prospects for survival. The draft *Guide* identified a mechanism for obtaining that information, and discussed the need for confidentiality. It also mentioned the ancillary requirements imposed by some insolvency laws that touched on personal freedoms, such as the requirement that the debtor should not leave its habitual place of residence.

*B. The insolvency representative* (A/CN.9/WG.V/WP.63/Add.10)

44. Ms. CLIFT (Secretariat) said that the neutral term "insolvency representative" had been chosen to refer to the person undertaking the range of functions which might be performed, without distinguishing between those specific to different types of proceedings. The insolvency representative was normally an individual, although some jurisdictions made provision for a legal

entity to perform that role. The draft *Guide* outlined possible methods of selecting the insolvency representative, and stressed the need for the person appointed to have relevant knowledge and experience of commercial law, noting that some jurisdictions required the representative to hold particular professional and other qualifications. It noted the desirability of including a provision relating to disclosure of possible conflicts of interest. In some jurisdictions, a conflict of interest would disqualify an individual from performing that function, while others allowed the appointment if approved by a court.

45. A list of the duties and functions of the insolvency representative was set out in paragraph 242, and was also covered in the recommendations. Reference was also made to the need for confidentiality.

### C. Creditors (A/CN.9/WG.V/WP.63/Add.11)

46. Ms. CLIFT (Secretariat) said the draft *Guide* recognized that, notwithstanding the appointment of an insolvency representative to safeguard their interests, creditors might be given a more active role to play in insolvency proceedings for a variety of reasons, and that their participation should be encouraged in order to counter the widespread phenomenon of creditor apathy. Insolvency laws provided for different levels of such participation, and a variety of representative mechanisms were employed. Particular attention was devoted to the use of creditor committees, covering such issues as the proceedings for which it might be desirable to have a creditor committee or other representative mechanism; the relationship between a committee and creditors generally; the creditors eligible for appointment to a committee; the formation, functions and liability of a creditor committee; and the removal and replacement of its members. In the secretariat's view, further refinement of the text was necessary in order to spell out what was understood by the terms "general body" or "assembly" of creditors, so as to avoid any possibility of confusion between those bodies and the creditor committee.

47. Ms. VEYTIA PALOMINO (Mexico) requested clarification of the distinction between the roles of the general body or assembly of creditors and the creditor committee.

48. Ms. CLIFT (Secretariat) said that, as she understood it, the creditor committee was a mechanism designed to represent creditors in insolvency proceedings. It was of particular value in representing the diverse interests of a large number of creditors.

49. Mr. REDMOND (Observer for the American Bar Association) added that some jurisdictions provided for a mass meeting of creditors, known as the general body of creditors, to act and make determinations based on the recommendations of the creditors. The reference to that body was confusing, and the simplest solution might be for the Working Group to consider deleting paragraph 269, which was the only paragraph in the draft *Guide* to refer to the general body of creditors.

50. Ms. JASZCZYNSKA (Observer for Poland) said that the value of the creditor committee was that it effectively represented the wide range of interests within the general body of creditors.

51. Mr. SIGAL (United States of America) said the important distinction was that each creditor within the general body of creditors had voting rights, whereas the function of the creditor committee was to liaise with the insolvency representative to facilitate the reorganization. Paragraph 269 should be reworded to make it clear that there was no conflict between the two bodies.

52. Mr. RWANGAMPUHWE (Rwanda) said that the relationship between secured and unsecured creditors in the creditor committee should be clarified in the Working Group.

53. Mr. SIGAL (United States of America) said that creditor committees typically represented unsecured creditors, whose interests differed from those of secured creditors. The draft *Guide*, however, offered States flexibility in deciding whether to allow the participation of secured creditors in a creditor committee.

54. Ms. CLIFT (Secretariat) said that the Working Group agreed on the substance of the recommendations, although the commentary might require some adjustment. Some of the issues raised were already addressed in the latest revision of addendum 11, which was not yet available. In any event, a further opportunity to resolve such issues would arise when the final version of the draft *Guide* was considered by the Working Group in 2004.

### D. Institutional framework (A/CN.9/WG.V/WP.63/Add.11)

55. Ms. CLIFT (Secretariat) said that many of the reports on which the draft *Guide* had drawn, in particular those of the Asian Development Bank, IMF and the World Bank, pointed to the critical importance of developing an insolvency law in conjunction with a consideration of the institutional framework required to support that law. While it had been felt that to make recommendations on the institutional framework would go beyond the mandate of the Commission and the scope of the draft *Guide*, it had nevertheless been deemed important to include a short commentary on the issues to be addressed in that connection, including, for example, the extent to which the courts should participate in all steps of the insolvency process. Further refinement of the text might be necessary in the interests of internal consistency.

56. Mr. JOHNSON (Observer for the World Bank) said that the World Bank had actively focused on the institutional framework in the context of capacity-building and was working to further elaborate techniques aimed at strengthening court systems throughout the world. To that end, it had organized a working group of judges to consider the issues at stake and define relevant areas and standards for qualification, training and capacity. More recently, it had organized a global forum involving participants from 65 countries, to discuss those issues.

57. Mr. OLIVENCIA RUIZ (Spain) stressed the importance of coordinating the insolvency regime with the institutional framework. Given the complexity of the insolvency system in the current economy, judges, experts and others working in the administration of justice required specialized knowledge of the subject, and the efforts of the World Bank in that area were thus to be commended. Spain's recent reform of its insolvency laws provided for courts that specialized in insolvency.

*The meeting rose at 12:30 p.m.*

## Summary record of the 767th meeting

Friday, 4 July 2003, at 2 p.m.

[A/CN.9/SR.767]

Chairman: Mr. Wiwen-Nilsson. (Sweden)

The meeting was called to order at 2.10 p.m

PRELIMINARY APPROVAL OF DRAFT UNCITRAL  
LEGISLATIVE GUIDE ON INSOLVENCY LAW  
(continued) (A/CN.9/529, A/CN.9/530, A/CN.9/534;  
A/CN.9/WG.V/WP.63 and Add.1-17)

Part two: Core provisions of an efficient and effective insolvency regime (continued)

Chapter V. Reorganization (A/CN.9/WG.V/WP.63/ Add.12)

### A. The reorganization plan

1. Ms. CLIFT (Secretariat) said the reorganization plan might take a variety of different forms. The draft *Guide* did not deal with the precise contents of the plan, but rather with its timing, the negotiations for and proposal of the plan, the information to be provided to creditors to enable them to make an informed judgement thereon, the approval of the plan and its modification. It also discussed whether a plan approved by the creditors should be confirmed by a court, the possibility of challenges to the approval of the plan, and its implementation.

2. It was recommended that the debtor might be given an exclusive period to propose a plan. Should it fail to propose one within the exclusive period, other parties should be given the opportunity to do so. The *Guide* discussed the advisability of imposing time limits for the preparation of the plan. It recommended that the plan should be accompanied by a disclosure statement, which should include sufficient information to enable those voting on the plan to evaluate it. It also recommended a minimum content of the plan and of the disclosure statement. It discussed ways in which insolvency laws dealt with the voting procedures for approval of plans, the kinds of voting majorities required and the division of voters into classes of creditors. It recommended that insolvency laws should establish the voting majority required, subject to the proviso that the majority should be a majority of those actually voting. It suggested that voting methods should be sufficiently flexible to allow for voting either in person, by proxy or by electronic means. In recommendations 129 and 130 the Working Group had provided for creditors voting by classes, an arrangement which might require a specified majority of classes to support the plan, and had addressed the treatment of those classes that did not support it. There was a need for further consideration of those issues.

3. The *Guide* went on to deal with the question of confirmation of the plan by a court following its approval; challenges to its approval and confirmation; amendments and the requirements for their approval; supervision of the implementation of the plan; and the circumstances in which it might be appropriate to convert the reorganization proceedings to liquidation proceedings. In that event, account would have to be taken of payments already made during implementation of the plan, especially in the context of avoidance proceedings.

4. Ms. VEYtia PALOMINO (Mexico) asked whether an insolvency representative that had been involved in preparing a reorganization plan would play a part in evaluating, amending and finalizing the plan, and in supervising its implementation.

5. Ms. CLIFT (Secretariat) said that arrangements differed. The *Guide* discussed the advisability of having a number of different parties involved in negotiating and preparing the plan. If the debtor was given an exclusive opportunity to do so, it would be advisable for it to cooperate in that process with the creditors and with the insolvency representative, mainly to ensure that whatever plan was proposed would be approved. The *Guide* noted that where there was no provision for the insolvency representative to participate in preparing or proposing the plan, the representative should nevertheless be given the opportunity to comment on it. Once the plan was approved, the extent to which the representative was involved would depend on the provisions of the plan itself and of the insolvency law. Some laws regarded the proceedings as complete once the plan was approved, so that issues of implementation lay outside their scope; others provided for the proceedings to be terminated once the plan had been fully implemented. The *Guide* offered the option of the insolvency representative being appointed to supervise the implementation of the plan.

6. Mr. SIGAL (United States of America) noted that whereas recommendation 122 stated that the parties permitted to propose a reorganization plan should be identified, in paragraphs 312 to 316 of the commentary that decision was left to States, each of which would have its own ways of implementing the recommendation and deciding which parties should be involved. According to paragraph 314, one of those parties might be the insolvency representative. Paragraphs 312, 313 and 316 allowed for the involvement of the debtor, the creditors, and, in some circumstances, of government agencies and trade unions. The *Guide* was very flexible on that score, and the recommendation could readily be tailored to the needs of different legal systems.

7. Ms. WEEKS-BROWN (Observer for the International Monetary Fund—IMF) queried the arrangements for voting by secured creditors. If they were involved in the reorganization process, would they be expected to vote as a separate class?

8. Ms. CLIFT (Secretariat) said the *Guide* did not offer a conclusive answer on the role of secured creditors in a reorganization, although paragraphs 329 to 334 of the commentary discussed their role in approving reorganization plans. The position of secured creditors should be further clarified in the revision of the chapter that was currently being undertaken.

9. Mr. RWANGAMPUHWE (Rwanda) asked whether a creditor who proposed a reorganization plan would be able to make the final decision on it, or whether the insolvency representative would intervene at the final stage.

10. Ms. CLIFT (Secretariat) said that the insolvency representative was not considered to have a role in either the approval or the confirmation of the plan. Once the plan had been approved by the required majority of voters, the insolvency representative had no further role to play. However, the *Guide* dealt with the question whether a plan already approved by the creditors had to be confirmed by a court. Some jurisdictions provided that the vote was sufficient in itself. Where confirmation by a court was required, the court might be asked to consider, inter alia, whether the approval process had been properly conducted and whether

the requirements on provision of information had been complied with. Some insolvency laws required the court to consider whether the reorganization plan was economically feasible. On the basis that judges may lack the necessary commercial knowledge to make such a determination, the *Guide* recommended that courts should consider only very specific criteria relating to the plan. It could in any case be assumed that the creditors, whose rights were affected, would themselves have come to a conclusion about the economic feasibility of the plan.

*B. (Expedited) reorganization proceedings [Recognition of a reorganization plan negotiated and agreed prior to commencement of reorganization proceedings]*

11. Ms. CLIFT (Secretariat) explained that section B dealt with procedures involving both an informal negotiation process and formal insolvency proceedings. Informal out-of-court negotiation was often impeded, both by the need for unanimous consent on the part of the creditors in order to alter the terms of existing debt, and by the ability of individual creditors to enforce their rights to the detriment of other creditors, or to refuse to accept a reorganization plan which was in the best interests of the majority. The first part of section B dealt with the mechanism for imposing upon dissenting creditors a plan approved by the required majority. The purpose of expedited proceedings was to enable a plan negotiated informally to be approved in court, thereby obviating the need to initiate full formal insolvency proceedings. Large institutional creditors might be included in expedited proceedings, whereas trade creditors and employees might be paid in the ordinary course of business.

12. As for the kinds of debtor entitled to commence expedited proceedings, the revised version of recommendation 139 proposed that any debtor unable to pay its debts as they matured would be able to commence proceedings. The degree of financial distress in that case would be less than that required for full reorganization proceedings. In expedited proceedings, certain elements of full reorganization such as the consideration of claims and the appointment of an insolvency representative could be avoided, except where the plan provided otherwise. Other provisions, such as application of the stay and the discharge of claims, would remain. The *Guide* discussed the relative applicability of various aspects of insolvency law in that context. Protection afforded to dissenting creditors should be much the same as in full reorganization proceedings. Additional issues covered in the context of expedited proceedings included the possible failure of the reorganization plan and the rights of creditors in that event. Because there was relatively little understanding of the scope of expedited proceedings, they were explained in some detail. Nevertheless, even fuller explanations in the commentary might be in order.

*Chapter VI. Management of proceedings*

*A. Treatment of creditor claims (A/CN.9/WG.V/WP.63/Add.13)*

13. Ms. CLIFT (Secretariat) said that creditor claims in insolvency proceedings operated to determine which creditors might vote in the proceedings, and how they could vote, according to class, and also for purposes of distribution. The *Guide* dealt with the procedures for submitting and processing claims. It recommended that insolvency laws should include a mechanism for submitting claims, and might also provide for undisputed claims to be automatically admitted, by reference, for example, to company records. It addressed the types of claims which had to be submitted, and dealt with rights to payment arising from the acts or omissions of the debtor. It discussed whether all secured creditors should be required to submit claims, or only to the extent that they might be undersecured. It stressed the need to ensure equal treatment of all similarly situated creditors.

14. As for the timing of submission of claims, the *Guide* indicated two possibilities: submission at a specified time after commencement of proceedings, and submission at any time before final distribution. It pointed to the need to address the consequences if a claim was not submitted within the specified time limit. It referred to the conversion of foreign currency claims and the timing of conversion, and the need for insolvency laws to specify what evidence was required in support of claims. Creditors were not required to appear in person to prove their claim.

15. The *Guide* provided for the right of review of claims which were rejected or limited, and the entitlement of interested parties to seek review of claims already admitted. Provisional admission should be facilitated to allow some participation by creditors pending valuation of the claims. Claims by related parties should be subject to scrutiny, and the voting rights of the related party or the amount of the claim might be restricted. Finally, the *Guide* dealt with the effects of admission, including the right of creditors to vote, the priority accorded to claims, determination of the amounts for which creditors could vote, and the right of creditors to participate in a distribution.

16. Mr. OH SOO-KEUN (Observer for the Republic of Korea) said that subordination of claims requiring special treatment (section A. 3 (f)) was one of the most difficult issues facing the legislator. His delegation would welcome more detailed examination of the question in the *Guide*.

*B. Post-commencement finance (A/CN.9/WG.V/WP.63/Add.14)*

17. Ms. CLIFT (Secretariat) said the *Guide* noted that the continued operation of the debtor's business after the commencement of insolvency proceedings was critical for reorganization, and to a lesser extent, in liquidation where the business was to be sold as a going concern. The *Guide* discussed the availability of finance for that purpose, and what incentives might be needed to attract lenders. Insolvency laws took a variety of approaches to the question, some of them making it difficult for debtors in those circumstances to obtain new loans. The *Guide* therefore recommended that laws should facilitate the obtaining of post-commencement finance where it was determined to be necessary for the continued operation or survival of the business. By way of incentives, the *Guide* discussed two approaches: providing security, which might be problematic where the debtor had no unencumbered assets; and affording priority to new lending. In some insolvency laws, new lending was accorded administrative priority or ranked above other priority creditors, including secured creditors. That was a controversial issue, and the *Guide* accordingly recommended that laws should establish the priority to be provided for post-commencement finance.

18. Ms. VEYtia PALOMINO (Mexico) acknowledged that it was essential to obtain financing for debtors following commencement, so that they could pay creditors that supplied raw materials and continue operating their businesses. However, she had been surprised at the use of the term "administrative priority". Paragraph 419 referred to a "super" administrative priority under some insolvency laws, which would rank ahead of all creditors, including secured creditors. How would that arrangement operate in practice?

19. Mr. SIGAL (United States of America) said that there were some very unusual instances in which an administrative claim might take precedence over a secured claim, for example, where the secured creditor was over-collateralized. Such a creditor could at most get back the value of its loan plus interest, yet its collateral might be worth more than the value of the loan. For example, an airline might have assets in the form of an aircraft worth

\$US 100 million, as against outstanding loans of only US\$ 70 million. In such a case, a court might grant a cushion of perhaps \$US 10 million as a “super” administrative priority, whereupon the banks would be willing to finance the \$US 20 million differential between the ultimate value of the collateral and the loan. The underlying concept was that the differential between the collateral owned by the debtor and the amount of the debt was an asset forming part of the debtor’s estate, and could form the basis of financing that was crucial for a reorganization. An overriding principle, both in the *Guide* and in the work of Working Group VI (Security Interests), was that the value of the secured creditor’s collateral must never in any circumstances be impaired.

*C. Priorities and distribution [of proceeds of liquidation]*  
(A/CN.9/WG.V/WP.63/Add.14)

20. Ms. CLIFT (Secretariat) explained that the material in section C and in documents A/CN.9/WG.V/WP.63/Add.15 and 16 dated from early 2001 and had not yet been fully discussed by the Working Group. Section C dealt with the various priorities to be accorded to different types of claims, and how they would affect the distribution of the insolvency estate. The *Guide* took the view that the law should establish the order in which claims were to be paid. Priority would normally be accorded to tax claims and to claims related to social security. Employees were often given priority for unfunded leave and outstanding wages. The *Guide* noted that there was a tendency for insolvency laws to include a very large number of such claims, resulting in uncertainty and unpredictability for commercial creditors. Recommendation 169 set out the order in which claims should be paid, and recommendation 170 reiterated the principle that equally situated creditors should be treated similarly, unless otherwise agreed.

*Chapter VII. Resolution of proceedings*  
(A/CN.9/WG.V/WP.63/Add.15)

21. Ms. CLIFT (Secretariat) said the treatment of discharge in insolvency laws, discussed in section A of chapter VII, tended to be inconsistent. In some cases a short waiting period was imposed before the debtor could be discharged from its liabilities, while in other cases the period was long. The conditions for discharge were now being actively discussed in various forums, including the European Union. The prevailing view seemed to be that if the goal of insolvency proceedings was to resolve the financial difficulties of debtors and allow them to return to productive activity in an entrepreneurial climate which encouraged risk-taking, they should be discharged within a reasonable period. Recommendation 172 was somewhat tentative, since it had not yet been discussed by the Working Group. As for the conclusion of proceedings, discussed in section B, the *Guide* noted that insolvency laws adopted different approaches to the manner in which a proceeding should be concluded or closed, the prerequisites for closure and the procedures to be followed. The recommendations on that point merely stated that the insolvency law should make provision for the conclusion of proceedings.

*Chapter IV. Participants and institutions (continued);*  
*Chapter VI. Management of proceedings (continued)*  
(A/CN.9/WG.V/WP.63/Add.16)

22. Ms. Clift (Secretariat) explained that the material in document A/CN.9/WG.V/WP.63/Add.16 supplemented earlier chapters of the *Guide*, and had not yet been discussed by the Working Group. There were no draft recommendations as yet, either for the section of chapter IV dealing with the rights of review and appeal of debtors and creditors, or for the section of chapter VI dealing with the treatment of corporate groups in insolvency.

*Applicable law governing in insolvency proceedings*  
(A/CN.9/WG.V/WP.63/Add.17)

23. Ms. CLIFT (Secretariat) said the question of the applicable law in insolvency proceedings had not yet been discussed by the Working Group. Addendum 17 had been prepared in response to suggestions that it would be desirable for the *Guide* to deal with the vexed question of applicable law. The group of experts who had worked on the topic had decided to produce draft recommendations only, without a commentary. The material had been circulated for informal discussion at the previous session of the Working Group. The view of the Working Group was that it would be difficult, within the time frame for completion of the draft *Guide*, to reach agreement on the question of applicable law. It was often the case that the Commission’s texts did not include provisions on conflict of laws, a complex issue in which other organizations in any case specialized. The present draft had been transmitted to the Hague Conference on Private International Law, which had indicated that it lacked the expertise to deal with conflicts in the area of insolvency law. The Commission must therefore decide how to ensure the necessary expertise to resolve the matter within the Working Group. One solution might be to treat the question of the applicable law as a separate topic, so as to avoid delaying the completion of the remainder of the *Guide*.

24. Mr. BURMAN (United States of America) said that the question of the applicable law called for careful consideration by the Working Group. His own delegation had changed its position, and now believed that the *Legislative Guide* would be improved by including guidance on the applicable law, which would be helpful to those who had frequently to deal with the issue in everyday life. The Working Group should take up the issue with a view to achieving a consensus within the time frame for completion of the entire draft.

25. Mr. MURREY (United Kingdom) agreed with the view expressed by the secretariat. While there might be some benefit in having some simple indicative guiding principles on the question of the applicable law, to go further than that was unlikely to be helpful and might even delay completion of the *Guide*.

26. Mr. OLIVENCIA RUIZ (Spain) said that even in their provisional form, the draft recommendations on the applicable law failed to comply with the objective of harmonious and balanced protection of the rights of both creditors and debtors. Paragraph (b) stated that the purpose of legislative provisions on the applicable law was to “facilitate commercial transactions by providing a clear and transparent basis for predicting the rules of law that will apply to the legal relationships with the debtor”. Paragraphs (c) and (d) likewise referred to “contracts with a debtor” and “legal relationships with the debtor”. The text thus appeared to be written exclusively from the viewpoint of the creditor, whereas the emphasis should be on the reciprocity of rights and obligations as between the debtor and the creditor.

27. Ms. SABO (Canada) said it would be premature to make any decision on the text until the Working Group had discussed it. On the question of how to proceed, she believed Governments would be able to provide expert advice on the issues of the applicable law and jurisdiction, to enable the Working Group to conduct an informed discussion of the subject. While the Commission could not yet decide whether the *Guide* should include provisions on the applicable law, it could try to offer some guidance to the Working Group. For its part, the Working Group could explore how to strike a balance between providing basic guidance to legislators on conflict of laws issues in insolvency law and discussing in undue detail all the pertinent issues of private international law. Even a brief comment on the matter by the Working Group would be useful, because it would alert legislators to the need to take it into account. Noting that the draft *Guide* on secured transactions

contained an entire chapter dealing with conflicts of laws, she welcomed the collaboration between Working Group V (Insolvency Law) and Working Group VI (Security Interests), and hoped the secretariat would continue to find ways of enabling that collaboration to continue.

28. Mr. MARKUS (Observer for Switzerland) agreed that it would be premature for the Commission to decide whether to include in the draft *Guide* recommendations on the applicable law. The Working Group must first frame proposals defining the issues involved. The private international law questions arising in the field of insolvency were peculiarly novel and complex. Since the relevant expertise was not available at the Hague Conference, it was necessary to look to the member States to provide it. In the meantime, it would be risky to engage with the subject in any detail, because doing so might engender contradictions and inconsistencies with the various systems of private international law. However, it was very important to offer national legislators some guidance on the matter, and to bring home to them that they needed to consider it.

29. Mr. REDMOND (Observer for the American Bar Association) said that, as practitioners were aware, conflicts of laws were an issue that arose routinely in insolvency cases, and one that the draft *Guide* could not afford totally to ignore.

30. The CHAIRMAN said it appeared to be the common view that the Working Group should be asked to explore further the question of the applicable law, and should decide how best to deal with it, bearing in mind the time frame for the adoption of the *Guide*. In that light, it should not seek further to broaden the scope of the topic.

31. If he heard no objection, he would take it that, pursuant to paragraph 10 of the annotated provisional agenda for the current session (A/CN.9/519), the Commission wished to approve the scope of the *Legislative Guide* as being responsive to the mandate given to the Working Group; to give preliminary approval to the key objectives, general features and structure of insolvency regimes to direct the secretariat to make the draft *Guide* available to member States, relevant intergovernmental and non-governmental international organizations, as well as private-sector and regional organizations for comment; and to direct the Working Group to complete its work on the draft *Guide* and present it to the Commission in 2004 for finalization and adoption.

32. *It was so decided.*

#### *Future work of the Working Group*

33. Ms. SABO (Canada) emphasized that, with a view to achieving consistency, when completing its work on the draft *Guide* the Working Group should have available to it the documents on the same subject produced by other bodies, and, in particular, by the World Bank.

34. Mr. JOHNSON (Observer for the World Bank) said the Bank would provide those documents to the Working Group at

its next session. The World Bank had been reviewing its own insolvency principles through a series of pilot assessments, and was now finalizing them for submission to its Board of Directors. It had held discussions with the Commission's secretariat on the need to ensure consistency between the work of the two bodies. For that purpose, it would provide the Working Group with the principles in draft form, and both sides would work to achieve alignment of the two texts.

35. Mr. BURMAN (United States of America) welcomed the prospect of collaborative work between the World Bank and the Working Group, a task which would no doubt also involve IMF. It would be helpful if the secretariat could provide a tentative schedule of work for the forthcoming session of the Working Group.

36. Ms. CLIFT (Secretariat) said that the Working Group had still to consider the material contained in documents A/CN.9/WG.V/WP.63/Add.15-17. In addition, it would have to complete its consideration of the material in document A/CN.9/WG.V/WP.63/Add.14, and might also wish to revisit some earlier parts of the draft *Guide*. In particular, it would need to reconsider the glossary and definitions in document A/CN.9/WG.V/WP.63/Add.1, which was currently being revised, and would have to consider the revised proposal on setoff and netting, some of the issues of convergence arising from the final draft of the World Bank Principles, and issues raised at the current meeting. The Working Group was thus faced with an ambitious schedule.

37. Mr. BURMAN (United States of America) said he hoped it would be possible to complete work on the draft *Guide* during the Working Group's final session in March 2004, bearing in mind that some adjustment to the text might be necessary when dealing with the chapters already approved in principle by the Commission.

38. Ms. CLIFT (Secretariat) said that while it was highly desirable that the consolidated version to be circulated to Governments and other organizations should be as complete as possible, there should nonetheless be sufficient time to refine and complete the text in final draft form before the Commission's session in 2004. As for cooperation between Working Groups V and VI, the draft texts on insolvency and secured transactions and on insolvency law had both evolved since the joint session held in December 2002, and some further joint work was needed on the treatment of secured creditors. That work could be commenced during the September 2003 session of Working Group V. However, the two texts were much closer in that respect than they had been one year previously.

39. Ms. SABO (Canada) urged the secretariat to arrange for experts in the two working groups to meet. When the draft *Guide on Insolvency Law* was circulated to Governments, their attention should be drawn to the need to involve experts in both fields when preparing their comments.

*The meeting rose at 4 p.m.*

## Summary record of the 768th meeting

Monday, 7 July 2003, at 9.30 a.m.

[A/CN.9/SR.768]

Chairman: Mr. Wiwen-Nilsson. (Sweden)

*The meeting was called to order at 9.35 a.m*

FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (*continued*) (A/CN.9/522 and Add.1 and 2; A/CN.9/XXXVI/CRP.1/Add.7; A/CN.9/XXXVI/CRP.3 and Add.1 and 2)

1. The CHAIRMAN invited the Commission to resume discussion of agenda item 4 with a view to the adoption of the model legislative provisions. It must first be decided whether the legislative recommendations should be retained in their entirety, together with the model legislative provisions; whether all the recommendations should be eliminated; or whether only those recommendations not superseded by model legislative provisions should be retained.

2. Mr. WALLACE (United States of America) said that a distinction had been drawn between the short-term and the long-term solution. His delegation had understood there to be a consensus on the long-term solution embodied in the square-bracketed paragraph 2 bis of the draft decision contained in document A/CN.9/XXXVI/CRP.1/Add.7, in which the secretariat was requested, subject to availability of resources, to consolidate in due course the text of the model legislative provisions and the *Legislative Guide* into a single publication and, in doing so, to replace the legislative recommendations contained in the *Guide* with the model provisions to the extent that they dealt with the same subject matter.

3. As a short-term solution, the secretariat had suggested the publication of a slim booklet. What had not been decided was whether that booklet should contain not only the model legislative provisions, but also the recommendations from the *Guide*. His delegation's preference was for it to contain the model legislative provisions and only those recommendations that had not been replaced by model legislative provisions. That solution would not involve substantial resources, inasmuch as the texts would have already been consolidated for publication on the UNCITRAL web page.

4. The CHAIRMAN said it was his understanding that no decision had been taken regarding the long-term solution contained in paragraph 2 bis, which remained simply an option.

5. Ms. SABO (Canada) said her delegation did not support the substitution of the model provisions for the legislative recommendations. Even those recommendations superseded by model provisions had intrinsic value and users should not be deprived of access to them. As a long-term solution, her delegation favoured the publication of a single consolidated document containing all the model provisions and legislative recommendations. The best short-term solution would be to publish the model provisions separately, and to retain the complete set of recommendations, making it clear to users that the provisions themselves did not constitute a complete law. Users should be urged to refer also to the *Guide* and to the legislative recommendations contained therein.

6. Mr. SCHÖFISCH (Germany) said that if the Commission felt that the best way of providing guidance to legislators was to pro-

duce a single consolidated document in due course, his delegation would not oppose that decision. However, in his view, national legislatures could be trusted to realize that they must consult the *Legislative Guide* as well as the model provisions when drafting legislation, since some of the legislative recommendations had not been superseded by model provisions.

7. Ms. PERALES VISCASILLAS (Spain) said her delegation favoured consolidating the recommendations with the model provisions, along the lines of the third option suggested by the secretariat in paragraph 2 of document A/CN.9/522/Add.1. However, the text of the *Legislative Guide* would need to be amended so as to reflect the fact that some of the model provisions had no corresponding legislative recommendation.

8. Mr. MARKUS (Observer for Switzerland) said it was essential to retain all the recommendations, including those now covered by model legislative provisions. It would be wrong simply to jettison the result of so much laudable work. The future reader of the recommendations and model provisions must be in a position to appreciate the historical evolution of the various texts, something which would no longer be possible if a part of the recommendations was abandoned. Perhaps the best solution might be to publish the model legislative provisions, the legislative recommendations and the explanatory text as separate sections of a single booklet, with cross-references.

9. Mr. PARK WHON-IL (Observer for the Republic of Korea) said his delegation would prefer to retain the legislative recommendations in their entirety, since they constituted a historical record of the discussions and of the sterling efforts of the Working Group and the secretariat. There had also been significant qualitative developments in the model legislative provisions, which, as modified, superseded the recommendations. His delegation favoured consolidating the legislative recommendations and the model legislative provisions in a single legal document. However, the recommendations should perhaps take the form of recitals or core principles.

10. Mr. YEPES ALZATE (Colombia) said that while the *Legislative Guide* had been a source of guidance to States, the two years spent working on the new text had yielded a fresh perspective on the legislative recommendations contained therein. The new publication should contain only the new model provisions and those legislative recommendations in the *Guide* which had not been superseded by model provisions. Having regard to the cost implications, the Commission should decide whether to have two separate publications—the *Guide* and the model provisions—and consolidate them later into a single document; or whether it would be more cost-effective to publish both texts in a single document from the outset.

11. The CHAIRMAN said it would be inconsistent to argue that only one set of recommendations should be retained but two documents issued. If just some of the recommendations were kept, that must surely result in a consolidated text.

12. Mr. ESTRELLA FARIA (Secretariat) said that financial constraints meant that it would be impossible to reprint the *Guide* with an addition thereto during the current biennium. That was



why, during the Commission's debates, the secretariat had referred to a short-term and a medium-term solution. In the secretariat's view, the least satisfactory outcome would be a publication containing both the legislative recommendations and the new model provisions in a merged format. The result would be endless inquiries from States about the disparities between the different texts covering the same subject matter. If the Commission decided to retain all the legislative recommendations in the *Legislative Guide* and also to adopt the new model legislative provisions, the most logical way of doing so would be to have two separate publications. However, if the Commission preferred not to keep all the existing recommendations, it would not be too costly to adopt the interim solution of having two documents which could co-exist for a certain period, namely, the *Guide* in its present form and the model provisions which the Commission wished to substitute for some of its recommendations. That would not be a waste of resources because, at some point in the near future, stocks of the *Guide* would be exhausted and budgetary appropriations would have to be requested to replace them.

13. Mr. CHAN (Singapore) said that the key issue was how the Commission's intellectual products should be presented to those who would be relying on them in future. As the observer for Switzerland had pointed out, the Commission's deliberations had to be seen in their historical context.

14. The *Guide* had been adopted at the Commission's thirty-third session following lengthy deliberations in the Working Group, and had reflected current thinking on the subject. Accordingly, his delegation could not support any proposal aimed at doing away with it. The reason for drafting the model provisions was that at the Commission's thirty-third session some delegations, especially from developing countries, had spoken of their difficulties in applying the recommendations to their law-making processes in the absence of model legislative provisions. The model provisions were intended to give effect to the ideas in the *Guide*, not to change them—although some improvement and updating had inevitably taken place in the course of discussion. He suggested adopting as a model the practice followed in some common law countries, whereby digests of laws were regularly updated by means of supplements containing judicial pronouncements and subsequent enactments. In other words, the legislative recommendations would be updated rather than amended. That solution would also address the concerns voiced by some delegations that the work of the thirty-third session should not be undermined. The *Guide* would remain a settled text, as approved at the Commission's thirty-third session, but the legislative recommendations it contained would be updated as often as was necessary.

15. The CHAIRMAN asked how the differences between the two texts would be highlighted if the model provisions were to stand alone.

16. Mr. CHAN (Singapore) said that every model provision was related to a principle contained in the *Guide*. The supplement would update the thinking of the *Guide* on the issues presently addressed.

17. Mr. WALLACE (United States of America) welcomed the proposal by the representative of Singapore, which would have the effect of preserving the history of the project. An analogous solution had been chosen in 1994 when adopting the Model Law on Procurement of Goods, Construction and Services, the first of the footnotes to which explained that services had been added to the scope "without thereby superseding the Model Law on Goods and Construction, adopted by the Commission at its twenty-sixth session". The Commission had still to decide how to deal with its new product. If financial resources were available, the

Commission would opt for a single consolidated text, and that should still be the preferred solution in the medium to longer term. The consolidated publication should contain the materials in the *Legislative Guide*, with appropriate amendments to the text of the recommendations, as proposed by the representative of Spain, together with an explanation of how the text had evolved to produce the model provisions. The new publication would contain, first, the model provisions and those legislative recommendations which had not been replaced; followed by the text of all the recommendations.

18. It was important to bear in mind that the Commission was working for its member States, especially those from developing countries and countries in transition. The text should therefore be clear and efficient, and a consolidated publication should appear as soon as possible. Meanwhile, for the short term, the emphasis should be on ease of presentation. His delegation could accept a publication containing the model provisions only, but would prefer a combined text, also incorporating the surviving legislative recommendations.

19. Mr. ADENSAMER (Austria) favoured keeping all the recommendations, not merely those without a corresponding model provision. He doubted whether the model provisions on their own would be much help to legislators, firstly because in framing legislation they would have to have recourse to the *Guide* and to the legislative recommendations it contained. Moreover, in order to draft legislation adapted to the domestic legal system, the legislator might need to change a model provision, in which case the legislative recommendation which had preceded it would be helpful. Nor should it be too difficult to produce an explanation of how the model provisions had evolved from the materials in the *Guide*.

20. Mr. LEBEDEV (Russian Federation) said there were bound to be shortcomings in whatever solution the Commission decided to adopt. Most members of the Commission were in favour of publishing the new model provisions. That was the thrust of paragraph 2 of document A/CN.9/XXXVI/CRP.1/Add.7, which if adopted would require the secretariat to transmit the text of the model provisions, along with the *Legislative Guide*, to Governments and other bodies. If the decision was made to publish the model provisions as a separate booklet, it must then be decided what would be the fate of the legislative recommendations. The suggestion that all the texts so far produced should be retained was also a feasible solution. The third alternative would be to retain only those legislative recommendations which were not reflected in any of the new model provisions. His own delegation could accept any of those solutions.

21. The simplest course of action would be to publish the text of the model provisions with an introduction by the secretariat, indicating that they had been developed from the ideas in the *Guide* and from subsequent discussion and clarification of those ideas in the Commission. For the longer term, the best solution would be the one outlined in paragraph 2 bis of document A/CN.9/XXXVI/CRP.1/Add.7, to which the representative of the United States of America had already referred.

22. Mr. RWANGAMPUHWE (Rwanda) said that, as an interim measure, the text of the model legislative provisions should be published separately and circulated to all interested parties. Thereafter, it would be essential to begin preparing a consolidated text comprising both the legislative recommendations and the text of the model legislative provisions.

23. Ms. XUE XIAOHONG (China) said that the practical aspect of the issue should also be taken into account; even after publication of the model legislative provisions, the recommendations contained in the *Legislative Guide* would continue to be a helpful tool

for legislators. She therefore endorsed the Austrian delegation's view that both the legislative recommendations and the model legislative provisions should be retained. The best way of linking the two, however, was a matter for the secretariat to decide.

24. Ms. MANGKLATANAKUL (Thailand) said that the model legislative provisions had evolved from the legislative recommendations and should therefore replace them. In the short term, those provisions should be published separately as a way of highlighting the differences between them and the legislative recommendations. In the longer term, however, they should be consolidated with the *Legislative Guide* to form a single publication. Any legislative recommendations not superseded by model provisions should be converted into explanatory notes.

25. Mr. OBEID (Observer for Yemen) said that, in the drafting of economic and trade legislation, model legislative provisions agreed within the framework of the Commission were consistently helpful to the legislatures in the developing and least developed countries, of which Yemen was one. If, however, separate documents containing the *Legislative Guide*, the legislative recommendations and the model legislative provisions were to be circulated simultaneously, those legislatures would find it impossible to identify which issues were most essential to the development of appropriate legislation on privately financed infrastructure projects. The model legislative provisions would be of vital assistance to the legislature in countries such as Yemen, which had encountered difficulties in its attempts to produce the legislation needed to begin negotiating its membership of the World Trade Organization. He therefore supported the two-stage approach, whereby the model legislative provisions approved by the Commission would immediately be published in a separate document, concluding, if necessary, with a reference to the legislative recommendations which had not been developed into model legislative provisions. Such a document would provide the assistance specifically needed by the legislatures in the resource-poor developing and least developed countries.

26. As for the long-term solution, when the necessary resources became available, the *Legislative Guide* could be published in its current form in order to serve as a historical record of the development of the model legislative provisions, which could themselves be reproduced in an annex thereto. The resulting single publication could then be circulated to all legislatures.

27. The CHAIRMAN said that, in regard to the short-term solution, the consensus appeared to be that the model legislative provisions should be published in a separate document, in which case it would also be necessary to indicate that they were based on previous legislative recommendations contained in the *Legislative Guide*, not all of which had been developed into model provisions. As to the long-term solution, however, views continued to vary as to whether the legislative recommendations should be retained in the next edition of the *Legislative Guide*. If they were retained, it would be necessary to decide whether, for example, they should be reproduced in full or simply mentioned in a reference to the earlier edition. If they were not retained, it would then be necessary to decide whether to update the *Guide* for the sake of consistency with the model legislative provisions, as suggested by the representative of Spain.

28. Mr. WANAMI (Japan) favoured replacing the legislative recommendations with the model legislative provisions to the extent that they dealt with the same subject matter, on the ground that the model legislative provisions differed somewhat from the legislative recommendations on which they were based. To retain the legislative recommendations in their entirety would be confusing for national legislatures, which could instead refer to the *Legislative Guide*, should they wish to amend any of the model legislative provisions for incorporation in their national laws.

Publication of the model provisions as a separate booklet was an acceptable short-term solution. For the longer term, however, only those legislative recommendations that had not been replaced by model legislative provisions should be published, along with the model legislative provisions, in a consolidated text.

29. Mr. WALLACE (United States of America) endorsed the view of the representative of Japan. While he had no objection to preservation of the present edition of the *Legislative Guide* on the grounds of its historical value, a consolidated second edition incorporating any necessary revisions should be produced as soon as financial and human resources permitted. However, the evolution in the material covered by those provisions must be clarified. The original legislative recommendations could be annexed to the consolidated text; or else the reader could be informed in a note that the recommendations were to be found in the first edition of the *Guide*. The short-term problem would be resolved by the Commission's adoption of the model legislative provisions as a draft addendum to the *Legislative Guide*.

30. Mr. SCHÖFISCH (Germany) asked whether a new consolidated version of the *Legislative Guide* would be discussed by the Commission, or by the Working Group.

31. The CHAIRMAN said that altering the terminology of the *Legislative Guide* for the sake of consistency would be a mechanical exercise. If substantive changes were to be introduced, the task would be more complicated.

32. Mr. ESTRELLA FARIA (Secretariat) agreed that adjustment of the language of the *Legislative Guide* to ensure consistency with the model legislative provisions was a straightforward exercise which could perhaps be completed within a year. As for substantive differences between the content of the *Legislative Guide* and the model legislative provisions, the suggested approach was set forth in paragraph 4 of document A/CN.9/522/Add.1, and in the foreword to the model provisions. As the secretariat was not in a position to explain the Commission's intentions, the ensuing text would require approval by the Commission unless it decided that it was unnecessary to highlight such changes on the basis that they should be obvious to the reader.

*The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.*

33. The CHAIRMAN drew attention to the report of the drafting group (A/CN.9/XXXVI/CRP.3 and Add.1 and 2). That document proposed that the set of general legislative principles should take the form of an explanatory foreword, a part one containing the surviving legislative recommendations, and a part two containing model provisions 1 to 51.

34. Ms. PERALES VISCASILLAS (Spain) said that, without prejudice to the question of a long-term solution, the most acceptable short-term solution would be to publish the surviving legislative recommendations and the model legislative provisions in the format recommended by the drafting group in its report.

35. The CHAIRMAN said he took it that the Commission agreed to that principle.

36. *It was so agreed.*

37. The CHAIRMAN said that various views had been expressed on the long-term status of the legislative recommendations as contained in the *Legislative Guide*: they could be scrapped; kept purely as a record of the evolution of the Commission's work; or maintained as legislative recommendations. Each of those solutions had different implications for the future work of the Commission.

38. Mr. WALLACE (United States of America) said he favoured producing a new edition of the *Legislative Guide*, in which the full set of legislative recommendations would be relegated to the end, for reference. The first part of the volume would contain a foreword explaining why a second edition was being issued, followed by those few legislative recommendations that had not been replaced by model provisions, and by the model provisions themselves. The only modifications to the text would be minor editorial changes.
39. Mr. SCHÖFISCH (Germany) sought clarification. If changes were to be made to the text, would the Working Group be asked to agree on such changes; would the secretariat be entrusted with the task; or would the Commission itself discuss and approve any new text produced by the secretariat?
40. Ms. SABO (Canada), referring to the proposal made by the representative of the United States, said that the presentation of the new edition was not merely a matter of form but also raised the issue of the relative weight which the Commission wished legislators to give to the different parts of the text. The existing *Legislative Guide* contained detailed policy discussions whose importance should be made clear to legislators. If the new edition focused too heavily on the model provisions, legislators might be tempted simply to accept the model provisions and disregard the policy considerations behind them. Her delegation would therefore prefer the new edition to consist of all the legislative recommendations and an annex setting out the model provisions, with references to the corresponding legislative recommendations.
41. Expressing support for the remarks of the representative of Germany, she said she was not convinced that future modifications to the *Guide* would be purely editorial in nature. It might be appropriate to request the secretariat to make any necessary editorial changes, while substantive inconsistencies between the model provisions and the legislative recommendations could be resolved by modifying the recommendations. Since any such modifications would not be extensive, the secretariat could prepare a revised version of the recommendations for early approval by the Commission at a future session. If that approach were adopted, any changes would have to be non-controversial, since the Commission would already have approved the model provisions by that stage.
42. Ms. ZHOU XIAOYAN (China) said that, since the *Legislative Guide* had already been published, it should be retained so as to conserve resources. An addendum could be issued, consisting of a foreword, the model provisions themselves, and an annex containing the legislative recommendations in their entirety, to help legislators understand the text.
43. Mr. WALLACE (United States of America) said that, having heard the remarks of the representative of Canada, he agreed that it might not be possible simply to entrust the secretariat with the task of making the necessary changes to the text. However, he did not favour her proposal to modify the legislative recommendations since, in a sense, that had already been done through the drafting of the model provisions. Nonetheless, it was important to ensure that legislators did not simply transpose the model provisions without taking into account the significance of the policy discussions in the

*Legislative Guide*. That objective could best be achieved by publishing all the texts in a single volume, along the lines he had previously proposed.

44. Ms. PERALES VISCASILLAS (Spain) said that the proposal made by the United States would be the least costly option, provided that only small editorial changes were made to the text, since there would be no need for the Working Group to continue its work or for the Commission to approve any changes. The inclusion of the complete text of the legislative recommendations in the new edition would preserve the logical structure of the *Legislative Guide*. However, her delegation favoured the option of adapting the content of the *Guide* to the text of the model provisions, even though that would be more costly because the Working Group would have to continue its work and refer changes to the Commission for approval. Her delegation would not, therefore, oppose the United States proposal if the Commission wished to support it.
45. The CHAIRMAN said that the key issue seemed to be whether the legislative recommendations should be retained for their intrinsic significance, or purely for historical purposes. As to the procedure for preparing the new edition of the *Legislative Guide*, perhaps the secretariat could make the necessary editorial changes and submit them to the Commission at its next session. Substantive differences between the model provisions and the legislative recommendations had already been identified in documents A/CN.9/522 and A/CN.9/522/Add.2.
46. Mr. WALLACE (United States of America) said that the secretariat's extensive analysis of the similarities and differences between the legislative recommendations and the model provisions showed that the differences were very slight. However, even those slight differences could cause confusion if both the recommendations and the provisions were accorded equal weight in the new edition of the *Legislative Guide*.
47. Ms. PERALES VISCASILLAS (Spain) said that, while the legislative recommendations could be placed at the end of the new edition to serve as a reminder that they were part of the history of the Commission's work on the topic, her delegation took the view that the legislative recommendations were for the most part superseded by the model provisions, because the latter were the legal transposition of the recommendations and therefore of higher standing. That fact should be acknowledged in the new edition.
48. Ms. SABO (Canada) said that, if the legislative recommendations were retained as a historical record and accorded less importance than the model provisions, the Commission would not need to review any changes made, which would be of a purely editorial nature.
49. The CHAIRMAN said he took it that the Commission wished to preserve the legislative recommendations in their entirety, in a new consolidated edition of the *Guide*, and to request the secretariat to make only the necessary editorial changes thereto.
50. *It was so decided.*

*The meeting rose at 12.35 p.m.*

## Summary record (partial)\* of the 769th meeting

Monday, 7 July 2003, at 2 p.m.

[A/CN.9/SR.769]

*Chairman:* Mr. Wiwen-Nilsson. (Sweden)

*The meeting was called to order at 2.05 p.m.*

*The discussion covered in the summary record began at 2.25 p.m.*

FINALIZATION AND ADOPTION OF THE DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (*continued*) (A/CN.9/CRP.3 and Add.1 and 2; A/CN.9/CRP.1/Add.7)

*Report of the drafting group* (A/CN.9/XXXVI/CRP.3 and Add.1 and 2)

1. The CHAIRMAN invited the Commission to consider the amended text of the legislative recommendations and model legislative provisions, as contained in the report of the drafting group. He would take it that, in the absence of proposals to the contrary, the chapter titles, section headings and footnotes were adopted together with their corresponding model provisions.

*Foreword* (A/CN.9/XXXVI/CRP.3)

2. *The foreword was adopted.*

*Part one. Legislative recommendations* (A/CN.9/XXXVI/CRP.3)

3. The CHAIRMAN recalled that part one of the report contained those legislative recommendations that had not been reflected in the model legislative provisions.

*I. General legislative and institutional framework*

*Recommendations 1 to 11*

4. *Recommendations 1 to 11 were adopted.*

*II. Project risks and government support*

*Recommendations 12 and 13*

5. *Recommendations 12 and 13 were adopted.*

6. *Part one as a whole was adopted.*

*Part two. Draft model legislative provisions on privately financed infrastructure projects*

*I. General provisions*

*Model provisions 1 to 4* (A/CN.9/XXXVI/CRP.3)

7. *Model provisions 1 to 4 were adopted.*

*II. Selection of the concessionaire*

*Model provisions 5 to 23* (A/CN.9/XXXVI/CRP.3)

8. *Model provisions 5 to 23 were adopted.*

*Model provisions 24 to 27* (A/CN.9/XXXVI/CRP.3/Add.1)

9. *Model provisions 24 to 27 were adopted.*

*III. Contents and implementation of the concession contract*

*Model provision 28* (A/CN.9/XXXVI/CRP.3/Add.2)

10. The CHAIRMAN said that the title of chapter III and text of model provision 28 to be found in document A/CN.9/XXXVI/CRP.3/Add.1 had been superseded by new versions, to be found in document A/CN.9/XXXVI/CRP.3/Add.2. Model provision 28 had been amended by the addition of an unnumbered footnote.

11. *The title of chapter III and model provision 28, as contained in document A/CN.9/XXXVI/CRP.3/Add.2, were adopted.*

*Model provisions 29 to 36* (A/CN.9/XXXVI/CRP.3/Add.1)

12. Mr. ESTRELLA FARIA (Secretariat) said that variant B of model provision 33 was enclosed in square brackets because it had previously been presented only as an oral proposal by the secretariat. Variant B had, however, been approved by the drafting group. If it were adopted by the Commission, the square brackets could be deleted.

13. The CHAIRMAN said he took it that the Commission wished to delete the square brackets from variant B of model provision 33.

14. *It was so decided.*

15. *Model provisions 29 to 36 were adopted.*

*Model provisions 37 to 42* (A/CN.9/XXXVI/CRP.3/Add.2)

16. *Model provisions 37 to 42 were adopted.*

*IV. Duration, extension and termination of the concession contract*

*Model provisions 43 to 48* (A/CN.9/XXXVI/CRP.3/Add.2)

17. *Model provisions 43 to 48 were adopted.*

*V. Settlement of disputes* (A/CN.9/XXXVI/CRP.3/Add.2)

*Model provisions 49 to 51*

18. *Model provisions 49 to 51 were adopted.*

19. *The legislative recommendations and model legislative provisions as a whole, as contained in the report of the drafting group, were adopted.*

\*No summary record was prepared for the rest of the meeting.

*Draft decision (A/CN.9/XXXVI/CRP.1/Add.7)*

20. The CHAIRMAN drew attention to the draft decision on the adoption of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, which appeared as an addendum to chapter III (D) of the draft report of the Commission on its thirty-sixth session. The reference in the first preambular paragraph of the draft decision should be to the 769th meeting. In the light of the decision adopted at the 768th meeting concerning the consolidation of the Model Legislative Provisions and the *Legislative Guide*, he suggested that the final phrase of paragraph 2 bis should be amended to read: "... and, in doing so, to retain the legislative recommendations contained in the *Legislative Guide* as an account of the development of the model legislative provisions". The square-bracketed paragraph 2 bis and paragraph 3 would become paragraphs 3 and 4 respectively.

21. Mr. WALLACE (United States of America) proposed that the words "as an account of" should instead read "as a basis of".

22. *The draft decision, as amended, was adopted.*

23. Ms. VEYTIA PALOMINO (Mexico) nominated Mr. Yepes Alzate (Colombia) for the post of Rapporteur.

24. Mr. OLIVENCIA RUIZ (Spain), Mr. DE ALENCAR LIMA (Brazil), Mr. VELÁSQUEZ ARGAÑA (Paraguay) and Mr. BURMAN (United States of America) seconded the nomination.

25. *Mr. Yepes Alzate (Colombia) was elected Rapporteur by acclamation.*

*The discussion covered in the summary record ended at 3 p.m.*

### Summary record (partial)\* of the 774th meeting\*\*

Friday, 11 July 2003, at 10.30 a.m.

[A/CN.9/774]

Chairman: Ms. Chadha..(India)  
(Vice-Chairman)

*In the absence of Mr. Wiwen-Nilsson (Sweden), Ms. Chadha (India),  
Vice-Chairman, took the Chair.*

*The meeting was called to order at 10.35 a.m.*

ADOPTION OF THE REPORT OF THE COMMISSION  
(A/CN.9/XXXVI/CRP.1/Add.1 and Corr.1 and Add.2-8;  
A/CN.9/XXXVI/CRP.4/Rev.1)

*The discussion covered in the summary record  
began at 10.45 a.m.*

III. *Draft UNCITRAL Model Legislative Provisions  
on Privately Financed Infrastructure Projects*  
(A/CN.9/XXXVI/CRP.1/Add.1 and Corr.1 and Add.2-7)

A. *Preparatory work and organization of discussions*  
(A/CN.9/XXXVI/CRP.1/Add.1)

1. *Document A/CN.9/XXXVI/CRP.1/Add.1 was adopted.*

B. *Relationship between the draft model provisions and the  
Legislative Guide (A/CN.9/XXXVI/CRP.1/Add.1/Corr.1)*

2. Mr. WALLACE (United States of America) proposed that, in paragraph 10, the words "of the publication" should be inserted after "at the end" in order to clarify the intended meaning.

3. *It was so decided.*

4. *Document A/CN.9/XXXVI/CRP.1/Add.1/Corr.1, as amended,  
was adopted.*

C. *Consideration of draft model provisions*

*Foreword; chapter I. General provisions*  
(A/CN.9/XXXVI/CRP.1/Add.2)

5. *The foreword and chapter I were adopted.*

*Chapter II. Selection of the concessionaire*  
(A/CN.9/XXXVI/CRP.1/Add.3 and 4)

*Model provisions 5 to 23 (A/CN.9/XXXVI/CRP.1/Add.3)*

6. Mr. WALLACE (United States of America) said that, in paragraph 24 of the document, the word "amendments" should read "amendment". He also proposed that, in order to provide an accurate reflection of the discussion that had taken place, the first phrase of paragraph 38 should be amended to read: "In response to a proposal that there should be a limit to the number of times that a contracting authority had the right to require a bidder to demonstrate again its qualifications, ...".

7. *It was so decided.*

8. *Document A/CN.9/XXXVI/CRP.1/Add.3, as amended, was  
adopted.*

*Model provisions 24 to 27 (A/CN.9/XXXVI/CRP.1/Add.4)*

9. *Document A/CN.9/XXXVI/CRP.1/Add.4 was adopted.*

\*No summary record was prepared for the rest of the meeting.

\*\*No summary records were prepared for the 770th to 773rd meetings.

*Chapter III. Construction and operation of infrastructure;*  
*Chapter IV. Duration, extension and termination of the concession contract;*  
*Chapter V. Settlement of disputes (A/CN.9/XXXVI/CRP.1/Add.5 and 6)*

*Model provisions 28 to 35 (A/CN.9/XXXVI/CRP.1/Add.5)*

10. Mr. POLIMENI (Italy), speaking with reference to the last sentence of paragraph 5, said that it seemed inappropriate to state in the report that it would be preferable for the Commission to avoid revisiting a decision of the Working Group, as that wording failed to reflect the fact that a decision had been taken not to undertake any further work on the subject.

11. Mr. ESTRELLA FARIA (Secretariat) said that the wording in question had been customarily used in the past and was intended to indicate that a decision had been taken. Moreover, in view of the absence of any further reference to future work, it was understood to mean that no such work would be undertaken.

12. Mr. POLIMENI (Italy) said that the secretariat's explanation was acceptable. However, the report should also contain a reference to the footnote that the Commission had agreed to add to the *chapeau* of model provision 28.

13. Mr. ESTRELLA FARIA (Secretariat) said that the footnote in question was to be found in the report of the drafting group (A/CN.9/XXXVI/CRP.3/Add.2), which would be annexed to the report of the Commission. It would not, however, be reflected in the report itself. A solution might be to add a further sentence at the end of paragraph 3 of the document under discussion, to read: "The Commission, however, agreed that, for the purpose of clarity, a footnote should be added to the *chapeau* of the model provision in which enacting States should be reminded that the inclusion in the concession contract of provisions dealing with some of the matters listed in the model provision is mandatory pursuant to other model provisions."

14. *It was so decided.*

15. Mr. WANAMI (Japan) proposed that the end of the first sentence in paragraph 30 should be amended to read: "since the restriction by the concession contract might not be effective vis-à-vis third parties."

16. *It was so decided.*

17. Mr. WALLACE (United States of America) pointed out that, at the end of the first sentence of paragraph 31, the words "project agreement" should read "concession contract."

18. *Document A/CN.9/XXXVI/CRP.1/Add.5, as amended, was adopted.*

*Model provisions 36 to 51 (A/CN.9/XXXVI/CRP.1/Add.6)*

19. *Document A/CN.9/XXXVI/CRP.1/Add.6 was adopted.*

*D. Adoption of the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (A/CN.9/XXXVI/CRP.1/Add.7)*

20. Mr. ESTRELLA FARIA (Secretariat) reminded the Commission of its earlier decision to amend the latter part of paragraph 2 bis of the draft decision contained in document A/CN.9/XXXVI/CRP.1/Add.7, to read: "... in doing so, to retain the legislative recommendations contained in the *Legislative Guide* as a basis of the development of the model legislative pro-

visions." The Commission had also decided to remove the square brackets and to renumber paragraphs 2 bis and 3 as paragraphs 3 and 4 respectively.

21. *Document A/CN.9/XXXVI/CRP.1/Add.7 was adopted.*

22. *Chapter III of the report as a whole, as amended, was adopted.*

*IV. Draft UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XXXVI/CRP.1/Add.8 and A/CN.9/XXXVI/CRP.4/Rev.1)*

*A. Preliminary approval of the draft UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XXXVI/CRP.1/Add.8)*

*Paragraphs 1 to 6*

23. Mr. WALLACE (United States of America) proposed adding, in paragraph 3, after the words "the World Bank", in the sixth line, the words "which had described its work to the Commission", to indicate that observers from both the International Monetary Fund and the World Bank had addressed the Commission.

24. Mr. SEKOLEC (Secretary of the Commission) suggested that since the World Bank observer had described, not the work of the World Bank, but the broad content of its Principles, the entire sentence should be reworded to read, "The observer of the World Bank noted that the World Bank was currently revising its *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*, the content of which was described in general terms to the Commission."

25. Mr. RWANGAMPUHWE (Rwanda) proposed rewording the beginning of the paragraph to read, "The observer for the International Monetary Fund stated ...", so as to dispel any doubt as to who had made the statement.

26. Mr. FONT (France) proposed inserting, in the fourth sentence, the phrase "while recognizing the different mandates of UNCITRAL and the World Bank," so as to reflect the content of the informal discussion that had taken place.

27. Mr. WALLACE (United States of America) said that paragraph 6 did not make it clear that not all aspects of the Working Group's work had been completed.

28. Ms. CLIFT (Secretariat) said that although the idea was encapsulated, albeit somewhat circuitously, in the last sentence of the paragraph, it would be possible to insert, after the words "while noting that" in the second line, the words "the work had not been completed and that ...".

29. *Paragraphs 1 to 6, as amended, were adopted.*

*Part one. Designing the structure and key objectives of an effective and efficient insolvency regime (chapters I and II)*

*Paragraphs 7 to 11*

30. Mr. RWANGAMPUHWE (Rwanda) asked for clarification of the meaning of the words "level of detail", in the third line of paragraph 10. It was also important to draw a clear distinction between informal processes and judicial proceedings.

31. Ms. CLIFT (Secretariat) said that the first concern raised by the representative of Rwanda might result from an omission in the French version. The English text intended to convey concern expressed at the inclusion of informal processes in a *Guide* principally designed to deal with insolvency legislation; and also at

the level of detail in which they had been discussed in the introductory chapter.

32. The *Guide* drew a clear distinction between the use of the words “process” and “proceedings”, the latter being used to describe reorganization and liquidation proceedings conducted before the court, whereas the former was used to describe informal processes conducted out of court. Therefore, the remainder of the paragraph referred only to out-of-court processes. It was true, however, that expedited reorganization involved both processes and proceedings, so that the language became problematical.

33. Mr. RWANGAMPUHWE (Rwanda) said he was concerned that the informal processes proposed were not subject to judicial guarantee. Those processes should be judicially supervised so as to ensure protection of the debtor’s interests. As currently worded, the text was biased in favour of the creditor. In that regard, the qualification of the processes as “useful” was invidious.

34. Mr. FONT (France) said that the first sentence implied that the concern expressed referred both to the principle of the informal reorganization processes and to the procedure for implementing them. Perhaps reference should be made only to concerns regarding the level of detail in which they were treated in the introductory chapter. The second sentence might be amended to read: “The Commission recognized, however, that those types of process, inasmuch as they guarantee the balance of rights between creditors and debtors, were increasingly being developed, that they were a useful addition to the tools available ...”, the rest of the sentence remaining unchanged.

35. Mr. WALLACE (United States of America), supporting the comments by the representative of Rwanda, said that the paragraph should contain a sentence to the effect that one delegation had stressed the need to pre-empt abuses by ensuring protection of the debtor’s rights in informal processes. The United States delegation also proposed inserting the words “by some delegations” after the phrase “concern was expressed”, in the first line.

36. Mr. SEKOLEC (Secretary of the Commission) said that the description of the current role of the informal processes and how they had been developed could be deleted, and a new sentence added, after the second sentence, to read: “It was suggested that when the Working Group discussed the draft *Legislative Guide* relating to informal reorganization processes, it should bear in mind the interests of the debtor.” That wording would render the French proposal superfluous and enable the word “useful” to be retained in the fifth line.

37. *Paragraphs 7 to 11, as amended, were adopted.*

*Part two. Core provisions of an effective and efficient insolvency regime (chapters II to VI)*

*Paragraphs 12 to 25*

38. Mr. RWANGAMPUHWE (Rwanda), referring to paragraph 15, asked whether the term “the treatment of labour contracts” also referred to their enforcement during insolvency proceedings, the question being what was the status of such contracts during the reorganization period.

39. Ms. CLIFT (Secretariat) said she did not recall any specific discussion of the enforcement of labour contracts in the context of reorganization. While it had been acknowledged that such contracts were important, it had been felt that it would be problematic to deal with them in greater detail.

40. The CHAIRMAN noted that the enforcement of labour contracts was important both in the context of reorganization and during insolvency proceedings.

41. Mr. WALLACE (United States of America) proposed the addition, at the end of paragraph 17, of a sentence to read, “It was expected that the Working Group, at its September meeting, would ensure that those systems would not be adversely affected.”

42. *Paragraphs 12 to 25, as amended, were adopted.*

43. *Document A/CN.9/XXXVI/CRP.1/Add.8 as a whole, as amended, was adopted.*

*B. Recommendation on approval in principle of the draft UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XXXVI/CRP.4/Rev.1)*

44. Mr. SEKOLEC (Secretary of the Commission) drew attention to the draft recommendation contained in document A/CN.9/XXXVI/CRP.4/Rev.1.

45. Ms. CLIFT (Secretariat) suggested that, in the penultimate preambular paragraph, the word “substantial” should be inserted before “completion of core elements”, as identification of those elements was not yet complete in every detail.

46. *It was so decided.*

47. *The draft recommendation contained in document A/CN.9/XXXVI/CRP.4/Rev.1, as amended, was adopted.*

48. *Chapter IV of the report as a whole, as amended, was adopted.*

*The discussion covered in the summary record ended at 12.20 p.m.*





### III. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL NOTE BY THE SECRETARIAT

(A/CN.9/566) [Original: English]

#### CONTENTS

	<i>Page</i>
I. General .....	809
II. International sale of goods .....	809
III. International commercial arbitration and conciliation .....	813
IV. International transport .....	815
V. International payments .....	816
VI. Electronic commerce .....	816
VII. Independent guarantees and stand-by letters of credit .....	816
VIII. Procurement .....	817
IX. Cross-border insolvency .....	817
X. Receivables financing .....	817
XI. International construction contracts .....	818
XII. International countertrade .....	818
XIII. Privately financed infrastructure projects .....	818
XIV. Security interests .....	818
<i>Annex.</i> UNCITRAL legal texts .....	819

#### I. General

- Bazinas, S. V. Harmonization of international and regional trade law; the UNCITRAL experience. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:53-62, 2003.
- Berger, B. Unspektakulärer Dienst am Welthandel; das Arbeitsprogramm der UNCITRAL. *Vereinte Nationen* (Baden-Baden) 51:1:6-10, 2003.
- Farnsworth, E. A. Modernization and harmonization of contract law; an American perspective. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:97-106, 2003.
- Gopalan, S. Transnational commercial law; the way forward. *American University international law review* (Washington, D.C.) 18:803-849, 2003.
- King, D. B. Does an unknown world government exist? Impact of commercial and consumer law. *Penn State international law review* (Carlisle, Pennsylvania) 22:73-85, 2003.
- Linarelli, J. The economics of uniform laws and uniform law-making. *Wayne law review* (Detroit, Michigan) 48:4:1387-1447, 2003.

Morán Bovio, D. 35° Período de sesiones del plenario de UNCITRAL-CNUDMI. *Revista de derecho bancario y bursátil* (Valladolid) 22:401-413, 2003.

Palmeri, R. P. U.N. deserves praise for trade efforts. *Milwaukee Journal Sentinel/JSONline* (Milwaukee, Wisconsin) 16 June 2003.

Available at  
<http://www.jsonline.com/bym/news/jun03/148204.asp>

Rocks, S. M., and K. A. Sawyer. Survey of international commercial law developments during 2002. *Business lawyer* (Chicago, Illinois) 58:1657, 2003.

#### II. International sale of goods

Akseli, N. O. Commentary on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret article 16 of the CISG. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:1:151-160, 2003.

- Aljure, A. Ámbito de aplicación de la Convención de Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías (CNUCIM). In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003.
- Araújo Segovia, R. Principios de interpretación de la Convención de Viena sobre Compraventa Internacional de Mercaderías. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 251-270.
- Arce Caicedo, E. Conformidad. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 503-559.
- Barrera Tapias, C. D. Obligaciones de las partes en el contrato de venta internacional de mercaderías. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 487-501.
- Bernstein, H., and J. Lookofsky. Understanding the CISG in Europe. 2. ed. The Hague, Kluwer Law International, 2003.
- Boele-Woelki, Katharina. Terms of co-existence; the CISG and the UNIDROIT Principles. In *The international sale of goods revisited*. Petar Šarčević and Paul Volken, eds. The Hague, Kluwer Law International, 2001. p. 203-240.
- Bonsau, M., and S. Feuerriegel. Die Probleme der Bestimmung von Fälligkeitsszinsen im UN-Kaufrecht. *IPRax: Praxis des internationalen Privat- und Verfahrensrechts* (Bielefeld) 23:5:421-425, 2003.
- Bridge, M. G. Uniformity and diversity in the law of international sales. *Pace international law review* (White Plains, New York) 15:55-89, 2003.
- \_\_\_\_\_. The UK Sale of Goods Act, the CISG and the UNIDROIT Principles. In *The international sale of goods revisited*. Petar Šarčević and Paul Volken, eds., The Hague, Kluwer Law International, 2001. p. 115-155.
- Butler, A. E. Caveat emptor; remedy-oriented approach restricts buyer's right to avoidance under article 49(1)(a) of the United Nations Convention on Contracts for the International Sale of Goods. *Internationales Handelsrecht* (München) 3:208-212, 2003.
- Cárdenas Mejía, J. P. La Convención de Viena y el derecho privado colombiano. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 315-391.
- Caro Nieto, J. La formación del contrato bajo la "Convención de Naciones Unidas sobre Compraventa Internacional de Mercaderías". In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 393-424.
- CISG-AC opinion no 1; electronic communications under the CISG; 15 August 2003. *Internationales Handelsrecht* (München) 3:244-252, 2003.
- Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003.
- Compraventa internacional de mercaderías; la Convención de Viena de 1980 sobre compraventa internacional de mercaderías. By C. Esplugues Mota and others. In *Derecho del comercio internacional*. Valencia, Spain, Tirant Lo Blanch, 2003. p. 169-192.
- Cortier, A. Zinsen in einheitlicher Rechtsanwendung; eine Lösung für das Problem der Zinshöhe nach Art 78 und Art 84 Abs 1 UN-Kaufrecht (CISG). *ZfRV: Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (Wien) 2:43-51, 2003.
- Dahan, H. The UNIDROIT Principles and their influence in the modernization of contract law in the People's Republic of China. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:107-117, 2003.
- De Ly, F. The relevance of the Vienna Convention for International Sales Contracts; should we stop contracting it out? *Business law international* (London) 3:241-249, 2003.
- DiMatteo, L. A. The law of international contracting. The Hague, Kluwer Law International, 2000.
- Dokter, D., and S. A. Kruisinga. The application of the CISG in the Netherlands; a Dutch treat for the CISG? *Internationales Handelsrecht* (München) 3:3:105-115, 2003.
- Douajni, G. K. La vente commerciale OHADA. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:191-200, 2003.
- Erauw, J., and H. M. Fletchner. Remedies under the CISG and limits to their uniform character. In *The international sale of goods revisited*. Petar Šarčević and Paul Volken, eds. The Hague, Kluwer Law International, 2001. p. 35-75.
- Espinosa Pérez, C. A. Del uso convencional a la costumbre mercantil en la Convención de Viena sobre Compraventa Internacional de Mercaderías. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 221-250.
- Farnsworth, E. A. Modernization and harmonization of contract law; an American perspective. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:97-106, 2003.
- Felemegas, J. An interpretation of article 74 CISG by the U.S. Circuit Court of Appeals. *Pace international law review* (White Plains, New York) 15:91-147, 2003.
- \_\_\_\_\_. The United Nations Convention on Contracts for the International Sale of Goods; article 7 and uniform interpretation. In *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001*. The Hague, Kluwer Law International, 2002. p. 115-395.
- Ferrari, F. Auslegung von Parteierklärungen und -verhalten nach UN-Kaufrecht. *Internationales Handelsrecht* (München) 3:1:10-15, 2003.
- \_\_\_\_\_. Burden of proof under the CISG. In *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001*. The Hague, Kluwer Law International, 2002. p. 1-8.
- \_\_\_\_\_. Form und UN-Kaufrecht. *Internationales Handelsrecht* (München) 4:1:1-6, 2004.
- \_\_\_\_\_. Gap-filling and interpretation of the CISG; overview of international case law. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:1:63-92, 2003.
- \_\_\_\_\_. International sale law and the inevitability of forum shopping; a comment on Tribunale di Rimini, 26 November 2002. *Vindobona journal of international commercial law and arbitration* (Vienna) 8:1:1-22, 2004.
- \_\_\_\_\_. The relationship between international uniform contract law conventions. *The journal of law and commerce* (Pittsburgh, Pennsylvania) 22:57-75, 2003.
- \_\_\_\_\_. Trade usages and practices established between the parties under the CISG. *Revue de droit des affaires internationales/International business law journal* (Paris) 5:571-580, 2003.

- \_\_\_\_\_. Verzugszinsen nach Art. 78 UN-Kaufrecht. *Internationales Handelsrecht* (München) 3:4:153-160, 2003.
- \_\_\_\_\_. Universal and regional sales law; can they coexist? *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:177-189, 2003.
- \_\_\_\_\_, H. Flechtner and R. A. Brand, eds. The draft UNCITRAL digest and beyond; cases, analysis and unresolved issues in the U.N. Sales Convention. Munich, Sellier. European Law Publishers, 2004.  
Soft cover edition.
- Flechtner, H., and J. Lookofsky. Viva Zapata! American procedure and CISG substance in a U.S. Circuit Court of Appeal. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:1:93-104, 2003.
- Fogt, M. M. Einheitlicher Vertrag oder Aufspaltung gemäss Art. 3 Abs. 2 CISG bei einem Mietkauf (zu dänisches Østre Landsret, 4.12.2000). *IPRax: Praxis des internationalen Privat- und Verfahrensrechts* (Bielefeld) 23:4:364-369, 2003.
- \_\_\_\_\_. The stipulation and interpretation of freight prepaid delivery clauses under the CISG; preliminary considerations for reform of part II of the CISG and a limited withdrawal of Scandinavian declarations. *European legal forum* (Munich) 2:61-70, 2003.  
Journal available in English and German.
- Fontaine, M., and F. De Ly. Droit des contrats internationaux. 2. ed. Bruxelles, Bruylant, 2003.
- Fountoulakis, C. Das Verhältnis von Nacherfüllungsrecht des Verkäufers und Vertragsaufhebungsrecht des Käufers im UN-Kaufrecht. *Internationales Handelsrecht* (München) 3:4:161-168, 2003.
- Gärtner, A. Britain and the CISG; the case for ratification; a comparative analysis with special reference to German law. In *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001*. The Hague, Kluwer Law International, 2002. p. 59-81.
- Galán Barrera, D. R. El ámbito de aplicación de la Convención de las Naciones Unidas sobre los Contratos de Compraventa Internacional de Mercaderías. In *Compraventa internacional de mercaderías: comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 271-313.
- Garro, A. M. Prólogo. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 21-27.
- Gerhart, P. M. The Sales Convention in courts; uniformity, adaptability and adoptability. In *The international sale of goods revisited*. Petar Šarcevic and Paul Volken, eds. The Hague, Kluwer Law International, 2001. p. 77-114.
- Goldštajn, A. Lex mercatoria and the CISG; the global merchant. In *The international sale of goods revisited*. Petar Šarcevic and Paul Volken, eds. The Hague, Kluwer Law International, 2001. p. 241-258.
- Gopalan, S. Transnational commercial law; the way forward. *American University international law review* (Washington, D.C.) 18:803-849, 2003.
- Grace, D. L. Force majeure; China and the CISG; is China's new contract law a step in the right direction? *San Diego international law journal* (San Diego, California) 2:173-207, 2001.
- Graffi, L. Case law on the concept of "fundamental breach" in the Vienna Sales Convention. *Revue de droit des affaires internationales/International business law journal* (Paris) 3:338-349, 2003.
- Guillemand, S. A comparative study of the UNIDROIT Principles, the principles of the European law of contracts, and some dispositions of the CISG applicable to the formation of international contracts. In *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001*. The Hague, Kluwer Law International, 2002. p. 83-113.
- Hartwig J. R. Schmitz-Werke GmbH and Co. v. Rockland Industries Inc. and the United Nations convention on contracts for the international sale of goods (CISG); diffidence and developing international legal norms. *Journal of law and commerce* (Pittsburgh, Pennsylvania) 22:77-98, 2003.
- Herber, R. "Lex mercatoria" und "Principles"; gefährliche Irrlichter im internationalen Kaufrecht. *Internationales Handelsrecht* (München) 1:1-10, 2003.
- \_\_\_\_\_. Eine neue Institution; der CISG Advisory Council. *Internationales Handelsrecht* (München) 3:201-202, 2003.
- Hennecke, R. Gefahrtragung beim Rücktransport mangelhafter Ware. *Internationales Handelsrecht* (München) 6:268-275, 2003.
- Heutger, V. Konturen des Kaufrechtskonzeptes der Study Group on a European Civil Code; ein Werkstattbericht. *European review of private law* (The Hague) 11:2:155-173, 2003.
- Horn, N. The use of transnational law in the contract law of international trade and finance. In *The practice of transnational law*. Klaus Peter Berger, ed. The Hague, Kluwer Law International, 2001. p. 67-80.
- Huber, P., and S. Kröll, Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002. *IPRax: Praxis des internationalen Privat- und Verfahrensrechts* (Bielefeld) 23:4:309-317, 2003.
- Jacobs C. M. Notice of avoidance under the CISG; a practical examination of substance and form considerations, the validity of implicit notice, and the question of revocability. *University of Pittsburgh law review* (Pittsburgh, Pennsylvania) 64:407-429, 2003.
- Janssen, A. Das Verhältnis nationaler Verjährungsvorschriften zur Ausschlussfrist des Art. 39 Abs. 2 CISG in der Schweiz. *IPRax: Praxis des internationalen Privat- und Verfahrensrechts* (Bielefeld) 23:4:369-372, 2003.
- Kluth, P. Die Einbeziehung von allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts. *Internationales Handelsrecht* (München) 3:61-66, 2003.
- Köhne, H. C., and S. D. Langner. Geltendmachung von Gegenforderungen im internationalen Schiedsverfahren. *Recht der internationalen Wirtschaft: Betriebs-Berater international* (Heidelberg) 49:5:361-370, 2003.
- Kröll, S., and R. Hennecke. Kaufmännische Bestätigungsschreiben beim internationalen Warenskauf. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen) 67:3:448-493, 2003.
- Laguado Monsalve, D. Compraventa internacional de mercaderías. In *Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980*. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 39-49.
- Lando, O. Das neue Schuldrecht des Bürgerlichen Gesetzbuchs und die Grundregeln des europäischen Vertragsrechts. *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (Tübingen) 67:2:231-245, 2003.
- \_\_\_\_\_. Salient features of the Principles of European Contract Law. In *The international sale of goods revisited*. Petar Šarcevic and Paul Volken, eds. The Hague, Kluwer Law International, 2001. p. 157-202.

- Larroumet, C. Convenio de Viena sobre la compraventa internacional de mercaderías; obligaciones del vendedor, obligaciones del comprador, sanciones del incumplimiento de las partes, interpretación del Convenio de Viena. *In* Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 425-485.
- Le, Net. Rules of interpretation of contracts under the UNIDROIT Principles and their possible adoption in Vietnamese law. *Uniform law review/Revue de droit uniforme* (Rome) 7:4:1017-1030, 2002.
- Lehmkuhl, H. Das Nacherfüllungsrecht des Verkäufers im UN-Kaufrecht bei Lieferung fehlerhafter Ware. *Internationales Handelsrecht* (München) 3:3:115-118, 2003.
- Letterman, G. G. UNIDROIT's rules in practice; standard international contracts and applicable rules. The Hague, Kluwer Law International, 2001.
- Linarelli, J. The economics of uniform laws and uniform law-making. *Wayne law review* (Detroit, Michigan) 48:4:1387-1447, 2003.
- Lookofsky, J. In dubio pro conventionem? Some thoughts about opt-outs, computer programs and preemption under the 1980 Vienna Sales Convention (CISG). *Duke journal of comparative and international law* (Durham, North Carolina) 13:263-289, 2003.
- Magnus, U. Force majeure and the CISG. *In* The international sale of goods revisited. Petar Šarcevic and Paul Volken, eds. The Hague, Kluwer Law International, 2001. p. 1-33.
- Mazzotta, F. G. The international character of the UN convention on contracts for the international sale of goods; an Italian case example. *Pace international law review* (White Plains, New York) 15:437-452, 2003.
- Mistelis, L. CISG-AC publishes first opinion. *Internationales Handelsrecht* (München) 3:243-244, 2003.
- Mowbray, J. The application of the United Nations Convention on Contracts for the International Sale of Goods to e-commerce transactions; the implications for Asia. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:1:121-150, 2003.
- Münzel, F. Lexicographic musings; the variegated language of sales law; a modern Tower of Babel. *Uniform law review/Revue de droit uniforme* (Rome) 8:3:641-645, 2003.
- Ongley, C. Going international; the good, the bad, and the ugly. *Texas lawyer* (Dallas, Texas) 19:18:14, 2003.
- Oviedo Albán, J. UNIDROIT y la unificación de derecho privado; referencia a los principios para los contratos comerciales internacionales. *In* Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 51-143.
- \_\_\_\_\_. Un nuevo orden internacional de los contratos; antecedentes, instrumentos y perspectivas. *In* Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 153-219.
- Perales Viscasillas, M. P. Prólogo. *In* Compraventa internacional de mercaderías; comentarios a la Convención de Viena de 1980. Bogotá, Pontificia Universidad Javeriana Facultad de Ciencias Jurídicas, 2003. p. 15-20.
- Piche, C. The Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code remedies in light of remedial principles recognized under U.S. law; are the remedies of granting additional time to the defaulting parties and of reduction of price fair and efficient ones? *North Carolina journal of international law and commercial regulation* (Chapel Hill, North Carolina) 28:519-566, 2003.
- Piltz, B. New developments in UN sales law. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:2:213-232, 2003.
- Rabello, A. M., and P. Lerner. The UNIDROIT Principles of International Commercial Contracts and Israeli contract law. *Uniform law review/Revue de droit uniforme* (Rome) 7:3:601-629, 2003.
- Ramberg, J. Unification of sales law; a look at the Scandinavian States. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:201-208, 2003.
- Reifegerste, S., and G. Weiszberg. Obligation de minimiser le dommage et « raisonnable » en droit du commerce international (Obligation to mitigate loss and the concept of "reasonableness" in international commercial law). *Revue de droit des affaires internationales/International business law journal* (Paris) 2:181-197, 2004.
- \_\_\_\_\_. In English and French.
- Rosenberg, M. G. Venskaya konventzeya UN 1980 o dogovorax mezhdynarodnoi kuple-prodazhe tovarov; k 10-letyey ee premeneneya Russia. Moskva, Statut, 2001.
- \_\_\_\_\_. In Russian.
- Rubinstein, J. H. International law's new importance in the U.S.; the Supreme Court's latest term provides the most recent example. *National law journal* (New York) 26:3:16, 15 September 2003.
- Ruhl, G. The battle of the forms; comparative and economic observations. *University of Pennsylvania journal of international economic law* (Philadelphia, Pennsylvania) 24:189-224, 2003.
- Saidov, D. Cases on CISG decided in the Russian Federation. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:1:1-62, 2003.
- Šarcevic, Petar, and Paul Volken, eds. The international sale of goods revisited. The Hague, Kluwer Law International, 2001.
- Scarlott, K. T. A boilerplate trap; the CISG and choice of law. *Boston bar journal* (Boston, Massachusetts) 47:31-32, 2003.
- Schäfer, F. Zur Anwendbarkeit des UN-Kaufrechts auf Werklieferungsverträge. *Internationales Handelsrecht* (München) 3:3:118-121, 2003.
- Schillo, F. J. UN-Kaufrecht oder BGB? Die Qual der Wahl beim internationalen Warenkaufvertrag; vergleichende Hinweise zur Rechtswahl beim Abschluss von Verträgen. *Internationales Handelsrecht* (München) 6:257-268, 2003.
- Schmidt-Kessel, M. Auf dem Weg zu einem europäischen Vertragsrecht. *Recht der internationalen Wirtschaft: Betriebs-Berater international* (Heidelberg) 49:7:481-489, 2003.
- Schroeter U. G. Die Vertragsstaatszugehörigkeit Hongkongs und Macaus unter dem UN-Kaufrecht. *Internationales Handelsrecht* (München) 4:1:7-17, 2004.
- Shaohui, Z. L'internationalisation du nouveau droit chinois des contrats; exemple de la résolution du contrat de vente internationale de marchandises. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:219-230, 2003.
- Sierralta Ríos, A. La compraventa internacional de mercaderías y el derecho paraguayo. Asunción, Paraguay, Intercontinental Editora, 2000.
- Smiley, M. S. "Where do we start, Professor?" An approach to starting and navigating article 2 of the Uniform Commercial Code. *Idaho law review* (Moscow, Idaho) 40:133-154, 2003.
- Sondhal, E. Understanding the remedy of price reduction; a means to fostering a more uniform application of the United Nations Convention on Contracts for the International Sale of Goods. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:2:255-276, 2003.

- Stiegele, A., and R. Halter. Nochmals; Einbeziehung von allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts; Zugänglichmachung im Internet. *Internationales Handelsrecht* (München) 3:4:169, 2003.
- Takahashi, K. Right to terminate (avoid) international sales of commodities. *Journal of business law* (London) 102-130, March 2003.
- Yingxia Su, Xian. Die Rechtsmängelhaftung des Verkäufers nach UN-Kaufrecht im Vergleich mit dem chinesischen Vertragsgesetz. *Zeitschrift für vergleichende Rechtswissenschaft* (Heidelberg) 102:101-115, 2003.
- Vanto, J. Attorney's fees as damages in international commercial litigation. *Pace international law review* (White Plains, New York) 15:203-222, 2003.
- Varul, P. CISG; a source of inspiration for the Estonian law of obligations. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:209-210, 2003.
- Ventsch, V., and P. Kluth. Die Einbeziehung von allgemeinen Geschäftsbedingungen im Rahmen des UN-Kaufrechts. *Internationales Handelsrecht* (München) 3:2: 61-66, 2003.
- \_\_\_\_\_. UN-Kaufrecht; keine Einbeziehung von AGB durch Abrufmöglichkeit im Internet. *Internationales Handelsrecht* (München) 3:5:224-225, 2003.
- Vilus, J. Electronic commerce; an incentive for the modernisation and harmonisation of contract law. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:163-170, 2003.
- Wang X., and C. Baasch Andersen. The Chinese declaration against oral contracts under the CISG. *Vindobona journal of international commercial law and arbitration* (Vienna) 8:1:145-164, 2004.
- Watté, N., and A. Nuyts. Le champ d'application de la Convention de Vienne sur la vente internationale; la théorie à l'épreuve de la pratique. *Journal du droit international* (Paris) 130:365-424, 2003.
- Will, M. Twenty years of international sales law under the CISG; international bibliography and case law digest (1980-2000). The Hague, Kluwer Law International, 2000.
- Williams, A. E. Forecasting the potential impact of the Vienna Sales Convention on international sales law in the United Kingdom. In *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2000-2001*. The Hague, Kluwer Law International, 2002. p. 9-57.
- Witz, C. Droit uniforme de la vente internationale de marchandises. *Recueil Dalloz* (Paris) 179:34:2361-2373, 2003.
- \_\_\_\_\_. L'interprétation de la CVIM: divergences dans l'interprétation de la Convention de Vienne. In *The 1980 Uniform Sales Law; old issues revisited in the light of recent experiences*. Franco Ferrari, ed. Munich, Sellier. European Law Publishers, 2003. p. 279-304.
- Wu, Dong. The effect of fundamental breach on passage of risk in the international sale of goods under the United Nations Convention on Contracts for the International Sale of Goods; comparative analysis with the contract law of the People's Republic of China. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:2:233-254, 2003.
- Zaremba, J. International electronic transaction contracts between U.S. and EU companies and customers. *Connecticut journal of international law* (Hartford, Connecticut) 18:479-521, 2003.
- Zeller, B. Fundamental breach and the CISG; a unique treatment or failed experiment? *Vindobona journal of international commercial law and arbitration* (Vienna) 8:1:81-94, 2004.
- Zerres, T. Recht auf Nacherfüllung im deutschen und englischen Kaufrecht. *Recht der internationalen Wirtschaft: Betriebs-Berater international* (Heidelberg) 49:10:746-757, 2003.
- Zuffranieri, B. M., Jr., and J. I. Feinstein. UN sale of goods convention may be trap for the unwary. *Lawyer's weekly* (Markham, Canada) 23:31, 12 December 2003.

### III. International commercial arbitration and conciliation

- Abascal, J. M. Barcelona afterthoughts. *Journal of international arbitration* (London) 20:1:111-119, 2003.
- Alberti, U. M. Medidas cautelares en el arbitraje. *Revista de derecho y ciencia política* (Lima) 58:1-2:113-136, 2001.
- Alvarez, H. C., Neil Kaplan and D. W. Rivkin. Model law decisions; cases applying the UNCITRAL Model Law on International Commercial Arbitration (1985-2001). The Hague, Kluwer Law International, 2003.
- Amundsen, J. L. Membership has its privileges; the confidence-building potential of the New York convention can boost commerce in developing nations. *Wisconsin international law journal* (Madison) 21:383-408, 2003.
- Anglade, L. Ireland as a place for international arbitration. *American review of international arbitration* (New York) 12:2:263-278, 2001.
- Barbosa, J. C. Arbitration law in Brazil; an inevitable reality. *Southwestern journal of law and trade in the Americas* (Los Angeles, California) 9:131-147, 2002/2003.
- Barcello, J. J., III. Who decides the arbitrator's jurisdiction? Separability and competence-competence in transnational perspective. *Vanderbilt journal of transnational law* (Nashville, Tennessee) 36:1115-1136, 2003.
- Barin, B. UN model conciliation law; can Canada make history again? *Lawyer's weekly* (Canada) 23:27, 14 November 2003.
- Barker, I. Growth and development of international laws and centres in the Asia-Pacific region; a report on recent developments in arbitration in New Zealand. *International arbitration law review* (London) 6:4:124-133, 2003.
- Berger, K. P. Integration of mediation elements into arbitration; "hybrid" procedures and "intuitive" mediation by international arbitrators. *Arbitration international* (London) 19:3:387-403, 2003.
- \_\_\_\_\_. Internationale Investitionsverträge und Schiedsgerichtsbarkeit; Äquivalenzstörungen, Neuverhandlungsklauseln und Vertragsanpassung. *Zeitschrift für vergleichende Rechtswissenschaft* (Heidelberg) 102:1-32, 2003.
- Bergsten, E. E. Implementation of the UNCITRAL model law on international commercial arbitration into national legislation. *Croatian arbitration yearbook* (Zagreb) 10:101-112, 2003.
- \_\_\_\_\_. Ten years of the Willem C. Vis International Commercial Arbitration Moot. *International arbitration law review* (London) 6:1:37-41, 2003.
- Biggs, Gonzalo. Resolving international trade and investment disputes. *CEPAL review* (Santiago) 80:97-114, August 2003. United Nations publication.  
Available in English and Spanish.
- Blackaby, N., and S. Noury. International arbitration in the MERCOSUR; is harmonisation the solution? *NAFTA: law and business review of the Americas* (Dallas, Texas) 9:445, 2003.  
Compares MERCOSUR international commercial arbitration agreement with UNCITRAL model law on international commercial arbitration.
- Böhm, E. Outlook on a new Austrian arbitration law. *International arbitration law review* (London) 6:4:105-109, 2003.

- Born, G. B. *International commercial arbitration; commentary and materials*. 2. ed. Ardsley, New York, Transnational Publishers, 2001.
- Brower, C. N., C. H. Brower II, and J. K. Sharpe. The coming crisis in the global adjudication system. *Arbitration international* (London) 19:4:415-440, 2003.
- Burghetto, M. B. Notes on arbitration in Argentina. *NAFTA: law and business review of the Americas* (Dallas, Texas) 9:471, 2003.
- Compares draft domestic legislation with the UNCITRAL model law on international commercial arbitration.
- Caron, D. D., and J. R. Crook, eds. *The Iran-United States Claims Tribunal and the process of international claims resolution*. Ardsley, New York, Transnational Publishers, 2000.
- Castello, J. Arbitral ex parte interim relief. *Dispute resolution journal* (New York) 58:3:60, 65-69, 2003.
- Chatterjee, C. The reality of the party autonomy rule in international arbitration. *Journal of international arbitration* (London) 20:6:539-560, 2003.
- Coe, J. J., Jr. From anecdote to data; reflections on the Global Center's Barcelona meeting. *Journal of international arbitration* (London) 20:1:11-22, 2003.
- Derains, Y. L'arbitre et l'octroi de mesures provisoires ex parte. *Gazette du Palais: spécial arbitrage* (Paris) 123:309-310:14-16, 5-6 November 2003.
- \_\_\_\_\_. The view against arbitral ex-parte interim relief. *Dispute resolution journal* (New York) 58:3:61-63, 2003.
- de Rosas, P. E. Arbitraje comercial internacional comparado; analisis de las reglas procesales arbitrales de Camara de Comercio Internacional, London Court of International Arbitration y American Arbitration Association. *Revista juridica universidad de Puerto Rico* (Puerto Rico) 72:1-30, 2003.
- Dewan, N. Interim measures in arbitration; a comparative analysis of Indian and English arbitration acts. *Revue de droit des affaires internationales/international business law journal* (Paris) 6:667-695, 2003.
- De Witt, N. Online international arbitration; nine issues crucial to its success. *American review of international arbitration* (New York) 12:3-4:441-464, 2001.
- Dobbins, R. N. UNCITRAL model law on international commercial conciliation; from a topic of possible discussion to approval by the General Assembly. *Pepperdine dispute resolution law journal* (Malibu, California) 3:529-538, 2003.
- Drahozal, C. R. Enforcing vacated arbitral awards; an economic approach. *American review of international arbitration* (New York) 11:4:451-479, 2000.
- El arbitraje español se renueva y adopta el modelo de UNCITRAL. *Derecho de los negocios* (Madrid) 161:1-4, 2004.
- Gaillard, E. International arbitration law; arbitration-agreement recognition; N.Y. convention, national law. *New York law journal* 8 December 2003:3.
- Gharavi, H. G. The international effectiveness of the annulment of an arbitral award. The Hague, Kluwer Law International, 2002.
- Ginkel, E. van. Reframing the dilemma of contractually expanded judicial review; arbitral appeal vs. vacatur. *Pepperdine dispute resolution law journal* (Malibu, California) 3:157-220, 2003.
- \_\_\_\_\_. The UNCITRAL model law on international commercial conciliation; a critical appraisal. *Journal of international arbitration* (The Hague) 21:1:1-65, 2004.
- Gruner, D. M. Accounting for the public interest in international arbitration; the need for procedural and structural reform. *Columbia journal of transnational law* (New York) 41:964, 2003.
- Gumzej, N. Certain aspects of public policy in enforcement of foreign arbitral awards. *Croatian arbitration yearbook* (Zagreb) 10:39-98, 2003.
- Hacking, D. Ex parte interim relief and the UNCITRAL model law. *Dispute resolution journal* (New York) 58:3:63-64, 2003.
- Heger, S. Widerklage und Aufrechnung; zur Interpretation des Art 7a der "Wiener Regeln". *ZfRV: Zeitschrift für Rechtsvergleichung, internationales Privatrecht und Europarecht* (Wien) 5:171-177, 2003.
- Heidkamp, M. O. Die Antragserfordernisse im Verfahren zur Anerkennung und Vollstreckbarerklärung ausländischer Schiedssprüche. *Internationales Handelsrecht* (München) 4:1:17-19, 2004.
- Helmer, E. V. International commercial arbitration; Americanized, "civilized," or harmonized? *Ohio State journal on dispute resolution* (Columbus, Ohio) 19:35-67, 2003.
- Henderson, A. Thai Arbitration Institute; new arbitration rules. *Mondaq business briefing* (London) 3 September 2003.
- Huber, P. Das Verhältnis von Schiedsgericht und staatlichen Gerichten bei der Entscheidung über die Zuständigkeit. *Zeitschrift für Schiedsverfahren* (München) 2:73-75, 2003.
- Idornigie, P. O. The 1988 Nigerian Arbitration and Conciliation Act; need for review? *International arbitration law review* (London) 6:2:49-57, 2003.
- International amendment of UMA offers choices. *Dispute resolution journal* (New York) 58:3:10, 2003.
- International arbitration; practical considerations with a Latin American focus. By D. E. Gonzales and others. *Journal of structured and project finance* (London) 9:1:33, 22 March 2003.
- [Introduction]. *IAC Arbitration Bulletin*, p. 1-2. (Almaty, Kazakhstan) September 2003.
- Jones, D. Comparative assessment of some of UNCITRAL rules, ICSID, LCIA, ICC, Stockholm Chamber Arbitration Rules. *Regional Centre for Arbitration Kuala Lumpur newsletter* (Kuala Lumpur) December 2002. p. 24-47.
- Kaufmann-Kohler, G. Globalization of arbitral procedure. *Vanderbilt journal of transnational law* (Nashville, Tennessee) 36:1313-1333, 2003.
- Köhne, H. C., and Langner, S. D. Geltendmachung von Gegenforderungen im internationalen Schiedsverfahren. *Recht der internationalen Wirtschaft: Betriebs-Berater international* (Heidelberg) 49:5:361-370, 2003.
- Koch, C. Standards and procedures for disqualifying arbitrators. *Journal of international arbitration* (London) 20:4:325-353, 2003.
- Kreindler, R. H. Aspects of illegality in the formation and performance of contracts. *International arbitration law review* (London) 6:1:1-24, 2003.
- Lew, J. D. M., L. A. Mistelis, and S. M. Kröll. *Comparative international commercial arbitration*. The Hague, Kluwer Law International, 2003.
- Liebscher, C. Der Entwurf des neuen österreichischen Schiedsrechts. *Zeitschrift für Schiedsverfahren* (München) 2:59-68, 2003.
- Lynch, K. The forces of economic globalization; challenges to the regime of international commercial arbitration. The Hague, Kluwer Law International, 2003.

- Ma, J., and N. Kaplan. eds. Arbitration in Hong Kong; a practical guide. Hong Kong, Sweet and Maxwell Asia, 2003. 2 v.
- Mayer, P., and A. Sheppard. Final ILA report on public policy as a bar to enforcement of international arbitral awards. *Arbitration international* (London) 19:2:249-263, 2003.
- Naglis, A. Overview of international commercial arbitration in Russia. *Asian dispute resolution* (Hong Kong) 14-15 March 2004.  
Compares Russian domestic legislation with UNCITRAL model law on international commercial arbitration.
- Nakamura, Tatsuya. Salient features of the new Japanese arbitration law based upon the UNCITRAL Model Law on International Commercial Arbitration. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 18:9:28-33, 2003.
- Onyema, E. Drafting an effective arbitration agreement in international commercial contracts. *Vindobona journal of international commercial law and arbitration* (Vienna) 7:2:277-286, 2003.
- Park, W. W. The specificity of international arbitration; the case for FAA reform. *Vanderbilt journal of transnational law* (Nashville, Tennessee) 36:1241-1311, 2003.
- Partasides, C. International commercial arbitrations. In Bernstein's handbook of arbitration and dispute resolution practice. John Tackaberry and Arthur Marriott, eds. 4. ed. London, Sweet and Maxwell, 2003. p. 651-706.
- Park, Y.-G. The doctrine of separability and competence de la competence under international commercial arbitration. *Arbitration journal* (Seoul) 309:4-12, 2003.
- Philippe, M. Difficultés procédurales causées par les clauses compromissoires paritaires et les tribunaux arbitraux tronqués. *Gazette du Palais: spécial arbitrage* (Paris) 123:309-310:21-32, 5-6 November 2003.
- Pinsolle, P. Commentaire: arrêt du 31 mars 2003 ; Air France c. Libyan Arab Airlines. *ASA bulletin* (The Hague) 21:3:649-661, 2003.
- Prpić, M. Setting aside recourse and enforcement of awards annulled in the country of their origin. *Croatian arbitration yearbook* (Zagreb) 10:13-37, 2003.
- Rubino-Sammartano, M. International arbitration; law and practice. The Hague, Kluwer Law International, 2001.
- Rubio Guerrero, R. Desarrollo y posibilidades del arbitraje institucional en el Peru. October 2003.  
Doctoral thesis presented at the Pontificia Universidad Católica del Peru.
- Schwebel, S. M. Injunction of arbitral proceedings and truncation of the tribunal. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 18:4:33-38, 2003.
- Sekolec, J. International dispute resolution; areas where further research may be useful. *Journal of international arbitration* (London) 20:1:35-66, 2003.
- \_\_\_\_\_ and M. B. Getty. The UMA and the UNCITRAL model rule; an emerging consensus on mediation and conciliation. *Journal of dispute resolution* (Columbia, Missouri) 1:175-196, 2003.
- \_\_\_\_\_. The UMA and the UNCITRAL model rule; an emerging consensus on mediation and conciliation. *Dispute resolution magazine* (Washington, D.C.) 9:4:17-20, 2003.
- Shaleva, V. The "public policy" exception to the recognition and enforcement of arbitral awards in the theory and jurisprudence of the Central and East European States and Russia. *Arbitration international* (London) 19:1:67-93, 2003.
- Sheppard, A. Interim ILA report on public policy as a bar to enforcement of international arbitral awards. *Arbitration international* (London) 19:2:217-248, 2003.
- Sorieul, R. The work of UNCITRAL in the field of arbitration. In Treteickei sud v Kazakhstane; problemii pravogo perylerobnaya (Arbitrage court in Kazakhstan; problems of legal regulation). M. K. Sulimenov, ed. Almaty, KazRUI, 2003. p. 30-35.
- Tackaberry, John, and Arthur Marriott, eds. Bernstein's handbook of arbitration and dispute resolution practice. 4. ed. London, Sweet and Maxwell, 2003. p. 651-706.
- Triantafyllides, A. Cypriot judgment Ioannou and Paraskevaides of Nicosia, Cyprus v. Biwetes Europe Ltd. of Nicosia "is in line" with intent of UNCITRAL Model Law draftsmen. *Mealey's international arbitration report* (King of Prussia, Pennsylvania) 17:8:14-15, 2002.
- UNCITRAL; report of the Working Group on Arbitration on the work of its thirty-seventh session; availability and enforcement of interim measures of protection. *ASA bulletin* (The Hague) 21:1:43-50, 2003.
- UNCITRAL adopts new Model Conciliation Law. *International arbitration report* (Houston, Texas) 4:1:10-16, 2003.
- U.N. Committee shifts stance on interim relief. *Dispute resolution journal* (New York) 58:3:11, 2003.
- Vidal Ramirez, F. Manual de derecho arbitral. Lima, Gaceta jurídica, 2003.
- Voser, N. Interessenskonflikte in der internationalen Schiedsgerichtsbarkeit; die Initiative der International Bar Association (IBA). *Zeitschrift für Schiedsverfahren* (München) 2:59-65, 2003.
- Wang, W. International arbitration; the need for uniform interim measures of relief. *Brooklyn journal of international law*. (Brooklyn, New York) 28:1059-1099, 2003.
- Webster, T. H. Party control in international arbitration. *Arbitration international* (London) 19:2:119-142, 2003.
- Whittinghill, C. L. The role and regulation of international commercial arbitration in Argentina. *Texas international law journal* (Austin, Texas) 38:796-813, 2003.
- Winckless, M. L. J. The history and current status of arbitration in Thailand. *Asian dispute resolution* (Hong Kong) 12-13, March 2004.  
Compares Thai domestic legislation with UNCITRAL model law on international commercial arbitration.
- Wolski, B. New rules to facilitate the use of ADR in resolving international commercial disputes. *ADR bulletin; the monthly newsletter on dispute resolution* 5:9:149-157, 2003.
- Yoshida, I. Interpretation of separability of an arbitration agreement and its practical effects on rules of conflict of laws in arbitration in Russia. *Arbitration international* (London) 19:1:95-112, 2003.
- Yu, Hong-lin, and Nasir Motassem. Can online arbitration exist within the traditional arbitration framework? *Journal of international arbitration* (London) 20:5:455-473, 2003.

#### IV. International transport

- Asariotis, R. Draft instrument on transport law; an update on proceedings at the UNCITRAL Working Group. *Journal of international maritime law* (Witney, United Kingdom) 9:4:400-402, 2003.
- Baughen, S. International maritime law. In International maritime and commercial law yearbook 2003. London, United Kingdom, Informa Professional, 2003. p. 142-150.  
Discusses UNCITRAL draft instrument on carriage of goods.

- Bello, H. Nigerian shippers don't know their rights. *Africa news*, 24 July 2003.
- Berlingieri, F. A new convention on the carriage of goods by sea; port-to-port or door-to-door? *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:265-280, 2003.
- Block, S. The continuing saga of cargo liability reform; the debate goes international. *Mondaq business briefing* (London) 5 September 2003.
- Clarke, M. The line in law between land and sea. *Journal of business law* (London) 522-524, September 2003.
- Edelman, P. S. A new regime for cargo claims. *New York law journal* (New York) 29 September 2003. p. 3.
- Edmonson, R. G. All together now; U.S. seeks compromise on international cargo liability rules; U.N.-sponsored meetings to resume. *Traffic world* (Washington, D.C.) 29 September 2003. p. 32.
- Griggs, P. J. S. Obstacles to uniformity of maritime law; the Nicholas J. Healy lecture. *Journal of maritime law and commerce* (Baltimore, Maryland) 34:2:191-208, 2003.
- Haicong, Z. A call for the restoration of contractual freedom in cargo shipping. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:309-318, 2003.
- Karan, H. Revising liability limits in international maritime conventions; a Turkish perspective. *Journal of maritime law and commerce* (Baltimore, Maryland) 34:4:615-628, 2003.
- Lefebvre G. Le projet préliminaire de la CNUDCI et la responsabilité du transporteur de marchandises par mer; périple difficile ou échouement? *Revue juridique Thémis* (Montréal) 37:431-472, 2003.
- Lejnieks, M. Diverging solutions in the harmonisation of carriage of goods by sea; which approach to choose? *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:303-307, 2003.
- Lin, J. CMI transport law draft; material contribution to the China Maritime Code. *Journal of international maritime law* (Witney, United Kingdom) 9:4:370-382, 2003.
- McLaughlin, J. Carriage of goods; finishing line finally in sight in long race for liability reform. *Lloyd's list*, 1 October 2003, p. 6.
- Racine, J. B. Le retard dans le transport maritime de marchandises. *Revue trimestrielle de droit commercial et de droit économique* (Paris) 2:223-257, 2003.
- Sturley, M. F. The United Nations Commission on International Trade Law's transport law project; an interim view of a work in progress. *Texas international law journal* (Austin, Texas) 39:65-110, 2003.
- Sze, Ping-Fat. Carrier's liability under the Hague, Hague-Visby and Hamburg Rules. The Hague, Kluwer Law International, 2002.
- Tetley, W. Reform of carriage of goods; the UNCITRAL draft and Senate COGSA '99. *Tulane maritime law journal* (New Orleans, Louisiana) 28:1-44, 2003.
- van der Ziel, G. The legal underpinning of e-commerce in maritime transport by the UNCITRAL draft instrument on the carriage of goods by sea. *Journal of international maritime law* (Witney, United Kingdom) 9:5:461-470, 2003.
- Brazell, L. Electronic signatures law and regulation. London, Sweet and Maxwell, 2004.
- DiMatteo, L. A. The law of international contracting. The Hague, Kluwer Law International, 2000.
- Draetta, U. Internet et commerce électronique. Bruxelles, Bruylant, 2003.
- Fletcher, C. The banker's role in electronic trade documentation; are bankers doing enough? A trader's perspective. *Documentary credit world* (Montgomery Village, Maryland) 7:4:31-33, 2003.
- Geist, M. Have-not world more plugged-in than we think. *Toronto star*, 21 April 2003.
- Jawahitha, S. Electronic contract in the Malaysian Contracts Act 1950; an analytic comparison with the EU Directive on E-Commerce and the US Uniform Computer Information Transaction Act 1999. *Business law review* (The Hague) 24:4:91-106, 2003.
- Madrid Parra, A. El negocio jurídico electrónico. *Revista de la contratación electrónica* (Cádiz) 29:3-62, 2002.
- Martínez-Nadal, A., and J. L. Ferrer-Gomila. Liability of certification authorities issuing electronic signature certificates. *Electronic communication law review* (The Hague) 9:4:225-248, 2002.
- Pistorius, T. "Nobody knows you're a dog"; the attribution of data messages. *SA mercantile law journal* (Lansdowne) 14:4:737-747, 2002.
- Rosas, R. Comparative study of the formation of electronic contracts in American law with references to international and Mexican law. *Houston journal of international law* (Houston) 26:63-96, 2003.
- Sawyer, A. J. An electronic transactions act for New Zealand—at last! *Journal of international banking law and regulation* (London) 18:4:151-159, 2003.
- Vilus, J. Electronic commerce; an incentive for the modernisation and harmonisation of contract law. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:163-170, 2003.

## VII. Independent guarantees and stand-by letters of credit

- Fayers, R. Two key court decisions involving L/Cs; an express agreement of the beneficiary not to draw under an L/C. *DCI insight* (Paris) 9:4:14, 2003.
- Gao, Xiang. The fraud rule in the law of letters of credit; a comparative study. The Hague, Kluwer Law International, 2002.
- \_\_\_\_\_ and R. P. Buckley. The unique jurisprudence of letters of credit; its origins and sources. *San Diego international law journal* (San Diego, California) 4:91-125, 2003.
- Kerković, T. M. Konvencija UN o nezavisnim garancijama i stand by akreditivima; u susret novoj lex mercatoria (UN Convention on Independent Guarantees and Stand-by Letters of Credit; meeting the new lex mercatoria. *Pravni život* (Beograd) 11:317-330, 2000.
- In Serbian.
- \_\_\_\_\_. Nezavisna bankarska garancija i stand by akreditiv u međunarodnim poslovnim transakcijama (Independent (bank) guarantees and stand-by letters of credit in international business transactions. *Ekonomске teme* (Niš) 3:123-133, 2000.
- In Serbian.
- Niibori, S. Global law on commercial transactions; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. *JCA journal* (Tokyo) 50:11:68-72, November 2003
- Part I. In Japanese.

## V. International payments

[No publications recorded under this heading.]

## VI. Electronic commerce

- Astrup, J. Clearing up e-contracting issues; self-regulation is a better approach, says ICC, than the convention being drafted by UNCITRAL. *Legal times* (Washington, D.C.) 21 July 2003, p. 21.



- \_\_\_\_\_. Global law on commercial transactions; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. *JCA journal* (Tokyo) 50:12:42-46, December 2003
- Part II. In Japanese.
- \_\_\_\_\_. Global law on commercial transactions; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. *JCA journal* (Tokyo) 51:1:68-73, January 2004
- Part III. In Japanese.
- \_\_\_\_\_. Global law on commercial transactions; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. *JCA journal* (Tokyo) 51:2:42-46, February 2004
- Part IV. In Japanese.
- \_\_\_\_\_. Global law on commercial transactions; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. *JCA journal* (Tokyo) 51:3:67-71, March 2004
- Part V. In Japanese.
- \_\_\_\_\_. Global law on commercial transactions; the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. *JCA journal* (Tokyo) 51:4:58-62, April 2004
- Part VI. In Japanese.
- Rodríguez Díaz, I. El torno a la garantía a primera demanda. *Revista de derecho bancario y bursátil* (Valladolid) 22:7-52, 2003.

### VIII. Procurement

- Arrowsmith, S. New developments in UNCITRAL future work on public procurement and new model provisions on privately financed infrastructure projects. *Public procurement law review* (London) 6:NA131-NA134, 2003.
- \_\_\_\_\_. Public procurement; an appraisal of the UNCITRAL Model Law as a global standard. *International and comparative law quarterly* (London) 53:1:17-46, 2004.
- \_\_\_\_\_, J. Linarelli and Don Wallace, Jr. Regulating public procurement; national and international perspectives. The Hague, Kluwer Law International, 2000.
- Dischendorfer, M. The UNCITRAL model law on procurement; how does it reconcile the theoretical goal of total objectivity with the practical requirement for some degree of subjectivity? *Public procurement law review* (London) 2:100-107, 2003.
- Watermeyer, R. B. Facilitating sustainable development through public and donor procurement regimes; tools and techniques. *Public procurement law review* (London) 1:30-55, 2004.

### IX. Cross-border insolvency

- Cooper, N. Fifth INSOL international/UNCITRAL judicial colloquium; Las Vegas. *INSOL world; the quarterly journal of INSOL International* (London) Fourth quarter 2003, p. 4.
- Cronje, T. South Africa update. *INSOL world; the quarterly journal of INSOL International* (London) First quarter 2004, p. 34.
- Felsberg, T. B. Cross-border insolvencies and restructurings in Brazil. *INSOL world; the quarterly journal of INSOL International* (London) Second quarter 2003, p. 25.
- Gerber, E. J. Not all politics is local; the new chapter 15 to govern cross-border insolvencies. *Fordham law review* (New York) 71:2051-2099, 2003.
- Harmer, R. W. The UNCITRAL Model Law on Cross-Border Insolvency or "Trivial Pursuit". In *Cross-border insolvency; a guide to recognition and enforcement*. London, INSOL publishing, 2003. p. 5-13.
- Lechner, R. Waking from the jurisdictional nightmare of multinational default; the European Council Regulation on Insolvency Proceedings. *Arizona journal of international and comparative law* (Tucson, Arizona) 19:975-1024, 2002.
- Leonard, E. B. The international scene; the international year in review. *American bankruptcy institute journal* (Alexandria, Virginia) 223, December 2003.
- Discusses developments relating to UNCITRAL model law on cross-border insolvency.
- Look, Chan Ho. Anti-suit injunctions in cross-border insolvency; a restatement. *International and comparative law quarterly* (London) 52:3:697-736, 2003
- Neiman, D. International insolvencies and environmental obligations; a prelude to resolving the conflicting policies of a clean slate versus a clean site in transnational bankruptcies. *Fordham journal of corporate and financial law* (New York) 8:789-852, 2003.
- Olivencia Ruiz, M. El tema de la insolvencia en la agenda de UNCITRAL. *Revista de derecho bancario y bursátil* (Valladolid) 15:62:411-433, 1996.
- Rouillon, A. A. N. Cooperación internacional en materia concursal; la Ley Modelo de la CNUDMI (UNCITRAL) sobre Insolvencia Transfronteriza. *La ley* (Buenos Aires) 66:113:1-5, 12 de junio 2002.
- Sánchez-Mejorada y Velasco, C. The New Mexican Insolvency Law. Paper presented at the 19th Annual Bankruptcy Conference, University of Texas School of Law (2000).
- Shidlovitsky, L. Adoption of chapter 15; a necessary step in international bankruptcy reform. *Southwestern journal of law and trade in the Americas* (Los Angeles) 10:171-193, 2003.
- Tobler, C. Managing failure in the new global economy; the UNCITRAL Model Law on Cross-Border Insolvency. *Boston College international and comparative law review* (Boston) 22:383-423, 1999.
- Torremans, P. L. C. Cross border insolvencies in EU, English and Belgian Law. The Hague, Kluwer Law International, 2002.
- Trichardt, A., and A. Antoniou. UNCITRAL Model Law on Cross-Border Insolvency. *Insolvency law bulletin* 3:1:1-5, 2002.
- US bankruptcy reform; progress to date. By J. G. Miller and others. *INSOL world; the quarterly journal of INSOL International* (London) second quarter 2003, p. 21-22.

### X. Receivables financing

- Affaki, G. L'apport de la Convention CNUDCI sur la cession de créances aux opérations de banque. *Banque et droit; la pratique du droit bancaire* (Paris) 90:3-25, 2003.
- Bang-Pederson, U. R. Mere om transport i tilgodehavender fra eksport. *Ugeskrift for Retsvaesen* (København) 2:140:143, 2002.
- Bazinas, S. V. Contribución de la CNUDMI a la unificación del derecho que rige la financiación mediante cesión de créditos; Convención de las Naciones Unidas sobre la cesión de créditos en el comercio internacional. *Derecho comercial y de las obligaciones* (Buenos Aires) v. 1: 699-720, 2002.
- Spanish translation of article by Spiros Bazinas in *Uniform law review/Revue de droit uniforme* (Rome) 7:2:49-67, 2002.
- \_\_\_\_\_. Key policy issues of the United Nations Convention on the Assignment of Receivables in International Trade. *Tulane journal of international and comparative law* (New Orleans, Louisiana) 11:275-301, 2003.

Burman, H. S. The commercial challenge in modernizing secured transactions law. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2:347-352, 2003.

Campbell, D., ed. *International secured transactions*. Dobbs Ferry, New York, Oceana Publications, 2003.

Looseleaf, two vols.

Commercial Finance Association. Annual report 2002; international developments; UN Convention on the Assignment of Receivables in International Trade; UNCITRAL Legislative Guide on Secured Transactions Law. *The secured lender* (New York) March/April 2003, p. 5-6.

Kieninger, E. M., and E. Schütze. Neue Chancen für internationale Finanzierungsgeschäfte; die UN-Abtretungskonvention. *Zeitschrift für Wirtschaftsrecht ZIP* (Köln) 24:48:2181-2185, 2003.

Osuna Gonzalez, A. Comentarios a la Convencion de Naciones Unidas sobre la Cesion de Creditos en el Comercio Internacional. *Revista juridica universidad de Puerto Rico* (Puerto Rico) 72:31-6, 2003.

Palmeri, R. P. UN deserves praise for trade efforts. *Milwaukee journal Sentinel /JSOnline* (Milwaukee, Wisconsin) June 16, 2003.

Available at

<http://www.jsonline.com/bym/news/jun03/148204.asp>

#### XI. International construction contracts

[No publications recorded under this heading.]

#### XII. International countertrade

Kerković, T. M. Obaveza kontratrgovine prema pravnom vodiču UN za međunarodne kontratrgovinske transakcije (Countertrade commitment according to the UNCITRAL Legal Guide on International Countertrade Transactions). In *Regional development and democratic influences in Balkan countries*. Niš, University of Niš Economics Faculty, June 2001. p. 215-223.

In Serbian.

\_\_\_\_\_. Učešće trećih lica u međunarodnim kontratrgovinskim transakcijama (Participation of third parties according to the UN Legal Guide on International Countertrade Transactions). *Pravni život* (Beograd) 11:405-417, 2001.

In Serbian.

\_\_\_\_\_. Međunarodni kontratrgovinski poslovi i rešenja u nacionalnoj regulativi (International countertrade transactions and solutions in national regulations). *Pravo i privreda* (Beograd) 5-8, 2000:840-853, 2002.

In Serbian.

\_\_\_\_\_. Pravni vodič UNCITRAL-a za međunarodne kontratrgovinske transakcije (UNCITRAL Legal Guide in International Countertrade Transactions). *Ekonomске teme* (Niš) 1-2:587-599, 2002.

In Serbian.

\_\_\_\_\_. Novi pristup u poimanju međunarodnih kontratrgovinskih poslova (A new approach to the concept of international countertrade transactions). *Ekonomika* (Niš) 6:90-98, 2002.

In Serbian.

\_\_\_\_\_. Mehanizmi plaćanja u međunarodnim kontratrgovinskim poslovima (Mechanism of different payment methods in international countertrade transactions.) *Pravo i privreda* (Beograd) 5-8:792-804, 2003.

In Serbian.

\_\_\_\_\_. Pravni aspekti i pravna priroda međunarodnih kontratrgovinskih poslova (Legal aspects and legal nature of international countertrade transactions). Doctoral thesis, University of Belgrade Faculty of Law, Belgrade, 2003. 410 p.

In Serbian. Includes tables and bibliography.

#### XIII. Privately financed infrastructure projects

Neumann, P. Build, operate, transfer project financing in emerging countries. In *International project finance*. F. Scott and C. P. Martens, eds. Ardsley, New York, Transnational publishers, 2000. p. 133-164.

Wiwen-Nilsson, T. UNCITRAL Legislative Guide for Privately Financed Infrastructure Projects. In *International project finance*. F. Scott and C. P. Martens, eds. Ardsley, New York, Transnational publishers, 2000. p. 7-13.

#### XIV. Security interests

Buxbaum, H. L. Unification of the law governing secured transactions; progress and prospects for reform. *Uniform law review/Revue de droit uniforme* (Rome) 8:1/2: 321-340, 2003.

Campbell, D., ed. *International secured transactions*. Dobbs Ferry, New York, Oceana Publications, 2003. 2 v.

Looseleaf.

Commercial Finance Association. Annual report 2002; international developments; UN Convention on the Assignment of Receivables in International Trade; UNCITRAL Legislative Guide on Secured Transactions Law. *The secured lender*. (New York) March/April 2003, p. 5-6.

## Annex

## UNCITRAL legal texts

<i>Short title</i>	<i>Full title</i>
Hamburg Rules (1978)	United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) <sup>a</sup>
Limitation Convention (1974/1980)	Convention on the Limitation Period in the International Sale of Goods, 1974 (New York), <sup>b</sup> and Protocol amending the Convention on the Limitation Period in the International Sale of Goods, 1980 (Vienna) <sup>c</sup>
UNCITRAL Arbitral Proceedings Notes (1996)	UNCITRAL Notes on Organizing Arbitral Proceedings (1996) <sup>d</sup>
UNCITRAL Arbitration Rules (1976)	UNCITRAL Arbitration Rules (1976) <sup>e</sup>
UNCITRAL Bills and Notes Convention (1988)	United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) <sup>f</sup>
UNCITRAL Conciliation Rules (1980)	UNCITRAL Conciliation Rules (1980) <sup>g</sup>
UNCITRAL Construction Contracts Guide (1987)	UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works (1987) <sup>h</sup>
UNCITRAL Credit Transfer Model Law (1992)	UNCITRAL Model Law on International Credit Transfers (1992) <sup>i</sup>
UNCITRAL Electronic Funds Guide (1986)	UNCITRAL Legal Guide on Electronic Funds Transfers (1986) <sup>j</sup>
UNCITRAL Infrastructure Projects Guide (2001)	UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2001) <sup>k</sup>
UNCITRAL International Countertrade Guide (1992)	UNCITRAL Legal Guide on International Countertrade Transactions (1992) <sup>l</sup>
UNCITRAL Model Arbitration Law (1985)	UNCITRAL Model Law on International Commercial Arbitration (1985) <sup>m</sup>
UNCITRAL Model Conciliation Law (2002)	UNCITRAL Model Law on International Commercial Conciliation (2002) <sup>n</sup>
UNCITRAL Model Insolvency Law (1997)	UNCITRAL Model Law on Cross-Border Insolvency (1997) <sup>o</sup>
UNCITRAL Model Law on Electronic Commerce (1996)	UNCITRAL Model Law on Electronic Commerce (1996) <sup>p</sup>
UNCITRAL Model Law on Electronic Signatures (2001)	UNCITRAL Model Law on Electronic Signatures (2001) <sup>q</sup>
UNCITRAL Model Procurement Law (1994)	UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) <sup>r</sup>
United Nations Assignment Convention (2001)	United Nations Convention on the Assignment of Receivables in International Trade (2001) <sup>s</sup>
United Nations Guarantee and Stand-by Convention (1995)	United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995) <sup>t</sup>
United Nations Sales Convention (1980)	United Nations Convention on Contracts for the International Sale of Goods (1980) <sup>u</sup>
United Nations Terminal Operators Convention (1991)	United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) <sup>v</sup>

## Notes

<sup>a</sup>United Nations publication, Sales No. E.95.V.14.

<sup>b</sup>*Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974* (United Nations publication, Sales No. E.74.V.8), part I.

<sup>c</sup>*Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980* (United Nations publication, Sales No. E.81.IV.3), part I.

<sup>d</sup>*Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, part II.

<sup>e</sup>United Nations publication, Sales No. E.77.V.6.

<sup>f</sup>United Nations publication, Sales No. E.95.V.16.

<sup>g</sup>United Nations publication, Sales No. E.81.V.6.

<sup>h</sup>United Nations publication, Sales No. E.87.V.10.

<sup>i</sup>United Nations publication, Sales No. E.99.V.11.

<sup>j</sup>United Nations publication, Sales No. E.87.V.9.

<sup>k</sup>United Nations publication, Sales No. E.01.V.4.

<sup>l</sup>United Nations publication, Sales No. E.93.V.7.

<sup>m</sup>United Nations publication, Sales No. E.95.V.18.

<sup>n</sup>*Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17 (A/57/17)*, annex I; see also General Assembly resolution 57/18, annex.

<sup>o</sup>United Nations publication, Sales No. E.99.V.3.

<sup>p</sup>United Nations publication, Sales No. E.99.V.4.

<sup>q</sup>United Nations publication, Sales No. E.02.V.8.

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

<sup>s</sup>General Assembly resolution 56/81, annex.

<sup>t</sup>United Nations publication, Sales No. E.97.V.12.

<sup>u</sup>United Nations publication, Sales No. E.95.V.12.

<sup>v</sup>*Official Records of the United Nations Conference on the Liability of Operators of Transport Terminals in International Trade, Vienna, 2-19 April 1991* (United Nations publication, Sales No. E.93.XI.3), part I, document A/CONF.152/13, annex.

## IV. CHECK-LIST OF DOCUMENTS

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
<b>A. List of documents before the Commission at its thirty-sixth session</b>		
<i>I. General series</i>		
A/CN.9/519	Provisional agenda, annotations thereto and scheduling of meetings of the thirty-sixth session	Not reproduced
A/CN.9/520	[ <i>Not issued.</i> ]	
A/CN.9/521	Report of Working Group I (Privately Financed Infrastructure Projects) on the work of its fifth session (Vienna, 9-13 September 2002)	Part two, I, A
A/CN.9/522 and Add.1 and 2	Note by the secretariat on the draft addendum to the <i>UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects</i> and consolidated final draft of the model legislative provisions	Part two, I, C
A/CN.9/523	Report of Working Group II (Arbitration) on the work of its thirty-seventh session (Vienna, 7-11 October 2002)	Part two, III, A
A/CN.9/524	Report of Working Group II (Arbitration) on the work of its thirty-eighth session (New York, 12-16 May 2002)	Part two, III, C
A/CN.9/525	Report of Working Group III (Transport Law) on the work of its tenth session (Vienna, 16-20 September 2002)	Part two, IV, A
A/CN.9/526	Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March-4 April 2003)	Part two, IV, C
A/CN.9/527	Report of Working Group IV (Electronic Commerce) on the work of its fortieth session (Vienna, 14-18 October 2002)	Part two, V, A
A/CN.9/528	Report of Working Group IV (Electronic Commerce) on the work of its forty-first session (New York, 5-9 May 2003)	Part two, V, C
A/CN.9/529	Report of Working Group V (Insolvency Law) on the work of its twenty-seventh session (Vienna, 9-13 December 2002)	Part two, II, A
A/CN.9/530	Report of Working Group V (Insolvency Law) on the work of its twenty-eighth session (New York, 24-28 February 2003)	Part two, II, D
A/CN.9/531	Report of Working Group VI (Security Interests) on the work of its second session (Vienna, 17-20 December 2002)	Part two, VI, A

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
A/CN.9/532	Report of Working Group VI (Security Interests) on the work of its third session (New York, 3-7 March 2003)	Part two, VI, C
A/CN.9/533 and Add. 1-7	Note by the secretariat on the draft addendum to the <i>UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects</i> : compilation of comments by Governments and international organizations	Part two, I, D
A/CN.9/534	Note by secretariat on the draft legislative guide on insolvency law	Part two, II, G
A/CN.9/535	Report of Working Group V (Insolvency Law) and Working Group VI (Security Interests) on the work of their first joint session (Vienna, 16 and 17 December 2002)	Part two, II, F
A/CN.9/536	Note by the secretariat on training and technical assistance	Part two, IX
A/CN.9/537	Note by the secretariat on the status of conventions and model laws	Part two, X
A/CN.9/538	Note by the secretariat: bibliography of recent writings related to the work of UNCITRAL Yearbook 2002	Part three, IV
A/CN.9/539 and Add.1	Note by the secretariat on current activities of international organizations in the area of public procurement: possible future work	Part two, VII, A
A/CN.9/540	Note by the secretariat on possible future work relating to commercial fraud	Part two, VII, B
<b>2. Restricted series</b>		
A/CN.9/XXXVI/CRP.1 and Add.1-22	Draft report of the United Nations Commission on International Trade Law on the work of its thirty-sixth session	Not reproduced
A/CN.9/XXXVI/CRP.2	Note by the Chairman	Not reproduced
A/CN.9/XXXVI/CRP.3 and Add.1-2	Report of the Drafting Group	Not reproduced
A/CN.9/XXXVI/CRP.4 and Rev.1	Draft recommendation on approval in principle of the draft <i>Legislative Guide on Insolvency Law</i>	Not reproduced
<b>3. Information series</b>		
A/CN.9/XXXVI/INF.1/Rev.1	List of participants	Not reproduced

**B. List of documents before the Working Group on Privately Financed Infrastructure Projects**

**1. Working papers**

A/CN.9/WG.I/WP.28	Provisional agenda	Not reproduced
A/CN.9/WG.I/WP.29 and Add.1-2	Working paper submitted to the Working Group on Privately Financed Infrastructure Projects: Draft addendum to the <i>UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects</i>	Part two, I, B

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
<b>2. Restricted series</b>		
A/CN.9/WG.I/V/CRP.1 and Add.1-8	Draft report of the Working Group on Privately Financed Infrastructure Projects on the work of its fifth session	Not reproduced
A/CN.9/WG.I/V/CRP.2 and Add.1-3	Report of the Drafting Group	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.I/V/INF.1	List of participants	Not reproduced
<b>C. List of documents before the Working Group on Insolvency Law at its twenty-seventh session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.V/WP.62	Provisional agenda	Not reproduced
A/CN.9/WG.V/WP.63 and Add. 3-15	Working paper submitted to the Working Group on Insolvency Law at its twenty-seventh session: Draft legislative guide on insolvency law	Part two II, B
A/CN.9/WG.V/WP.64	Working paper submitted to the Working Group on Insolvency Law at its twenty-seventh session: Draft legislative guide on insolvency law	Part two II, C
<b>2. Restricted series</b>		
A/CN.9/WG.V/XXVII/CRP.1 and Add.1-8	Draft report of the Working Group on Insolvency Law on the work of its twenty-seventh session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.V/XXVII/INF.1	List of participants	Not reproduced
<b>D. List of documents before the Working Group on Insolvency Law at its twenty-eighth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.V/WP.63 and Add. 1-2, Add.16-17	Working paper submitted to the Working Group on Insolvency Law at its twenty-eighth session: Draft legislative guide on insolvency law	Part two II, E
A/CN.9/WG.V/WP.65	Provisional agenda	Not reproduced
<b>2. Restricted series</b>		
A/CN.9/WG.V/XXVIII/CRP.1 and Add.1-6	Draft report of the Working Group Insolvency Law on the work of its twenty-eighth session	Not reproduced
A/CN.9/WG.V/XXVIII/CRP.2	Draft legislative guide on insolvency law	Not reproduced
A/CN.9/WG.V/XXVIII/CRP.3	Draft legislative guide on insolvency law	Not reproduced
A/CN.9/WG.V/XXVIII/CRP.4	Draft legislative guide on insolvency law	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.V/XXVIII/INF.1	List of participants	Not reproduced

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
<b>E. List of documents before the Working Group on Arbitration at its thirty-seventh session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.II/WP.120	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.121	Working paper submitted to the Working Group on Arbitration at its thirty-seventh session; interim measures of protection; Proposal by the United States	Part two III, B
<b>2. Restricted series</b>		
A/CN.9/WG.II/XXXVII/CRP.1 and Add.1-5	Draft report of the Working Group on Arbitration and Conciliation on the work of its thirty-seventh session	Not reproduced
A/CN.9/WG.II/XXXVII/CRP.2	Recognition and enforcement of interim measures of protection	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.II/XXXVII/INF.1/Rev.1	List of participants	Not reproduced
<b>F. List of documents before the Working Group on Arbitration at its thirty-eighth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.II/WP.122	Provisional agenda	Not reproduced
A/CN.9/WG.II/WP.123	Working paper submitted to the Working Group on Arbitration at its thirty-eighth session; interim measures of protection; Settlement of commercial disputes	Part two III, D
<b>2. Restricted series</b>		
A/CN.9/WG.II/XXXVIII/CRP.1 and Add.1-4	Draft report of the Working Group on Arbitration and Conciliation on the work of its thirty-eighth session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.II/XXXVIII/INF.1/	List of participants	Not reproduced
<b>G. List of documents before the Working Group on Transport Law at its tenth session</b>		
<b>1. Working papers</b>		
A/CN.9/WG.III/WP.22	Provisional agenda	Not reproduced
A/CN.9/WG.III/WP.23	Working paper submitted to the Working Group on Transport Law at its tenth session: Preliminary draft instruments on the carriage of goods [by sea]: Proposal by Canada	Part two IV, B



<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
------------------------	-----------------------------	-----------------------------------

**2. Restricted series**

A/CN.9/WG.III/X/CRP.1 and Add.1-8	Draft report of the Working Group on Transport Law on the work of its thirty-eighth session	Not reproduced
-----------------------------------	---	----------------

**3. Information series**

A/CN.9/WG.III/X/INF.1/Rev.1	List of participants	Not reproduced
-----------------------------	----------------------	----------------

**H. List of documents before the Working Group on Transport Law at its eleventh session**

1. Working papers

A/CN.9/WG.III/WP.24	Provisional agenda	Not reproduced
---------------------	--------------------	----------------

A/CN.9/WG.III/WP.25	Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instruments on the carriage of goods [by sea]: Proposal by Italy	Part two IV, D
---------------------	--	----------------

A/CN.9/WG.III/WP.26	Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instruments on the carriage of goods [by sea]: Proposal by Sweden	Part two IV, E
---------------------	---	----------------

A/CN.9/WG.III/WP.27	Working paper submitted to the Working Group on Transport Law at its eleventh session: Comparative Tables	Part two IV, F
---------------------	---	----------------

A/CN.9/WG.III/WP.28	Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instruments on the carriage of goods [by sea]: Compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument	Part two IV, G
---------------------	---	----------------

A/CN.9/WG.III/WP.29	Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instruments on the carriage of goods [by sea]: General remarks on the sphere of application of the draft Instrument	Part two IV, H
---------------------	---	----------------

A/CN.9/WG.III/WP.30	Working paper submitted to the Working Group on Transport Law at its eleventh session: Preparation of a draft instruments on the carriage of goods [by sea]: Information document provided by the United Nations Conference on trade and Development (UNCTAD)	Part two IV, I
---------------------	---	----------------

**2. Restricted series**

A/CN.9/WG.III/XI/CRP.1 and Add.1-8	Draft report of the Working Group on Transport Law on the work of its eleventh session	Not reproduced
------------------------------------	--	----------------

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
------------------------	-----------------------------	-----------------------------------

**3. Information series**

A/CN.9/WG.III/XI/INF.1/ Rev.1	List of participants	Not reproduced
----------------------------------	----------------------	----------------

**I. List of documents before the Working Group on Electronic Commerce at its fortieth session**

**1. Working papers**

A/CN.9/WG.IV/WP.97	Provisional Agenda	Not reproduced
--------------------	--------------------	----------------

A/CN.9/WG.IV/WP.98 and Add.1-4	Working paper submitted to the Working Group on Electronic Commerce at its fortieth session: Legal barriers to the development of electronic commerce in international instruments relating to international trade: Compilation of comments by Governments and international organizations	Part two V, B
-----------------------------------	--	---------------

**2. Restricted series**

A/CN.9/WG.IV/XXXX/ CRP.1 and Add.1-7	Draft report of the Working Group on Electronic Commerce on the work of its fortieth session	Not reproduced
---	--	----------------

**3. Information series**

A/CN.9/WG.IV/XXXX/ INF.1/	List of participants	Not reproduced
------------------------------	----------------------	----------------

**J. List of documents before the Working Group on Electronic Commerce at its forty-first session**

**1. Working papers**

A/CN.9/WG.IV/WP.99	Provisional agenda	Not reproduced
--------------------	--------------------	----------------

A/CN.9/WG.IV/WP.98 and Add.5-6	Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal barriers to the development of electronic commerce in international instruments relating to international trade: Compilation of comments by Governments and international organizations	Part two V, D
-----------------------------------	---	---------------

A/CN.9/WG.IV/WP.100	Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal aspects of electronic commerce: Electronic contracting: provisions for a draft convention	Part two V, E
---------------------	---	---------------

A/CN.9/WG.IV/WP.101	Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal aspects of electronic commerce: Electronic contracting: provisions for a draft convention: Comments by the International Chamber of Commerce	Part two V, F
---------------------	--	---------------

<i>Document symbol</i>	<i>Title or description</i>	<i>Location in present volume</i>
<b>2. Restricted series</b>		
A/CN.9/WG.IV/XXXXI/CRP.1 and Add.1-8	Draft report of the Working Group on Electronic Commerce on the work of its forty-first session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.IV/XLI/INF.1	List of participants	Not reproduced

**K. List of documents before the Working Group on Security Interests at its second session**

<b>1. Working papers</b>		
A/CN.9/WG.VI/WP.5	Provisional agenda	Not reproduced
A/CN.9/WG.VI/WP.6 and Add.1-5	Working paper submitted to the Working Group on Electronic Commerce at its forty-first session: Legal barriers to the development of electronic commerce in international instruments relating to international trade: Compilation of comments by Governments and international organizations	Part two VI, B
<b>2. Restricted series</b>		
A/CN.9/WG.VI/II/CRP.1 and Add.1-4	Draft report of the Working Group on Security Interests on the work of its second session	Not reproduced
<b>3. Information series</b>		
A/CN.9/WG.VI/II/INF.1	List of participants	Not reproduced



## V. LIST OF UNCITRAL DOCUMENTS REPRODUCED IN THE PREVIOUS VOLUMES OF THE *YEARBOOK*

This list indicates the particular volume, year, part, chapter and page where documents relating to the work of the Commission were reproduced in previous volumes of the *Yearbook*; documents that are not listed 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 1974); Privately Financed Infrastructure Projects (as of 2001)
  - (b) Working Group II:  
International Sale of Goods (1968 to 1977); International Contract Practices (as of 1979); International Commercial Arbitration (as of 2000)
  - (c) Working Group III:  
International Legislation on Shipping (1968 to 1978); Transport Law (as of 2002)\*\*
  - (d) Working Group IV:  
International Negotiable Instruments (1974 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1993 to 1996); Electronic Commerce (as of 1997)
  - (e) Working Group V:  
New International Economic Order; Cross-Border Insolvency (1995 to 1997); Insolvency Law (as of 1999)\*
  - (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.

---

\*For the twenty-third session (Vienna, 11-22 December 2000), this Working Group was named: Working Group on International Contract Practices (see A/55/17, para. 186).

\*\*At its thirty-fifth session, the Commission adopted one-week sessions, creating six of the three active Working Groups.

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
<b>1. Reports on the annual sessions of the Commission</b>			
A/7216 (first session)	Volume I: 1968-1970	Part two, I, A	71
A/7618 (second session)	Volume I: 1968-1970	Part two, II, A	94
A/8017 (third session)	Volume I: 1968-1970	Part two, III, A	129
A/8417 (fourth session)	Volume II: 1971	Part one, II, A	9
A/8717 (fifth session)	Volume III: 1972	Part one, II, A	9
A/9017 (sixth session)	Volume IV: 1973	Part one, II, A	11
A/9617 (seventh session)	Volume V: 1974	Part one, II, A	13
A/10017 (eighth session)	Volume VI: 1975	Part one, II, A	9
A/31/17 (ninth session)	Volume VII: 1976	Part one, II, A	9
A/32/17 (tenth session)	Volume VIII: 1977	Part one, II, A	11
A/33/17 (eleventh session)	Volume IX: 1978	Part one, II, A	11
A/34/17 (twelfth session)	Volume X: 1979	Part one, II, A	11
A/35/17 (thirteenth session)	Volume XI: 1980	Part one, II, A	7
A/36/17 (fourteenth session)	Volume XII: 1981	Part one, A	3
A/37/17 and Corr.1 (fifteenth session)	Volume XIII: 1982	Part one, A	3
A/38/17 (sixteenth session)	Volume XIV: 1983	Part one, A	3
A/39/17 (seventeenth session)	Volume XV: 1984	Part one, A	3
A/40/17 (eighteenth session)	Volume XVI: 1985	Part one, A	3
A/41/17 (nineteenth session)	Volume XVII: 1986	Part one, A	3
A/42/17 (twentieth session)	Volume XVIII: 1987	Part one, A	3
A/43/17 (twenty-first session)	Volume XIX: 1988	Part one, A	3
A/44/17 (twenty-second session)	Volume XX: 1989	Part one, A	3
A/45/17 (twenty-third session)	Volume XXI: 1990	Part one, A	3
A/46/17 (twenty-fourth session)	Volume XXII: 1991	Part one, A	3
A/47/17 (twenty-fifth session)	Volume XXIII: 1992	Part one, A	3
A/48/17 (twenty-sixth session)	Volume XXIV: 1993	Part one, A	3
A/49/17 (twenty-seventh session)	Volume XXV: 1994	Part one, A	3
A/50/17 (twenty-eighth session)	Volume XXVI: 1995	Part one, A	3
A/51/17 (twenty-ninth session)	Volume XXVII: 1996	Part one, A	3
A/52/17 (thirtieth session)	Volume XXVIII: 1997	Part one, A	3
A/53/17 (thirty-first session)	Volume XXIX: 1998	Part one, A	3
A/54/17 (thirty-second session)	Volume XXX: 1999	Part one, A	3
A/55/17 (thirty-third session)	Volume XXXI 2000	Part one, A	3
A/56/17 (thirty-fourth session)	Volume XXXII 2001	Part one, A	3
A/57/17 (thirty-fifth session)	Volume XXXIII 2002	Part one, A	3
<b>2. Resolutions of the General Assembly</b>			
2102 (XX)	Volume I: 1968-1970	Part one, II, A	18
2205 (XXI)	Volume I: 1968-1970	Part one, II, E	65
2421 (XXIII)	Volume I: 1968-1970	Part two, I, B, 3	92
2502 (XXIV)	Volume I: 1968-1970	Part two, II, B, 3	127
2635 (XXV)	Volume II: 1971	Part one, I, C	7
2766 (XXVI)	Volume III: 1972	Part one, I, C	7
2928 (XXVII)	Volume IV: 1973	Part one, I, C	8
2929 (XXVII)	Volume IV: 1973	Part one, I, C	8
3104 (XXVIII)	Volume V: 1974	Part one, I, C	10
3108 (XXVIII)	Volume V: 1974	Part one, I, C	10
3316 (XXIX)	Volume VI: 1975	Part one, I, C	6
3317 (XXIX)	Volume VI: 1975	Part three, I, B	297
3494 (XXX)	Volume VII: 1976	Part one, I, C	7
31/98	Volume VIII: 1977	Part one, I, C	7
31/99	Volume VIII: 1977	Part one, I, C	7
31/100	Volume XIII: 1977	Part one, I, C	7
32/145	Volume IX: 1978	Part one, I, C	8
32/438	Volume IX: 1978	Part one, I, C	8
33/92	Volume X: 1979	Part one, I, B	8
33/93	Volume X: 1979	Part one, I, C	8
34/143	Volume XI: 1980	Part one, I, C	4
34/150	Volume XI: 1980	Part three, III	166
35/166	Volume XI: 1980	Part three, III	166
35/51	Volume XI: 1980	Part one, II, D	31
35/52	Volume XI: 1980	Part one, II, D	31
36/32	Volume XII: 1981	Part one, D	20

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
36/107	Volume XII: 1981	Part three, I	269
36/111	Volume XII: 1981	Part three, II	270
37/103	Volume XIII: 1982	Part three, III	425
37/106	Volume XIII: 1982	Part one, D	21
37/107	Volume XIII: 1982	Part one, D	21
38/128	Volume XIV: 1983	Part three, III	275
38/134	Volume XIV: 1983	Part one, D	21
38/135	Volume XIV: 1983	Part one, D	21
39/82	Volume XV: 1984	Part one, D	23
40/71	Volume XVI: 1985	Part one, D	47
40/72	Volume XVI: 1985	Part one, D	47
41/77	Volume XVII: 1986	Part one, D	37
42/152	Volume XVIII: 1987	Part one, D	41
42/153	Volume XVIII: 1987	Part one, E	43
43/165 and annex	Volume XIX: 1988	Part one, D	19
43/166	Volume XIX: 1988	Part one, E	20
44/33	Volume XX: 1989	Part one, E	37
45/42	Volume XXI: 1990	Part one, D	18
46/56	Volume XXII: 1991	Part one, D	47
47/34	Volume XXIII: 1992	Part one, D	25
48/32	Volume XXIV: 1993	Part one, D	39
48/33	Volume XXIV: 1993	Part one, D	40
48/34	Volume XXIV: 1993	Part one, D	40
49/54	Volume XXV: 1994	Part one, D	32
49/55	Volume XXV: 1994	Part one, D	32
50/47	Volume XXVI: 1995	Part one, D	57
51/161	Volume XXVII: 1996	Part one, D	40
51/162	Volume XXVII: 1996	Part one, D	40
52/157	Volume XXVIII: 1997	Part one, D	40
52/158	Volume XXVIII: 1997	Part one, D	40
53/103	Volume XXIX: 1998	Part one, D	32
54/103	Volume XXX: 1999	Part one, D	51
55/151	Volume XXXI: 2000	Part one, D	67
56/79	Volume XXXII: 2001	Part one, D	65
56/80	Volume XXXII: 2001	Part one, D	65
56/81	Volume XXXII: 2001	Part one, D	65
57/17	Volume XXXIII: 2002	Part one, D	45
57/18	Volume XXXIII: 2002	Part one, D	46
57/19	Volume XXXIII: 2002	Part one, D	49
57/20	Volume XXXIII: 2002	Part one, D	49

### 3. Reports of the Sixth Committee

A/5728	Volume I: 1968-1970	Part one, I, A	5
A/6396	Volume I: 1968-1970	Part one, II, B	18
A/6594	Volume I: 1968-1970	Part one, II, D	58
A/7408	Volume I: 1968-1970	Part two, I, B, 2	88
A/7747	Volume I: 1968-1970	Part two, II, B, 2	121
A/8146	Volume II: 1971	Part one, I, B	3
A/8506	Volume III: 1972	Part one, I, B	3
A/8896	Volume IV: 1973	Part one, I, B	3
A/9408	Volume V: 1974	Part one, I, B	3
A/9920	Volume VI: 1975	Part one, I, B	3
A/9711	Volume VI: 1975	Part three, I, A	297
A/10420	Volume VII: 1976	Part one, I, B	3
A/31/390	Volume VIII: 1977	Part one, I, B	3
A/32/402	Volume IX: 1978	Part one, I, B	3
A/33/349	Volume X: 1979	Part one, I, B	3
A/34/780	Volume XI: 1980	Part one, I, B	4
A/35/627	Volume XI: 1980	Part one, II, C	30
A/36/669	Volume XII: 1981	Part one, C	20
A/37/620	Volume XIII: 1982	Part one, C	20
A/38/667	Volume XIV: 1983	Part one, C	20
A/39/698	Volume XV: 1984	Part one, C	22
A/40/935	Volume XVI: 1985	Part one, C	46
A/41/861	Volume XVII: 1986	Part one, C	37
A/42/836	Volume XVIII: 1987	Part one, C	40

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/43/820	Volume XIX: 1988	Part one, C	18
A/C.6/43/L.2	Volume XIX: 1988	Part three, II, A	187
A/43/405 and Add.1-3	Volume XIX: 1988	Part three, II, B	188
A/44/453 and Add.1	Volume XX: 1989	Part one, C	34
A/44/723	Volume XX: 1989	Part one, D	36
A/45/736	Volume XXI: 1990	Part one, C	18
A/46/688	Volume XXII: 1991	Part one, C	46
A/47/586	Volume XXIII: 1992	Part one, C	25
A/48/613	Volume XXIV: 1993	Part one, C	38
A/49/739	Volume XXV: 1994	Part one, C	31
A/50/640	Volume XXVI: 1995	Part one, C	57
A/51/628	Volume XXVII: 1996	Part one, C	39
A/52/649	Volume XXVIII: 1997	Part one, C	40
A/53/632	Volume XXIX: 1998	Part one, C	31
A/54/611	Volume XXX: 1999	Part one, C	50
A/55/608	Volume XXXI: 2000	Part one, C	66
A/56/588	Volume XXXII: 2001	Part one, C	63
A/57/562	Volume XXXIII: 2002	Part one, C	44

#### 4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development

A/7214	Volume I: 1968-1970	Part two, I, B, 1	86
A/7616	Volume I: 1968-1970	Part two, II, B, 1	121
A/8015/Rev.1	Volume II: 1971	Part one, I, A	3
TD/B/C.4/86, annex I	Volume II: 1971	Part two, IV	137
A/8415/Rev.1	Volume III: 1972	Part one, I, A	3
A/8715/Rev.1	Volume IV: 1973	Part one, I, A	3
A/9015/Rev.1	Volume V: 1974	Part one, I, A	3
A/9615/Rev.1	Volume VI: 1975	Part one, I, A	3
A/10015/Rev.1	Volume VII: 1976	Part one, I, A	3
TD/B/617	Volume VIII: 1977	Part one, I, A	3
TD/B/664	Volume IX: 1978	Part one, I, A	3
A/33/15/Vol.II	Volume X: 1979	Part one, I, A	3
A/34/15/Vol.II	Volume XI: 1980	Part one, I, A	3
A/35/15/Vol.II	Volume XI: 1980	Part one, II, B	30
A/36/15/Vol.II	Volume XII: 1981	Part one, B	19
TD/B/930	Volume XIII: 1982	Part one, B	20
TD/B/973	Volume XIV: 1983	Part one, B	20
TD/B/1026	Volume XV: 1984	Part one, B	22
TD/B/1077	Volume XVI: 1985	Part one, B	46
TD/B/L.810/Add.9	Volume XVII: 1986	Part one, B	36
A/42/15	Volume XVIII: 1987	Part one, B	40
TD/B/1193	Volume XIX: 1988	Part one, B	18
TD/B/1234/Vol.II	Volume XX: 1989	Part one, B	33
TD/B/1277/Vol.II	Volume XXI: 1990	Part one, B	18
TD/B/1309/Vol.II	Volume XXII: 1991	Part one, B	46
TD/B/39(1)/15	Volume XXIII: 1992	Part one, B	24
TD/B/40(1)/14 (Vol.I)	Volume XXIV: 1993	Part one, B	37
TD/B/41(1)/14 (Vol.I)	Volume XXV: 1994	Part one, B	31
TD/B/42(1)/19 (Vol.I)	Volume XXVI: 1995	Part one, B	56
TD/B/43/12 (Vol.I)	Volume XXVII: 1996	Part one, B	38
TD/B/44/19 (Vol.I)	Volume XXVIII: 1997	Part one, B	39
TD/B/45/13 (Vol.I)	Volume XXIX: 1998	Part one, B	31
TD/B/46/15 (Vol.I)	Volume XXX: 1999	Part one, B	50
TD/B/47/11 (Vol.I)	Volume XXXI: 2000	Part one, B	66
TD/B/48/18 (Vol.I)	Volume XXXII: 2001	Part one, B	63
TD/B/49/15 (Vol.I)	Volume XXXIII: 2002	Part one, B	43

#### 5. Documents submitted to the Commission (including reports of the meetings of Working Groups)

A/C.6/L.571	Volume I: 1968-1970	Part one, I, B	5
A/C.6/L.572	Volume I: 1968-1970	Part one, I, C	13
A/CN.9/15 and Add.1	Volume I: 1968-1970	Part three, III, B	256
A/CN.9/18	Volume I: 1968-1970	Part three, I, C, 1	207



<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/19	Volume I: 1968-1970	Part three, III, A,1	239
A/CN.9/21 and Corr.1	Volume I: 1968-1970	Part three, IV, A	260
A/CN.9/30	Volume I: 1968-1970	Part three, I, D	218
A/CN.9/31	Volume I: 1968-1970	Part three, I, A, 1	159
A/CN.9/33	Volume I: 1968-1970	Part three, I, B	202
A/CN.9/34	Volume I: 1968-1970	Part three, I, C, 2	216
A/CN.9/35	Volume I: 1968-1970	Part three, I, A, 2	176
A/CN.9/38	Volume I: 1968-1970	Part three, II, A, 2	243
A/CN.9/L.19	Volume I: 1968-1970	Part three, V, A	285
A/CN.9/38/Add.1	Volume II: 1971	Part two, II, 1	113
A/CN.9/41	Volume I: 1968-1970	Part three, II, A	233
A/CN.9/48	Volume II: 1971	Part two, II, 2	114
A/CN.9/50 and annex I-IV	Volume II: 1971	Part two, I, C, 2	87
A/CN.9/52	Volume II: 1971	Part two, I, A, 2	50
A/CN.9/54	Volume II: 1971	Part two, I, B, 1	66
A/CN.9/55	Volume II: 1971	Part two, III	133
A/CN.9/60	Volume II: 1971	Part two, IV	139
A/CN.9/62 and Add.1 and 2	Volume III: 1972	Part two, I, A, 5	77
A/CN.9/63 and Add.1	Volume III: 1972	Part two, IV	251
A/CN.9/64	Volume III: 1972	Part two, III	193
A/CN.9/67	Volume III: 1972	Part two, II, 1	145
A/CN.9/70 and Add.2	Volume III: 1972	Part two, I, B, 1	96
A/CN.9/73	Volume III: 1972	Part two, II, B, 3	115
A/CN.9/74 and annex I	Volume IV: 1973	Part two, IV, 1	137
A/CN.9/75	Volume IV: 1973	Part two, I, A, 3	61
A/CN.9/76 and Add.1	Volume IV: 1973	Part two, IV, 4, 5	59, 200
A/CN.9/77	Volume IV: 1973	Part two, II, 1	101
A/CN.9/78	Volume IV: 1973	Part two, I, B	80
A/CN.9/79	Volume IV: 1973	Part two, III, 1	129
A/CN.9/82	Volume IV: 1973	Part two, V	217
A/CN.9/86	Volume V: 1974	Part two, II, 1	97
A/CN.9/87	Volume V: 1974	Part two, I, 1	29
A/CN.9/87, annex I-IV	Volume V: 1974	Part two, I, 2-5	51
A/CN.9/88 and Add.1	Volume V: 1974	Part two, III, 1 and 2	113
A/CN.9/91	Volume V: 1974	Part two, IV	191
A/CN.9/94 and Add.1 and 2	Volume V: 1974	Part two, V	195
A/CN.9/96 and Add.1	Volume VI: 1975	Part two, IV, 1 and 2	187
A/CN.9/97 and Add.1-4	Volume VI: 1975	Part two, III	163
A/CN.9/98	Volume VI: 1975	Part two, I, 6	114
A/CN.9/99	Volume VI: 1975	Part two, II, 1	121
A/CN.9/100, annex I-IV	Volume VI: 1975	Part two, I, 1-5	49
A/CN.9/101 and Add.1	Volume VI: 1975	Part two, II, 3 and 4	137
A/CN.9/102	Volume VI: 1975	Part two, II, 5	159
A/CN.9/103	Volume VI: 1975	Part two, V	255
A/CN.9/104	Volume VI: 1975	Part two, VI	273
A/CN.9/105	Volume VI: 1975	Part two, IV, 3	222
A/CN.9/105, annex	Volume VI: 1975	Part two, IV, 4	246
A/CN.9/106	Volume VI: 1975	Part two, VIII	283
A/CN.9/107	Volume VI: 1975	Part two, VII	279
A/CN.9/109 and Add.1 and 2	Volume VII: 1976	Part two, IV, 1-3	193
A/CN.9/110	Volume VII: 1976	Part two, IV, 4	263
A/CN.9/112 and Add.1	Volume VII: 1976	Part two, III, 1-2	157
A/CN.9/113	Volume VII: 1976	Part two, III, 3	181
A/CN.9/114	Volume VII: 1976	Part two, III, 4	190
A/CN.9/115	Volume VII: 1976	Part two, IV, 5	299
A/CN.9/116 and annex I and II	Volume VII: 1976	Part two, I, 1-3	87
A/CN.9/117	Volume VII: 1976	Part two, II, 1	143
A/CN.9/119	Volume VII: 1976	Part two, VI	305
A/CN.9/121	Volume VII: 1976	Part two, V	303
A/CN.9/125 and Add.1-3	Volume VIII: 1977	Part two, I, D	109
A/CN.9/126	Volume VIII: 1977	Part two, I, E	142
A/CN.9/127	Volume VIII: 1977	Part two, III	233
A/CN.9/128 and annex I-II	Volume VIII: 1977	Part two, I, A-C	73
A/CN.9/129 and Add.1	Volume VIII: 1977	Part two, VI, A and B	291
A/CN.9/131	Volume VIII: 1977	Part two, II, A	171
A/CN.9/132	Volume VIII: 1977	Part two, II, B	222
A/CN.9/133	Volume VIII: 1977	Part two, IV, A	235
A/CN.9/135	Volume VIII: 1977	Part two, I, F	164

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/137	Volume VIII: 1977	Part two, V	289
A/CN.9/139	Volume VIII: 1977	Part two, IV, B	269
A/CN.9/141	Volume IX: 1978	Part two, II, A	147
A/CN.9/142	Volume IX: 1978	Part two, I, A	61
A/CN.9/143	Volume IX: 1978	Part two, I, C	105
A/CN.9/144	Volume IX: 1978	Part two, I, D	106
A/CN.9/145	Volume IX: 1978	Part two, I, E	121
A/CN.9/146 and Add.1-4	Volume IX: 1978	Part two, I, F	127
A/CN.9/147	Volume IX: 1978	Part two, II, B	160
A/CN.9/148	Volume IX: 1978	Part two, III	179
A/CN.9/149 and Corr.1 and 2	Volume IX: 1978	Part two, IV, A	181
A/CN.9/151	Volume IX: 1978	Part two, V	197
A/CN.9/155	Volume IX: 1978	Part two, IV, B	195
A/CN.9/156	Volume IX: 1978	Part two, IV, C	196
A/CN.9/157	Volume X: 1979	Part two, II, A	61
A/CN.9/159	Volume X: 1979	Part two, I, A	37
A/CN.9/160	Volume X: 1979	Part two, I, B	39
A/CN.9/161	Volume X: 1979	Part two, I, C	40
A/CN.9/163	Volume X: 1979	Part two, II, B	78
A/CN.9/164	Volume X: 1979	Part two, I, D	48
A/CN.9/165	Volume X: 1979	Part two, II, C	81
A/CN.9/166	Volume X: 1979	Part two, III, A	89
A/CN.9/167	Volume X: 1979	Part two, III, B	92
A/CN.9/168	Volume X: 1979	Part two, III, C	100
A/CN.9/169	Volume X: 1979	Part two, III, D	108
A/CN.9/170	Volume X: 1979	Part two, III, E	109
A/CN.9/171	Volume X: 1979	Part two, IV	113
A/CN.9/172	Volume X: 1979	Part two, V	123
A/CN.9/175	Volume X: 1979	Part two, VI	131
A/CN.9/176	Volume XI: 1980	Part two, V, A	117
A/CN.9/177	Volume XI: 1980	Part two, II	39
A/CN.9/178	Volume XI: 1980	Part two, III, A	43
A/CN.9/179	Volume XI: 1980	Part two, IV, A	97
A/CN.9/180	Volume XI: 1980	Part two, IV, B	100
A/CN.9/181 and annex	Volume XI: 1980	Part two, III, B, C	53
A/CN.9/183	Volume XI: 1980	Part two, I	37
A/CN.9/186	Volume XI: 1980	Part two, III, D	89
A/CN.9/187 and Add.1-3	Volume XI: 1980	Part two, IV, C	108
A/CN.9/189	Volume XI: 1980	Part two, IV, D	114
A/CN.9/191	Volume XI: 1980	Part two, V, B	121
A/CN.9/192 and Add.1 and 2	Volume XI: 1980	Part two, VI	137
A/CN.9/193	Volume XI: 1980	Part two, V, C	135
A/CN.9/194	Volume XI: 1980	Part two, V, D	136
A/CN.9/196	Volume XII: 1981	Part two, II, A	49
A/CN.9/197	Volume XII: 1981	Part two, I, A	25
A/CN.9/198	Volume XII: 1981	Part two, IV, A	93
A/CN.9/199	Volume XII: 1981	Part two, II, B	70
A/CN.9/200	Volume XII: 1981	Part two, II, C	70
A/CN.9/201	Volume XII: 1981	Part two, I, C	46
A/CN.9/202 and Add.1-4	Volume XII: 1981	Part two, V, A	191
A/CN.9/203	Volume XII: 1981	Part two, V, B	237
A/CN.9/204	Volume XII: 1981	Part two, VIII	263
A/CN.9/205/Rev.1	Volume XII: 1981	Part two, VI	257
A/CN.9/206	Volume XII: 1981	Part two, VII	259
A/CN.9/207	Volume XII: 1981	Part two, III	75
A/CN.9/208	Volume XII: 1981	Part two, V, C	255
A/CN.9/210	Volume XIII: 1982	Part two, II, A, 1	43
A/CN.9/211	Volume XIII: 1982	Part two, II, A, 3	109
A/CN.9/212	Volume XIII: 1982	Part two, II, A, 5	186
A/CN.9/213	Volume XIII: 1982	Part two, II, A, 4	122
A/CN.9/214	Volume XIII: 1982	Part two, II, A, 6	197
A/CN.9/215	Volume XIII: 1982	Part two, II, B, 1	252
A/CN.9/216	Volume XIII: 1982	Part two, III, A	287
A/CN.9/217	Volume XIII: 1982	Part two, IV, A	315
A/CN.9/218	Volume XIII: 1982	Part two, I, A	27
A/CN.9/219 and Add.1(F-Corr.1)	Volume XIII: 1982	Part two, I, B	34
A/CN.9/220	Volume XIII: 1982	Part two, II, B, 3	270
A/CN.9/221	Volume XIII: 1982	Part two, II, C	272

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/222	Volume XIII: 1982	Part two, III, C	311
A/CN.9/223	Volume XIII: 1982	Part two, II, A, 7	251
A/CN.9/224	Volume XIII: 1982	Part two, V	391
A/CN.9/225	Volume XIII: 1982	Part two, VI, B	399
A/CN.9/226	Volume XIII: 1982	Part two, VI, A	397
A/CN.9/227	Volume XIII: 1982	Part two, VII	413
A/CN.9/228	Volume XIII: 1982	Part two, VIII	415
A/CN.9/229	Volume XIII: 1982	Part two, VI, C	409
A/CN.9/232	Volume XIV: 1983	Part two, III, A	33
A/CN.9/233	Volume XIV: 1983	Part two, III, C	60
A/CN.9/234	Volume XIV: 1983	Part two, IV, A	95
A/CN.9/235	Volume XIV: 1983	Part two, I	27
A/CN.9/236	Volume XIV: 1983	Part two, V, C	168
A/CN.9/237 and Add.1-3	Volume XIV: 1983	Part two, V, B	134
A/CN.9/238	Volume XIV: 1983	Part two, V, D	174
A/CN.9/239	Volume XIV: 1983	Part two, V, A	132
A/CN.9/240	Volume XIV: 1983	Part two, VII	192
A/CN.9/241	Volume XIV: 1983	Part two, VI	189
A/CN.9/242	Volume XIV: 1983	Part two, II	32
A/CN.9/245	Volume XV: 1984	Part two, II, A, 1	155
A/CN.9/246 and annex	Volume XV: 1984	Part two, II, B,1 and 2	189
A/CN.9/247	Volume XV: 1984	Part two, III, A	235
A/CN.9/248	Volume XV: 1984	Part two, I, A, 1	27
A/CN.9/249 and Add.1	Volume XV: 1984	Part two, I, A, 2	106
A/CN.9/250 and Add.1-4	Volume XV: 1984	Part two, I, B	115
A/CN.9/251	Volume XV: 1984	Part two, V, B	315
A/CN.9/252 and annex I and II	Volume XV: 1984	Part two, IV, A and B	287
A/CN.9/253	Volume XV: 1984	Part two, V, C	324
A/CN.9/254	Volume XV: 1984	Part two, V, D	328
A/CN.9/255	Volume XV: 1984	Part two, V, A	313
A/CN.9/256	Volume XV: 1984	Part two, VII	335
A/CN.9/257	Volume XV: 1984	Part two, VI	333
A/CN.9/259	Volume XVI: 1985	Part two, III, A, 1	199
A/CN.9/260	Volume XVI: 1985	Part two, IV, A	327
A/CN.9/261	Volume XVI: 1985	Part two, II, A	143
A/CN.9/262	Volume XVI: 1985	Part two, III, B, 1	250
A/CN.9/263 and Add.1-3	Volume XVI: 1985	Part two, I, A	53
A/CN.9/264	Volume XVI: 1985	Part two, I, B	104
A/CN.9/265	Volume XVI: 1985	Part two, V	351
A/CN.9/266 and Add.1 and 2	Volume XVI: 1985	Part two, II, B	152
A/CN.9/267	Volume XVI: 1985	Part two, IX	387
A/CN.9/268	Volume XVI: 1985	Part two, III, C	325
A/CN.9/269	Volume XVI: 1985	Part two, VI	367
A/CN.9/270	Volume XVI: 1985	Part two, VIII	385
A/CN.9/271	Volume XVI: 1985	Part two, VII	381
A/CN.9/273	Volume XVII: 1986	Part two, I, A, 1	41
A/CN.9/274	Volume XVII: 1986	Part two, I, A, 2	58
A/CN.9/275	Volume XVII: 1986	Part two, III, A	179
A/CN.9/276	Volume XVII: 1986	Part two, II, A	85
A/CN.9/277	Volume XVII: 1986	Part two, II, C	165
A/CN.9/278	Volume XVII: 1986	Part two, I, B	81
A/CN.9/279	Volume XVII: 1986	Part two, V	237
A/CN.9/280	Volume XVII: 1986	Part two, IV	221
A/CN.9/281	Volume XVII: 1986	Part two, VI	251
A/CN.9/282	Volume XVII: 1986	Part two, VIII	297
A/CN.9/283	Volume XVII: 1986	Part two, VII	291
A/CN.9/285	Volume XVII: 1986	Part two, I, A, 4	78
A/CN.9/287	Volume XVIII: 1987	Part two, III, A	111
A/CN.9/288	Volume XVIII: 1987	Part two, I, 1	47
A/CN.9/289	Volume XVIII: 1987	Part two, II, A, 1	101
A/CN.9/290	Volume XVIII: 1987	Part two, II, A, 4	107
A/CN.9/291	Volume XVIII: 1987	Part two, II, B	108
A/CN.9/292	Volume XVIII: 1987	Part two	135
A/CN.9/293	Volume XVIII: 1987	Part two, VI	145
A/CN.9/294	Volume XVIII: 1987	Part two, V	139
A/CN.9/297	Volume XIX: 1988	Part two, I, A, 1	25
A/CN.9/298	Volume XIX: 1988	Part two, II, A	63
A/CN.9/299	Volume XIX: 1988	Part two, X, B	165

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/300	Volume XIX: 1988	Part two, X, A	163
A/CN.9/301	Volume XIX: 1988	Part two, I, B	46
A/CN.9/302	Volume XIX: 1988	Part two, III	87
A/CN.9/303	Volume XIX: 1988	Part two, IX	149
A/CN.9/304	Volume XIX: 1988	Part two, VII, A	125
A/CN.9/305	Volume XIX: 1988	Part two, VII, B	130
A/CN.9/306	Volume XIX: 1988	Part two, IV	103
A/CN.9/307	Volume XIX: 1988	Part two, V, A	109
A/CN.9/308	Volume XIX: 1988	Part two, V, B	113
A/CN.9/309	Volume XIX: 1988	Part two, VI	117
A/CN.9/310	Volume XIX: 1988	Part two, VII, D	140
A/CN.9/311	Volume XIX: 1988	Part two, VIII	143
A/CN.9/312	Volume XIX: 1988	Part two, VII, C	136
A/CN.9/315	Volume XX: 1989	Part two, II, A	103
A/CN.9/316	Volume XX: 1989	Part two, IV, A	183
A/CN.9/317	Volume XX: 1989	Part two, I, A	41
A/CN.9/318	Volume XX: 1989	Part two, I, C	69
A/CN.9/319 and Add.1-5	Volume XX: 1989	Part two, III, A	151
A/CN.9/320	Volume XX: 1989	Part two, III, B	176
A/CN.9/321	Volume XX: 1989	Part two, III, C	181
A/CN.9/322	Volume XX: 1989	Part two, V	207
A/CN.9/323	Volume XX: 1989	Part two, VIII	249
A/CN.9/324	Volume XX: 1989	Part two, VI	217
A/CN.9/325	Volume XX: 1989	Part two, VII	243
A/CN.9/328	Volume XXI: 1990	Part two, I, A	23
A/CN.9/329	Volume XXI: 1990	Part two, I, D	70
A/CN.9/330	Volume XXI: 1990	Part two, IV, A	227
A/CN.9/331	Volume XXI: 1990	Part two, II, A	117
A/CN.9/332 and Add.1-7	Volume XXI: 1990	Part two, III	185
A/CN.9/333	Volume XXI: 1990	Part two, V	253
A/CN.9/334	Volume XXI: 1990	Part two, VI	267
A/CN.9/335	Volume XXI: 1990	Part two, IX	297
A/CN.9/336	Volume XXI: 1990	Part two, VII	269
A/CN.9/337	Volume XXI: 1990	Part two, VIII	291
A/CN.9/338	Volume XXI: 1990	Part two, X	301
A/CN.9/341	Volume XXII: 1991	Part two, I, C	144
A/CN.9/342	Volume XXII: 1991	Part two, III, A	311
A/CN.9/343	Volume XXII: 1991	Part two, II, A	261
A/CN.9/344	Volume XXII: 1991	Part two, I, E	195
A/CN.9/345	Volume XXII: 1991	Part two, III, C	340
A/CN.9/346	Volume XXII: 1991	Part two, I, A	51
A/CN.9/347 and Add.1	Volume XXII: 1991	Part two, I, B	102
A/CN.9/348	Volume XXII: 1991	Part two, V, B	399
A/CN.9/349	Volume XXII: 1991	Part two, VIII	447
A/CN.9/350	Volume XXII: 1991	Part two, IV	381
A/CN.9/351	Volume XXII: 1991	Part two, VI	443
A/CN.9/352	Volume XXII: 1991	Part two, V,	399
A/CN.9/353	Volume XXII: 1991	Part two, VI	435
A/CN.9/356	Volume XXIII: 1992	Part two, III, A	197
A/CN.9/357	Volume XXIII: 1992	Part two, II, A	37
A/CN.9/358	Volume XXIII: 1992	Part two, IV, A	291
A/CN.9/359	Volume XXIII: 1992	Part two, III, C	247
A/CN.9/360	Volume XXIII: 1992	Part two, V, A	347
A/CN.9/361	Volume XXIII: 1992	Part two, IV, C	327
A/CN.9/362 and Add.1 to 17	Volume XXIII: 1992	Part two, II, C	91
A/CN.9/363	Volume XXIII: 1992	Part two, VIII	395
A/CN.9/364	Volume XXIII: 1992	Part two, VI, A	383
A/CN.9/367	Volume XXIII: 1992	Part two, I, A	29
A/CN.9/368	Volume XXIII: 1992	Part two, VII	387
A/CN.9/371	Volume XXIV: 1993	Part two, I, A	43
A/CN.9/372	Volume XXIV: 1993	Part two, II, A	139
A/CN.9/373	Volume XXIV: 1993	Part two, III, A	199
A/CN.9/374 and Corr.1	Volume XXIV: 1993	Part two, II, C	175
A/CN.9/375	Volume XXIV: 1993	Part two, I, C	102
A/CN.9/376 and Add.1 and 2	Volume XXIV: 1993	Part two, I, D	120
A/CN.9/377	Volume XXIV: 1993	Part two, I, E	136
A/CN.9/378 and Add.1 to 5	Volume XXIV: 1993	Part two, IV, A to F	227
A/CN.9/379	Volume XXIV: 1993	Part two, VII	293

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/380	Volume XXIV: 1993	Part two, V	261
A/CN.9/381	Volume XXIV: 1993	Part two, VI	285
A/CN.9/384	Volume XXV: 1994	Part two, VI, A	245
A/CN.9/385	Volume XXV: 1994	Part two, VII	257
A/CN.9/386	Volume XXV: 1994	Part two, VI, B	251
A/CN.9/387	Volume XXV: 1994	Part two, III, A	149
A/CN.9/388	Volume XXV: 1994	Part two, II, A	113
A/CN.9/389	Volume XXV: 1994	Part two, I, A	37
A/CN.9/390	Volume XXV: 1994	Part two, III, C	186
A/CN.9/391	Volume XXV: 1994	Part two, II, C	133
A/CN.9/392	Volume XXV: 1994	Part two, I, C	59
A/CN.9/393	Volume XXV: 1994	Part three, I	321
A/CN.9/394	Volume XXV: 1994	Part two, I, E	108
A/CN.9/395	Volume XXV: 1994	Part two, VIII	263
A/CN.9/396 and Add. 1	Volume XXV: 1994	Part two, IV	211
A/CN.9/397	Volume XXV: 1994	Part two, V, A	229
A/CN.9/398	Volume XXV: 1994	Part two, V, B	239
A/CN.9/399	Volume XXV: 1994	Part two, V, C	242
A/CN.9/400	Volume XXV: 1994	Part two, X	299
A/CN.9/401	Volume XXV: 1994	Part two, IX, A	287
A/CN.9/401/Add.1	Volume XXV: 1994	Part two, IX, B	294
A/CN.9/403	Volume XXV: 1994	Part three, II	323
A/CN.9/405	Volume XXVI: 1995	Part two, I, A	67
A/CN.9/406	Volume XXVI: 1995	Part two, II, A	111
A/CN.9/407	Volume XXVI: 1995	Part two, II, C	141
A/CN.9/408	Volume XXVI: 1995	Part two, I, C	91
A/CN.9/409 and Add.1-4	Volume XXVI: 1995	Part two, II, E	177
A/CN.9/410	Volume XXVI: 1995	Part two, III	195
A/CN.9/411	Volume XXVI: 1995	Part two, I, D	108
A/CN.9/412	Volume XXVI: 1995	Part two, IV, C	217
A/CN.9/413	Volume XXVI: 1995	Part two, IV, A	207
A/CN.9/414	Volume XXVI: 1995	Part two, IV, B	210
A/CN.9/415	Volume XXVI: 1995	Part two, VI	237
A/CN.9/416	Volume XXVI: 1995	Part two, V	229
A/CN.9/419 and Corr.1 (English only)	Volume XXVII:1996	Part two, III, A	113
A/CN.9/420	Volume XXVII:1996	Part two, IV	181
A/CN.9/421	Volume XXVII:1996	Part two, II, A	59
A/CN.9/422	Volume XXVII:1996	Part two, III, C	148
A/CN.9/423	Volume XXVII:1996	Part two, I, A	45
A/CN.9/424	Volume XXVII:1996	Part two, V	207
A/CN.9/425	Volume XXVII:1996	Part two, I, B	56
A/CN.9/426	Volume XXVII:1996	Part two, II, C	95
A/CN.9/427	Volume XXVII:1996	Part two, VII	229
A/CN.9/428	Volume XXVII:1996	Part two, VI	221
A/CN.9/431	Volume XXVIII:1997	Part two, V	289
A/CN.9/432	Volume XXVIII:1997	Part two, II, B	121
A/CN.9/433	Volume XXVIII:1997	Part two, I, B	45
A/CN.9/434	Volume XXVIII:1997	Part two, II, D	169
A/CN.9/435	Volume XXVIII:1997	Part two, I, D	72
A/CN.9/436	Volume XXVIII:1997	Part two, I, E	107
A/CN.9/437	Volume XXVIII:1997	Part two, III, B	219
A/CN.9/438 and Add.1-3	Volume XXVIII:1997	Part two, IV	259
A/CN.9/439	Volume XXVIII:1997	Part two, VIII	299
A/CN.9/440	Volume XXVIII:1997	Part two, VII	297
A/CN.9/444 and Add.1-5	Volume XXIX: 1998	Part two, III	183
A/CN.9/445	Volume XXIX: 1998	Part two, I, A	37
A/CN.9/446	Volume XXIX: 1998	Part two, II, A	131
A/CN.9/447	Volume XXIX: 1998	Part two, I, C	88
A/CN.9/448	Volume XXIX: 1998	Part two, VI	253
A/CN.9/449	Volume XXIX: 1998	Part two, V	251
A/CN.9/450	Volume XXIX: 1998	Part two, II, D	180
A/CN.9/454	Volume XXX: 1999	Part two, II, A	165
A/CN.9/455	Volume XXX: 1999	Part two, I, A	55
A/CN.9/456	Volume XXX: 1999	Part two, I, E	107
A/CN.9/457	Volume XXX: 1999	Part two, II, D	210
A/CN.9/458 and Add.1-9	Volume XXX: 1999	Part two, III	247
A/CN.9/459 and Add.1	Volume XXX: 1999	Part two, IV	375

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/460	Volume XXX: 1999	Part two, V	395
A/CN.9/461	Volume XXX: 1999	Part two, IX	423
A/CN.9/462	Volume XXX: 1999	Part two, VIII	421
A/CN.9/462/Add.1	Volume XXX: 1999	Part two, VI	415
A/CN.9/465	Volume XXXI: 2000	Part two, III, A	383
A/CN.9/466	Volume XXXI: 2000	Part two, II, A	193
A/CN.9/467	Volume XXXI: 2000	Part two, III, C	428
A/CN.9/468	Volume XXXI: 2000	Part two, IV, A	477
A/CN.9/469	Volume XXXI: 2000	Part two, V, A	517
A/CN.9/470	Volume XXXI: 2000	Part two, II, E	290
A/CN.9/471 and Add.1-9	Volume XXXI: 2000	Part two, I	71
A/CN.9/472 and Add.1-4	Volume XXXI: 2000	Part two, II, F	347
A/CN.9/473	Volume XXXI: 2000	Part two, IX	635
A/CN.9/474	Volume XXXI: 2000	Part two, VIII	633
A/CN.9/475	Volume XXXI: 2000	Part two, V, C	557
A/CN.9/476	Volume XXXI: 2000	Part two, V, D	570
A/CN.9/477	Volume XXXI: 2000	Part two, VI, A	579
A/CN.9/478	Volume XXXI: 2000	Part two, VI, B	594
A/CN.9/479	Volume XXXI: 2000	Part two, VI, C	599
A/CN.9/483	Volume XXXII: 2001	Part two, II, A	181
A/CN.9/484	Volume XXXII: 2001	Part two, II, C	226
A/CN.9/485 and Corr.1	Volume XXXII: 2001	Part two, III, A	341
A/CN.9/486	Volume XXXII: 2001	Part two, I, A	71
A/CN.9/487	Volume XXXII: 2001	Part two, III, D	389
A/CN.9/488	Volume XXXII: 2001	Part two, V, A	431
A/CN.9/489 and Add.1	Volume XXXII: 2001	Part two, I, B	105
A/CN.9/490 and Add.1-5	Volume XXXII: 2001	Part two, I, C	152
A/CN.9/491 and Add.1	Volume XXXII: 2001	Part two, I, D	171
A/CN.9/492 and Add. 1-3	Volume XXXII: 2001	Part two, II, I	303
A/CN.9/493	Volume XXXII: 2001	Part two, II, J	313
A/CN.9/494	Volume XXXII: 2001	Part two, VIII	471
A/CN.9/495	Volume XXXII: 2001	Part two, IV	425
A/CN.9/496	Volume XXXII: 2001	Part two, V, B	434
A/CN.9/497	Volume XXXII: 2001	Part two, V, C	455
A/CN.9/498	Volume XXXII: 2001	Part two, VI	463
A/CN.9/499	Volume XXXII: 2001	Part two, IX, B	480
A/CN.9/500	Volume XXXII: 2001	Part two, IX, A	477
A/CN.9/501	Volume XXXII: 2001	Part two, VII	469
A/CN.9/504	Volume XXXIII: 2002	Part two, III, A	179
A/CN.9/505	Volume XXXIII: 2002	Part two, II	161
A/CN.9/506	Volume XXXIII: 2002	Part two, I, A	53
A/CN.9/507	Volume XXXIII: 2002	Part two, III, D	246
A/CN.9/508	Volume XXXIII: 2002	Part two, I, D	99
A/CN.9/509	Volume XXXIII: 2002	Part two, IV, A	371
A/CN.9/510	Volume XXXIII: 2002	Part two, VI, A	523
A/CN.9/511	Volume XXXIII: 2002	Part two, III, H	334
A/CN.9/512	Volume XXXIII: 2002	Part two, V, A	439
A/CN.9/513 and Add.1-2	Volume XXXIII: 2002	Part two, I, G	136
A/CN.9/514	Volume XXXIII: 2002	Part two, I, H	145
A/CN.9/515	Volume XXXIII: 2002	Part two, IX	607
A/CN.9/516	Volume XXXIII: 2002	Part two, VIII	605
A/CN.9/518	Volume XXXIII: 2002	Part two, III, J	367

## 6. Documents submitted to Working Groups

### (a) Working Group I

#### (i) Time limits and Limitation (Prescription)

A/CN.9/WG.1/WP.9	Volume II: 1971	Part two, I, C, 1	74
------------------	-----------------	-------------------	----

### (b) Working Group II

#### (i) International Sale of Goods

A/CN.9/WG.2/WP.1	Volume I: 1968-1979	Part three, I, A, 2	188
A/CN.9/WG.2/WP.6	Volume II: 1971	Part two, I, A, 1	37

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/WG.2/WP.8	Volume III: 1972	Part two, I, A, 1	31
A/CN.9/WG.2/WP.9	Volume III: 1972	Part two, I, A, 2	41
A/CN.9/WG.2/WP.10	Volume III: 1972	Part two, I, A, 3	54
A/CN.9/WG.2/WP.11	Volume III: 1972	Part two, I, A, 4	69
A/CN.9/WG.2/WP.15	Volume IV: 1973	Part two, I, A, 1	31
A/CN.9/WG.2/WP.16	Volume IV: 1973	Part two, I, A, 2	36
A/CN.9/WG.2/WP.15/Add.1	Volume V: 1974	Part two, I, 3	60
A/CN.9/WG.2/WP.17/Add.1	Volume V: 1974	Part two, I, 4	65
A/CN.9/WG.2/WP.17/Add.2	Volume V: 1974	Part two, I, 4	65
A/CN.9/WG.2/WP.20	Volume VI: 1975	Part two, I, 4	88
A/CN.9/WG.2/WP.2 and Add.1 and 2	Volume VI: 1975	Part two, I, 3	70
A/CN.9/WG.2/WP.26 and Add.1 and appendix I	Volume VIII: 1977	Part two, I, C	90
A/CN.9/WG.2/WP.27	Volume IX: 1978	Part two, I, B	85
A/CN.9/WG.2/WP.28	Volume IX: 1978	Part two, I, B	85

(ii) *International Contract Practices*

A/CN.9/WG.II/WP.33 and Add.1	Volume XII: 1981	Part two, I, B, 1 and 2	30
A/CN.9/WG.II/WP.35	Volume XIII: 1982	Part two, III, B	302
A/CN.9/WG.II/WP.37	Volume XIV: 1983	Part two, III, B, 1	51
A/CN.9/WG.II/WP.38	Volume XIV: 1983	Part two, III, B, 2	56
A/CN.9/WG.II/WP.40	Volume XIV: 1983	Part two, III, D, 1	78
A/CN.9/WG.II/WP.41	Volume XIV: 1983	Part two, III, D, 2	85
A/CN.9/WG.II/WP.42	Volume XIV: 1983	Part two, III, D, 3	91
A/CN.9/WG.II/WP.44	Volume XV: 1984	Part two, II, A, 2(a)	179
A/CN.9/WG.II/WP.45	Volume XV: 1984	Part two, II, A, 2(b)	183
A/CN.9/WG.II/WP.46	Volume XV: 1984	Part two, II, A, 2(c)	187
A/CN.9/WG.II/WP.48	Volume XV: 1984	Part two, II, B, 3(a)	218
A/CN.9/WG.II/WP.49	Volume XV: 1984	Part two, II, B, 3(b)	227
A/CN.9/WG.II/WP.50	Volume XV: 1984	Part two, II, B, 3(c)	230
A/CN.9/WG.II/WP.52 and Add.1	Volume XVI: 1985	Part two, IV, B, 1	340
A/CN.9/WG.II/WP.53	Volume XVI: 1985	Part two, IV, B, 3	347
A/CN.9/WG.II/WP.55	Volume XVII: 1986	Part two, III, B, 1	193
A/CN.9/WG.II/WP.56	Volume XVII: 1986	Part two, III, B, 2	207
A/CN.9/WG.II/WP.58	Volume XVIII: 1987	Part two, III, B	127
A/CN.9/WG.II/WP.60	Volume XIX: 1988	Part two, II, B	79
A/CN.9/WG.II/WP.62	Volume XX: 1989	Part two, IV, B, 1	200
A/CN.9/WG.II/WP.63	Volume XX: 1989	Part two, IV, B, 2	203
A/CN.9/WG.II/WP.65	Volume XXI: 1990	Part two, IV, B	238
A/CN.9/WG.II/WP.67	Volume XXII: 1991	Part two, III, B, 1	324
A/CN.9/WG.II/WP.68	Volume XXII: 1991	Part two, III, B, 2	330
A/CN.9/WG.II/WP.70	Volume XXII: 1991	Part two, III, D, 1	352
A/CN.9/WG.II/WP.71	Volume XXII: 1991	Part two, III, D, 2	371
A/CN.9/WG.II/WP.73 and Add.1	Volume XXIII: 1992	Part two, IV, B	313
A/CN.9/WG.II/WP.76 and Add.1	Volume XXIV: 1993	Part two, II, B, 1	155
A/CN.9/WG.II/WP.77	Volume XXIV: 1993	Part two, II, B, 2	168
A/CN.9/WG.II/WP.80	Volume XXV: 1994	Part two, II, B	129
A/CN.9/WG.II/WP.83	Volume XXVI: 1995	Part two, I, B	86
A/CN.9/WG.II/WP.87	Volume XXVIII: 1997	Part two, II, B	152
A/CN.9/WG.II/WP.89	Volume XXVIII: 1997	Part two, II, D, 1	200
A/CN.9/WG.II/WP.90	Volume XXVIII: 1997	Part two, II, D, 2	212
A/CN.9/WG.II/WP.91	Volume XXVIII: 1997	Part two, II, D, 3	216
A/CN.9/WG.II/WP.93	Volume XXIX: 1998	Part two, I, B	66
A/CN.9/WG.II/WP.96	Volume XXIX: 1998	Part two, I, D	109
A/CN.9/WG.II/WP.98	Volume XXX: 1999	Part two, I, B	82
A/CN.9/WG.II/WP.99	Volume XXX: 1999	Part two, I, C	100
A/CN.9/WG.II/WP.100	Volume XXX: 1999	Part two, I, D	106
A/CN.9/WG.II/WP.102	Volume XXX: 1999	Part two, I, F	145
A/CN.9/WG.II/WP.104	Volume XXXI: 2000	Part two, I, B	230
A/CN.9/WG.II/WP.105	Volume XXXI: 2000	Part two, I, C	253
A/CN.9/WG.II/WP.106	Volume XXXI: 2000	Part two, I, D	269

(iii) *International Commercial Arbitration*

A/CN.9/WG.II/WP.108 and Add.1	Volume XXXI: 2000	Part two, IV, B	493
A/CN.9/WG.II/WP.110	Volume XXXII: 2001	Part two, III, B	364

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/WG.II/WP.111	Volume XXXII: 2001	Part two, III, C	383
A/CN.9/WG.II/WP.113 and Add.1	Volume XXXII: 2001	Part two, III, E	411
A/CN.9/WG.II/WP.115	Volume XXXIII: 2002	Part two, I, B	78
A/CN.9/WG.II/WP.116	Volume XXXIII: 2002	Part two, I, C	89
A/CN.9/WG.II/WP.118	Volume XXXIII: 2002	Part two, I, E	113
A/CN.9/WG.II/WP.119	Volume XXXIII: 2002	Part two, I, F	120
<b>(c) Working Group III</b>			
<i>(i) International Legislation on Shipping</i>			
A/CN.9/WG.III/WP.6	Volume IV: 1973	Part two, IV, 2	146
A/CN.9/WG.III/WP.7	Volume IV: 1973	Part two, IV, 3	155
A/CN.9/WG.III/WP.11	Volume V: 1974	Part two, III, 3	165
<i>(ii) Transport Law</i>			
A/CN.9/WG.III/WP.21 and Add.1	Volume XXXIII: 2002	Part two, IV, B	552
<b>(d) Working Group IV</b>			
<i>(i) International Negotiable Instruments</i>			
A/CN.9/WG.IV/WP.2	Volume IV: 1973	Part two, II, 2	117
A/CN.9/WG.IV/CRP.5	Volume VI: 1975	Part two, II, 2	136
A/CN.9/WG.IV/WP.21	Volume XIII: 1982	Part two, II, A, 2(a)	72
A/CN.9/WG.IV/WP.22	Volume XIII: 1982	Part two, II, A, 2(b)	77
A/CN.9/WG.IV/WP.23	Volume XIII: 1982	Part two, II, A, 2(c)	80
A/CN.9/WG.IV/WP.24 and Add.1 and 2	Volume XIII: 1982	Part two, II, A, 2(d-f)	81
A/CN.9/WG.IV/WP.25 and Add.1	Volume XIII: 1982	Part two, II, A, 2(g,h)	98
A/CN.9/WG.IV/WP.27	Volume XIII: 1982	Part two, II, B, 2	262
A/CN.9/WG.IV/WP.30	Volume XVII: 1986	Part two, I, A, 3	72
A/CN.9/WG.IV/WP.32 and Add.1-10	Volume XVIII: 1987	Part two, I, 2	66
A/CN.9/WG.IV/WP.33	Volume XVIII: 1987	Part two, I, 3	99
<i>(ii) International Payments</i>			
A/CN.9/WG.IV/WP.35	Volume XIX: 1988	Part two, I, A, 2	35
A/CN.9/WG.IV/WP.37	Volume XX: 1989	Part two, I, B	56
A/CN.9/WG.IV/WP.39	Volume XX: 1989	Part two, I, D	88
A/CN.9/WG.IV/WP.41	Volume XXI: 1990	Part two, I, B	42
A/CN.9/WG.IV/WP.42	Volume XXI: 1990	Part two, I, C	60
A/CN.9/WG.IV/WP.44	Volume XXI: 1990	Part two, I, E	90
A/CN.9/WG.IV/WP.46 and Corr.1	Volume XXII: 1991	Part two, I, D, 1	162
A/CN.9/WG.IV/WP.47	Volume XXII: 1991	Part two, I, D, 2	193
A/CN.9/WG.IV/WP.49	Volume XXII: 1991	Part two, I, F	214
A/CN.9/WG.IV/WP.51	Volume XXIII: 1992	Part two, II, B	47
<i>(iii) Electronic Commerce</i>			
A/CN.9/WG.IV/WP.53	Volume XXIII: 1992	Part two, V, B	365
A/CN.9/WG.IV/WP.55	Volume XXIV: 1993	Part two, III, B	208
A/CN.9/WG.IV/WP.57	Volume XXV: 1994	Part two, III, B, 1	173
A/CN.9/WG.IV/WP.58	Volume XXV: 1994	Part two, III, B, 2	183
A/CN.9/WG.IV/WP.60	Volume XXV: 1994	Part two, III, D	205
A/CN.9/WG.IV/WP.62	Volume XXVI: 1995	Part two, II, B	138
A/CN.9/WG.IV/WP.64	Volume XXVI: 1995	Part two, II, D, 1	157
A/CN.9/WG.IV/WP.65	Volume XXVI: 1995	Part two, II, D, 2	171
A/CN.9/WG.IV/WP.66	Volume XXVI: 1995	Part two, II, D, 3	172
A/CN.9/WG.IV/WP.67	Volume XXVI: 1995	Part two, II, D, 4	175
A/CN.9/WG.IV/WP.69	Volume XXVII: 1996	Part two, II, B	79
A/CN.9/WG.IV/WP.71	Volume XXVIII: 1997	Part two, III, A	242
A/CN.9/WG.IV/WP.73	Volume XXIX: 1998	Part two, II, B	162
A/CN.9/WG.IV/WP.74	Volume XXIX: 1998	Part two, II, C	178



<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/WG.IV/WP.76	Volume XXX: 1999	Part two, II, B	191
A/CN.9/WG.IV/WP.77	Volume XXX: 1999	Part two, II, C	205
A/CN.9/WG.IV/WP.79	Volume XXX: 1999	Part two, II, E	227
A/CN.9/WG.IV/WP.80	Volume XXX: 1999	Part two, II, F	241
A/CN.9/WG.IV/WP.82	Volume XXXI: 2000	Part two, III, B	404
A/CN.9/WG.IV/WP.84	Volume XXXI: 2000	Part two, III, B	448
A/CN.9/WG.IV/WP.86 and Add.1	Volume XXXII: 2001	Part two, II, B	204
A/CN.9/WG.IV/WP.88	Volume XXXII: 2001	Part two, II, D	244
A/CN.9/WG.IV/WP.89	Volume XXXII: 2001	Part two, II, E	270
A/CN.9/WG.IV/WP.90	Volume XXXII: 2001	Part two, II, F	277
A/CN.9/WG.IV/WP.91	Volume XXXII: 2001	Part two, II, G	294
A/CN.9/WG.IV/WP.93	Volume XXXII: 2001	Part two, II, H	302
A/CN.9/WG.IV/WP.94	Volume XXXIII: 2002	Part two, IV, B	387
A/CN.9/WG.IV/WP.95	Volume XXXIII: 2002	Part two, IV, C	406
A/CN.9/WG.IV/WP.96	Volume XXXIII: 2002	Part two, IV, D	425

(e) *Working Group V*

(i) *New International Economic Order*

A/CN.9/WG.V/WP.4 and Add.1-8	Volume XII: 1981	Part two, IV, B, 1	100
A/CN.9/WG.V/WP.5	Volume XII: 1981	Part two, IV, B, 2	189
A/CN.9/WG.V/WP.7 and Add.1-6	Volume XIII: 1982	Part two, IV, B	326
A/CN.9/WG.V/WP.9 and Add.1-5	Volume XIV: 1983	Part two, IV, B	99
A/CN.9/WG.V/WP.11 and Add.1-9	Volume XV: 1984	Part two, III, B	247
A/CN.9/WG.V/WP.13 and Add.1-6	Volume XVI: 1985	Part two, III, A, 2	215
A/CN.9/WG.V/WP.15 and Add.1-10	Volume XVI: 1985	Part two, III, B, 2	269
A/CN.9/WG.V/WP.17 and Add.1-9	Volume XVII: 1986	Part two, II, B	107
A/CN.9/WG.V/WP.19	Volume XVIII: 1987	Part two, II, A, 2	103
A/CN.9/WG.V/WP.20	Volume XVIII: 1987	Part two, II, A, 3	104
A/CN.9/WG.V/WP.22	Volume XX: 1989	Part two, II, B	116
A/CN.9/WG.V/WP.24	Volume XXI: 1990	Part two, II, B	138
A/CN.9/WG.V/WP.25	Volume XXI: 1990	Part two, II, C	150
A/CN.9/WG.V/WP.27	Volume XXII: 1991	Part two, II, B, 1	283
A/CN.9/WG.V/WP.28	Volume XXII: 1991	Part two, II, B, 2	291
A/CN.9/WG.V/WP.30	Volume XXIII: 1992	Part two, III, B, 1	221
A/CN.9/WG.V/WP.31	Volume XXIII: 1992	Part two, III, B, 2	243
A/CN.9/WG.V/WP.33	Volume XXIII: 1992	Part two, III, D, 2	273
A/CN.9/WG.V/WP.34	Volume XXIII: 1992	Part two, III, D,	287
A/CN.9/WG.V/WP.36	Volume XXIV: 1993	Part two, I, B	79
A/CN.9/WG.V/WP.38	Volume XXV: 1994	Part two, I, B	56
A/CN.9/WG.V/WP.40	Volume XXV: 1994	Part two, I, D	89

(ii) *Cross-Border Insolvency*

A/CN.9/WG.V/WP.42	Volume XXVII: 1996	Part two, III, B	136
A/CN.9/WG.V/WP.44	Volume XXVII: 1996	Part two, III, D	169
A/CN.9/WG.V/WP.46	Volume XXVIII: 1997	Part two, I, B	65
A/CN.9/WG.V/WP.48	Volume XXVIII: 1997	Part two, I, D	97
A/CN.9/WG.V/WP.50	Volume XXXI: 2000	Part two, V, B	535
A/CN.9/WG.V/WP.54 and Add.1-2	Volume XXXIII: 2002	Part two, III, B	199
A/CN.9/WG.V/WP.55	Volume XXXIII: 2002	Part two, III, C	238
A/CN.9/WG.V/WP.57	Volume XXXIII: 2002	Part two, III, E	275
A/CN.9/WG.V/WP.58	Volume XXXIII: 2002	Part two, III, F	286
A/CN.9/WG.V/WP.59	Volume XXXIII: 2002	Part two, III, G	332
A/CN.9/WG.V/WP.61 and Add.1-2	Volume XXXIII: 2002	Part two, III, I	347

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
<b>(f) Working Group VI: Security Interests</b>			
A/CN.9/WG.VI/WP.2 and Add.1-12	Volume XXXIII: 2002	Part two, V, B	451
A/CN.9/WG.VI/WP.3	Volume XXXIII: 2002	Part two, V, C	514
A/CN.9/WG.VI/WP.4	Volume XXXIII: 2002	Part two, V, D	519

### 7. Summary Records of discussions in the Commission

A/CN.9/SR.93-123	Volume III: 1972	Supplement	1
A/CN.9/SR.254-256	Volume XIV: 1983	Part three, I, A	197
A/CN.9/SR.255-261	Volume XIV: 1983	Part three, I, B, 1	202
A/CN.9/SR.270-278, 282 and 283	Volume XIV: 1983	Part three, I, B, 2	229
A/CN.9/SR.286-299 and 301	Volume XV: 1984	Part three, I	339
A/CN.9/SR.305-333	Volume XVI: 1985	Part three, II	399
A/CN.9/SR.335-353, 355 and 356	Volume XVII: 1986	Part three, II	317
A/CN.9/SR.378, 379, 381-385 and 388	Volume XVIII: 1987	Part three, III	165
A/CN.9/SR.402-421, 424 and 425	Volume XX: 1989	Part three, II	261
A/CN.9/SR.439-462 and 465	Volume XXII: 1991	Part three, II	459
A/CN.9/SR.467-476, 481 and 482	Volume XXIII: 1992	Part three, III	419
A/CN.9/SR.494-512	Volume XXIV: 1993	Part three, III	343
A/CN.9/SR.520-540	Volume XXV: 1994	Part three, III	347
A/CN.9/SR.547-579	Volume XXVI: 1995	Part three, III	253
A/CN.9/SR.583-606	Volume XXVII: 1996	Part three, III	253
A/CN.9/SR.607-631	Volume XXVIII: 1997	Part three, III	339
A/CN.9/SR.676-703	Volume XXXI: 2000	Part three, II	645
A/CN.9/SR.711-730	Volume XXXII: 2001	Part three, III	503
A/CN.9/SR.739-752	Volume XXXIII: 2002	Part three, III	621

### 8. Texts adopted by Conferences of Plenipotentiaries

A/CONF.63/14 and Corr.1	Volume V: 1974	Part three, I, A	209
A/CONF.63/15	Volume V: 1974	Part three, I, B	210
A/CONF.63/17	Volume X: 1979	Part three, I	145
A/CONF.89/13, annexes I-III	Volume IX: 1978	Part three, I, A-D	211
A/CONF.97/18 and annexes I and II	Volume XI: 1980	Part three, I, A-C	149
A/CONF.152/13	Volume XXIII: 1992	Part three, I	405

### 9. Bibliographies of writings relating to the work of the Commission

(no document symbol)	Volume I: 1968-1970	Part three	299
A/CN.9/L.20/Add.1	Volume II: 1971	Part two	143
(no document symbol)	Volume II: 1972	Part two	148
(no document symbol)	Volume III: 1972	Part two	311
(no document symbol)	Volume IV: 1973	Part two	229
A/CN.9/L.25	Volume V: 1974	Part three, II, A	216
(no document symbol)	Volume V: 1974	Part three, II, B	242
(no document symbol)	Volume VI: 1975	Part three, II, A	298
(no document symbol)	Volume VII: 1976	Part three, A	321
(no document symbol)	Volume VIII: 1977	Part three, A	311
(no document symbol)	Volume IX: 1978	Part three, II	219
(no document symbol)	Volume X: 1979	Part three, II	174
(no document symbol)	Volume XI: 1980	Part three, IV	168
(no document symbol)	Volume XII: 1981	Part three, III	271
(no document symbol)	Volume XIII: 1982	Part three, IV	426
(no document symbol)	Volume XIV: 1983	Part three, IV	276
(no document symbol)	Volume XV: 1984	Part three, II	378
A/CN.9/284	Volume XVI: 1985	Part three, III	511
A/CN.9/295	Volume XVII: 1986	Part three, III	399
A/CN.9/313	Volume XVIII: 1987	Part three, III	191
A/CN.9/326	Volume XIX: 1988	Part three, III	215

---

<i>Document symbol</i>	<i>Volume, year</i>	<i>Part, chapter</i>	<i>Page</i>
A/CN.9/339	Volume XX: 1989	Part three, III	343
A/CN.9/354	Volume XXI: 1990	Part three, I	305
A/CN.9/369	Volume XXII: 1991	Part three, IV	551
A/CN.9/382	Volume XXIII: 1992	Part three, V	469
A/CN.9/402	Volume XXIV: 1993	Part three, IV	415
A/CN.9/417	Volume XXV: 1994	Part three, IV	421
A/CN.9/429	Volume XXVI: 1995	Part three, IV	375
A/CN.9/441 and Corr.1 (not 442)	Volume XXVII: 1996	Part three, IV	321
A/CN.9/452	Volume XXVIII: 1997	Part three, IV	419
A/CN.9/463	Volume XXIX: 1998	Part three, III	263
A/CN.9/481	Volume XXX: 1999	Part three, I	431
A/CN.9/502 and Corr.1	Volume XXXI: 2000	Part three, III	771
A/CN.9/517	Volume XXXII: 2001	Part three, IV	579
A/CN.9/538	Volume XXXIII: 2002	Part three, IV	673



**كيفية الحصول على منشورات الأمم المتحدة**  
يمكن الحصول على منشورات الأمم المتحدة من المكتبات ودور التوزيع في جميع أنحاء العالم. استعلم عنها من المكتبة التي تتعامل معها أو اكتب إلى: الأمم المتحدة، قسم البيع في نيويورك أو في جنيف.

如何购取联合国出版物

联合国出版物在全世界各地的书店和经营处均有发售。 请向书店询问或写信到纽约或日内瓦的联合国销售组。

#### **HOW TO OBTAIN UNITED NATIONS PUBLICATIONS**

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

#### **COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES**

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à: Nations Unies, Section des ventes, New York ou Genève.

#### **КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ**

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

#### **CÓMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS**

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

Set of two volumes not to be sold separately.  
The ISBN number is for both volumes.



Printed in Austria  
V.04-57618—October 2006—550  
United Nations publication  
Sales No. E.06.V.14  
ISBN 92-1-133753-4  
ISSN 0251-4265  
A/CN.9/SER.A/2003



9 789211 337532

